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ARTICLES

*Wojciech Sadurski**DEMOCRATIC LEGITIMACY
OF THE EUROPEAN UNION: A DIAGNOSIS
AND SOME MODEST PROPOSALS**Abstract**

Debates and controversies about the democratic legitimacy of the EU have accompanied the Union from the very beginning. The “democratic paradox” of the EU exists because while committing itself to promote and scrutinize democracy in its member states, in candidate states, and in third states with whom it enters into contact, it does not display equivalent democratic features in its own functioning. Some commentators tried to define the problem out of existence; by pointing out that the EU is not a state-like polity, they argued that state-specific criteria of legitimacy, such as representative, participatory or deliberative democracy, do not apply. They postulated outcome-based or, at best, public reasons based, conceptions of legitimacy as applicable to the EU, and concluded that it satisfies those standards. But this argument is based on a non sequitur: from the statement that the EU is not a state (not even a quasi-federation or federation in statu nascendi) it does not follow that it should not be judged by the standards of democratic legitimacy.

The EU is a complex, untidy polity which amalgamates inter-governmental and supranational elements in its constitution, and therefore this article postulates a bifurcated approach to democratic legitimacy. In so far as the EU contains inter-governmental elements, indirect legitimacy is all that is required, i.e., democratic legitimacy of governments representing their respective states in the Council. The second face of the EU – its supranational character – calls for democratic legitimization of its institutions, in particular, in accordance with the promise contained in Art. 10 TEU, proclaiming representative democracy in the institutional setup of the EU. This requires changes to the electoral system of the EP in order to provide

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incentives for a more trans-European electoral process; strengthening of the supervisory role of the EP over the Commission; the strengthening of the role of the EP with regard to legislation, and endowing it with the competence of legislative initiative. Overall, the idea is for the institutional setup to resemble a canonical model of separation of powers and inter-institutional accountability, with the EP in a dominant position. Additionally, the first gesture towards direct democracy in the EU, the European Citizens' Initiative, should be strengthened, both by upgrading the status of successful initiatives and by lowering thresholds and administrative requirements.

INTRODUCTION: AN END OF AN ERA

It is a commonplace that the pace and depth of economic integration within (what is now) the European Union has not been paralleled by an equivalent pace and depth of *political* integration, and that the traditional strategy of “functionalism”¹ has exhausted its potential. At the origin of the European political project, going back to the Coal and Steel Community (“ECSC”) of 1951, was a thought that economic integration would force political rapprochement and then integration; that adding successive functions to the West (as it was then) European economic construction would compel creation of institutionalized, and consequently political, community. In contrast to a federalist political project, which starts with the bombastic idea of a brand new supranational polity (institutionally epitomized by the stillborn European Political Community proposed in 1952), and which was as unrealistic in the 1950s as it probably is now, the functionalist philosophy envisaged creation of a political union by stealth: political institutions were seen as an inevitable consequence triggered by economic unification rather than as parts of an overall design aimed at creating the United States of Europe. It was best expressed in the foundational document behind the setting up of the ECSC, the Shuman Declaration of 1950: “By pooling basic production and by instituting a new High Authority [the precursor to the European Commission], whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.”²

The functionalist strategy worked for several decades – and, among other things, had an undoubted advantage of promoting political unification without any dramatic challenges to deeply held views of European states’ citizens about sovereignty, separate identity and pluralism in Europe. Incremental integration at the level of institutions was largely invisible to average citizens; how many eyebrows were raised by the ECJ decisions in *Van Gend en Loos*³ and *Costa v. ENEL*⁴ which proclaimed, respectively,

¹ Most scholars refer, in this context, to “neo-functionalism”; I will be using a more generic concept of “functionalism”.

² Schuman Declaration, 9 May 1950, http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm (last accessed 29 October 2012).

³ Case 26/62, *Van Gend en Loos* [1963] ECR 1.

⁴ Case 6/64, *Costa v. ENEL* [1964] ECR 585.

direct effect of European norms and the supremacy of European law over national norms within the scope of application of the Treaties? There was no dancing (or rioting) on the streets, for sure. These were highly technocratic and arcane moves, and yet their import was tremendous. They fitted the functionalist logic perfectly well: once the common market has been decided, on purely economic grounds, certain political and legal consequences *had* to follow; the Community must have been endowed, or found to be endowed, with “real powers stemming from a limitation of sovereignty or a transfer of powers from the states” which “have limited their sovereign rights (...) and have thus created a body of law which binds both their nationals and themselves.”⁵ There was a sense of inevitability, automatism and strict economic determinism in this evolution, and yet it was accompanied by an apparent modesty, incrementalism and lack of any ideological conceit. The fact that most political integration of the EU was disguised in a legal costume, and effected by faceless judges rather than by politicians, provided a protective shield to the functionalist strategy – even if only by depriving it of transparency attached to political institution building.

These days are over. The last ten years or so have witnessed a gradual exhaustion and breakdown of the capacity of a functionalist strategy to foster political integration, and showed (to paraphrase a well-known Marxist formula) a growing contradiction between the ever-developing economic integration (with the monetary union in much of the EU being the epitome of the process so far) and the anachronistic political structure which failed to trace the economic developments. And as any canonical Marxist book reminds us, nothing good can come from such a contradiction between the “base” and the “superstructure”. The constitutional debacle of 2001-2005⁶ was perhaps the most dramatic evidence of the failure of the belief that a more advanced stage of trade and currency union would lead seamlessly and automatically to a higher level of political integration – this time, parroting a fully-fledged state constitution, with the anthem, the flag, the motto, the “ministers” and all that hubris. Considering that much of the reason behind the constitutional project was to enhance the legitimacy of the Union – the Laeken Declaration, which launched the process leading to the Convention on the Future of Europe, proclaimed that “[w]ithin the Union, the European institutions must be brought closer to its citizens”,⁷ that “[t]he Union needs to become more democratic, more transparent and more efficient,”⁸ and that one of the questions for the Convention must be to consider “how we can increase the *democratic legitimacy* and transparency

⁵ *Ibidem*, para. 593.

⁶ Formally speaking, the beginning of the constitutional process can be seen in the Laeken European Council of 2001, when the decision to establish the Convention on the Future of Europe (later dubbed the Constitutional Convention) was taken; the process has ended (for now) with two unsuccessful referenda over the Constitutional Treaty, in France (May 2005) and the Netherlands (June 2005). Officially, the EU proclaimed “the constitutional concept” dead (or, rather, “abandoned”) in 2007, see Presidency Conclusions, Brussels Council of the EU (21 June 2007).

⁷ Laeken Declaration on the Future of the European Union, Annex to the Conclusions of the Laeken European Council, 14-15 December 2001, SN 300/101 REV 1, Part I.

⁸ *Ibidem*, Part II.

of the present institutions”⁹ – the failure was spectacular. One lesson from this failure is that the EU can no longer enjoy the older, tacit “permissive consensus” but is in need of stronger, more active legitimating factors normally associated with democratic processes.¹⁰ While the Treaty of Lisbon, signed in December 2007 and subsequently ratified by all Member States, retained many of institutional and legal devices proposed by the Constitutional Treaty, it also introduced a sort of schizophrenia whereby its perception by Brussels elite is in the constitutional register, but at the national level of member states it is perceived as just one successive variant of an inter-governmental treaty. The tension between these two perceptions may be seen as one of the persisting problems built into the EU as we know it today.

The Euro-zone crisis dating from late 2009 has shown that traditional state-based and inter-governmental remedies are ineffective in coping with problems which are, in their very nature, supranational and global. A common market has been created and a (partially) shared currency has been constructed without, however, building institutions capable of coordinating the economic policies of the member states at the EU level. The underlying reasons for the crisis of the Euro-zone are therefore political: the absence of adequate administrative and regulatory mechanisms to harmonize the vastly diverse national economies. In the apt words of Jürgen Habermas, “The financial crisis, which has developed into a crisis of the states, calls to mind the birth defect of an incomplete political union marooned in midstream.”¹¹ Habermas added: “The financial, debt and euro crises occurring in rapid succession have revealed the flaw in the construction of a gigantic economic and currency area which lacks the necessary instruments to conduct a joint economic policy.”¹²

Various immediate proposals arising out of the crisis, including President (as he was then) Sarkozy’s idea of an “economic government” of the Euro-zone,¹³ or a joint finance ministry for the Euro-zone, suggested by President of the European Central Bank, Jean-Claude Trichet,¹⁴ suggest that *political* solutions must be found at a supranational level even though the governments tend to search for solutions of a technocratic nature, and not democratic or participatory designs. As Habermas further observed, “In this way, the heads of government would transform the European project into its opposite. The first transnational democracy would be transformed into an arrangement for exercising

⁹ *Ibidem*, Part II (emphasis added).

¹⁰ See C. Closa Montero, *Constitutional Prospects of European Citizenship and New Forms of Democracy*, in: G. Amato, H. Bribosia & B. de Witte (eds.), *Genèse et destinée de la Constitution européenne; Genesis and Destiny of the European Constitution*, Bruylant, Bruxelles: 2007, p. 1038.

¹¹ J. Habermas, *The Crisis of the European Union: A Response*, Polity Press, Cambridge: 2012, p. 121.

¹² *Ibidem*, p. 129.

¹³ See Associated Press, *Sarkozy and Merkel propose economic government for Eurozone*, The Independent, 16 August 2011, <http://www.independent.co.uk/news/world/europe/sarkozy-and-merkel-propose-eurozone-government-2338388.html> (last accessed 1 November 2012).

¹⁴ See Jean-Claude Trichet *proposes common European Ministry of Finance*, Business Insider, 2 June 2011, http://articles.businessinsider.com/2011-06-02/markets/29998704_1_eurozone-european-central-bank-finance (last accessed 1 November 2012).

a kind of post-democratic, bureaucratic rule.”¹⁵ In general, European political elites are visibly coming to terms with the idea that the only way to cope with crises, such as the debt crisis of 2011-2012, is through stronger political unification and transfer of more competencies to the EU. In the words of one of the most powerful European politicians, “We need a political union. That means we have to give up further competencies to Europe, step by step, in an ongoing process.”¹⁶ These views are echoed by leading EU decision-makers who proclaim that, in order to fight the crisis, more powers have to be transferred to the EU, and they must be accompanied by “greater institutional integration.”¹⁷

1. EU LEGITIMACY CONUNDRUMS

As Jiri Priban correctly observed: “The current state of the Union (...) persuasively illustrates that the process of economic integration does not automatically lead to supranational political integration and a constitutional momentum of state-building. It rather shows that political problems require political solutions which, within the EU institutional settings, cannot imitate processes, legitimation expectations and institutional frameworks of the modern nation state in its federal or confederative forms.”¹⁸ Functionalism has exhausted its capacity, and should be thrown into the dustbin of history. A further step in political integration within the EU, if it comes, will be a result of a deliberate, conscious political decision of European elites and citizens rather than a fortunate side effect of economic phenomena. Such an act of political will is necessary both for political integration and for democratization of the Union. These are, of course, two different matters: integration may but does not have to be of a democratic nature. And yet, for the Union to maintain (or acquire, depending on one’s perspectives) a modicum of legitimacy, it must be democratic: democracy is “the only game in town” as far as the political legitimacy of a polity such as the EU is concerned. As Koen Lenaerts and Marlies Desomer noted a long time ago, “the notions legitimacy and democratic legitimacy must be considered as interchangeable” for the purpose of discussion the EU constitution making.¹⁹

¹⁵ Habermas, *supra* note 11, p. 52.

¹⁶ German Chancellor Angela Merkel, cited in V. Pop, *EU referendum idea gains momentum in Germany*, EU Observer, 13 August 2012, <http://euobserver.com/political/117213> (last accessed 1 November 2012).

¹⁷ President of the European Commission Jose Manuel Barroso, cited in A. Rettman, *Barroso: UE Treaty needs to be renewed*, EU Observer, 3 September 2012, <http://euobserver.com/institutional/117398> (last accessed 1 November 2012).

¹⁸ J. Priban, *Desiring a Democratic European Polity: The European Union Between the Constitutional Failure and the Lisbon Treaty*, in: H.-J. Blanke & S. Mangiamelli (eds.), *The European Union after Lisbon*, Springer-Verlag, Berlin-Heidelberg: 2012, p. 72.

¹⁹ K. Lenaerts & M. Desomer, *New Models of Constitution – Making in Europe: The Quest for Legitimacy*, 39 Common Market Law Review 1217 (2002), p. 1220, n. 15.

The latter assertion is, naturally, not uncontroversial. In the interminable discussions about the “democracy deficit” within the EU, there is an important school of thought which insists on non-democratic grounds for the EU’s legitimacy. If democratic legitimacy is typical and required of a modern state, and the EU is not a state and emphatically does not aspire to statehood (as the argument goes), different standards of political legitimacy can be applied to the EU.²⁰ It is often argued that the EU can manage perfectly well with an output-based legitimacy only; legitimacy based on the goods it delivers to its stakeholders rather than on participation in decision-making, for instance. This is legitimacy based on “the need for greater attention, efficiency and expertise in areas where most citizens remain ‘rationally ignorant’ or non participatory.”²¹ If the EU is indeed exclusively, or predominantly, a problem-solving entity, then its legitimacy may be based on its efficiency in problem-solving and on reduction of the costs of decision-making, and its “justification” is not very different from that of a railway company or a university.

But there is much about the EU which upsets the picture of this entity as being based fundamentally on an instrumental rationality of efficient problem-solving. If the EU indeed was fundamentally such an enterprise, a number of developments would be incomprehensible or at least very hard to square with this paradigm. The moves aimed at deliberate construction of European identity, of the sense of a rights-based community, of democratic will formation, of political action going far beyond the common market, and – perhaps most significantly – the permanent drive to enlarge the Union, even in the face of improbable gains to the “older” members from embracing new, highly heterogeneous and not so prosperous member states (in the recent wave of Eastward enlargement, the population of the EU increased by more than a quarter but total GDP rose by barely 5 percent) – these phenomena hardly resonate with the idea of the EU as, first and foremost, an efficient problem-solver. The continuous deepening of the EU (and its predecessors’) integration marks a transition from a concern with mainly technocratic issues, where expertise is the most salient and democratic legitimacy is rarely sought, to areas which become more and more politically contentious, such as internal and external security, health, education etc., where responsiveness of decisions to a distribution of preferences within the community (at the level at which those decisions are made) is usually demanded and expected. But even if this was an unconvincing argument (after all, a proponent of outcome legitimacy may simply argue that all these steps were errors of gigantic proportions), efficiency itself is an indeterminate standard, also in need of legitimation: whether delivering the goods is the dominant source of a political organization’s legitimacy is in itself a subject of legitimate contestation. More importantly still, standards of efficiency are parasitic upon the *goals* of a given institution: in the case of a railroad company or (more controversially) a university, these

²⁰ See G. Majone, *Europe’s ‘Democratic Deficit’: The Question of Standards*, 4(1) European Law Journal 5 (1998), pp. 7-8.

²¹ A. Moravcsik, *In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union*, 40 Journal of Common Market Studies 603 (2002), p. 614 (italics removed).

are relatively settled. But in the case of a large polity with multiple goals and aims, and with an ongoing fundamental disagreement about its “real” goals (as the debates about the EU’s *finalité* testify) – no such standard can be confidently ascertained.²² Is it to provide prosperity for the Europeans, or prosperity and peace, or also the safeguarding of democracy and human rights, or perhaps also, as Jürgen Habermas and Jacques Derrida famously postulated,²³ to provide a counterforce to US military hegemony, or still something else? Each new goal, or each alteration of the mix of goals, will yield different criteria for “output legitimacy”.

It is important to emphasize what argument against output legitimacy I am *not* making. Eric Eriksen argues that efficiency-based legitimation is inadequate to the EU because it presupposes an intergovernmental organization, and the EU is much more than that. As Eriksen says, such efficiency is easily found in intergovernmental organizations based on consensus decision-making: “The veto power of all participants makes for legitimation itself, as parties will not consent to decisions that are contrary to their interests. Only decisions that no one will find unprofitable, or that will make no party worse off – Pareto-optimal solutions, will be produced.”²⁴ But, since the EU has gone well past this decision mode, Erikson argues that efficiency-based legitimacy is inadequate. While I agree with the conclusion, I do not think that Eriksen’s argument is correct because it tacitly presupposes that in an international organization the only conceivable actors whose utility counts are *states*. There is no conceptual link between positing an efficiency-based legitimacy standard and deciding about *who* counts for the purpose of a legitimacy calculus (what is the constituency of legitimacy, so to speak). We may still deal with a traditional, intergovernmental international organization (with veto power etc.) and at the same time posit that its legitimacy will be judged by the efficiency in solving problems for the individual *citizens* of member states. So the reasons for a rejection of the exclusive reliance on efficiency in legitimating the EU must be found elsewhere – not in the fact that its decision-making modes have surpassed the traditional intergovernmental paradigm, but rather in the facts that the EU has demonstrated, in its developments: real concerns for much more than the efficiency of problem-solving, and also that efficiency itself, in the case of multi-purpose entity such as the EU, is an unstable and indeterminate notion.

But, perhaps more importantly, the argument against exclusive reliance on output legitimacy is this: in a large polity, one important condition of efficiency of authoritative or distribution-affecting institutions is that those who are affected by these decisions *trust* them: that we, the citizens, respect those institutions, deem them valuable and trustworthy, and they are credible in our eyes. More often than not, perhaps with a few

²² See similarly, J. Thomassen & H. Schmitt, *Democracy and Legitimacy in the European Union* (manuscript 2004, on file with the author).

²³ J. Habermas and J. Derrida, *February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy. Beginning in the Core of Europe*, 10 *Constellations* 291 (2003).

²⁴ E. O. Eriksen, *The Unfinished Democratization of Europe*, Oxford University Press, Oxford: 2009, p. 64 (italics removed).

exceptions (banks? industrial firms? courts? armed forces?), a degree of accountability and responsiveness is needed for this trust and credibility. We must be confident not only that these institutions are transparent and sensitive to our preferences, but also that we are capable of affecting changes (including changes in personnel) if we find them wanting. We must also be confident that there is a sufficient institutional guarantee for allowing or even encouraging criticism, dissent, or alternative viewpoints within those institutions, to render such changes feasible and not prohibitively costly. These guarantees have the shape of democratic principles, of whatever form, depending on the type of institution to which they apply. But the regime as a whole, rather than an individual institution taken in separation from others, must have sufficient democratic pedigree in order to generate a degree of trust which makes efficiency of the regime as a whole feasible. Hence, output-legitimacy, when applied to a broad regime such as the EU system, has functional connections with input-legitimacy of a democratic character.²⁵ Habermas makes a *functional* and not only a normative statement when he asserts that “[t]oday the process of European unification, which was conducted above the heads of the population from the very beginning, has reached an impasse because it cannot proceed further without being switched from the established administrative mode to one involving increased popular participation.”²⁶

There has been a moderate version of input legitimacy for the EU proposed, as a version of deliberative democracy, where legitimacy relies on the sort of arguments that can be made to justify public decisions to its stakeholders. Jürgen Neyer, for one, launched an elegant justice-based argument relying on the conception of “the right to justification” which postulates that we have “a human right to demand and receive justification from all those individuals or organizations which restrict our freedom.”²⁷ On this basis, Neyer envisions a legitimate EU if it guarantees individual right to freedom and “safeguard that any restriction of that freedom is subjected to good reasons.”²⁸ Institutional correlates of such freedom include: transparency in decision-making procedures, permanent public access to all institutions with legislative competence, full scrutiny of the EU institutions by the media, and control by national parliaments over their governments’ actions in the EU institutions.²⁹ Leaving aside the last requirement (which, as will be argued below, constitutes one half of the democratic legitimacy institutional design in the EU), one may observe that the conception is not sufficient to uphold the burden of legitimating the EU in the eyes of its citizens. The fact that an institution takes its decisions on the basis of public reasons – that it conforms to the requirement of justifying its decisions to its stakeholders – may be a necessary but not

²⁵ For a similar argument, see A. Føllesdal, *The Legitimacy Deficits of the European Union*, 14 *Journal of Political Philosophy* 441 (2006), pp. 459-61.

²⁶ Habermas, *supra* note 11, p. 132.

²⁷ J. Neyer, *Justice, Not Democracy: Legitimacy in the European Union*, 48 *Journal of Common Market Studies* 903 (2010), p. 908.

²⁸ *Ibidem*, p. 917.

²⁹ *Ibidem*.

a sufficient ground for its legitimacy, except in some specific cases; namely, institutions such as arbitrators or courts (including constitutional courts) acquire legitimacy by virtue of deliberation and reliance on the right reasons, but this cannot apply to a large polity across the board. When a citizen asks herself why the polity can claim her compliance with its authoritative directives, an answer that these directives are based on the right reasons – in the sense, that they can be properly justified to the citizen – is often not enough.³⁰ At best, it can show that these decisions are reasonable. But not all reasonable decisions are legitimate in the sense that we should comply with them; the citizen must know that she is, in a political sense, a co-author of these decisions, that – in conjunction with others – she has authorized these decisions. In a large community, with varied preferences, interests and ideologies, we have good reasons to comply with the coercive or distributive decisions when they are sensitive to choices people make, and thus to a distribution of preferences, interests and values across the community.³¹ Reason-giving is normally thought sufficient (or at least, central) in the case of institutions such as courts when sensitivity to the actual spread of views is not expected from decision-makers, but a court cannot be an exemplar of political legitimacy in the entire polity; rather, it is a special case where the legitimacy of decisions (and, consequently, an institution) is derived from the paradigm of an impartial, reasonable arbiter.³² When a regime such as the EU engages in a massive chain of decisions which have direct consequences for the entire classes of citizens in a wide range of areas, a “right to justification” is much too weak a basis for assessing legitimacy compliance. For one thing, criteria of what reasons for decisions are *right* becomes much more contested and controversial, and many citizens are likely to remain dissatisfied with the “reasons” presented to them in implementation of their “right to justification”. For another thing, in a large number of political and economic decisions the main ingredient of “rightness” of a decision is the mere fact of it being sensitive to the distribution of interest, preferences and values throughout the society. This, obviously, can be assured only though traditional democratic means of participation and representation.

³⁰ As Montero put it: “whilst deliberative democracy may complement traditional democratic mechanisms, it may not substitute them”, Closa Montero, *supra* note 10, p. 1041. See also R. E. Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn*, Oxford University Press, Oxford: 2008): “Inevitably (...) deliberative democracy can only supplement rather than supplant the institutional apparatus of representative democracy as we know it. (...) Deliberative democrats need to figure out how to fit their particular contribution to existing institutions of representative democracy, just as practitioners of democratic politics have to figure out how to incorporate deliberative insights” (pp. 7-8).

³¹ Ronald Dworkin defines “choice sensitive issues” as those “whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community”, R. Dworkin, *Sovereign Virtue*, Harvard University Press, Cambridge Mass.: 2000, p. 204. Of course, in the democratic system that Dworkin endorses not all issues are choice-sensitive, and Dworkin emphasizes that the second-order decision about which issue is choice-sensitive and which is not is in itself choice-insensitive (pp. 204-205). However, all that matters here is that at least *some* important issues subject to collective authoritative decisions in a democracy are choice sensitive.

³² See M. Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, Chicago: 1981, pp. 1-64.

So from now on I will sidestep the output-legitimacy issue (or, more precisely, the *exclusive* reliance on output in ascertaining legitimacy of the EU) as well as deliberative-democracy solutions, and assume that in the modern world, in advanced and pluralistic societies such as in Europe, any large *authoritative* polity, in order to be legitimate, must be democratic.³³ This may not be *sufficient* for its legitimacy (output legitimacy will play an important role to a different degree in different organizations and institutions), but it is a *necessary* condition. In those authoritative large systems which have the powers to impose certain legal duties directly upon individuals, and/or which are capable of taking effective decisions about distribution of resources on a large scale – democracy is a condition of legitimacy. This is also the case of the EU. To quote Erikson again: “democracy (however understood) is the only morally sound principle for the legitimation of political domination. The EU needs legitimation and this can be accomplished only through institutionalizing democratic rights and procedures through which the addressees of the laws can exert influence and put decision-makers to account.”³⁴ Any attempt to minimize the salience of democratic legitimacy vis-à-vis the EU while maintaining the proper democratic creed with regard to nation states may reveal either a misunderstanding of a fundamentally *political* nature of the EU (with its huge coercive and large-scale distributive powers) or a weak attachment to the principles of democracy *tout court*, including at the state level; a benign despot, even if perfectly effective, is not even presumptively legitimate, under contemporary intuitions about political legitimacy.³⁵ EU may be effective (under any adopted criteria of effectiveness) in reaching its goals (whatever they may be), but in order to be legitimate, it must be democratic. Which is not to presuppose or imply that the EU is a state or a state-like polity; from the assertion that the EU is not a state it does not follow that input-legitimacy, characteristic of, *among other things*, states, is wholly inappropriate or unnecessary for the EU.³⁶ Such a non-sequitur has to be resisted: input legitimacy

³³ Perhaps at this point it is necessary to state, in case it is not obvious, that in this article I am dealing only with (what may be termed) “normative” legitimacy, as opposed to “empirical” legitimacy, measured by the actual degree of compliance and trust by the constituency of an authority. It is true that, as Bart Szewczyk notes, “the E.U. does not actually face a legitimacy crisis, which would imply an impending risk of systemic disobedience, collapse, or overthrow”, and that, “[i]n addition to compliance, there is no organized distrust of the E.U.’s legitimacy through secessionist efforts on the part of member states or other organized groups within the E.U.”, B. M.J. Szewczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, 17 Columbia Journal of European Law 151 (2011), p. 169. But when I write about legitimacy deficit or legitimacy crisis, I have in mind a clash of EU’s legitimacy with a plausible normative theory of legitimacy rather than actual perceptions and/or behaviour by individuals or member states. For more on the distinction between empirical and normative legitimacy, see W. Sadurski, *Constitutional Courts in Transition Processes: Legitimacy and Democratization*, Sydney Law Research Paper No. 11/53, <http://ssrn.com/abstract=1919363> (last accessed 1 November 2012), pp. 2-6.

³⁴ See Eriksen, *supra* note 24, p. 6.

³⁵ See Szewczyk, *supra* note 33, p. 193. For more on the role of democratic process in supporting legitimacy of law, see W. Sadurski, *Equality and Legitimacy*, Oxford University Press, Oxford: 2008, pp. 9-12.

³⁶ See similarly, P. Craig, *Integration, Democracy, and Legitimacy*, in: P. Craig & G. de Burca (eds.), *The Evolution of EU Law* (2nd ed.), Oxford University Press, Oxford: 2011, p. 39.

has its proper place in a number of other sites than the states (consider the calls for democracy in universities, etc).

2. THE DEMOCRATIC PARADOX IN THE EU

The fundamental paradox consists of the fact that, on the one hand, the EU declares *and practices* the commitment to democracy in its member states, as well as in candidate states and, to some extent, in the non-member states when it deals with them, and on the other hand, it displays a radical “democracy deficit” in its own institutional structure and practices.

The commitment of the EU to democracy, as one of its foundational principles, is emphatic and forceful. Since the Treaty of Amsterdam, democracy has been listed as one of the foundational values of the EU; in the Lisbon Treaty commitment to the “value” and “principle” of democracy is mentioned right at the outset in the Preamble,³⁷ and democracy is listed as one of the values on which the Union is founded.³⁸ Good democratic credentials have long been established as one of the necessary conditions of accession to the EU: Art. 49 of the Treaty restricts the eligibility to join the EU to those European states which “respect the values referred to in Article 2”, which include democracy. Political conditionality goes back to the so-called Copenhagen criteria of 1993 which established, as the political conditions for new entrants, the “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”³⁹ In the most recent wave of enlargement, which ended with the admission of eight post-communist Central and East European states and Cyprus and Malta, in 2004 and 2007, these criteria were applied by the Commission when it started evaluating the progress of all candidates from 1997, in annual reports which included sections entitled “Democracy and the rule of law”, with subsections on the parliament, the executive, the judicial system, and anti-corruption measures. This scrutiny had real bite when, at the start of the monitoring cycle, the Commission determined that while some countries had already fulfilled the democracy criteria, others were only on their way to meeting those criteria (Bulgaria, Romania, Lithuania and Latvia) and one had not met this condition at the time (Slovakia) and was, temporarily, excluded from accession negotiations.⁴⁰ But even though, overall, candidate states in that sequence of accession negotiations kept receiving reasonably high “grades” from the Commission for their democratic practices, Commission Reports included some specific critical observations on matters such as the over-use of legislation through executive ordinances,⁴¹ the inadequate parliamentary representation of

³⁷ Consolidated version of the Treaty of the European Union, Preamble, recitals 2, 4 and 7.

³⁸ Art. 2 TEU.

³⁹ European Council, Presidency Conclusions, Copenhagen 21-22 June 1993.

⁴⁰ More in W. Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford University Press, Oxford: 2012, pp. 148-149.

⁴¹ See *ibidem*, p. 171.

minorities,⁴² the malfunctioning of certain parliamentary committees,⁴³ or inadequate staffing of parliamentary administration.⁴⁴ Largely, the role of political conditionality has been quite significant in improving democratic practices in candidate states, though experts and scholars disagree about the precise degree to which conditionality, compared to internal factors, had a positive impact on democratization.⁴⁵

Also in the Union's external action, the Treaty mandates the Union to advance democracy "in the wider world", as one of those principles which "have inspired its own creation";⁴⁶ hence, Prometheanism about democracy in the world is entrenched as a Treaty philosophy. The force of this democratic Prometheanism is underscored by the very title of one of the older documents by the Commission: Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries.⁴⁷ The Union runs a broad international democratization and human rights programme known as the European Instrument for Democracy and Human Rights (EIDHR) which proclaims that, among other things, it "support[s] groups or individuals within civil society defending democracy."⁴⁸

Further, the EU has at its disposal, in its Treaty, a mechanism for imposing sanctions on a state that falls short of democratic standards (Art. 7 TEU). The Treaty of Amsterdam introduced sanctioning measures, further expanded under the Nice Treaty, also preventive measures in cases when there is a serious and persistent breach or a clear risk of a serious breach, respectively, of the values of the Union (now referred to in Art. 2) which include democracy.⁴⁹ The preventive mechanism (Art. 7.1) may lead to a "determination" by the Council that such risk to the values (inter alia of democracy) exists, while the sanctioning procedure (Art. 7.2) may lead to a suspension of the voting rights of a misbehaving member state – though early in the process of deliberation about introducing such provisions, even the possibility of expulsion was considered.⁵⁰

⁴² *Ibidem*, p. 171, n. 86.

⁴³ *Ibidem*, p. 171, n. 85.

⁴⁴ *Ibidem*, p. 171, n. 87.

⁴⁵ For more on political conditionality see *ibidem*, pp. 148-155; see also G. Pop-Eleches, *Between Historical Legacies and the Promise of Western Integration: Democratic Conditionality after Communism*, 21 East European Politics and Societies 142 (2007); F. Schimmelfennig, S. Engert and H. Knobel, *The Impact of EU Political Conditionality*, in: F. Schimmelfennig & U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe*, Cornell University Press, Ithaca: 2005; H. Grabbe, *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe*, Palgrave Macmillan, Basingstoke: 2006; G. Pridham, *The EU's Political Conditionality and Post-Accession Tendencies: Comparisons from Slovakia and Latvia*, 46 Journal of Common Market Studies 365 (2008); B. M.J. Szewczyk, *Enlargement and Legitimacy of the European Union*, 30 Polish Yearbook of International Law 131 (2010), pp. 146-158.

⁴⁶ Art. 21.1 TEU.

⁴⁷ Commission Communication of 23 May 1995, COM (1995) 216.

⁴⁸ European Instrument for Democracy and Human Rights http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm (last accessed 1 November 2012).

⁴⁹ For a detailed account of the origins of Art. 7 mechanism, see W. Sadurski, *Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider*, 16 Columbia Journal of European Law 385 (2010).

⁵⁰ *Ibidem*, p. 391.

And while no such measures have been so far imposed, they are a distinctive possibility, and they are occasionally mentioned by European decision-makers. For example, when Hungary's Orban government came to power in April 2010 and introduced a number of questionable constitutional and legal measures, including those which were asserted to restrict media freedom, in its response to the developments the Commission implicitly raised the possibility of applying Art. 7.⁵¹ (Such a possibility was also flagged in the academic commentary regarding these developments).⁵² Subsequently, a similar threat was addressed by the EU towards Romania. When, in mid-2012, as part of the political struggle between Prime Minister Victor Ponta with President Traian Basescu, the Prime Minister ignored the rulings of the constitutional court and fired the ombudsman – with the aim of removing the legal obstacles on the road to impeachment of the President, the EU Commission reacted strongly, again raising the spectre of Art. 7. Justice Commissioner Viviane Reading has been reported as mentioning the possibility of using Art. 7 if the annual report on Romania's anti-corruption measures fails to bring about concrete changes.⁵³

So, the EU has a strong position on democracy, both in its member states, and elsewhere in the world. On the other hand, when it comes to the internal functioning of the Union itself, it falls short of even minimal standards of democracy, as generally established with regard to states. And, one might add, the practice falls short of *rhetoric* when it comes to the question of democracy at the level of the EU itself; the Preamble to the Treaty of Lisbon refers to the desire “to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them”;⁵⁴ in addition, there is a bold claim that “[t]he functioning of the Union shall be founded on representative democracy”,⁵⁵ and that European citizens “have the right to participate in the democratic life of the Union.”⁵⁶ But the fundamental institutional architecture of the EU does not parallel, even in approximation, any known mode of separation of powers or checks and balances. The only representative body of a parliamentary kind (the European Parliament has been elected through direct universal suffrage since 1979) is relatively weak and has only an ancillary role in legislation, being incapable of initiating legislation. Law-making is divided between the technocratic (Commission) and the inter-governmental (Council) and parliamentary (EP) bodies. Key decisions (in the

⁵¹ For a description of this episode, see Sadurski, *supra* note 40, pp. 158-159.

⁵² See my blog entry: *Rescue Package for Fundamental Rights; A Comment by Wojciech Sadurski*, Verfassungsblog, 24 February 2012, <http://verfassungsblog.de/rescue-package-fundamental-rights-comments-wojciech-sadurski/> (last accessed 1 November 2012).

⁵³ H. Mahony, *Romania: Will strong words be enough?*, EU Observer, 18 July 2012, <http://euobserver.com/political/117006> (last accessed 1 November 2012).

⁵⁴ Preamble of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing European Community, Consolidated version of the Treaty on European Union, O.J. C 115/15 (9 May 2008).

⁵⁵ Art. 10.1 TEU.

⁵⁶ Art. 10.3.

Council) are taken as a result of behind-the-scenes political negotiations and horse-trading with very little transparency and accountability. The most important body (the Council) has no direct democratic mandate, and even its indirect mandate (through the mandate of governments participating in the Council) is defective considering that any country can be outvoted in a system of a qualified majority rule which now is a default mode of voting, used unless the Treaty stipulates to the contrary,⁵⁷ in an increased number of areas under the Lisbon Treaty.⁵⁸

So it looks like a huge paradox: an organization *so* devoted to the democracy in its member states is *so* non-democratic itself. Or is it?

Only partly. To be more precise: only to the extent that we can consider the EU through the prism of statehood: as a quasi-state, quasi-federation, etc. If we think of the EU in the statehood register, the paradox (or the hypocrisy) noted above is indeed striking. This is where “federalists” and defenders of state sovereignty, ironically, meet. Federalists treat the Union as a flawed federation and deplore its distance from a fully-fledged United States of Europe.⁵⁹ In their perspective, lack of democracy in the institutional architecture of the EU is a fundamental defect, and something to be repaired as soon as possible. On the other hand, the state-sovereignists deplore the (alleged) moves of the EU towards a federal model, and by showing that it is not (and/or cannot be) democratic because true democracy can be built (as their argument goes) only in a nation-state, they condemn any moves for further political integration. The evaluative vectors of both these positions are opposite but they both converge in the diagnosis of the EU as a failed, imperfect, quasi-federation. While the former demand more democracy because the EU is for them a quasi-federation, the latter reject the EU’s aspiration to becoming more federal because it can never be truly democratic.

It is clear why one *would* be attracted to a (quasi-)federal template of conceptualizing the EU, either in a federalist or in a sovereignists version of the argument. If one has a dichotomous view: “either international organizations or states”, then it is obvious why one would be tempted to look at the EU as a sort of federation.⁶⁰ Emphatically, the EU is not a “mere” international organization, at least of a classical kind. It has much broader and pervasive competences than “regular” international organizations; its decision-making process is now based on majority vote and not consensus; it affects the legal status of individuals in member states directly; its law has supremacy over national law and has direct effect; it possesses a common currency (in much of its territory) and common citizenship (even if parasitic upon and derivative from state-based citizenship);

⁵⁷ Art. 16.3 TEU.

⁵⁸ As Bart Szewczyk puts it with precision: “there is a legitimacy problem when the E.U. Council, which is not elected by European citizens in European-wide elections (and thus undemocratic from an E.U. perspective), can impose its collective will on democratically elected national governments and their constituent national democracies through Qualified-Majority Voting...” (Szewczyk, *supra* note 33, p. 155).

⁵⁹ See G. F. Mancini, *Europe: The Case for Statehood*, 4(1) European Law Journal 29 (1998).

⁶⁰ For a particularly sophisticated defence of this approach, see R. Schütze, *On ‘Federal’ Ground: The European Union as an (Inter)national Phenomenon*, 46 Common Market Law Review 1069 (2009).

its member states surrender the right to conclude international treaties in the areas that belong to exclusive competences of the EU, etc. There is also a human resources factor: the EU has generated a large class of staff with par excellence supranational commitments and loyalties, what Neil Walker has aptly termed “the way in which a significant concentration of personnel across the various supranational institutions – in particular the Commission, as official keepers of the generic EU interest, but also the Council, Parliament and Courts – has created an unparalleled intensity of transnational administrative self-consciousness.”⁶¹ (There is anecdotal evidence that, in the Eurocrats’ politically correct speech, the country of one’s origins is described as “the country I know the best”). Even if for each, or most, of these factors there may be found some functional equivalents in the universe of contemporary international organizations,⁶² the cumulative effect is such that the EU has far transcended the paradigmatic international organizations as we know them. So, *to the degree that*, based on the cumulative effect of these features of the EU which distinguish it from an organization and make it resemble a state, albeit a non-national state, the point about its democratic deficit, and consequently about the paradox of preaching about democracy to its member states but not implementing it in its own functioning, is well taken.

But – and it is a very big “but”, and also the main point of this article – in some very important respects EU is *not* a federal state in the making. Although, as just noted, it is not a classical international organization, it is *not* marching on the continuum from an international organization to a federal state. If anything, it is the converse of federation in at least one quite fundamental respect: while typically federations encompass uniformity at a “macro” level while at the same time promoting, or at least tolerating, diversity at a “micro” level, in the EU it is the other way round: there is full diversity at a “macro” level, with growing integration of laws and policies at the “micro” level. By “macro” level, for these purposes, I have in mind principally the structure of government and the main patterns of exercising authority. Note that in all federations there is very little diversity when it comes to the structure of government of particular units of federation, and they normally mimic the federal governmental design. Take the United States. As Rubin and Feeley note: “There is one state (Nebraska) with a unicameral legislature, one state (Hawaii) with a unitary finance system, and one state (Minnesota) that refers to the Democratic and Republican Parties by funny names, but that is the limit of variation. (...) If some American state were to establish a monarchy or adopt Communism, national institutions, in particular the United States Marine Corps, would respond quickly, and the Supreme Court would approve that response.”⁶³ This is, generally speaking, the case of all other federations, and the scope for diversity is

⁶¹ N. Walker, *The Place of European Law*, in: G. de Búrca & J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge: 2012, p. 81.

⁶² For a powerful demonstration of this point, see B. de Witte, *The European Union as an International Legal Experiment*, in: de Búrca & Weiler, *supra* note 61, pp. 19-56.

⁶³ E. L. Rubin & M. Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA Law Review 903 (1994), pp. 922-23 (footnotes omitted).

relatively narrow – certainly much narrower than in the EU. In contrast, in federations there is great diversity at the “micro” level, for instance as far as the educational policy, taxation, environmental protection, health care, consumer protection, labour relations, etc. are concerned. Of course, the domain of state competences (or competences of units of federation which may be called provinces, states, etc) varies from country to country, but the general pattern is of increasing the sphere of diversity on the matters which directly concern individuals at their local or regional level and which do not engage great political choices of national significance. In fact, much of the *raison d’être* of federations is to promote diversity at the level of component units of the state.⁶⁴

The EU reverses this pattern. There is a wide and unrestricted diversity at the level of systems of government. Among member states of the EU there are monarchies and republics, unitary and federal states, states with robust judicial review and with strong parliamentary supremacy, presidential and parliamentary republics; two-party systems in a “first past the post” electoral model and multi-party systems within PR electoral design; countries with an established state religion and with a high wall of separation between the state and churches, etc. Importantly, there is no evolution towards uniformization of these designs – and not even the slightest aspiration to move the EU in that direction. In fact, respect for distinct fundamental constitutional structures of member states is explicitly written into the Lisbon Treaty,⁶⁵ which has taken up and concretized a treaty provision present in the EU law since the Treaty of Maastricht: that the EU is obliged to respect national identities of member states. This idea of “constitutional identity of member states”, antithetical to classical federal thinking (one may talk about “states’ rights” but whoever heard about separate and diverse “constitutional identities” of states or provinces or *Länder* in a federation?), interestingly, has been asserted both by courts in member states and, to a degree, by the ECJ, and so has become a matter of a firm consensus throughout the EU. At the level of member states, one can mention the Italian doctrine of “*controlimiti*” – an idea that there are certain national constitutional values (ascertained, naturally, by the *Corte costituzionale*) that cannot be changed or annulled by EU law,⁶⁶ or the German Federal Constitutional Court which proclaimed, in its Treaty of Lisbon judgment, that “the Act [of Parliament] approving an international agreement (...) must (...) be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union (...) to violate the Member States’ constitutional identity, *which is not*

⁶⁴ “The point of granting partial independence (...) and thus the point of federalism, is to allow normative disagreement amongst the subordinate units so that different units can subscribe to different value systems”, *Ibidem*, p. 912 (footnote omitted). See also D. J. Elazar, *Exploring Federalism*, University of Alabama Press 1987, pp. 90-91: “the existence of federalism allowed the development of a variety of forms of pluralism side by side within the same civil society.”

⁶⁵ “The Union shall respect the equality of member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” (Art. 4.2 TEU)

⁶⁶ See G. Guzzetta & F. S. Marini, *Diritto pubblico Italiano ed Europeo* (3rd ed.), G. Giappichelli Editore, Torino: 2011, p. 66.

open to integration (...)”.⁶⁷ It also asserted that “the values codified in Article 2 Lisbon TEU (...) may in the case of a conflict of laws not claim primacy over the constitutional identity of the Member States...”.⁶⁸ At the same time, the European Court of Justice acknowledged that member states have significant latitude in identifying specific legal consequences of their fundamental constitutional choices (such as republican form of government) which need not be a matter of consensus throughout the EU.⁶⁹ In a recent book two EU law scholars note that, certainly after the Eastward enlargement, and then after the Lisbon Treaty, “[t]he ECJ (...) seems increasingly committed to work on a self-restriction of the principle of EU primacy when it comes to the protection of identity-based constitutional dimensions of one or more Member States.”⁷⁰

So, a principle of wide and stable diversity at the “macro” level of the EU is well established. But there is a growing trend of integration and uniformization (which are two different phenomena but I will lump them together for the purposes of this stylized account) at the level of “micro” policies and laws: in common agricultural policy and structural funding and development aid, competition policy, risk regulation in the areas of environmental and product standards, environment, industrial policy, working conditions, scientific and technological research and development, etc. The EU centralizes many of the functions that federal states devolve to smaller units, and lacks many of the characteristics which federal states reserve for the federation as a whole. The EU does not have – and is not moving towards having – attributes of a typically federal state such as a police force, army, criminal justice and punishment systems, or high-cost infrastructure creation and maintenance (has anyone heard of plans for EU flagship airlines?).

This is, in my view, the most emphatic case against describing the EU as a quasi-federation, or as an embryonic federation. But there are more arguments, not just about the *substance* of allocation of competences between the centre and the constituent entities, but also about more formal and legal characteristics of the EU. Its most fundamental characteristic, related to the “*pouvoir constituant*” in the EU, is the fact that member

⁶⁷ BVerfG, 2 BvE 2/08 Judgment of 30 June 2009, para. 239, emphasis added; official English translation at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html (last accessed 1 November 2012).

⁶⁸ *Ibidem*, para. 332.

⁶⁹ See Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, judgment of 22 December 2010. In this interesting decision, the Court established that the principle of free movement and residence enjoyed by citizens of the Union permits the Austrian authorities to refuse to recognise all the elements of the surname of an Austrian national because that surname includes a title of nobility which is not permitted under Austrian constitutional law. The Court explained that “it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State ...” (para. 91), and, immediately after this maxim, observed that “in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic” (para. 92).

⁷⁰ G. Martinico & O. Pollicino, *The Interaction between Europe's Legal Systems*, Edward Elgar, Cheltenham: 2012, p. 193.

states are, are remain to be, the masters of the constitutive legal foundations of the Union. Those foundations have the form of international treaties which rely upon a consensus of all members, and more importantly, which require unanimity for any change or a new treaty. So the model of a “constitutional change” within the EU is symptomatic of an international organization and not of a federal state where the will of constituent entities can be normally overcome in the constitutional amendment process (thanks to the design of constitutional amendments conditional upon a qualified majority and not unanimity of the entities making up the federation). In the EU, member states remain therefore, in the deepest and most fundamental sense, the “masters” of the Treaties, in a way in which no constituent entity in any federation may be meaningfully considered to be a “master” of a federal constitution. It is the process of typically inter-governmental treaty change (plus the case law of the Court of Justice) which has been the engine of the successive steps of political and legal unification within the EU: “Since the 1960s, revisions of the so-called ‘founding treaties’ have, together with accession treaties, gradually become the main instrument for the legal deepening and widening of European integration.”⁷¹ So while, in *substance*, the EU has far exceeded a typical sphere of competences for an international organization, in the *procedures* of conferring those new competences on the Union it has largely respected the authorship of the member states over the Union’s constitution (a small-c constitution, one should add).⁷² This model of unanimity-based control by member states over the powers and character of the Union has been further *strengthened* by the prerogative, introduced by the Lisbon Treaty, of any member to withdraw from the Union,⁷³ an unusual feature for any federation where such a step would be normally considered not as an exercise of a “right of exit” but as an unconstitutional secession.⁷⁴ In this way, with the Lisbon Treaty, the legal structure of the Union evolved *away from*, rather than towards, a federal model.

Furthermore, the structure of “judicial review” (to use the concept broadly) of federal competences characteristic of contemporary federations, has no equivalent in the EU. Normally, in federations the final adjudication about the precise distribution of competences between the federation and the constituent entities belongs to *federal* judicial bodies.⁷⁵ This has led some constitutional scholars to ruminate about an alleged

⁷¹ De Witte, *supra* note 62, p. 22.

⁷² That applied also to the (now defunct) capital-C Constitution: “the adoption of a European Constitution was seen by all the leading actors (...) as involving (...) a *revision* in accordance with the procedure of Article 48 EU treaty, rather than the creation *ex nihilo* of a new legal edifice: a replacement of the existing treaties that kept in existence the European Union as an organization”, de Witte, *ibidem*, p. 31 (emphasis in original). And the Constitutional treaty itself envisaged that all important future amendments would again be made by a unanimously ratified amending treaty “rather than by a decision of the European Union organs, as would befit a federal state”, *ibidem*, p. 33 (footnote omitted).

⁷³ Art. 50 TEU.

⁷⁴ An exception was Soviet “federalism”. According to successive constitutions of the USSR (of 1924, 1936 and 1977) republics or comprising the Soviet Union retained the right to secede. But, of course, just as constitutionalism in the USSR was sham, so was any claim of federalism.

⁷⁵ See de Witte, *supra* note 62, p. 45.

lack of impartiality whereby an umpire of federal-state relationship is part of the federal branch,⁷⁶ but this institutional design is a logical consequence of the principle of the primacy of federal law over the law of constituent units. But in the EU, notwithstanding the principle of primacy of EU law (within a precisely confined area of EU competences), “inconsistencies between national law and EU law will come to light through litigation before member State courts and will have to be solved by them possibly, but only possibly, with the preliminary guidance of the [European] Court of Justice.”⁷⁷ And such decisions of State courts cannot be appealed against to the ECJ – which is in contrast with a procedure available in any “standard” federation. Indeed, in federal states there is also a second order primacy: the principle of primacy itself has its source in the federal law and is interpreted authoritatively by federal bodies. In the EU, it is the other way around; the principle of authority of the EU law is rooted in the national constitutions, and is subject to such interpretation and limitations as provided by national constitutions and construed by national constitutional courts. A dominant view among constitutional courts of EU member states is that a national constitution has primacy before the EU law, and that the national constitutional courts, and not the ECJ, are the ultimate guardians of the distribution of powers between the EU and their state.⁷⁸ This is based, among other things, on a deeper principle that the level of rights and liberties guaranteed at the national level (of which the national courts are guarantors) must serve as a standard of scrutiny of European law when it is applied at the national level. In all these ways, member states remain masters of the Union and of the distribution of competences within the Union, in contrast to a typical federal design.

So, while the EU is more than an international organization, it is not a quasi-federal entity; not even an entity *on the route towards* federation. Its institutional make-up is a reflection of its hard-to-classify, *sui generis* character: it combines, in a complex architecture of interlocking institutions, elements which are inter-governmental (the Council), technocratic/supranational (the Commission), representative (the EP) and judicial (the ECJ). These elements are positioned towards each other in a way which resembles neither a traditional separation of powers in a tripartite fashion à

⁷⁶ “The [Supreme] Court proclaims itself as the arbiter of clashes between state and national regulatory authority when it itself is a part of the national government. This looks dangerously like the court acting as judge in its own case, and this danger is surely at its greatest when the Court strikes down a state statute for conflicting with (...) a national statute enacted by Congress”, M. Shapiro, *Some Lessons for the Success of Constitutional Courts: Lessons from the U.S. Experience*, in: W. Sadurski (ed.), *Constitutional Justice, East and West*, Kluwer Law International, The Hague: 2002, p. 46 (footnote omitted).

⁷⁷ De Witte, *supra* note 62, pp. 45–46. As Bruno de Witte notes, the exception is when the ECJ can directly examine the inconsistency of a national norm with a Community norm only in the framework of an infringement action brought by the European Commission, where the ECJ can make the Union law prevail, “just like any international court will give precedence to international law over the domestic laws of the states parties to a dispute”, *ibidem*, p. 45.

⁷⁸ For an account of this doctrine, especially as articulated by constitutional courts of Central and Eastern Europe, see W. Sadurski, ‘Solange, Chapter 3’: *Constitutional Courts in Central Europe – Democracy – European Union*, 14 European Law Journal 1 (2008).

la Montesquieu (most strikingly, the legislative power is divided into the power of initiation, held by the Commission, and the power of final decision, held by the Council and the EP),⁷⁹ nor a checks and balances model, *à la* the US Constitution. This combination, with each element belonging to a different logic, makes up a community which is less than a federation (*vide* the role of governments which retain their role as masters of the entire entity) but also much more than an organization (e.g. seen in the role of the technocratic Commission, of a representative Parliament, directly elected by EU citizens, and the crucial role of the Court of Justice in policing the supremacy of the EU law). All this coheres (if that is a proper word in the context of the EU) into a “Community method”, unique among the supranational entities.

3. INDIRECT LEGITIMACY OF THE EU

In so far (and only in so far) as the “Community method” incorporates inter-governmental mechanisms and institutions, the democratic legitimacy of the EU as a whole hinges crucially on the democratic legitimacy of state (governmental) institutions when they participate in policy and law-making at the EU level. When state governments have a central role in the formation of law at the Union level, their democratic legitimacy translates directly into democratic legitimacy of the Union as a whole.⁸⁰ Democratic legitimacy crucially boils down to the connection between an individual citizen and the functioning (and the outcome) of a political institution. It is a matter of authorship in the collective institutional decisions: if the legitimacy of the governmental positions expressed in the Council is weak – if it cannot boast of democratically obtained support from the citizens in the government’s relevant jurisdiction – then, as far as citizens are concerned, the legitimacy of the Council decision will be weak. In contrast, if the government enjoys democratically obtained support for its position, then citizens will have reasons to be satisfied about the legitimacy of the Council’s final position.

⁷⁹ Under the Treaty of Lisbon, enshrined in Art 289 TFEU, the “ordinary legislative procedure” involves both the Council and the Parliament as joint legislators in a symmetrical manner; there are also cases of special legislative procedures where it is the EP which adopts an act with the participation (in the form of the “consent”) of the Council, or the other way round: the Council with the participation (the “consent” or “consultation”) of the EP. In the latter cases, the powers of the EP are quite limited: when the consent is needed, the EP can effectively “veto” a proposal but cannot amend it; when the “consultation” is needed, which is more common, “a bare requirement to consult the European Parliament is all that is required. The Council is not bound to adopt the Parliament’s opinion”, P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials* (5th ed.), Oxford University Press, Oxford: 2011, p. 130. There are thirty-three articles of both the TEU and TFEU that provide for a special legislative procedure with the Council as the dominant actor, *see ibidem*, p. 130, n. 64.

⁸⁰ On the notion of “global legitimacy for the Union as a whole” in contrast to “a set of partial constituencies of support for the application of particular legitimacy approaches to specific sectors”, *see* C. Lord & P. Magnette, *E Pluribus Unum? Creative Disagreement about Legitimacy in the EU*, 42 *Journal of Common Market Studies* 183 (2004), p. 190.

So, in order to enquire into the democratic legitimacy of the EU we must investigate the democratic legitimacy of governments of member states when they participate in the Council. A key aspect of the latter legitimacy is a matter of parliamentary control over the government's position: the better the control, the higher the legitimacy of the governmental position in the Council, and consequently, of the Union, as far as the citizens of *that* country are concerned. This, as is well known, was one of the central points of the famous (or infamous, depending on one's evaluation,⁸¹ and they differed widely in the EU legal scholarship) judgment of the German Constitutional Court, of 30 June 2009, on the ratification of the Lisbon Treaty.⁸² One of the outcomes of the judgment was to annul the legislation accompanying the proposed ratification (significantly, the accompanying legislation was entitled the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters) on the basis that the German Parliament's powers had not been properly specified and strengthened. At stake was, among other things, the parliamentary involvement in the so-called flexibility procedures for the simplified amendments of European Treaties: these mechanisms were interpreted by the Court as "Treaty revisions for the purpose of German constitutional law, therefore requiring national parliamentary approval before the government consents at European level."⁸³ The Court also imposed upon the government a requirement to obtain prior approval from the Parliament before consenting in the Council to the so-called *passerelle* clause [bridging clause], which basically allows the Council to move from unanimity to qualified majority voting in those areas where unanimity is still required. In a similar vein, the Court imposed upon the German representative in the Council a requirement of legislative approval for using the so-called "emergency brake" (the procedure applicable to certain proposals regarding criminal law and social security, which allows any Council member to suspend consideration of the proposed measure and refer the matter to the European Council).⁸⁴ Further, with regard to EU missions with military means (under Art. 43(2) TEU), the German representative in the Council is obliged, under the Court-

⁸¹ For some impassioned critiques of the judgment, see *inter alia* D. Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 Common Market Law Review 1795 (2009) (deploring the fact that the judgment "may perpetuate the Union's democratic deficit following the Court's deconstruction of the European Parliament", p. 1821); D. Halberstam & C. Möllers: *The German Constitutional Court says 'Ja zu Deutschland!'*, 10 German Law Journal 1241 (2009) (concluding that "the entire decision seems rather like a performative utterance in which the Court underlines its own importance in a strange combination of rhetoric and verbosity", p. 1257); J. Baquero Cruz, *An Area of Darkness: Three Conceptions of the Relationship Between European Union Law and State Constitutional Law*, in: N. Walker, J. Shaw & S. Tierney (eds.), *Europe's Constitutional Mosaic*, Hart Publishing, Oxford: 2011, pp. 54-55 (stating that "in the world [the judgment] represents everything is seen through the peculiar lens of German constitutional law, which becomes the beginning and the end of an axiomatic and ultimately, in spite of all its turns, rather simple circular reasoning", p. 54).

⁸² BVerfG, 2 BvE/08 of 30 June 2009.

⁸³ Thym, *supra* note 81, p. 1802 (footnote omitted).

⁸⁴ For discussion, see Halberstam & Möllers, *supra* note 81, pp. 1243-44.

imposed rule, to deny approval to any decision that would violate the constitutionally prescribed necessity of parliamentary approval of any defence action. All in all, it was observed that “[t]he judgment underlines the importance of democratic legitimization in the further process of integration, and therefore calls for a strengthening of the role of the legislature (...) with regard to important decisions taken within the Council.”⁸⁵ (The accompanying legislation was duly changed by German Parliament, opening the way to the ratification of the Lisbon Treaty by Germany).

Among EU member states there is a variety of institutional measures of parliamentary control over governmental positions in the EU, but there seems to be a general awareness that the most effective way parliaments may affect EU law and policy-making is through controlling their respective governments, as a consequence of the fact that it is the government which directly represents the state in the EU law-making (especially in the Council of Ministers). Remedial action to offset the inevitable weakening of parliaments’ role, resulting from the transfer of competencies from the national to the EU level, has been taken by a number of member states. For example, the German, Finnish, Portuguese, Austrian, Swedish, French, Belgian, Czech and Slovak constitutions were all amended to ensure a degree of parliamentary participation in EU affairs. In Denmark, the executive is rigidly controlled by the opinion of parliament: the Folketing (Danish parliament) exercises its control over the government’s positions in European affairs by outlining in advance what positions can be taken and which are beyond the representative’s mandate. This function is performed by Folketing’s European Affairs Committee to which a relevant minister must present in person his or her proposed position, and must obtain support by majority of the Committee. This applies also to the amendments to approved positions: if such amendments are made necessary by the negotiations in Brussels, or if the relevant minister for whatever other reasons wants to go beyond the authorization already obtained – he or she must seek an approval for an amended position.⁸⁶ This is, however, the only example in Europe of such a strong parliamentary role, although one has to add that the status of the European Affairs Committee in the Parliament of Slovakia comes close to this arrangement. Under the Constitutional Act of 24 June 2004, the Slovakian government is obliged to submit to the parliament all drafts of EU legal acts and to inform the parliament about all issues concerning membership of Slovakia in the Union; the parliament, in turn, can endorse or even change the government’s position on draft EU legal acts. In practice, it has never happened so far.⁸⁷ Generally, scholars in Europe observe that parliamentarians are not very interested in European affairs; further, the lack of any clear party split along pro/anti-EU lines has meant that, except in the cases of extraordinary crises, there is

⁸⁵ Editorial Comments, *Karlsruhe has spoken: ‘Yes to the Lisbon Treaty, but (...)’*, 46 Common Market Law Review 1023 (2009), p. 1029.

⁸⁶ For a detailed description, see S.Z. von Dosenrode, *Danish EU-Policy Making*, in: H. Branner & M. Kelstrup (eds.), *Denmark’s Policy Towards Europe After 1945: History, Theory and Options*, Odense University Press, Odense: 2000.

⁸⁷ See Sadurski, *supra* note 40, pp. 176-178.

unlikely to be any strong criticism of the government by parliament for not having respected the views of the latter on EU matters.⁸⁸

Another way of enhancing democratic legitimacy of the EU through the injection of state-based democratic legitimacy, but this time without an intermediary of national governments, is by involving national parliaments in EU law-making more directly. There have been some attempts of that kind within the EU, and since the Amsterdam Treaty there has also been formal recognition at the Treaty level of the right of national parliaments to be engaged in the EU law-making process (the engagement already foreshadowed earlier, by a declaration attached to Maastricht Treaty⁸⁹ was followed by a more formal protocol adopted at Amsterdam,⁹⁰ and again, by a Declaration annexed to the treaty of Nice).⁹¹ The Protocol on the role of the national parliaments attached to the Treaty of Amsterdam provided for an exchange of information between the European institutions and the national parliaments; the Commission was mandated to send all its consultation documents to the parliaments, and the legislative documents could also be forwarded to parliaments by the national governments. This tendency has been consolidated by the Treaty of Lisbon, which announced that the national parliaments “contribute actively to the good functioning of the Union” (Art. 12 TEU) and under which the national parliaments have been equipped with a power of control over the legislative proposals made by the Commission before they are subject to adoption by the European Parliament and the Council of Ministers.

In addition to Art. 12 TEU, Protocol no. 1 on the role of national parliaments establishes a procedure whereby the Commission informs national parliaments about its proposals, and the parliaments have eight weeks to react before the legislative process begins. Protocol no. 2 on the application of the principles of subsidiarity and proportionality provides for the “yellow card” and “orange card” procedures: under the former, if a third of national parliaments consider there to be a breach of the subsidiarity principle, a given draft legislation needs to be reviewed; under the latter procedure, if more than a half of national parliaments find a breach of the subsidiarity principle, this opinion is then conveyed to the European Parliament and to the Council, and a special majority is required in the Council in order for the measure to be adopted.

While some scholars draw very sanguine conclusions by applauding “the multi-level parliamentary complex”, and suggest that “the providence of the parliamentary principle and of representative democracy as such in Europe does not merely reflect the power and operations of the EP, but also the complex manner in which it is connected

⁸⁸ See E. Carpano, *La transformation des régimes parlementaires: des réalités dans les Etats membres aux perspectives ouvertes par la Constitution pour l'Europe*, in: J. Ziller (ed.), *L'Europeanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe – The Europeanisation of Constitutional Law in the Light of the Constitution of Europe*, L'Harmattan, 2003, p. 165.

⁸⁹ Declaration No. 13.

⁹⁰ Protocol on the role of national parliaments in the European Union.

⁹¹ The role of national parliaments was one of four issues highlighted in the Declaration No. 23 on the future of the Union.

and shored up in national parliaments”,⁹² the degree of empowerment of national parliaments made possible by these rules and procedures must not be overstated. To start with, scrutiny under the subsidiarity principle is different from, and narrower than, a general scrutiny on merits: it resembles a “jurisdictional” rather than a substantive scrutiny. In addition, no precise definition of “subsidiarity” is provided by these Protocols. (Though, one should be careful not to fall into belief that subsidiarity scrutiny, because it is not “substantive”, is in some way “objective” and unambiguous. There may even be disagreement on subsidiarity between two chambers of the same parliament, as evident in scrutiny by the Polish parliament of the draft directive on conditions of entry and residence of third-country nationals, when the upper chamber found a breach while the lower did not).⁹³ Second, it has been observed that there is a lack of clarity about the procedure in the later stages of negotiations when the draft legislation, with the negative opinion by some national parliaments attached, enters the crucial decision-making process in the Parliament and in the Council.⁹⁴ The experience of the first year (2010) of using the “yellow” and “orange” card procedures shows that out of 24 scrutiny procedures initiated in this period, less than 60 percent were completed within the 8-week period by national parliaments, which seems to indicate that the 8-week deadline is unrealistically short.⁹⁵ On the other hand, extending this deadline might paralyse the EU legislative process. Third, it is very difficult to envisage a degree of coordination across Europe, which would result in one-fourth or one-third of all the chambers voicing their objections to a particular proposal on the basis of the subsidiarity principle.

Still, the consequences for national parliaments may be significant. As a report published in September 2010 concluded: “The already observable trend of increasing communication between the Commission and national parliaments (200 opinions of national parliaments sent to the Commission in 2008 and 250 in 2009) might suggest a growing awareness in some of the national parliaments about the possibilities of influencing the EU decision-making process at an earlier stage.”⁹⁶ The wider use of these instruments may create a new dynamic between parliaments and governments in member states. A Polish expert observed that as a result of the use of these instruments

⁹² Eriksen, *supra* note 24, p. 224.

⁹³ See P. M. Kaczynski, *Paper Tigers Or Sleeping Beauties? National Parliaments in the Post-Lisbon European Political System*, Centre for European Policy Studies Special Report (January 2011), <http://www.ceps.eu/book/paper-tigers-or-sleeping-beauties-national-parliaments-post-lisbon-european-political-system> (last accessed 1 November 2012), p. 13.

⁹⁴ For this observation, see Joint Study by Centre for European Policy Studies (CEPS), Royal Institute for International Relations (EGMONT) and European Policy Centre (EPC), *The Treaty of Lisbon: A Second Look at the Institutional Innovations* (September 2010) (*Joint Study*), http://www.epc.eu/documents/uploads/pub_1150_epc_egmont_ceps_-_treaty_of_lisbon.pdf (last accessed 1 November 2012), p. 113.

⁹⁵ Kaczynski, *supra* note 93, pp. 11-13. Incidentally, the same study shows that none of the draft laws subject to subsidiary control by the date of the report (1 February 2011) have generated enough reasoned opinions to initiate any of the “cards” procedures.

⁹⁶ Joint Study, *supra* note 94, pp. 117-118.

“[t]here [will] be less room for political anti-Brussels accusations, as *politically* the national parliaments [will] now be co-responsible for the European legislation, not only in the *ex post* transposition phase, but also in the drafting of the original laws.”⁹⁷ Overall, the very existence of such possibilities, even regardless of how effectively they are being used, may serve as a useful argumentative tool “to rebut the claim that the development of the European Union is necessarily inimical to the powers of national parliaments.”⁹⁸

4. DIRECT LEGITIMACY OF THE EU

So far this article focused on one aspect of democratic legitimacy of the EU: the aspect which is linked to the inter-governmental (and inter-state) mechanisms of the EU. It assumed that, in so far as the states maintain their separate identity in the EU, and remain in a way “masters” and “owners” of the entity, with the Community method incorporating, among other things, classical inter-governmental devices (best reflected in the functioning of the Council), the way to enhance democratic legitimacy of the Union is through enhancing democratic legitimacy of the governments participating in the Union decisions, and increasing the participation of national parliaments (the democratic legitimacy of which may be taken for granted for the purposes of this argument) in Union decision-making. But this is only one part of the story about democratic legitimacy of the Union. The Union is *not only* an international organization: it is also “a polity in its own right with direct links to the citizens”,⁹⁹ and consequently the community method incorporates not only inter-governmental devices and procedures. The Union, as a whole, is a rather untidy combination of inter-governmental, supranational, technocratic, parliamentary and judicial institutions and procedures. And as far as it goes beyond the international organization paradigm, the enhancement of democratic legitimacy must proceed by routes other than enhancing states’ legitimacy and national parliaments’ involvement in the Union. As Giandomenico Majone put it, “even if it is true that the democratic character of the Member States is sufficient to legitimate the intergovernmental component of the Union, such indirect legitimation cannot provide an adequate normative foundation for its supranational component.”¹⁰⁰ Many scholars put forward a thesis that since the EU is not a state, it should not be measured by legitimacy standards coined with regard to a state.¹⁰¹ But this is a non sequitur: it is true

⁹⁷ Kaczynski, *supra* note 93, p. 14, emphasis in original.

⁹⁸ W. Sleath, *The Role of National Parliaments in European Affairs*, in: Amato et al., *supra* note 10, p. 563.

⁹⁹ Eriksen, *supra* note 24, p. 2 (italics omitted).

¹⁰⁰ Majone, *supra* note 20, p. 12.

¹⁰¹ Among very numerous sources which may be cited to illustrate this proposition, for one of the best recent articulations see Neyer, *supra* note 27; see also similarly T. Ward, *The European Union: A Crisis of Legitimacy?*, 9 *European Way* 115 (2010).

that the EU is not a state (not even an embryonic one) with the classical prerogatives of a modern state (including, most importantly, the power to tax, the power to enforce its norms by means of coercion, and the real or asserted capacity to defend the territory against foreign threats) but it does not follow that state-centred criteria of legitimacy cannot be applied to it *if* it is a large political entity, with comprehensive competencies, and can establish norms which apply directly to individuals and firms, and which can be effectively enforced (even if enforcement needs to occur mainly through the channels of member states). If the latter criteria are also displayed by nation states, and justify, *inter alia*, a demand for democratic legitimation, then absence of statehood of the EU cannot argue against requiring democratic legitimation from the EU. As Eriksen states, “the political system of domination already in place at the European level requires and aspires to direct legitimation – from the citizens themselves; and not only indirect – derived from the member states. This can be achieved only by making EU into a democratic polity.”¹⁰² Or, to put it more bluntly, in so far as the Union’s institutional architecture resembles statehood (though not federalism, for reasons mentioned earlier), enhancing its democratic legitimacy must proceed through the routes typical of enhancement of democratic legitimacy of the states. This may be called a *direct* democratic legitimation of the Union, in contrast to the indirect legitimation considered so far.¹⁰³

A general template for such a legitimation is provided by the traditional, tripartite separation of powers, with the supremacy of the legislature and the accountability of the executive controlled by the representative and electorally responsive parliament. The current EU institutional architecture is a far cry from that model, and the best way of considering enhancement of direct democratic legitimacy of the union is by applying that template to it. There are several reforms which may be (and have been) demanded and considered, going some way towards making the EU more like a democratic statehood based on a tripartite separation of powers.

First, strategically central is the electoral legitimacy and accountability of the European Parliament (EP). After all, Art. 10 of the TEU states the EU shall be founded on representative democracy, and preserves the right of citizens to be directly represented at EU level in the European Parliament. But this is, at best, a promise, and only to a small degree fulfilled. It may be observed, and deplored, that the EP’s electoral system has not been changed since 1999, and that it has been left far behind by major institutional changes of the Union that have happened since, such as the treaties of Nice and Lisbon, which dramatically increased the powers of the Union, and the historical enlargement of the Union of 2004 and 2007, which increased the number of states from 15 to 27 and the population of the Union from 381 million to 494 million. What is badly needed is a high degree of “transnationalization of the elections

¹⁰² Eriksen, *supra* note 24, pp. 6-7.

¹⁰³ For a sustained argument that the EU, even though a non-state entity, should be legitimated by similar standards to those that apply to state legitimacy, see C. Lord & D. Beetham, *Legitimizing the EU: Is there a ‘Post-parliamentary Basis’ for its Legitimation?*, 39 *Journal of Common Market Studies* 443 (2001).

to the European Parliament.”¹⁰⁴ The current electoral system is anachronistic and fails to generate a sense of commitment to and identification with the Parliament by the voter citizens of the EU. The low voter turnout may be one result of, among other things, this obsolete system.¹⁰⁵ As Andrew Moravcsik characterized it, although about a decade ago, the EP elections “are decentralized, apathetic affairs, in which a relatively small number of voters select among national parties on the basis of national issues.”¹⁰⁶ There are several points to this statement. The very fact that EP election campaigns are largely run on national issues (something which, incidentally, should not necessarily be taken for granted as obvious or persisting)¹⁰⁷ need not be such a bad thing; after all, in par excellence federal systems, elections in constituent entities also are often a reflection of national party political battles. And what are often termed “European” issues are frequently *national* issues, as far as they concern the further transfer of sovereignty from the national to European level, or a national attitude to further enlargement of the EU.¹⁰⁸ Even if the EP elections really are a sum of national elections, nevertheless, it was observed that “the aggregation of the outcomes of national processes still leads to a reasonable congruence between the European electorate and the European Parliament”, so “the parties in the European Parliament appear to function relatively effectively as representatives.”¹⁰⁹ Next, it can be argued that low turnout is a sort of exercise of accountability for the Parliament: voters can express, in that way, their dissatisfaction with the inferior political powers of the EP (a point discussed below). One of the main problems of the system is that the method of selecting MEPs does not favour cross-border and pan-European political parties’ involvement in the EP elections: there is no common election based on common European electoral law, and the electoral campaigns are largely run on national agendas. One proposal, which gained some fame in EU circles, was made by MEP for East of England Andrew Duff, who recommended creating an EU wide constituency from which 25 extra MEPs will be elected. Those MEPs for the pan-European constituency would be politically accountable both to the

¹⁰⁴ Habermas, *supra* note 11, p. 43.

¹⁰⁵ It may be noted that the anachronistic nature of MEP elections has caused some perceptive observers, including the former UK Foreign Secretary Jack Straw, to argue for a virtual abandonment of the idea of a directly elected EP and return to an earlier design whereby the EP was composed of representatives of the national parliaments (see e.g., P. Wintour, *European parliament should be abolished, says Jack Straw*, The Guardian, 21 February 2012, <http://www.guardian.co.uk/world/2012/feb/21/european-parliament-abolish-jack-straw> (last accessed 1 November 2012)). But that would be a real abdication of an attempt to improve input-legitimacy of the EU.

¹⁰⁶ Moravcsik, *supra* note 21, p. 604.

¹⁰⁷ A study of 2004 EPO elections found that there were signs of a substantial degree of Europeanization of national debates, see C. De Vreese, H. Boomgaarden, S. Banducci and H. Semetko, *Light at the End of the Tunnel: Towards a European Public Sphere?*, in: J. J. A. Thomassen (ed.), *The Legitimacy of the European Union after Enlargement*, Oxford University Press, Oxford: 2009, p. 63.

¹⁰⁸ See similarly, J. Thomassen *The Legitimacy of the European Union after Enlargement*, in: Thomassen (ed.), *supra* note 107, p. 12.

¹⁰⁹ P. Mair & J. Thomassen, *Political representation and government in the European Union*, 17 Journal of European Public Policy 20 (2010), p. 30.

European political parties and to the electorate (much like any other MEPs).¹¹⁰ This proposal resonates with the idea of creating incentives – including financial ones – for creation of truly transnational European parties. These parties would then put forward their candidates for the Commission President.¹¹¹

But the improvement of the ways of generating the composition of the EP cannot be the only method of improving the democratic legitimacy of the Union; a weak and powerless Parliament, even with perfect input legitimacy, will do little to improve the democratic legitimacy of the Union as a whole. It is not a legislative agenda-setter (the Commission being the sole authoritative initiator of legislative proposals), and its legislative powers are at best those of a “co-legislator” (now technically participating in an “ordinary” legislative procedure under Art. 294 TFEU, enshrined between the Council and the EP and applicable to nearly all EU legislation). So, *second*, the position of the EP within the institutional system of the EU must be strengthened, and in particular, it must have a stronger connection with, and supremacy over, the Commission. As a preliminary matter, it will be important to make the composition and the policy of the Commission reflect the outcome of the elections to the EP. Currently, the EP elections “do not determine the political colour of the Union, how it is to be governed, for they do not affect the composition of the Commission, nor, of course, of the Council of Ministers. Therefore, they do little to help determine the policies followed by the Union (...).”¹¹² The most radical step in this direction would be to endow the Parliament with the exclusive competence of electing the Commissioners. Under the present system, the EP approves the President of the Commission, who has been nominated by the Heads of Government, and if the nomination is accepted, it must also approve the College of Commissioners nominated by the President of the Commission and the heads of Government (Art. 17.1 TEU). But to what extent the outcome of elections of the EP are reflected in the appointment of the President of the Commission, and then in the composition of the Commission, is a matter of Council discretion. The TEU now formally requires the EP elections to be “taken into account” by the European Council when proposing a candidate for the President of the Commission – but “taking into account” is a vague notion, and does not impose any strict constraint upon the European Council. In fact, the Parliament has little choice but to approve the candidate proposed by the European Council. However, the events of the nomination of José Manuel Barroso to his first term of office (and even more so, to his second term) have

¹¹⁰ Details of these proposals are available at <http://andrewduff.eu/en/page/electoralreformep> accessed 1 November 2012, and also in Duff's article: A. Duff, *Why do MEPs fear electoral reform?*, EU Observer, 14 March 2012, <http://euobserver.com/opinion/115596> (last accessed 1 November 2012).

¹¹¹ H. Mahony, *New rules to boost profile of European political parties*, EU Observer, 12 September 2012 <http://euobserver.com/political/117517> (last accessed 1 November 2012). A similar proposal was recently put forward also by European Commission President José Manuel Barroso, see B. Fox, *Barroso envisages federation of nation states*, EU Observer, 13 September 2012, <http://euobserver.com/news/117526> (last accessed 1 November 2012).

¹¹² V. Bogdanor, *Legitimacy, Accountability and Democracy in the European Union*, A Federal Trust Report, January 2007, p. 7.

shown increasing influence of the Parliament over the nomination, reflected in the firm insistence by the EPP/ED Group, which became the leading group after the 10-13 June 2004 EP elections, that its candidate should become the President of the Commission.¹¹³ Nevertheless, the nomination of the candidate for Presidency of the Commission has always been an outcome of political battles and coalition building in the European Council, evident in the circumstances in which Barroso's predecessors were elected: Jacques Delors was chosen following a Franco-British disagreement over Claude Cheysson, Jacques Santer was a compromise after Britain vetoed Jean-Luc Dehaene (known for his federalist views), and Romano Prodi was backed by a coalition of thirteen states against the Franco-German preference for Guy Verhofstadt.¹¹⁴ So the question is now whether, starting with the Barroso nomination in 2004, the pattern of election of the President of the Commission will be reversed and Art. 17.7 will be interpreted as imposing upon the Council a strict requirement to nominate the President from the largest parliamentary grouping. If so, the Parliament will more closely resemble a democratic state Parliament: an executive-generating body. If the outcome of the election will matter more for the composition and the policy profile of the Commission, it may be an important incentive for generation of political will at a European level and a step towards creation of a pan-European demos, simply because the voters would have more incentive in turning to the elections, and would see the outcome of the election as much more relevant in shaping the policy of the central body of the EU, namely the Commission.¹¹⁵

This is a moderate step; a more radical step would be for voters to directly elect the President of the Commission in pan-European elections. Such a proposal was made recently – more than once – by German Finance Minister Wolfgang Schäuble.¹¹⁶ In this scenario before the next EP elections political parties would enter their top candidate who, in the event of an electoral victory, would be accepted by the leaders of national governments as Commission President. This would mean that the EP elections would be at the same time focused on a search for a good candidate for the Commission Presidency, and obviously

¹¹³ See T. Beukers, *The Barroso Drama Enhancing Parliamentary Control Over the European Commission and the Member States*, 2(1) European Constitutional Law Review 21 (2006), p. 22.

¹¹⁴ S. Hix, *What's wrong with the EU and how to fix it*, Polity, Cambridge: 2008, p. 56.

¹¹⁵ Another proposal, aimed at what he called "parliamentarisation of the Commission", was made in 2010 by the EP President at the time, Jerzy Buzek, who suggested in a lecture at the Humboldt University in Berlin that member states should be persuaded to "increasingly put their candidates for a seat in the Commission on the European election lists, where they could occupy first place". This would make commissioners "visible" for EU citizens and give them a "democratic mandate" and as a result, "The Commission would have stronger democratic legitimacy", H. Mahony, *EP president wants future EU commissioners directly elected*, EU Observer, 23 March 2010, <http://euobserver.com/news/29742> (last accessed 1 November 2012).

¹¹⁶ K. Haimerl, *Germany's Schäuble calls for directly-elected EU president*, Euractiv, 18 May 2012, <http://www.euractiv.com/future-eu/germanys-schaeuble-calls-directl-news-512823> (last accessed 1 November 2012). For the full text of the speech see <http://www.bundesfinanzministerium.de/Content/EN/Reden/2012/2012-05-17-karlspreis.html> (last accessed 1 November 2012).

only politicians with transnational appeal would have a chance of being nominated by their parties. The second step would involve a Europe-wide election campaign, with the candidates successful in the party race engaging in a campaign promoting their policies and themselves. A vote for a particular party in the EP elections would be at the same time a vote for this party's (or rather, the European grouping to which this party belongs) candidate for the office of President of the Commission.¹¹⁷ An even more radical step – clearly requiring a major change of the treaties – would be to elect the President of the Commission in direct elections, thus sidestepping the EP electoral process, or even combining two presidential offices; the President of the Commission and the President of the Council, to create one 'EU President', and to have such an EU President elected in pan-EU elections held on the same day in all member states.¹¹⁸

Third, not only should the electoral outcome inform the make-up of the Commission but also, during the Parliament's and the Commission's terms, the controlling function of the EP over the Commission must be strengthened. In particular, the principle of individual responsibility of particular Commissioners should be introduced and enforced. It is important that, in exercising its oversight of the Commission, the EP should have the power of control (including of expressing no confidence) over individual Commissioners, not only to censure the Commission as a whole, which is the current system (Art. 17 TEU and Art. 234 TFEU). This "all or nothing power" prevents effective control of the Commission, as the EP rarely takes issue with the Commission as a whole (as was the case of the Santer Commission which resigned in 1998 *en bloc* as a result of allegations of corruption against individual commissioners), but rather with particular portfolios. The words of a scholar written just after Maastricht Treaty, in relation to legitimacy-related problems with its ratification, are as valid now as they were then: "In order to overcome the problems of legitimacy, today's EU needs to be endowed with a more transparent structure of political accountability, based on the classic executive-legislative model found in most European states."¹¹⁹

Fourth, in the long term it is impossible, if we are concerned with direct input legitimacy of the EU, to maintain the Commission as the sole authorized initiator of legislation; nowhere else in the democratic world does a group of unelected officials hold the exclusive power of legislative initiative.¹²⁰ This is the pinnacle of the "Community

¹¹⁷ For a similar proposal, see also J. Croon and M. Poiars Maduro, *The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis*, Global Governance Programme: Policy Brief 3 (2012), pp. 1-7, http://globalgovernanceprogramme.eui.eu/wp-content/uploads/2012/05/PB_Euro_web.pdf (last accessed 1 November 2012). The report of the meeting of the Global Governance Programme held at the European University Institute in Florence on 10 May 2012 argued that the next elections to the EP should be transformed into an electoral competition for the presidency of the European Commission.

¹¹⁸ See A. Rettman, *Ministers call for stronger EU and foreign policy chief*, EU Observer, 18 September 2012, <http://euobserver.com/institutional/117581> (last accessed 1 November 2012).

¹¹⁹ K. Featherstone, *Jean Monnet and the 'Democratic Deficit' in the European Union*, 32 *Journal of Common Market Studies* 149 (1994), p. 151.

¹²⁰ J.-P. Bonde, *The European Union's Democratic Deficit: How to Fix It*, 17 *Brown Journal of World Affairs* 147 (2011), p. 147.

method”, and it has a certain logic within the inter-governmental dimension of the EU,¹²¹ but in so far as the EU becomes a supranational entity and we try to make it resemble a democratic polity based on a tripartite division of powers, an idea that the only directly elected body has no say in the legislative initiative is untenable. Not only is the Parliament unable to initiate legislation; moreover, it has no right to access documents dealing with the early legislative process, and depends heavily on lobbyists and informal contacts for any information regarding the preliminary legislative proposals.¹²² Featherstone is right: “By almost any measure, the Commission fails the test of democratic legitimacy.”¹²³ In defence of the role of the Commission, Majone argued that “the Commission’s monopoly on legislative proposals is a mechanism for linking more closely the Council and the EP to European law”¹²⁴ – but this is question-begging, for reasons put forward in a moment. Majone explains this point in the following way: “the Commission’s right of legislative initiative (...) is best understood as a way of ensuring that EC policies are directed towards the advancement of the general interests of the Community (as defined by the Treaties) as opposed to national and sectoral interests.”¹²⁵ This is because, Majone claims, the Commission is better placed than other European institutions to take into account the general interests of the Community, as other institutions tend to be moved by sectoral, short-term, and national self-interests.¹²⁶ There are several points which can be made about this statement. For one thing, the article by Majone was published in 1998, when as he observed, the EP was “not yet institutionally suited to take into account the general interests of the Community in its legislative proposals”¹²⁷ – but since then, there has been important institutional growth and evolution in the EP, including a strengthening of its legislative role. Second, these sorts of assessments have an unfortunate consequence of becoming self-fulfilling prophecies, or self-perpetuating phenomena: if the Parliament does not obtain more competences, it will stay at a level of weak institutional development, and develop strategies to cope with its inferior position. Third, Majone may underestimate the strength of the impact of interest groups and sectoral or national self-interests upon the Commission itself. And fourth, the attribution of legislative initiative to the EP does not necessarily mean the removal of the power of initiative from the Commission: all it will lose is the initiative *monopoly* and not the power of initiative per se. The EP

¹²¹ It is worth reminding ourselves that the Commission was a direct progeny of the of the ECSC’s High Authority – a body which was aptly described by Paul Reuter (one of the Founding Fathers of the European Communities) as a last-resort solution that was conceived to “solve the problem of how to create a Europe without Europeans”, quoted in E. Zoller, *The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union*, 12 *Indiana Journal of Global Legal Studies* 391 (2005), p. 398.

¹²² Bonde, *supra* note 120, pp. 149-151.

¹²³ Featherstone, *supra* note 119, p. 162.

¹²⁴ Majone, *supra* note 20, p. 8.

¹²⁵ *Ibidem*, p. 23.

¹²⁶ *Ibidem*.

¹²⁷ *Ibidem*.

will never be fully considered as a “real” parliament for the European citizens, as those whom they elect cannot decide the agenda, and can only react to the proposals made by an independent technocratic body – independent, that is, “from the member States, from the governments, and from the people.”¹²⁸

The *fifth*, and the last proposal put forward here concerns the only instrument of direct democracy within the EU. The Lisbon Treaty, echoing earlier regulation in the project of the Constitutional Treaty,¹²⁹ introduced the European Citizens’ Initiative (ECI)¹³⁰ which was the culmination of discussions and proposals that go back to the late 1980s. Starting in 1988, the EP adopted a number of resolutions that called for finding ways of consulting European citizens directly, and to allow the popular will to express itself by some forms of referenda.¹³¹ In 1996, two member states (Austria and Italy) proposed to the IGC the inclusion of a popular legislative initiative (suggesting

¹²⁸ Zoller, *supra* note 121, p. 397. Zoller’s article is the most sustained critique in the literature on the subject of the Commission’s monopoly on legislative initiative, and this observation nicely summarizes the tenor of her article: “So long as the EU Parliament is deprived of the right to initiate legislation, th[e] European] general will is certain to remain silent, and European laws will be the exclusive province of leaders and elites ...” (p. 407). Though her remarks applied to the Draft Treaty establishing a Constitution for Europe, they still maintain validity today. A proposal to endow the EP with the power of initiating legislation was recently made by German Finance Minister Wolfgang Schäuble, see K. Haimerl, *Germany’s Schäuble calls for directly-elected EU president*, Euractiv, 18 May 2012, <http://www.euractiv.com/future-eu/germanys-schaeuble-calls-directl-news-512823> (last accessed 1 November 2012). Also a recent “Future of Europe report”, adopted by 11 foreign ministers from Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and on 18 September 2012 after a meeting in Warsaw, stated that the EP should be able to initiate EU law, see “Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain” 17 September 2012, outlined in A. Rettman, *Ministers call for stronger EU and foreign policy chief*, EU Observer, 18 September 2012, <http://euobserver.com/institutional/117581> (last accessed 1 November 2012).

¹²⁹ Art. I-47.4 of the Treaty establishing a Constitution for Europe (subsequently not ratified).

¹³⁰ Art. 11.4 TEU states: “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens’ initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union”. Art. 24 TFEU reads: “The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens’ initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come”. The Regulation was adopted in February 2011, Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens’ Initiative.

¹³¹ See JO C 187/231; EP (1988). Resolution on ways of consulting European citizens about the EU. Brussels: JO C 187/231. In December 1993, the Public Liberty and Domestic Affairs Commission of the European Parliament expressed its support for the introduction of a “European legislative referendum”, EP institutional commission. DOC A2-0332/88, as well as the possibility of citizens’ ballots on “Community decisions”, EP Commission. DOC A3-0031/94.

a threshold of ten per cent of European voters).¹³² As Bruno Kaufmann notes, this was the result not only of the will to democratize decision-making within the EU, but also of the tendency to submit major national decisions about the EU to popular votes; Kaufmann observes that since 1972 more than fifty popular votes on European integration have taken place in Europe.¹³³

But is the ECI, as currently designed, likely to democratize the Union itself? There are different views on the matter: some commentators are optimistic, claiming that it can become “the next big thing” in the history of democracy,¹³⁴ while others are much more sceptical, saying that it “does not dramatically change the democratic nature of the European Union and it does not bring the Union and its decision-making closer to the citizens.”¹³⁵ To start with, the ECI is constructed not as a decision-making instrument: it is neither a referendum nor can it trigger a binding referendum;¹³⁶ at best, it can be seen as an agenda-setting device.¹³⁷ This not a small thing, but it already suggests basic limits on the impact that it may have upon democratic legitimacy of the EU: unless the successful initiatives produce some legal obligations on the Commission, they are unlikely to reduce the legitimacy deficit. If anything, a successful initiative which then is disregarded by the Commission may increase the frustration of the participants and deepen their sense of legitimacy deficit within the Union. The present design does not place any positive obligations upon the Commission in response to successful initiatives (it may decide to take no action), and the Commission is likely to be adamant about preserving its monopoly on legislative initiative; as Johannes Pichler melancholically notes, “If the Commission is entitled by the Treaties and by the Constitution [*sic*] to ignore calls even from the Parliament or the Council, why should it react to small minorities?”¹³⁸ Speculation that “it seems likely that the political pressure on the Commission to be responsive will be strong”¹³⁹ is something which is yet to be tested, and for the moment remains just that – speculation. So while, politically speaking, the very process of raising an initiative may be a useful communicative and mobilizing

¹³² See Closa Montero, *supra* note 10, p. 1049, n. 23.

¹³³ B. Kaufmann, *Transnational Babysit: The European Citizens' Initiative*, in: M. Setälä & T. Schiller, (eds.), *Citizens' Initiatives in Europe: Procedures and Consequences of Agenda-setting by Citizens*, Palgrave Macmillan, London: 2012, p. 233.

¹³⁴ *Ibidem*, p. 240.

¹³⁵ A. H. Kammel, *Bridging the Gap: the European Citizens' Initiative and its Consequences for Democracy within the European Union*, in: J. W. Pichler and B. Kaufmann (eds.), *The Next Big Thing: Making Europe ready for the Citizens' Initiative*, Intersentia, NWV, Neuer Wissenschaftlicher Verlag, Wien: 2011, p. 55.

¹³⁶ Commenting on the model of initiative contained in the draft Constitutional treaty (subsequently taken up by the Treaty of Lisbon), P. Magnette had observed: “*on est loin des initiatives populaires de type suisse ou américain*”, P. Magnette, *Vers un changement de régime politique?*, in: Amato, Bribosia & de Witte (eds.), *supra* note 10, p. 1069.

¹³⁷ B. Kaufmann and J. W. Pichler, *Editorial: It's the practice, stupid!*, in: Pichler & Kaufmann (eds.), *supra* note 135, p. 10.

¹³⁸ J. W. Pichler, *The EU Commissions Draft Proposal on the European Citizens' Initiative – A First Balance*, in: Pichler and Kaufmann (eds.), *supra* note 135, p. 18.

¹³⁹ Craig & de Burca, *supra* note 79, p. 849.

instrument on a transnational scale, legally speaking, the ECI is little more than a petition to the Commission, which is allowed “to deny any legal effect to the explicit will of more than one million citizens.”¹⁴⁰

Further, there are a number of obstacles placed upon the initiative that are not understandable. To start with, the threshold of 1 million signatures combined within the minimum of seven countries,¹⁴¹ with a minimum number of signatories required in each of the member states,¹⁴² ranging from 4,500 to 74,250 depending on the size of the country,¹⁴³ is deeply unrealistic, and may be overcome only on the rarest occasions.¹⁴⁴ In fact, the hurdles are placed so high that, with all the costs and administrative resources involved, they are likely to be successfully overcome only by very powerful, established organizations.¹⁴⁵ The same applies to the time limit of one year for completing a petition process. Especially considering the weak legal status of a successful initiative, it is incomprehensible why such obstacles have been placed on its use. As Kaufmann realistically observed: “The whole complex process (...) means that it will be pretty difficult indeed for citizens across Europe merely to get started with an initiative.”¹⁴⁶ One may therefore suggest the revision of the ECI regulation by lowering the threshold, say to 100,000 signatures in 2-3 states.

But this is not to say that a purely cynical view of the ECI, as meaningless window-dressing, is justified. Quite apart from its agenda-setting implications, the very possibility of the ECI provides NGOs, opinion leaders and social movements with an opportunity of engaging in a coordinated communicative action related to EU laws and policies. The process of preparing the initiative proposal may promote the transnational public discourse on European affairs and therefore the ECI could become “a truly extraordinary communication tool.”¹⁴⁷

CONCLUSIONS

As Sergio Fabbrini observed recently, “The management of the euro crisis (...) show[s] that an intergovernmental EU cannot satisfy the basis requirements of effectiveness

¹⁴⁰ A. Auer, *European Citizens' Initiative*, 1 *European Constitutional Law Review* 79 (2005), p. 83.

¹⁴¹ Art. 2(1) and Art. 7(1), Regulation 211 (2011).

¹⁴² Art. 7(2) and Annex I of the Regulation 211 (2011).

¹⁴³ See <http://ec.europa.eu/citizens-initiative/public/signatories> (last accessed 7 April 2013).

¹⁴⁴ At the time of the writing the current draft of this article (early April 2013), there are fourteen “open initiatives” with deadlines for collection of necessary number of supporters ranging between 1 November 2013 and 28 January 2014, <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing> (last accessed 7 April 2013).

¹⁴⁵ M. Bühler, *ECI – An Initiative for Citizens in the EU*, in: Pichler & Kaufmann (eds.), *supra* note 135, p. 48.

¹⁴⁶ Kaufmann, *supra* note 133, p. 239.

¹⁴⁷ A.-M. Sigmund, *Towards a supportive infrastructure*, in: Pichler & Kaufmann (eds.), *supra* note 135, p. 79.

and legitimacy.”¹⁴⁸ In this article, I have focused on the latter requirement, though the two are intimately interconnected. Debates and controversies about democratic legitimacy of the EU have of course accompanied the Union from the very beginning. Some commentators tried to define the problem out of existence; by pointing out that the EU is not a state-like polity, they argued that state-specific criteria of legitimacy, such as representative, participatory or deliberative democracy, do not apply. They postulated outcome-based or, at best, public reasons based, conceptions of legitimacy as applicable to the EU, and concluded that it satisfies those standards. But this argument is based on a non sequitur: from the statement that the EU is not a state (not even a quasi-federation or federation *in statu nascendi*) it does not follow that it should not be judged by the standards of democratic legitimacy. There is no reason to accept that such standards apply only to fully-fledged states in the modern world, in which we accept that large organizations with coercive and distributive powers should be sensitive to preferences, values and interests of those whom they control, and that this sensitivity is best implemented by democratic mechanisms. So there is no escape from scrutinizing legitimacy of the EU by democratic standards.

Hence, a huge “democratic paradox” of the EU: while committing itself to promote and scrutinize democracy in its member states, in candidate states, and in third states with whom it enters into contact, it does not display equivalent democratic features in its own functioning. EU officials and representatives – the President of the Council, President of the Commission, High Representative for Foreign Affairs and Security Policy etc. – may travel the world and lecture about the supreme virtues of democracy, having themselves not been appointed in a fully democratic way, and not having to be accountable to their constituency in a way in which is expected and required in a democracy. Striking democratic imperfections in the EU institutional system, even with the positive corrections introduced by the Treaty of Lisbon, are in stark contrast with the Treaty promise that the EU shall be founded on representative democracy and preservation of the right of citizens to be directly represented at EU level (Art. 10 TEU).

But the EU is a complex, untidy polity which amalgamates inter-governmental and supranational elements in its constitution; hence, the bifurcated approach to democratic legitimacy postulated in this article. In so far as the EU contains inter-governmental elements – best exemplified by the powers of the Council – indirect legitimacy is all that is required, i.e., democratic legitimacy of governments representing their respective states in the Council. National parliamentary control over the position of the member state in the Council and direct involvement of national parliaments in the EU law-making, if effectively managed, satisfy the conditions of indirect legitimacy. The burden is then shifted to the democratic mechanisms within member states, as far as those states participate in the EU.

¹⁴⁸ S. Fabbrini, *After the Euro crisis: The President of Europe*, EuropEos Commentary No. 12, 1 June 2012, <http://www.ceps.be/book/after-euro-crisis-president-europe-new-paradigm-increasing-legitimacy-and-effectiveness-eu> (last accessed 1 November 2012), p. 4.

The second face of the EU – its supranational character – calls for democratic legitimization of its institutions, in particular, in accordance with the promise contained in Art. 10 TEU, proclaiming representative democracy in the institutional setup of the EU, and the right of EU citizens to be directly represented in the EP. This requires changes to the electoral system of the EP in order to provide incentives for a more trans-European electoral process; strengthening of the supervisory role of the EP over the Commission, in particular the power of electing the Commission and exercising accountability with respect to individual Commissioners; the strengthening of the role of the EP with regard to legislation, and endowing it with the (non-exclusive) competence of legislative initiative. Overall, the idea is for the institutional setup to resemble a canonical model of separation of powers and inter-institutional accountability, with the EP in a dominant position. Additionally, the first gesture towards direct democracy in the EU, the ECI, should be strengthened, both by upgrading the status of successful initiatives and by lowering thresholds and administrative requirements.

The EU is undergoing a crisis these days, with the institutional structure clearly inadequate to solve pan-European problems with currency and debt. Ironically, perhaps the time of crisis may be a good moment to place at the centre of the agenda of the EU debates, the matter of its democratic legitimacy. The institutional setup of the EU – its constitution – will most probably be changed, but the change may either be of a managerial-technocratic character or of a democratic-participatory nature. This article outlined some modest steps which should be taken if the latter scenario is to be demanded by European societies. As it should be.

Roman Kwiecień*

DOES THE STATE STILL MATTER? SOVEREIGNTY, LEGITIMACY AND INTERNATIONAL LAW

Abstract

This article explores the issue of sovereignty of States in the context of legitimacy of international law. Sovereign statehood is today increasingly challenged. The article examines if an essential incompatibility exists between international law conceived as a true, that is, legitimized, system of law and State sovereignty. To this end, it seems necessary to determine a meaning and importance of sovereignty in and for international law. The article seeks to argue that the idea of State sovereignty, deprived of orthodox positivistic justification, can still perform an important cognitive function in international law. In a world in which non-State actors suffer from a “democratic deficit”, democratic accountability and responsibility remains concentrated in States. States are, therefore, still the main source of legitimacy of political decisions. It is sovereign States that are the legal subjects assuring the public underpinnings within the international legal order. Consequently, there is no contradiction between the sovereign status of States in international society, and international law conceived as a legitimized legal order.

INTRODUCTION: THE PROBLEM OF STATEHOOD IN CONTEMPORARY INTERNATIONAL LAW

As history shows, there have been no perennial social entities. And yet, the State has seemed to be such an inviolable construct in the law of nations since modern *jus publicum Europaeum* became established. The legal status of States was combined with international law to such an extent that most international law scholars and international courts were inclined to present international law for a long time as inter-state in nature. The axiomatic approach of the Permanent Court of International

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Justice (PCIJ), expressed in the famous *dictum* of the *S.S. Lotus* judgment,¹ can be seen as an illustration of this trend. According to the PCIJ, the underpinnings of international law were created by the presumptive freedom of State action and the consent of States. However, in the contemporary field of international law, the leading status of States as international legislators is increasingly challenged. Consequently, the thesis that international law is a law for States is hardly a truism, even under legal positivism.

There are a number of reasons the significance of States in international law has been brought into question. First, this questioning derives from a changing understanding of State sovereignty. Second, it is based on a noticeable increase in the activity of non-State actors in international society, which is today expressed through the concept of *multilevel global governance*. Third, the classical position of States in international society is called into question by the growing role of the ideology of human rights in international law. The so-called humanization of international law seeks to enhance the legal subjectivity of human beings. This is a substantial reason for calling for a rejection of the ontology of statehood, either for enhancing the status of non-State actors within international society, or in order to enhance the understanding of international society as “the society of all human beings, the society of all societies.”² The well-known *Responsibility to Protect* doctrine demonstrates this tendency toward placing a lesser emphasis on the significance of States in international law. Within the doctrine, the functions of State sovereignty are presented as ancillary to the protection of human rights. As a doctrine, it is not a new idea. But it now, looking at a situation in Libya in 2011, say, possesses serious political popularity, which gives it a considerable chance of succeeding. The legal authorisation of the doctrine in international society would at first sight amount to a usurpation of State sovereignty in favour of human rights. Thereby this ideological turn would transform international law into a legal order conceived primarily as an “individual-centred system.”³ On that account, it is hardly surprising that there are questions concerning the future of the State in international law.⁴

¹ “International law governs relations between independent States”. *The case of the S.S. ‘Lotus’ (France v Turkey)*, PCIJ Publ., Series A, No. 10, p. 18.

² Ph. Allott, *The Health of Nations. Society and Law Beyond the State*, Cambridge University Press, Cambridge: 2002, *passim*.

³ See A. Peters, *Humanity as the A and Ω of Sovereignty*, 20 *European Journal of International Law* 513 (2009).

⁴ See e.g., G. Cahin, *Le droit international et la question de la ‘fragmentation’ des Etats*, 40(2) *Revue Belge de Droit International* 327 (2007); F. Hoffmann, *In Quite a State: The Trials and Tribulations of an Old Concept in New Times*, in: R.A. Miller & R.M. Bratspies (eds.), *Progress in International Law*, Martinus Nijhoff Publishers, Leiden: 2008, pp. 263-287; S. Jodoin, *International Law and Alterity: The State and the Other*, 21 *Leiden Journal of International Law* 1 (2008); W.M. Reisman, *Designing and Managing the Future of the State*, 8 *European Journal of International Law* 409 (1997); J. Salmon, *Quelle place pour l’État dans le droit international d’aujourd’hui?*, 347 *Recueil des Cours de l’Académie de Droit International (Recueil des Cours)* 9 (2010); O. Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 *Columbia Journal of Transnational Law* 7 (1998); S. Sur, *The State between Fragmentation and Globalization*, 8 *European Journal of International Law* 421 (1997).

The ideological roots of criticisms of statehood are mainly embedded in Marxism. They follow from the appraisal of statehood as “morally unjustified egotism”, responsible for the creation of artificial divisions among the human society and the legalization of repressive measures. Another school of criticism stems from sociological observations, which lead critics of statehood to conclusions on the inability of contemporary States to meet global problems, or even to secure their own safety. Therefore, States are inclined, the critics say, to stronger and stronger forms of institutionalised cooperation, which lead to the diminishing of their sovereign competencies.⁵ Matthew Craven aptly asserts in this context that the contemporary State as an “institution becomes ultimately vulnerable to an essentially instrumental critique: either it does its job and can be justified on that basis, or it doesn’t and can’t.”⁶

Calling into question the ontology of statehood has given rise to another phenomenon in the area of international law: a quest for new criteria of statehood. These criteria, which recently seemed unquestionable – defined territory, permanent population and effective government – are treated by some scholars as non-exhaustive.⁷ In other words, the criteria for statehood in contemporary international law are not yet clear. If we also take into account both the theoretical and practical controversies concerning the recognition of States, and self-determination, it is easy to recognize that the classical issue of the State in international law remains alive and worthy of further enquiry.

The problem of statehood in international law should be seen in the perspective of the entire international legal order. Such perspective gives rise to questions regarding the relationship between the legal status of States and systemic features of international law. The issue can be articulated as follows: is the controversial nature of the criteria and consequences of statehood, especially sovereignty, a result of noticeable changes in international law, or rather, does the evolution of statehood itself constitute a systemic transformation of international law? This issue raises another question, namely, whether international law as a legal order legitimizes the status of States within it, or, vice versa, the status of States legitimizes the systemic underpinnings of international law? This is a crucial problem for the entire international legal order. After all, there is a strong link between the genesis and development of international law, and the creation of

⁵ See M. Koskenniemi, *The Wonderful Artificiality of States*, 88 American Society of International Law Proceedings (1994), pp. 22-29.

⁶ M. Craven, *Statehood, Self-determination, and Recognition*, in M. Evans (ed.), *International Law* (3rd ed.), Oxford University Press, Oxford: 2010, p. 247.

⁷ See critical analysis of the criteria for statehood by J. Crawford, *The Creation of States in International Law* (2nd ed.), Oxford University Press, Oxford: 2006, pp. 37-95; Craven, *supra* note 6, pp. 217-229; K. Knop, *Statehood: Territory, People, Government*, in: J. Crawford & Martti Koskenniemi (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge: 2012, pp. 95-116; A. Peters, *Statehood after 1989: ‘Effectivités’ between Legality and Virtuality*, in: J. Crawford & S. Nouwen (eds.), *Selected Proceedings of the European Society of International Law*, Hart, Oxford: 2011, p. 171 *et seq*; H. Ruiz-Fabri, *Genèse et disparition de l’État à l’époque contemporaine*, 38 *Annuaire français de droit international* 153 (1992), pp. 163-169.

modern European nation-States.⁸ In other words, there is inherent feedback between the concept of State sovereignty and the development of international law.

Contemporary international law scholarship on the issue of statehood is divided into two schools of thought: positivism-realism and idealism-naturalism. The positivistic-realism approach emphasizes the leading role of States in the law of international society, whereas the naturalistic-idealism approach questions such a role. Furthermore, the latter treats statehood as an obstacle to the establishment of international law as a real legal order. This criticism hinges on the basic consequence of statehood – sovereignty. According to the critics of the statehood, it is State sovereignty which is responsible for the imperfect legitimization of international law. Sovereignty is often believed to be an obstacle to the *ex ante* legitimacy of international law. Indeed, there are “traditional manifestations” of State sovereignty, as Hersch Lauterpacht once named them,⁹ which may be treated as a source of doubts about the legal nature of international law. They primarily include the presumptive freedom of State actions, supported by the *Lotus* doctrine, and the consent theory, which attempts to find the binding force of international law in the will of States. In addition, the State and its sovereignty are also challenged by the growing activity of non-State actors and the increasing importance of human rights. Consequently, according to a number of scholars, international law can do today without State sovereignty. The present author took a different stance on the problem in this Yearbook several years ago.¹⁰ This article basically supports that standpoint in the context of the issue of legitimacy. It seeks to examine, first, if an essential incompatibility exists between international law conceived as a true, that is, legitimized, system of law, and the sovereign status of States. To this end it seems necessary to determine the meanings of both legitimacy and State sovereignty. This is advisable, furthermore, because the foregoing concepts, particularly the concept of sovereignty, are rather ambiguous, if not misleading. Second, the paper seeks to prove that the idea of the sovereignty of States, deprived of orthodox positivistic justification, can perform an important cognitive function in international law. Consequently, this paper argues that there is no contradiction between the leading status of sovereign States in international society, and international law conceived as a legitimized legal order.

⁸ This Europe-centred view should not be relativized by political correctness because it solely confirms a well-known fact. As such, it is supported even by scholars who seek to overcome the Euro-centric perspective of international law. See especially, O. Yasuaki, *When Was the Law of International Society Born?*, 2 *Journal of the History of International Law* 3 (2000), *passim*; O. Yasuaki, *A Transcivilizational Perspective on International Law. Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century*, 342 *Recueil des Cours* 77 (2009), pp. 266-341.

⁹ H. Lauterpacht, *The Organization of Peace and the Revision of the Status Quo*, in: E. Lauterpacht (ed.), *International Law Being the Collected Papers of Hersch Lauterpacht*, Vol. I, Cambridge University Press, Cambridge: 1970, p. 443; H. Lauterpacht, *Règles Générales du Droit de la Paix*, 62 *Recueil des Cours* 95 (1937), p. 416.

¹⁰ R. Kwiecień, *In Defence of the Idea of State Sovereignty in International Law*, 27 *Polish Yearbook of International Law* 87 (2005-2006).

1. THE MEANING AND SIGNIFICANCE OF STATE SOVEREIGNTY IN INTERNATIONAL LAW

1.1. The meaning of State sovereignty

There is inherent feedback between the concept of State sovereignty and the development of international law, both at the level of ideas and the practice that implements them. Even challengers of the idea of State sovereignty cannot disregard the reality of the operation of organized, independent political communities.¹¹ Without this fact, the development of the institutions of international law would not have been possible. It is State sovereignty as the consequence of this reality that is the *spiritus movens*, to which we owe the legal foundations of the contemporary international society. These foundations are certainly still imperfect, as they are plagued by internal tensions and conflicts hardly known to municipal law. Nevertheless, they increasingly eliminate the shortcomings of the modern law of nations. State sovereignty should therefore be regarded as a regulative idea (in the Kantian sense of the word) of international law: the idea without which it would be impossible for the structure and institutions of this law to exist and be explored.

It is puzzling, however, that the concept of State sovereignty eludes a single generally accepted definition. Many authors speak of “their own” idea of State sovereignty, which is often associated with an intuitive rather than discursive meaning. This resembles, to some extent, the case of the definition of the State in contemporary international law. One supposedly knows what a “State” is in law, yet it is futile to seek a legal definition of the term in a universally binding act.¹² Indeed, as Giorgio Agamben pointed out “(...) there is a moment in the life of concepts when they lose their immediate intelligibility and can then (...) be overburdened with contradictory meanings.”¹³ The concept of sovereignty surely belongs to them.

According to Martti Koskenniemi, the ambiguity surrounding the modern doctrine of sovereignty is caused by a paradox deriving from the difficulties connected with a coherent view of the State and its “freedom”. Koskenniemi maintains that we seem incapable of conceptualizing the State, or whatever liberties it has, without reflecting on the character of the social relations which surround it. However, Koskenniemi argues, we also cannot derive the State completely from its social relations, and its liberty from an external normative perspective, without losing the State’s individuality as a

¹¹ Take, for example, the view of J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. I, Sijthoff, Leyden: 1968, p. 256, who, when opting for the removal of the concept of State sovereignty from legal language because of its ambiguity, wrote in his monumental work: “One of the major cruxes in the theory and practice of the law of nations is the claim of States to sovereignty or ‘sovereign independence’”. No publication which pretends to deal with the major problems posed by international law can, therefore, possibly by-pass this central concept.”

¹² It is noteworthy that the International Law Commission remarked in its comment on the 1949 *Draft Declaration of Rights and Duties of States* that “the term ‘State’ is used in the sense commonly accepted in international practice” (Yearbook of International Law Commission (1949), p. 289).

¹³ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press, Stanford: 1998, p. 80.

nation and the justification for its claims to independence and self-determination.¹⁴ Another source of controversy lies in the presumed normative sense of State sovereignty in international law. Can we speak of sovereignty as a legal norm at all? The answer to this question is not obvious. "Sovereign equality" is, without doubt, a legal norm as the principle of Charter of the United Nations (UN Charter), constitutive acts of other international organizations and an essential element of a number of international agreements. It is from sovereign equality that the rights and duties of States follow. This principle, at least as authentically interpreted at the UN founding conference, does not, however, directly explain what sovereignty is in its nature, or whether sovereignty has any legal nature at all. The principle of sovereign equality is highly State-centric, and denotes the equality of all States in respect of sovereignty. This principle gives legal protection to every State's position within international society, and as such, is still recognized by the International Court of Justice (ICJ) as the fundamental principle of the international legal order.¹⁵ The present problem can thus be formulated in the following way: in what way are all States equal?

Some more recent studies concerning sovereignty reject, in the spirit of postmodern philosophy, the essential question of what sovereignty is. Jens Bartelson's standpoint seems to be especially characteristic. Bartelson maintains, following Koskenniemi in great measure, that the more sovereignty is explained, the more it evades explanation. Furthermore, Bartelson denies sovereignty the status of a being, and consequently, maintains that it is impossible to ascertain what it is, as one can only name its functions.¹⁶ Nevertheless, Bartelson is, to some extent, correct in pointing out that the underlying sticking point in the contemporary debate on sovereignty concerns the ontological status of concepts. Thus, the belief that sovereignty is undergoing profound change is greatly influenced by a *nominalist* view of concepts, that is, the idea that concepts are nothing but general names that we use to constitute different classes of objects. However, the belief that sovereignty is a permanent feature of political life is supported by a *realist* view of concepts, according to which classes of objects exist independently of our descriptions of them.¹⁷ In fact, Koskenniemi's standpoint also

¹⁴ M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue*, Cambridge University Press, Cambridge: 2005, p. 225.

¹⁵ See recently, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, (Judgment of 3.2.2012), available at <<http://www.icj-cij.org/docket/files/143/16883.pdf>> accessed 21.02.2013, para. 57. At the same time the ICJ emphasised that the sovereign rights of a given State could influence such rights of others. It argued that the rule of State immunity derived from the principle of sovereign equality had to be viewed together with the principle that each State possesses sovereignty over its own territory. State immunity, the ICJ maintains, may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

¹⁶ J. Bartelson, *A Genealogy of Sovereignty*, Cambridge University Press, Cambridge: 1995, pp. 1, 17, 48-49. The same, incidentally, Bartelson speaks of the concept of the State. See J. Bartelson, *The Critique of the State*, Cambridge University Press, Cambridge: 2001, pp. 1-15.

¹⁷ See J. Bartelson, *The Concept of Sovereignty Revisited*, 17 *European Journal of International Law* 463 (2006), p. 465.

denies cognitive significance to the concept of State sovereignty. Koskenniemi argues that sovereignty works both as a description and a norm, and its main difficulty relates to “holding the facts/law (‘is’/‘ought’) opposition intact”.¹⁸ The present author takes, however, a different stance, which maintains that sovereignty is neither description nor norm. It is an idea within international legal reasoning. This idea simply summarizes legal consequences of statehood. As such, it allows us, *inter alia*, to distinguish the legal status of States from other subjects within international society.

Sovereignty remains inherently entwined with the reality of supreme authority in a State. It is itself not, however, a fact. It is rather through its agency that specific states exist. It expresses, at the level of ideas, the ultimate character of authority in a politico-legal community. In relations between States, however, it emphasizes something quite the opposite: the absence of “suprastate” authority between them.¹⁹ We therefore have a thesis – the supreme authority in a certain community, and an anti-thesis – the absence of such authority in international relations. This opposition constitutes the identity of the concept of State sovereignty in international law.

When following the development of the concept and meaning of State sovereignty, one can arrive at a seemingly paradoxical conclusion. The argument is frequently stated that, in modern and contemporary law, the process of relativization of State sovereignty has occurred, that is, the transition from “absolute sovereignty” to “sovereignty subordinated” to the supremacy of international law. However, contrary to this view, the development of modern and contemporary law demonstrates that State sovereignty is being strengthened.²⁰ First and foremost, sovereignty was never outside the law. It has always been subject to international law, because from the very beginning it was international law’s regulative idea. The problem of the “relativization” of sovereignty can be explained in another way. In the days of negligible legal regulation of international relations, the scope of the freedom of State action was not constrained by a legal straitjacket. It was only in this sense that State sovereignty, especially that of great powers, was unlimited. As the number of provisions that regulated various aspects of State activity increased, the State’s freedom to take imperious action was restricted, or at least these actions were no longer legally indifferent. This does not, however, justify the thesis regarding the restriction or diminishment of State sovereignty itself. On the contrary, the development of international law is a process of strengthening the protection of legal status of States, which culminates in the firm establishment of the

¹⁸ Koskenniemi, *supra* note 14, pp. 224-302.

¹⁹ Cf., F.H. Hinsley, *The Concept of Sovereignty and the Relations between States*, in: W. Stankiewicz (ed.), *In Defence of Sovereignty*, Oxford University Press, New York: 1969, p. 275; G. Schwarzenberger, *The Forms of Sovereignty*, in: Stankiewicz (ed.), this note, p. 162.

²⁰ Cf., J.H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 *American Journal of International Law* 782 (2003), p. 782; N. Schrijver, *The Changing Nature of State Sovereignty*, 70 *British Yearbook of International Law* 65 (1999), *passim*; H. Schermes, *Different Aspects of Sovereignty*, in: G. Kreijen (ed.), *State, Sovereignty and International Governance*, Oxford University Press, Oxford: 2002, p. 185.

principle of sovereign equality. The more legal norms exist which define the status of the State in international law, the greater the significance of sovereignty manifests itself in this legal order. Without its normative background, sovereignty is devoid of a cognitive framework in the structure of international law. Is sovereignty then a legal norm? I object to treating sovereignty in this way. However, I concur with the view that recognizes State sovereignty as the fundamental idea of international law, even though this idea lacks a direct normative meaning.²¹ The idea of sovereignty is very closely connected with the international community and international law. As known, many central principles and institutions of contemporary international law originate from the idea of State sovereignty, and many continue to derive their justification from it. Therefore, a criticism of sovereignty is tantamount to a criticism of the very underpinnings of modern international law. It is not, thus, a coincidence that contemporary critics of sovereignty support the idea of global governance based on a leading role of non-State actors.

Sovereignty has always been associated with the independence of central authority exercised in a specific territory. No wonder therefore, that the concept of "independence" has often been regarded as synonymous with "sovereignty".²² Independence is undoubtedly the foundation of State sovereignty. However, this concept is not an exhaustive description of the nature of sovereignty. Independence is merely a negative definition that indicates the absence of subordination to other entities. Sovereignty, on the other hand, is something more. Its nature is fulfilled in the State's full capacity to perform acts in law, within which the State exercises its functions. The complete and autonomous capacity to perform acts in law includes both internal and external relations.²³ Its tangible manifestations include the making, application and enforcement of the law by State agencies, treaty-making powers, rights of legation and consulate, *ius standi* in the field of international relations, in addition to the international responsibility of States. The full use of these attributes demonstrates that a given territorial entity enjoys sovereignty, thereby affirming its status as a State under international law, even if it is actually politically connected with other subjects. The absence of legal subordination of the authority to exercise control over a specific territory justifies the State's autonomous capacity to perform acts in law. Therefore,

²¹ Likewise Crawford, *supra* note 7, p. 32; J. Kranz, *Państwo i jego suwerenność* (The State and its Sovereignty), 7 *Państwo i Prawo* 4 (1996), p. 23; J. Kranz, *Réflexions sur la souveraineté*, in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski*, Kluwer, The Hague: 1996, p. 183 *et seq*; Kwiecień, *supra* note 10, p. 91. Peters, *supra* note 3, p. 515 rightly remarks in this context that sovereignty "is not a physical reality, but pertains to 'world 3' in a Popperian sense", that is a world of ideas and symbolism.

²² See e.g., the position of Hart, who writes that the word "sovereign" means nothing but "independent" and like the other, it points to something negative: a sovereign State is one that is not subject to some kind of control, while its sovereignty defines the area of activity, within which it is autonomous (H.L.A. Hart, *The Concept of Law* (2nd ed.), Oxford University Press, Oxford: 1994, p. 223).

²³ That is why one can speak of the inner (internal) and outer (external) sides of sovereignty. See e.g., R. Jennings, *Sovereignty and International Law*, in: Kreijen (ed.), *supra* note 20, pp. 35-38; Peters, *supra* note 3, pp. 515-518.

the independence of the territorial subject is a necessary condition for its sovereignty, or full and exclusive capacity to exercise State functions. It could also be said, after James Crawford, that independence constitutes the preliminary and most important condition for statehood, and sovereignty, its legal consequence, is in this sense a basic attribute of States.²⁴

Throughout their lifetime, States undergo various changes. These are most often minor changes, but they may also include ones that penetrate deep into the State's structure, sometimes calling into question its further existence. Presumption weighs in favor of preserving a State's identity and sovereignty in such situations. The relation between a State's identity and its sovereignty is very closely connected, because sovereignty should be viewed as the main criterion for State identity in international law. The State cannot thus be legally identical with a non-sovereign political entity, even when the two subjects have the same territory and population.²⁵ Therefore, the presumption of preservation of identity is abolished when circumstances occur that lead to the loss of sovereignty of the State and, consequently, the extinction of its personality under international law. International practice shows that third States usually adopt stances "for" rather than "against" the continued legal existence of a State undergoing serious changes. This is illustrated by Poland's situation in 1945. Even the establishment in Yalta of conditions for the formation of a Polish government, which could enjoy general international recognition without the presence of Polish authorities, was no obstacle to third States treating, with very few exceptions, the post-Yalta Poland as a continuator of the Second Republic of Poland.²⁶ The fact that Poland preserved her sovereignty was not challenged by the overwhelming majority of States during World War II, or during the period of her most acute political dependence on the Soviet Union. Serious changes in the government system in Poland at the end of the 1980s did not change its international legal status, because no problem arose regarding the succession between the present form of Poland's government system, and the government of Poland under the communist regime (the Polish People's Republic). The actions of the latter thus co-determine the legal position of the present-day Polish State, which is fully confirmed by treaty practice. This observation also applies to agreements that were the expression of the lack of Poland's full political independence. This is why the Republic of Poland, as the continuator of the Polish People's Republic, terminated under the law of treaties, for example, the Agreement on the stationing of Soviet troops in Poland and the Warsaw Pact of 1955.²⁷ This situation, which also affected other Eastern European

²⁴ J. Crawford, *The Criteria for Statehood in International Law*, 48 *British Yearbook of International Law* 93 (1976-1977), pp. 139-140; Crawford, *supra* note 7, pp. 32, 89.

²⁵ On this relation see K. Marek, *Identity and Continuity of States in Public International Law* (2nd ed.), Droz, Genève: 1968, pp. 186-189; Crawford, *supra* note 7, pp. 667-672.

²⁶ Crawford, *supra* note 7, pp. 692-695.

²⁷ See L. Antonowicz, *Tożsamość państwa polskiego w prawie międzynarodowym* (Identity of Polish State in International Law), 10 *Państwo i Prawo* 3 (1993); R. Kwiecień, *Tożsamość i ciągłość prawnomiędzynarodowa państwa polskiego* (International Legal Identity and Continuity of Polish State), 8 *Państwo i Prawo* 13 (1998).

States demonstrates that a test of sovereignty in international law is the formal-legal attributes within which States exercise their functions, rather than the absence of full political subordination. And it is the preservation or loss of formal-legal attributes that determine the identity and continuity of States in international law.

The argument that a “relativization” of sovereignty is occurring as international law develops is often justified by the limitations placed on the competences of States. This view is based on an interpretation of sovereignty in the spirit of Bodin and Hobbes: a sovereign is the holder of complete and exclusive power, not constrained by any obligations, as the sovereign is above the law it has itself made. However, it seems to be incorrect to perceive sovereignty as the sum of competences of power.²⁸ The question of whether the State is vested with specific exclusive competences is relative, and always depends on the governmental system of a State and its international obligations. An authoritarian State has more freedom in exercising its power than a democratic State. In the latter type of State, the authority to exercise power remains under supervision and has – judicially enforceable – obligations towards the subjects under its jurisdiction. In an authoritarian State, however, there is a more limited supervision of State power; in extreme cases it is subject to no supervision. Does this mean that such a State is more sovereign than a democratic one? Certainly not, although an authoritarian State has without doubt more uncontrolled freedom of action. Under general international law, both types of State are equally sovereign, and thereby they enjoy equal protection of their rights through the principle of sovereign equality.²⁹ The lack of a democratic form of government also does not adversely affect the position of authoritarian States, because international law does not yet obligate States to satisfy, in internal relations, the so-called “sovereignty of the nation” postulated by a number of constitutions. A universal norm of the right to democratic government has not yet developed in international law, despite some degree of change in recent years which suggests there is a trend evolving in this direction.³⁰

²⁸ See J. Kranz, *Państwo*, *supra* note 21, pp. 10, 16-18, 23-24, who contends that there is no formal minimum of sovereignty in the form of a predetermined or constant catalogue of State competences. The ICJ pointed out in this context: “A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for purposes of accepting a limitation of its sovereignty. This is a conceivable situation for a State which is bound by institutional links to a confederation of States, or indeed to an international organization”. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment), [1986] ICJ Rep 14, p. 131, para 259. Thus, sovereignty was identified with State’s *competence of competences* by the Court.

²⁹ *Contra*, F.R. Tesón, *A Philosophy of International Law*, Westview Press, Colorado: 1998, pp. 57-58; J. Kokott, *Souveräne Gleichheit und Demokratie im Völkerrecht*, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 517 (2004), pp. 528-532.

³⁰ See especially, T.M. Franck, *The Emerging Right to Democratic Governance*, 86 *American Journal of International Law* 46 (1992); T.M. Franck, *Legitimacy and the Democratic Entitlement*, in: G.H. Fox & B.R. Roth (eds.), *Democratic Governance and International Law*, Cambridge University Press, Cambridge: 2000, p. 25; J. Crawford, *Democracy and the Body of International Law*, in: Fox & Roth (eds.), this note, p. 91; S. Marks, *What has Become of the Emerging Right to Democratic Governance?*, 22 *European Journal of International Law* 507 (2011). It is also worth noting that the Warsaw Declaration *Towards a Community*

The understanding of sovereignty as a sum of State competences is also challenged by the existence of international obligations that bind States without their consent. This especially concerns newly formed States. The creation of a State as an international subject is determined by its acceptance of the basic norms of international law. New States entering the international community do not enjoy the benefits of the *tabula rasa* principle, in the sense that they have complete freedom of action. This does not mean, however, that at the outset their sovereignty is already restricted. The converse seems to be true. Subordination of States to international law, manifested in the observance of its main principles, constitutes the basic condition for the protection of their sovereignty. Following the reasoning of the PCIJ in the *Wimbledon* case (1923), it should be stressed that not only do international obligations not restrict sovereignty, but the capacity to undertake international obligations proves that sovereignty exists.³¹ International obligations, without doubt, diminish the scope of the exclusive competences of States. They thereby direct the exercise of sovereignty, because they create, in specific fields, the legal framework for the exercise of State functions in domestic and international relations. This is why sovereignty does not create any justification for State actions against the law.³² If we accept as accurate the view that sovereignty is diminished through undertaking international obligations, we have to first place sovereignty not within international law, but beside it, and second, we have to agree with the thesis that denies the existence of sovereign States. One could only speak of States having sovereignty restricted to different extents, meaning that those with a lower intensity of international obligations would be more sovereign. The cognitive value of such an argument, however, remains limited. Firstly, this argument does not explain the *raison d'être* of the concept of "State sovereignty" in the acts of international law, as, according

of *Democracies* of 27.7. 2000 (2 Polish Quarterly of International Affairs 63 (2000)) dismisses the view on the mutual exclusion of the principle of the democratic State based on the rule of law and sovereignty. Representatives of 107 States declared *inter alia*: "We shall cooperate to consolidate and strengthen democratic institutions, with due respect for sovereignty and the principle of non-interference in internal affairs."

³¹ *Case of the S.S. 'Wimbledon' (UK et al v Germany)*, PCIJ Publ., Series A, No. 1, p. 25. See also *Exchange of Greek and Turkish Populations* (Advisory Opinion), PCIJ Publ., Series B, No. 10, p. 36 and the arbitral decision in the case of *The 'Kronprins Gustaf Adolf' (Sweden v USA)*, 2 RIAA 1241 (1932), p. 1254. Also worth noting is the individual opinion by Judge Anzilotti in the case of *Customs Régime between Germany and Austria* (Advisory Opinion), PCIJ Publ., Series A/B, No. 41, p. 77, which emphasizes that restrictions on a States' freedom of action, resulting from either customary or treaty law, does not restrict a State's independence unless legal supremacy of one state over another is imposed. The thesis treating the capacity to make obligations as an attribute immanently attached to sovereignty can also be found in the US Supreme Court decisions. Judge Hughes, in the case of *Perry v United States*, US 294 (1935) 330, emphasized that "the right to make binding obligations is a competence attaching to sovereignty" (p. 353).

³² The ICJ rejected claims of some States wanting to become parties to the Genocide Convention of 1948 regardless of scope of their reservations to the Convention maintaining that "it is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention" (*Reservations to the Convention on Genocide*, (Advisory Opinion), [1951] ICJ Rep 15, p. 24).

to this view, if there are no States without international obligations then there is no fully corresponding reference to State sovereignty. Secondly, this reasoning calls into question, apparently groundlessly, the reasonable sense of the principle of sovereign equality, because the idea that the sovereignty of States is restricted to different extents does not allow us to speak of their sovereign equality. In fact, controversy over the scope of State sovereignty does not derive from sovereignty itself. It is rather a consequence of strong interdependencies among States, which results in the performance of State functions not only at national, but also at the international level.

1.2. State sovereignty is compatible with international law

Sir Robert Jennings once observed:

The question of sovereignty and debates about it have always been at the center of the system of public international law. Views about the nature and purposes of sovereignty and about its rightful place in international law have necessarily varied from time to time because changing times need different approaches.³³

Indeed, views on the nature of sovereignty have varied throughout time, and continue to do so. The concept of State sovereignty has been ambiguous since its formation at the close of the Middle Ages. As pointed out by Jan H.W. Verzijl, there were at that time three different meanings attributed to the concept: 1) highest power within the State; 2) independence from any other powers; 3) independence from any legal and moral obligations.³⁴ The latter gave basis to the absolutization of State sovereignty in the nineteenth century legal positivism, connected with theory of “self-obligation of State” and Hegel’s philosophy of law. Yet, before this, Emerich de Vattel had emphasized the significance of sovereignty for the law of nations. Vattel’s standpoint is worth remembering, because, on the one hand, it demonstrates the essential relationship between the idea of sovereignty and the very concept of international law, but on the other hand, it became a source of suspicion of sovereignty as a legal value.

Following the examples of Hugo Grotius, Samuel Puffendorf, and especially Christian Wolff, Vattel made a synthesis of naturalism and positivism in his treatise. His *Droit des gens* can be seen as the first so broadly attempt to conceive an explanation of modern international law. It was written at a time when sovereign nation-States were already well rooted in international relations. His reasoning on the legal position of States, even today, does not seem to be an anachronistic.³⁵ Vattel maintains that the

³³ Jennings, *supra* note 23, p. 29.

³⁴ Verzijl, *supra* note 11, pp. 258-259. See also F.H. Hinsley, *Sovereignty* (2nd ed.), Cambridge University Press, Cambridge: 1986, pp. 100-125.

³⁵ M. Lachs, *Rzecz o nauce prawa międzynarodowego* (On the science of international law), Ossolineum, Wrocław: 1986, p. 73 gave an even more approving assessment of Vattel’s work, writing: “His reasoning is strikingly modern. It is especially visible in his way of explanation of States’ obligations to one another and their rights, above all sovereignty”. Cf. also E. Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law*, Cambridge University Press, Cambridge: 2012, pp. 18-19. There are, however, different assessments of Vattel’s reasoning. For example Rafael Domingo points out: “The paradigm offered to us by

natural condition of States relies on their sovereignty, which amounts to a State's ability to solely follow their own will. According to Vattel, sovereignty is independence from anything not based on State consent. He explains this as follows:

Since Nations are composed of men who are by nature free and independent, and who before the establishment of civil society lived together in the state of nature, such Nations or sovereign States must be regarded as so many free persons living together in the state of nature. Proof can be had from works on the *natural law* that liberty and independence belong to man by his very nature, and that they cannot be taken from him without his consent. Citizens of a State, having yielded them in part to the sovereign, do not enjoy them to their full and absolute extent. But the whole body of the Nation, the State, so long as it has not voluntarily submitted to other men or other Nations, remains absolutely free and independent. Owing to the freedom and independence of Nations, the conduct of one Nation may be unlawful and censurable according to the laws of conscience, and yet other Nations must put up with it so long as it does not infringe upon their perfect rights. The liberty of a Nation would not remain complete of other Nations presumed to inspect and control its conduct; a presumption which would be contrary to the natural law, which declares every Nation free and independent of all other Nations.³⁶

From the foregoing a few conclusions may be drawn: 1) sovereignty is a natural feature of every State; 2) owing to sovereignty every State is its own judge; 3) all States are equal on account of their sovereignty; 4) limitations on State sovereignty are constituted by the sovereignty of other States. Thus, for Vattel, State sovereignty is unquestionably the basis of international law. What is more, it performs a role of axiom, which means that it is beyond criticism. At the same time, in Vattel's treatise one can observe a change in the function of sovereignty. Sovereignty, at its beginning, had a defensive character, because it protected emerging European nation-States, whereas in the eighteenth century it assumed an offensive shape, justifying the claims of States. Naturally, it is hard to accuse Vattel himself of the anarchism of international relations at that time. His treatise was simply a conceptual reproduction of international practice, or an attempt at its cognition and explanation. Nevertheless, the relationships between international law and State sovereignty in Vattel's work clearly shows that a lack of legal prohibition allows imperious States action, deriving from the unlimited nature of their sovereignty. Vattel himself attempted to civilize the destructive effects of these actions. He emphasized a State's right to intervene for the protection of other States that were the object of aggression, a right to intervene at the request of the State authorities of an oppressed nation, and a right to collective intervention directed against a State violating

Vattel has become completely outdated in our time". R. Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, 22 *European Journal of International Law* 627 (2011), p. 639.

³⁶ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), Ch. G. Fenwick (tr.), Vol. III, Carnegie Institution of Washington, Washington, DC: 1916, pp. 3, 5. For a commentary on Vattel's *droit des gens* in the context of sovereignty see e.g. S. Beaulac, *The Power of Language in the Making of International Law. The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia*, Martinus Nijhoff Publishers, Leiden: 2004, pp. 156-166.

the basis of the existence for the entire society of States.³⁷ The legal frameworks of these rights are shaped by a common factor: the protection of State sovereignty. This is why the violation of sovereignty through aggression authorizes other States to restore the *status quo ante*. For Vattel, the protection of sovereignty is simply a barrier against the transformation of international relations into *bellum omnia contra omnes*. However, in Vattel's work the prohibition against the violation of State sovereignty is rather a principle of natural, than positive, international law. Thus, it is rather a postulation than an effective legal rule. The law of nations at that time suffered from a shortage of prohibitive norms. Therefore, fulfilling hegemonic interests, the balance of powers and the politics of *fait accompli* took precedence over the sovereign equality of States, especially weak ones, in modern international relations. This demonstrates that in a legal order in which there are not enough peremptory norms protecting the status of its subjects, the borderline between permitted actions and arbitrary ones is likely to be erased.

The biggest contribution to absolutization of the idea of State sovereignty was made by nineteenth century German philosophers of law, particularly Fichte and Hegel. Fichte's political philosophy is mainly known for his conception of the "closed State" (*Der geschlossene Staat*).³⁸ According to Fichte, such a character of statehood seems to be a *sine qua non* condition for the elimination of international conflicts. But it is impossible to establish this state of affairs until every State achieves its own "natural" frontiers. Before this, wars appear to be inevitable, which means that every State is vested in power to provide its nation with "natural" *Lebensraum*. As history shows, placing State sovereignty above the rights of other States leads to nihilistic consequences. Therefore, the conception of "closed statehood" is both practically and intellectually hard to justify.

Some strands of Fichte's thought were developed by Hegel. His significance in the development of the idea of sovereignty should not be underestimated, in spite of its destructive influence on international law.³⁹ Sovereignty, for Hegel, is a corollary of his understanding of a State as an autonomic ethical-political-legal community. Hegel presents his treatise on State within the frameworks of theoretical philosophy. Therefore, he does not ask what a State should be, which characterises practical philosophy. He intends to present the State as an object of rational cognition, because a philosophical question on the State is a question concerning its essence, or its ideal. Thus, Hegel puts: "In considering the Idea of the State, we must not have any particular States or particular institutions in mind: instead, we should consider the Idea, this actual god, in its own

³⁷ Vattel, *supra* note 36, p. 8.

³⁸ J.G. Fichte, *Der geschlossene Handelsstaat*, in *Fichtes Werke*, Band III: *Zur Rechts – und Sittenlehre I*, Walter de Gruyter & Co., Berlin: 1971, p. 387 *et seq.*

³⁹ On the influence of Hegel's idea of "sovereign statehood" on the science of international law, especially in Germany until 1945, see S. Hobe, K. Nowrot, *Whither the Sovereign State?*, 50 *German Yearbook of International Law* 243 (2007), pp. 254-262.

right.”⁴⁰ For Hegel, the essence of a State discloses both in a polity, or “internal law of the State” (*Das innere Staatsrecht*) and in international law labelled by him the “external law of the State” (*Das äußere Staatsrecht*). Indeed, international relations conducted by States reveal the main feature of statehood or sovereignty.⁴¹ Sovereignty means that a State can be seen as a centre of ethical-political national identity. It is sovereignty that makes the condition for international law. “International law [*das äußere Staatsrecht*] – wrote Hegel – applies to the *relations* between independent States. What it contains *in and for itself* therefore assumes the form of an *obligation*, because its actuality depends on *distinct and sovereign wills*.”⁴² In fact, international law follows from the will of sovereign States. However, interstate relations based on treaties are rather flexible, since a will of every sovereign State is externally unlimited and, consequently, changeable. International legal relations are simply deprived of the interdependencies which characterise internal legal relations. According to Hegel, there is no common good in international relations. The main principle remains the interests of individual States, which are often in contradiction to one other. Although international agreements should be observed, says Hegel, mutual treaty obligations are deprived of their real underpinnings because of the lack of international *volonté générale*. As a result, mutual relations between States are simply relations between independent subjects, whose legal obligations do not transcend the sphere of “what only ought to be” (*Sollen*).⁴³ For Hegel, there is no *tertium datur* – State sovereignty cannot be reconciled with the objective character and efficiency of international law. Thus, we may have either sovereign States or effective international law. Hegel is in favour of the former, which means that the sovereign State is above international law. There is, in international relations, no broader and more important principle than the sovereignty principle which would be able to subordinate the individual interests of States to common interests. Therefore, mutual obligations between States expressed in treaties are not a real law, but only a promise of given conduct. If required for the sake of State interest, such a promise can be unilaterally recalled by the State.

Although Hegel’s remarks on sovereignty and international law can be defined as legal nihilism, they are characterised by great coherence and intellectual courage. The author of *Wissenschaft der Logik* did not even attempt to adjust what is beyond

⁴⁰ G.W.F. Hegel, *Elements of the Philosophy of Right*, H.B. Nisbet (tr.), A.W. Wood (ed.), Cambridge Texts in the History of Political Thought, Cambridge University Press, Cambridge: 2005, p. 279, para. 258. In German edition: “Bei der Idee des Staats muß man nicht besondere Staaten vor Augen haben, nicht besondere Institutionen, man muß vielmehr die Idee, diesen wirklichen Gott, für sich betrachten”. G.W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*, Akademie-Verlag, Berlin: 1981, p. 284, para. 258, Zusatz.

⁴¹ *Ibidem*, p. 359, para. 322; p. 374, para. 331. German edition *ibidem*, pp. 366–367, para. 322; p. 374, para. 331.

⁴² *Ibidem*, p. 366, para. 330. In German edition: “Das äußere Staatsrecht geht von dem *Verhältnisse* selbständiger Staaten aus; was *an und für sich* in demselben ist, erhält daher die Form des *Sollens*, weil, daß es wirklich ist, auf *unterschiedenen souveränen Willen* beruht” (*Ibidem*, p. 373, para. 330).

⁴³ See *ibidem*, p. 366, para. 330. German edition *ibidem*, p. 373, para. 330, Zusatz.

adjusting, namely, unlimited State sovereignty and the binding force and efficiency of international law. Nonetheless, there were attempts to reconciling absolute State sovereignty with international law, in the German doctrine of “self-obligation” (*Selbstverpflichtung*) of the State. Within its framework, the views of Georg Jellinek are especially important.

According to Jellinek, State sovereignty consists of two aspects: the independence of a State from other States, and supreme authority within a State. Owing to sovereignty, States can establish both borders and the essence of their own legal order. In this sense, sovereignty is an inevitable feature of statehood. At the same time, sovereignty is exclusive and indivisible, because no one except a given State is able to shape its legal order.⁴⁴ Essentially, sovereignty is a State’s “competence of competences” (*Kompetenz-Kompetenz*). The autonomous nature of a State’s legal order proves sovereignty. A sovereign State has the full capacity to self-define the scope of its own actions, or the self-limitations of its own competences. Jellinek emphasises that sovereignty is not tantamount to arbitrary State authority, because their actions are subjected to law. Nevertheless, there is no such barrier in international relations. It is at this point that a shortcoming in the self-obligation doctrine is revealed. The doctrine relies on the difficulty in justifying the binding force of international law, which is connected with the external unlimited will of the State. It is true that Jellinek maintains that international obligations undertaken by States should be observed, because, through these, States self-limited their own sovereign wills.⁴⁵ However, the following problem arises in this context: why can sovereign States not free themselves from undertaking these obligations? It is a hard question to answer within the framework of Jellinek’s theory. A State is sovereign, or has a full “competence of competences” and thereby the ability to change its own decisions, or it is not able to do so. Yet, the latter would lead to the logical conclusion that the State is not sovereign. Jellinek himself perceived this difficulty, and, having tried to defend the coherence of his theory was in favour of rejecting international commitments. He stated:

When the observance of the law of nations challenges the existence of the State, non-compliance with legal norms is permissible because the State is above every legal norm, as shown by international legal relations of States: the law of nations is for States, not States for the law of nations.⁴⁶

Within the frameworks of the self-obligation theory, the absolutization of State sovereignty reached the intellectual end of its development. Such an understanding

⁴⁴ See G. Jellinek, *Allgemeine Staatslehre*, 3. Aufl., Häring, Berlin: 1914, pp. 479-484.

⁴⁵ *Ibidem*, pp. 483-484.

⁴⁶ *Ibidem*, p. 377. In German edition: “Da, wo Beobachtung des Völkerrechts mit der Existenz des Staates in Konflikt kommt, tritt hingegen die Rechtsregel zurück, weil der Staat höher steht als jeder einzelne Rechtssatz, wie ja schon die Betrachtung der innerstaatlichen Rechtsverhältnisse gelehrt hat: das Völkerrecht ist der Staaten nicht aber sind die Staaten des Völkerrechts wegen da”. See also A. Zorn, *Grundzüge des Völkerrechts*, 2. Aufl., Weber, Leipzig: 1905, pp. 5-10; Ph. Zorn, *Das Staatsrecht des Deutschen Reiches*, Band II, 2. Aufl., Guttentag, Berlin: 1895, pp. 495-500.

of sovereignty was also naturally presented at a later date.⁴⁷ However, it lacked new, original grounds, and demonstrates the limited intellectual base of the doctrine of absolute sovereignty. More importantly, this also shows that the absolutization of State sovereignty challenges international law as an objective legal order. The doctrine simply elevated sovereignty above international law. This approach was also supported by John Austin, who equated the binding force of law with the sovereign power to give orders.⁴⁸ According to Austin, international law cannot be “real” law: because of the lack of such a power in international relations, it can only be considered “positive morality”.

It is also appropriate to highlight the dualistic opposition following from the doctrine of absolute sovereignty: strong sovereign States – weak international law, or weak sovereignty of States – strong international law. However, one should bear in mind that such oppositions are only possible when sovereignty is identified with bare power, rather than authority. Hence, representatives of the doctrine of absolute sovereignty are not accidentally known as “deniers” of international law. It is the idea of State sovereignty supported by this doctrine that was once described by John Williams in the following way: “What is sovereignty is not law; what is law is not sovereignty. All law is based on an abandonment of sovereignty (...).”⁴⁹ However, sovereignty, understood as such, has never been a constitutive factor within international law. Strictly speaking, the “absolutist” conception of sovereignty, conceived as a claim to power unrestrained by law and a legal bulwark against the enforcement of legally protected values, is contrary to the very idea of legal order. It is not logically possible that States are the subjects of international law, and at the same time are above international legal obligations. Thus, juridically, State sovereignty has never been absolute. As James Crawford puts it, sovereignty does not mean freedom from law, but freedom within the law.⁵⁰ Such

⁴⁷ See e.g., H. Heller, *Die Souveränität. Ein Beitrag zur Theorie des Staats und Völkerrechts*, Walter de Gruyter & Co., Berlin: 1927, pp. 161-173. For Heller, State sovereignty is an unlimited capability to make decisions. Owing to this State confirms an autonomous status both within and outside a given legal order. Likewise Carl Schmitt who pointed out: “Sovereign is he who decides on the exception”. See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, G. Schwab (tr.), The University of Chicago Press, Chicago: 2005, p. 5. On Heller’s and Schmitt’s conceptions of sovereignty see e.g., D. Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Herman Heller in Weimar*, Clarendon Press, Oxford: 1997, pp. 42-51, 194-200.

⁴⁸ J. Austin, *The Province of Jurisprudence Determined* (1832), W.E. Rumble (ed.), Cambridge University Press, Cambridge: 1995, p. 171. Austin stated among others: “A law (...) may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him” (p. 18). According to Austin there is no legal order without a sovereign that is highest power.

⁴⁹ J.F. Williams, *Aspects of Modern International Law. An Essay*, Oxford University Press, London: 1939, p. 29. See also J. Maritain, *The Concept of Sovereignty*, in: Stankiewicz (ed.), *supra* note 19, p. 41; H.J. Laski, *Studies in the Problem of Sovereignty* (1917), Batoche Books, Kitchener: 1999, pp. 6-19.

⁵⁰ J. Crawford, *Sovereignty as a Legal Value*, in: Crawford & Koskeniemi (eds.), *supra* note 7, p. 122. See also D. Kennedy in: J.D. Derian, M.D. Doyle, J.L. Snyder, D. Kennedy, *How Should Sovereignty Be Defended?*, in A. Gourevitch (ed.), *Politics Without Sovereignty: A Critique of Contemporary International Relations*, University College London Press, London: 2007, p. 187, J. Verhoeven, *L’État et l’ordre juridique international. Remarques*, 42 RGDI 749 (1978), p. 753, and S. Besson, *The Authority of International Law*

a view has, from the very beginning, been supported by the World Court, which has not seen a contradiction between the sovereign status of States, and their submission to international engagements. It is worth remembering the well-known standpoint of the Court presented in *Wimbledon* case:

The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of state sovereignty.⁵¹

The subordination of State sovereignty to international law has been also strongly supported by the International Law Commission. Article 14 of the *Draft Declaration on Rights and Duties of States* of 1949 provides as follows: "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."⁵² State sovereignty, therefore, means the plenary competence that States *prima facie* possess by virtue of international law.⁵³ As such, sovereignty does not create a legal basis for action which disregards the object and purpose of international legal obligations.⁵⁴

2. LEGITIMACY OF INTERNATIONAL LAW AND STATE SOVEREIGNTY

2.1. Meanings of legitimacy of international law

The concept of legitimacy of law (and legitimacy under law) has different meanings. It can be used in a wide variety of ways, from procedural to substantive. One can roughly discern two of its essential meanings.⁵⁵ According to the first, legitimacy amounts to the original justification of law, and as such points out why law, including international law, as a whole, is binding upon a given community, or, in other words, explains the basis of obligations in law. This legitimacy may be seen as an *ex ante* legitimacy. The

– *Lifting the State Veil*, 31 Sydney Law Review 343 (2009), p. 373, who writes: "There can be no international legal order without sovereign states, but equally there can be no sovereign states without international law. What a state's sovereignty is and what it amounts to is not given as a matter of the intrinsic value of its individuality, but determined by the rules of the international legal order. (...) [S]tate sovereignty is necessarily compatible with international legal authority."

⁵¹ *Wimbledon* case, *supra* note 31, p. 25.

⁵² ILC Yearbook [1949], p. 288.

⁵³ Crawford, *supra* note 7, p. 89.

⁵⁴ See e.g., *Reservations to the Convention on Genocide*, (Advisory Opinion), *supra* note 32, p. 24.

⁵⁵ See D. Bodansky, *The Concept of Legitimacy in International Law*, in: R. Wolfrum & V. Röben (eds.), *Legitimacy in International Law*, Springer, Berlin: 2008, pp. 314-315.

second meaning of legitimacy labels it as an *ex post* or *de facto* legitimacy. Legal subjects' consciousness of the binding force of law can be seen as its expression. A given legal order derives its legitimacy largely from spontaneous social acceptance. This meaning of legitimacy identifies the conditions under which a norm is accepted as legitimate within a given society.⁵⁶ Thus, *ex post* legitimacy is sociologically grounded.

Philip Allott once wrote that "it could be said that, in international law, there is really only one problem, what to do about natural law."⁵⁷ Indeed, the question of natural law seems to be crucial for the philosophy of international law, because it underpins the very issue of the justification of legal rules. Allott explains this problem in the following way:

The question raised by natural law is whether it can be said that a legal system, such as international law, should conform to some general underlying pattern or principle, or whether it must be said that the rules of international law must justify themselves in their own terms and in terms of their end-purpose as being useful to, and accepted by, States.⁵⁸

This is precisely what is usually labeled as a problem of the *ex ante* legitimacy of international law. Further, according to Thomas Franck, legitimacy is a key factor in explaining the influence of international law because legitimacy "accommodates a deeply held popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied."⁵⁹

The issue of *ex ante* legitimacy of international law concerns the very underpinnings of the international legal order. Previously, this issue was presented as a problem of justifying the binding force of international law, which means that it dealt with the ontological nature of international law. In the contemporary doctrine, this problem is described as the above mentioned *ex ante* legitimacy, or as legitimacy in the normativistic meaning.⁶⁰ Legitimacy thus defined underlies the very nature of international law, and

⁵⁶ Cf., G. Schwarzenberger, *International Law and Order*, Stevens & Sons, London: 1971, p. 14; H. Charlesworth, *Conclusions: The Legitimacies of International Law*, in: H. Charlesworth & Jean-Marc Coicaud (eds.), *Fault Lines of International Legitimacy*, Cambridge University Press, Cambridge: 2010, pp. 389, 392.

⁵⁷ P. Allott, *Language, Method and the Nature of International Law*, 45 *British Yearbook of International Law* 79 (1971), p. 99.

⁵⁸ *Ibidem*, p. 100.

⁵⁹ T.M. Franck, *Fairness in International Law and Institutions*, Clarendon Press, Oxford: 1995, pp. 7-8.

⁶⁰ Cf., A. Buchanan, R.O. Keohane, *The Legitimacy of Global Governance Institutions*, in: Wolfrum & Rübén (eds.), *supra* note 55, p. 25; A. Buchanan, *The Legitimacy of International Law*, in: S. Besson & J. Tasioulas (eds.), *Philosophy of International Law*, Oxford University Press, Oxford: 2010, p. 79; Besson, *supra* note 50, pp. 344-345; J. Brunnée, S. J. Toope, *Legitimacy and Legality in International Law. An Interactional Account*, Cambridge University Press, Cambridge: 2010, pp. 52-55. See also J. Raz, *The Authority of Law. Essays on Law and Morality* (2nd ed.), Oxford University Press, Oxford: 2009, pp. 28-33.

on that account may be recognized as the basic problem of the philosophy of law, since it concerns the reason for the existence of international law. As such, it requires searching for a solution beyond the binding principles, rules and norms which form the international legal order. The authors of the last edition of *Oppenheim's International Law* put it in the following way: "It is not possible to say why international law as a whole is binding upon the international community without entering the realm of non-legal consideration."⁶¹ This is why every approach to the legitimacy issue which posits legitimacy as the original justification of law (*ex ante* legitimacy) discloses philosophical beliefs on the nature of law. In other words, it is a peculiar touchstone of preferred ontology of law, whether positivistic or naturalistic. At the same time, it is noteworthy that the negation of international law in past legal philosophy derived from the rejection of international law a sufficiently legitimate, that is, a reason justifying its validity and binding force.

The problem of the legitimacy of international law is as old as the science of international law, although, as mentioned above, at one time it was named differently. The founding-fathers of the study of international law (i.e. Gentili, Grotius, Puffendorf) were both lawyers and philosophers, and that is why they began their treatises on the law of nations with questions such as: what is law and what is the basis of its validity? At its beginning, the science of international law was at the same time its philosophy. With the positivisation of legal rules and the doctrinal expansion of legal positivism, these questions receded into the background, or were simply omitted as they were labelled "unscientific". As a rule, the positivistic doctrine has presented international law as a system of norms, rules, and principles established by States and binding on them on the basis of their own will. In this way, legal positivism creates the most minimalistic philosophy of international law possible. However, in today's legal sciences, it is a clearly visible fact that law, including international law, is not a *Dinge an sich* (*the thing in itself*), that is, it is clear that it is not able itself to justify the reason for its own validity. One can therefore observe a significant growth of interest in the problem of legitimacy, including legal positivism. In this regard, it remains quite symptomatic that the contemporary debate on legitimacy of international law was largely initiated by Thomas Franck's book, which is recognized as a neo-positivistic attempt to legitimize international law.⁶²

⁶¹ R. Jennings, A. Watts, *Oppenheim's International Law*, Vol. I, Longman, London: 1996, p. 14. Likewise G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 *Modern Law Review* 1 (1956), pp. 10-12; I. Brownlie, *The Rule of Law at the Fiftieth Anniversary of the United Nations*, Martinus Nijhoff Publishers, The Hague: 1998, pp. 11-13.

⁶² T.M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, Oxford: 1990. However, such an appraisal of Franck's book does not seem to be well grounded because Franck offers a broader view of the problem of legitimacy, which is especially visible in his later works. See e.g., T.M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 *American Journal of International Law* 88 (2006), *passim*.

2.2. Sovereignty and legitimacy: an impossible peaceful relationship?

State sovereignty is particularly linked to the problem of the legitimacy of international law. Yet, this is a negative rather than positive connection, because sovereignty is more and more often perceived as a factor which prevents international law from realising its own legitimization. As is well known, the doctrine of State sovereignty was created by legal positivism, which derived the legitimacy of international law from the will of States. Meanwhile, the critics of legal positivism see the main obstacle to a real legitimacy of international law in the very will of these sovereign States, and so-called the consent theory. James L. Brierly directly expressed this view as follows: "The notion that the validity of international law raises some peculiar problems arises from the confusion which the doctrine of sovereignty introduced into international legal theory."⁶³

Indeed, legal positivism has contributed to the dogma of State sovereignty by absolutizing the will of States. Within the framework of legal positivism, State sovereignty and the perception of the voluntary nature of international law are an inseparable couple. Therefore, the criticism of the positivistic legitimization of international law strikes *volens nolens* State sovereignty. In our times, the "humanization of international law", as labelled by Theodor Meron,⁶⁴ increases criticisms of State sovereignty, a concept which is refused any significance in the legitimization of international law. Above all, sovereignty is often accused by critics of legal positivism of supporting the individual interests of States at the expense of those of the international community, diminishing the legal status of individuals and an unjustified protection of States authority which lacks democratic legitimacy. Some scholars question whether there is any cognitive value in the idea of sovereignty. It is seen as an "anachronism and an illusion, inappropriate as a theoretical explanation of the totalising structure of society"⁶⁵ and even as a "catchword, a substitute for thinking and precision."⁶⁶ The idea of State sovereignty as the *raison d'être* of the democratic state is challenged.⁶⁷ It is dethroned in the context of the protection of human rights and the State's internal legitimacy,⁶⁸ from the feminist

⁶³ J. L. Brierly, *The Law of Nations. An Introduction to the International Law of Peace* (6 ed.), Clarendon Press, Oxford: 1963, p. 54. See also J.L. Brierly, *The Basis of Obligation In International Law*, in: H. Lauterpacht & C.H.M. Waldock (eds.), *The Basis of Obligation in International Law and Other Papers*, Clarendon Press, Oxford: 1958, pp. 62-63.

⁶⁴ T. Meron, *The Humanization of International Law*, Brill, Leyden: 2006.

⁶⁵ Allott, *supra* note 2, p. 178.

⁶⁶ L. Henkin, *International Law: Politics, Values and Functions. General Course on Public International Law*, 216 Recueil des Cours 9 (1989), p. 24. See also L. Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, et cetera*, 68 Fordham Law Review 1 (1999), p. 2.

⁶⁷ D. Kostakopoulou, *Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?*, 22 Oxford Journal of Legal Studies 135 (2002), *passim*.

⁶⁸ See e.g., W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 American Journal of International Law 866 (1990); Tesón, *supra* note 29, pp. 39-66. Such a view has been also professed by the former UN Secretaries General (see B. Boutros-Ghali, *An Agenda for Peace*, 31 International Legal Materials (1992), p. 956; K.A. Annan, *The Question of Intervention. Statements by the Secretary-General*, UN Department of Public Information, New York: 1999, p. 6).

perspective,⁶⁹ and has even been described as “organized hypocrisy”.⁷⁰ In relation to the legal status of the European Communities and the European Union (EU) Member States, the view was even advanced that there “simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.”⁷¹ Critics of State sovereignty in international law share a common conviction on international law’s absolutist nature, which prevents the State from respecting its legal obligations. Advanced processes of international interdependencies and the erosion of the frontier between “national” and “international” lead some scholars to argue the relativization of sovereignty, sometimes even its disappearance. At best, this new tendency treats sovereignty as a “second-order norm”.⁷² In this context, a question posed by Elihu Lauterpacht⁷³ is not groundless, namely, is sovereignty still a reality or merely a myth?

And yet, prevailing opinion still supports the crucial position of State sovereignty within the international legal order. But what is meant by sovereignty is far from clear. The notion is prone to ambiguity, if not abuse. Indeed, it is hard to find, at present, a more controversial concept in the international legal theory than sovereignty. It often arouses contradictory interpretations. A misuse of the language describing sovereignty adds to the difficulties surrounding its proper meaning. The language, including legal language, is often based on non-rational factors, on emotions and sentiment, which leads to the dominance of emotive meanings of the idea of sovereignty to the detriment

⁶⁹ K. Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *Transnational Legal & Contemporary Problems* 293 (1993), p. 293.

⁷⁰ S.D. Krasner, *Sovereignty: Organised Hypocrisy*, Princeton University Press, Princeton: 1999, pp. 3-42. Krasner points out four meanings of sovereignty: domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty. The latter two, according to him, are best conceptualized as examples of organized hypocrisy. Owing to State sovereignty conceived as the norm of the international order, international law is not a body of law comprising a set of coherent and consistent rules. See also S.D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 *Michigan Journal of International Law* 1075 (2003-2004), *passim*.

⁷¹ K. Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 *American Journal of Comparative Law* 205 (1990), p. 220. See also N. McCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford University Press, Oxford: 1999, pp. 123-136; N. McCormick, *Sovereignty and After*, in: H. Kalmo & Q. Skinner (eds.), *Sovereignty in Fragments. The Past, Present and Future of a Contested Concept*, Cambridge University Press, Cambridge: 2010, pp. 151-168; K. Schiemann, *Europe and the Loss of Sovereignty*, 56 *International & Comparative Law Quarterly* 475 (2007).

⁷² Peters, *supra* note 3, p. 544. See also A.-M. Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 *American Journal of International Law* 619 (2005), p. 628, who, following the doctrine “responsibility to protect”, speaks of “conditional sovereignty”.

⁷³ E. Lauterpacht, *Sovereignty – Myth or Reality?*, 73 *International Affairs* 137 (1997), p. 138. Cf. also, R. McCorquodale, *International Community and State Sovereignty: An Uneasy Symbiotic Relationship*, in: C. Warbrick & S. Tierney (eds.), *Towards an ‘International Legal Community’? The Sovereignty of States and the Sovereignty of International Law*, British Institute of International and Comparative Law, London: 2006, pp. 244-248; Jackson, *supra* note 20, *passim*; K.J. Keith, *Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?*, 63 *Cambridge Law Journal* 581 (2004), pp. 595-596; Reisman, *supra* note 4, p. 415.

of cognitive ones.⁷⁴ Such misuse of language should be opposed, because the use of the terms stripped of their usual meaning is confusing and wasteful. Therefore, the research conducted in the first part of this study aimed to restore clear semantic bounds to the concept of State sovereignty. Such a restoration of the proper meaning of the concept should be treated as a basic condition in answering the question of the relationship between sovereignty and legitimacy of international law, and, consequently, the significance of sovereign statehood in contemporary international law.

2.3. Sovereignty as a legitimized attribute of States

Sovereignty, conceived as the plenary competence that States possess by virtue of international law, means that it is the complete and exclusive competence to define the competences within which State functions are exercised. Originating from the above-mentioned Jellinek's theory, the conception of the *competence of competences* (*Kompetenz-Kompetenz*)⁷⁵ encountered criticism by some international law scholars. It was especially challenged by opponents of the above-mentioned theory of the self-obligation of the State, who argued that the State, while establishing its powers within its *competence of competences*, unfoundedly influences the competences of other States.⁷⁶ It does not appear, however, that the concept of a State's general capacity to shape its own competences, invoked to explain State sovereignty or even as its criterion, should constitute any source of anarchy in international law, or a factor destructive for its theories. Although, in its original wording, this is as an element of the broader theory of self-obligation of the State, it causes certain theoretical-legal difficulties, and the concept does not necessarily need to be associated with the theory of self-obligation. It has its existence independent of the theory. In particular, the idea that a State has the general capacity to shape its own competences and functions will not be discredited by the charge of illegitimately defining the competences of other States, or influencing their sovereignty. The State, as a sovereign subject of international law, comes under this law, and it is bound to observe its principles and rules, including due respect for the sovereignty of other States. Sovereignty does not so much arise from the self-limitation of State power – for it is not a fact unlike greater or smaller independence – as this is bestowed upon a State by international law shaped by the earlier concerted consciousness of States. It should therefore be assumed that the competence to determine one's own competences

⁷⁴ Hersch Lauterpacht was aware of the misleading nature of the language describing sovereignty many years ago. See H. Lauterpacht, *Sovereignty and Federation in International Law*, in: *International Law. Being the Collected Papers of Hersch Lauterpacht*, ed. by E. Lauterpacht, Vol. 3, Cambridge University Press, Cambridge: 1977, p. 6. See also R. Kwiecień, *Sir Hersch Lauterpacht's Idea of State Sovereignty – Is It Still Alive?*, 13 *International Community Law Review* 23 (2011).

⁷⁵ See Jellinek, *supra* note 44, pp. 474-489.

⁷⁶ See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, Mohr, Tübingen: 1920, pp. 187-190; W. Sukiennicki, *La souveraineté des Etats en droit international moderne*, A. Pedone, Paris: 1927, pp. 168-216; G. Scelle, *Droit international public*, Domat-Montchrestien, Paris: 1944, pp. 78-79; Ch. Rousseau, *L'indépendance de l'Etat dans l'ordre international*, 73 *Recueil des Cours* 167 (1948), pp. 198-199.

and functions, vested in every sovereign subject, is subordinate to international law, in the sense that it allows the State to operate freely in the domains that are not legally reserved for other States. One can thus assert that it is international law that separates the competences of individual States and their legal orders' spheres of operation. The alternative conclusion, that the perception of the *competence of competences* as a capacity arises from the self-limitation by the State of its omnipotence leads – here we should concur with Kelsen and other critics of the self-obligation theory – to the negation of the sovereign character of other States and consequently, to the negation of international law itself.

It is clear that sovereignty has acquired the status of a fundamental, even constitutive, feature of the State in twentieth-century international law. It is characteristic that, with the steady rise in the number of States after World War II more and more the significance attached to sovereignty has been observed simultaneously in political and legal practice. Paradoxically, this occurs despite prophecies warning that State sovereignty is on the wane in the present-day configuration of international relations. This especially concerns small and weak States.⁷⁷ History has in some sense completed a circle: sovereignty is attributed with the role of advocating the idea of equality and therefore protecting smaller States, which is the role it fulfilled at its beginning. This has resulted in the almost complete elimination of the concept of the “dependent State”, as the concept is self-contradictory in the language of international law. This concept not infrequently encountered in diplomatic practice and legal literature as late as the interwar decades.⁷⁸ Alternatively, the term “sovereign State” can simply be seen as a pleonasm in contemporary international law. James Crawford puts it as follows: “(...) the state is sovereign because it is a state; not one of a kind but one of a species, the species of states. The term ‘sovereign state’ is often used but one might as well say ‘sovereign sovereign’.”⁷⁹

2.4. The functions of State sovereignty and legitimacy of international law

The view that announced the decline of State sovereignty or, in a milder form, its relativization or fundamental reevaluation, has been criticized above. One often speaks of the difference between present-day sovereignty and Westphalian sovereignty. In other words, opinions persist regarding the variable nature of State sovereignty. Yet I believe that these matters may be viewed differently: sovereignty, as a legal consequence of statehood,

⁷⁷ Christine Chinkin rightly underlined the significance of vocabulary of sovereignty especially for weak social entities, stating that “sovereignty matters most to weaker, more vulnerable groups in society. By talking in terms of sovereignty (...) can acquire representation and legitimacy”. Ch. Chinkin in *The End of Sovereignty? Roundtable*, 88 American Society of International Law Proceedings (1994), p. 73.

⁷⁸ Sometimes the term “dependent State” is found in the contemporary treatises of international law. See e.g. I. Brownlie, *Principles of Public International Law* (6th ed.), Oxford University Press, Oxford: 2003, pp. 72-74. However, the examples given are, in their vast majority, only historically important, while those that have preserved their current relevance should rather be defined as States voluntarily surrendering some of their capacity to perform acts in law.

⁷⁹ Crawford, *supra* note 50, p. 117.

has a permanent nature at its core, but as the international legal order develops, its role and the functions performed change. If more meticulous attention were paid to the separation of the nature of sovereignty from its functions, this would certainly result in increased numbers emphasizing the relativization of sovereignty. The functions of sovereignty are derivative of the binding force of rules and principles defining the status of a State in international society. Sovereignty therefore had different functions while the foundations of international legal order were being shaped, different ones again while the hegemonic position of the great powers was legitimized, and still more now when the principle of sovereign equality has a status of basic principle of international law.

In its origin, sovereignty performed the functions of advocating the political and legal emancipation of States, and their equality. At the same time, an evaluative sense started to become attributed to sovereignty: being sovereign was equivalent to having the status of a full member of the international society. We must not forget, however, that the function of sovereignty at that time was also to legitimize action that would not be justified under present-day international law. For example, *jus ad bellum* essentially legalized the power politics and spheres of influence in relations between States. It is thus difficult to see, in early-modern times, sovereignty functioning to safeguard the inviolability of the legal status of States. Hence arises the conviction regarding the absolutist and anti-legal, in this sense, nature of sovereignty. However, it is not the nature of sovereignty but its function at the time, stemming from the absence of norms prohibiting violation of the legal existence of a State, which allowed States to establish a political and legal position at the expense of other actors in international relations.

Acceptance of de facto inequalities led to the legitimization of hegemony in international relations, which was demonstrated by the legal accomplishments of the Vienna Congress, and later the Holy Alliance and the European Concert. This obviously defied the postulate of the sovereign equality of States. Therefore, at that time it was accurate to speak of unequal sovereigns.⁸⁰ Hegemony was the consequence of great powers making international law, which in effect excluded ideological and axiological pluralism in the community of States. As late as the first half of the twentieth century, we find references to “civilized nations” in international law documents. The hegemony of great powers, however, was overcome by the increasingly widespread awareness of a need for the legal equality of all States. This process culminated, without doubt, in the establishment of the principle of sovereign equality in international law. Sovereign equality denotes the equality of States in respect of their sovereignty, and is thereby the fundamental international legal factor which protects them.⁸¹ In the

⁸⁰ So does G. Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order*, Cambridge University Press, Cambridge: 2004, pp. 227-253.

⁸¹ See B. Kingsbury, *Sovereignty and Inequality*, 9 *European Journal of International Law* 599 (1998), *passim*; M.S. Korowicz, *Some Present Aspects of Sovereignty in International Law*, 102 *Recueil des Cours* 1 (1961), pp. 34-35; Kranz (*Państwo*), *supra* note 21, p. 19. In this context the opinion of ICJ President of 1951 is worth remembering: “Before this Court, there are no great or small States (...)”. ICJ Yearbook [1950-1951], p. 17.

light of this fundamental legal principle, we can identify of the following functions of State sovereignty: 1) protection of pluralism in the community of States, manifested in the right to choose a political, social and economic system; 2) protection of the legal equality of States, including equality their capacity to act in international law; 3) justification for autonomous decisions regarding a State's exercise of its functions in domestic relations and in its relations with other States; 4) justification for the participation of each State in developing universal international law; 5) justification for actions undertaken by a State in domains not reserved by international law for its other subjects.

As the functions of State sovereignty depend on the development of international legal rules and principles concerning the status of States, one can discern another function of sovereignty, which has been especially emphasized in the last decade. Sovereignty is here presented as the responsibility for protecting the safety and welfare of citizens. Sovereignty as responsibility means that national political authorities are responsible to their citizens internally, in addition to the international society. The view that human beings should be treated as the ultimate subjects of all law, and that sovereignty means not only State rights, but also State responsibility, is today strongly supported by academia,⁸² and some politicians. For instance, former Secretary-General of the UN, Kofi Annan, points out: "Sovereignty implies responsibility, not just power."⁸³ This understanding of sovereignty has also been broadly presented in a well-known report *Responsibility to Protect* (2001) adopted by the International Commission on Intervention and State Sovereignty. According to this report, State sovereignty implies that State authorities are responsible for protecting the safety and lives of citizens, and promoting their welfare.⁸⁴

This new aspect of State sovereignty does not call into question sovereignty's legitimacy in international law. Firstly, State sovereignty has been always subject to the supremacy of international law. This is why sovereignty has never justified violation of international legal rules and principles. As the *Responsibility to Protect* doctrine maintains,

⁸² See Peters, *supra* note 3, *passim*.

⁸³ Annan, *supra* note 68, p. 6.

⁸⁴ *The Responsibility to Protect*, Report of The International Commission on Intervention and State Sovereignty, December 2001, Annex to the letter dated 26 July 2002 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General (UN Doc A/57/303), paras. 2.14-15. The main idea of this report was confirmed by the Outcome Document of the 2005 World Summit (UN Doc A/Res/60/1) and during a three-day debate at the General Assembly in July 2009 based on the Secretary General's Report "Implementing the Responsibility to Protect" (UN Doc A/63/677). It is worth noting that "responsibility to protect" was also mentioned in Security Council resolutions. See UNSC Res 1674 (28.04.2006) UN Doc S/RES/1674, UNSC Res 1704 (25.08.2006) UN Doc S/RES/1704, UNSC Res 1894 (11.11.2009) UN Doc S/RES/1894, UNSC Res 1973 (17.03.2011) UN Doc S/RES/1973. See more broadly on this doctrine e.g. G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, The Brookings Institution Press, Washington: 2008; A. Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, Cambridge: 2011; S. Zifcak, *The Responsibility to Protect*, in: Evans (ed.), *supra* note 6, pp. 504-527.

the defence of State sovereignty, by even its strongest supporters, does not include any claim to the unlimited power of a State to do what it wants to its own people. Internally, sovereignty implies respect for the dignity and basic rights of all people within a State (para. 1.35). Secondly, the meaning of State sovereignty has always been shaped by legal norms, especially prohibitive ones, determining position of States in the international legal order. Consequently, State sovereignty is such a comprehensive idea that it absorbs changes within international law, including international human rights law. The above mentioned concept *sovereignty as responsibility* confirms this, by showing that there is no contradiction between sovereignty and the duty to refrain from violating human rights. The *Responsibility to Protect* doctrine, to some extent, can even be considered to enhance the idea of State sovereignty. It emphasises that sovereignty is, for many States, their best – and sometimes seemingly their only – line of defence. It is a recognition of their equal worth and dignity, a protection of their unique identities and their national freedoms, and an affirmation of their right to shape and determine their own destiny (para. 1.32). The authors of the report strongly argues that effective and legitimate States remain the best method of ensuring the benefits of the internationalization of trade, investment, technology and communication will be equitably shared. States which can call upon strong regional alliances, internal peace, and a strong and independent civil society, are clearly best placed to benefit from globalization. They will also be the most likely to respect human rights. Further, in relation to security, a cohesive and peaceful international system is far more likely to be achieved through the cooperation of effective States, confident of their place in the world, than in an environment of fragile, collapsed, fragmenting or generally chaotic State entities (para. 1.34). Thus, the *Responsibility to Protect* doctrine demonstrates that State sovereignty still matters, or, in other words, the stronger legitimate sovereign States that exist, the greater the prospects for a safe and peaceful world. It therefore does not seem to be true that State sovereignty because of its nature undermines the legitimacy of international law. A deeper examination reveals that this conclusion is even confirmed by most fierce critics of legal positivism.⁸⁵

The aforementioned functions of sovereignty are disturbed from time to time, with varying intensity. This is the result of special rights which great powers still possess under the UN Charter. In such situations, tensions arise between the egalitarianism and pluralism of the community of States, and the hegemonic aspirations of great powers. They lead to a rise in situations – unilateral use of force should be particularly mentioned – whose legal appraisal lies on the fine line between lawful restrictions on State sovereignty, and the infringement of it. It might be thought that that the more the idea of State sovereignty is challenged, the lesser the importance attached to the equality of States in international law, and to the pluralism of values that constitute the normative identity of this law. States are thereby divided into those that are “equal and more equal than others.” Consequently, the latter are given the opportunity to shape

⁸⁵ It is well illustrated by Hersch Lauterpacht's work. See Kwiecień, *supra* note 74, *passim*.

international relations, not only through the law, but also through their position of power.⁸⁶ Such a situation poses obvious threats to the international legal order, for it discredits the significance of the fundamental norms of international law that safeguard the subjectivity of States, including the principle of non-intervention. The role of this principle stems from the desire to civilize international relations through reconciling the actions of sovereign States. The ICJ has rightly emphasized that usurping the right to intervene is a manifestation of force, the use of which is, in principle, prohibited by international law, because the nature of international relations means that intervention will be used by the most powerful States. In the Court's opinion, this challenges the principle of equality and "might easily lead to perverting the administration of international justice itself."⁸⁷ It also leads to the phenomenon of "false universalism", as Koskenniemi⁸⁸ terms it, which is the practice of invoking universal values to justify actions that protect one's own interests. A barrier to this phenomenon is created by the idea of sovereignty and the principle of the sovereign equality of States. To challenge their normative position in international law is to accept inequalities in the mutual legal relations of States.⁸⁹ For this reason, the idea of State sovereignty is valuable and worthy of protection in international law and in its science.

CONCLUSION

Sovereignty is the main consequence of statehood in international law. As such, it determines the existence of an independent government within a territorial entity, which is able to effectively perform a State's function both internally and externally. In respect of sovereignty, all States are equal, and this is expressed through the principle of sovereign equality.

The meaning of sovereignty is shaped by its functions which are, in turn, determined by international legal rules and principles. Therefore, State sovereignty is subject to the supremacy of international law, and cannot be used to justify the infringement of international legal obligations. Conversely, the capacity to undertake international obligations proves that sovereignty exists. Claims which question the legitimized significance of sovereignty, understood as such, for international law, are groundless. State sovereignty does not undermine the legitimacy of international law, nor monopolize the position of States in the international legal order. It is worth noting in this context that even some supporters of the idea of global governance and standard-setting functions of non-State actors still underline the leading role of sovereign statehood in international

⁸⁶ Cf., M. Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 *European Journal of International Law* 113 (2005), pp. 113-119; G. Schwarzenberger, *Power Politics. A Study of International Society* (2nd ed.), Stevens & Sons, London: 1951, p. 92.

⁸⁷ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Reports 4, p. 35.

⁸⁸ Koskenniemi, *supra* note 86, p. 116.

⁸⁹ *Likewise*, Kingsbury, *supra* note 81, *passim*.

society.⁹⁰ Indeed, in a world in which international organizations suffer from a “democratic deficit”, democratic accountability and responsibility remains concentrated in States, and it therefore follows that States remain the main source of the legitimacy of political decisions.⁹¹ The principle of sovereign equality underpins the legitimacy of international law in a far more definitive way than the perception that uncertain ethical values are the core of “international justice”. Consequently, it is States that are the legal subjects assuring the public underpinnings within the international legal order. These underpinnings seem to be a necessary condition of the unity of international law.

Undoubtedly, sovereignty provides States with a special position in the international legislative process, owing to the importance of their consent. Thus, it is true that sovereignty protects the individual interests of States. However, the consent of States does not justify illegal State action, because States themselves are bound by the general principles of law binding without their consent, and also have a duty to protect community interests. These interests are expressed, for instance, in *erga omnes* obligations, and are today explicitly supported by the *Responsibility to Protect* doctrine. States are those within international society that are able to enforce these interests. Therefore, sovereign statehood does still matter. The “traditional manifestations” of sovereignty, that is to say, the consent of States and the presumptive freedom of their actions, are neither above nor beside international law, but simply derive from it. Hence, State sovereignty does not challenge the primary justification of international law as a legal order, or its *ex ante* legitimacy.

⁹⁰ See recently, L. Condorelli, A. Cassese, *Is Leviathan Still Holding Sway over International Dealings?*, in: A. Cassese (ed.), *Realizing Utopia. The Future of International Law*, Oxford University Press, Oxford: 2012, pp. 14-25; J.E. Alvarez, *State Sovereignty Is Not Withering Away: A Few Lessons for the Future*, in: A. Cassese (ed.), this note, pp. 26-37. See also J. Meltzer, *State Sovereignty and the Legitimacy of the WTO*, 26(4) University of Pennsylvania Journal of International Economic Law 693 (2005), p. 694.

⁹¹ See A.L. Paulus, *Commentary to Andreas Fischer-Lescano & Gunther Teubner. The Legitimacy of International Law and the Role of the State*, 25 Michigan Journal of International Law 1047 (2003-2004), pp. 1056-1057.

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EXECUTION ON AN EMBASSY BANK ACCOUNT

Abstract

Recently Polish courts have started to attach bank accounts of foreign embassies for the purpose of enforcement of judgements against embassies of foreign States in e.g. employment cases. The courts have applied the same principle to jurisdictional State immunity and immunity from enforcement and recognized that if state activities giving rise to the claims examined by courts were of private-law character, they are not protected either by jurisdictional or enforcement immunity.

This standpoint is contrary to the dominant trend in other States' practice, confirmed by the International Court of Justice in 2012 (Germany v. Italy: Greece Intervening). While in the field of jurisdictional immunity, the nature of an act as iure imperii or iure gestionis is decisive, in a case of immunity from enforcement – the allocation of the property against which enforcement measures are sought. Embassy bank accounts are generally covered by immunity from enforcement. In this situation Polish courts should develop convincing and exhaustive reasons why it is necessary for the protection of an individual to overrule the ne impediatur legatio principle. The judgements are not sufficiently reasoned and there is no good argument to support this stance. They expose Poland to international liability.

1. Polish courts have on several occasions exercised jurisdiction, in employment cases, against foreign States' embassies. However, for successful private parties the enforcement of judgments has proven extremely difficult. Pressure from the Ministry of Foreign Affairs has seldom brought about expected results. In such circumstances, the courts have decided to take measures of constraint against the embassy bank accounts.

The purpose of this note is to critically assess one such judgment, i.e. the 2011 decision of the District Court in Warsaw in the case of *K.S. v. the Embassy of the Arab Republic of Egypt*, and to compare it to prevailing State practice and make normative suggestions on the proper judicial proceedings before national courts. Specifically, I argue that the conduct of the court in the embassy bank account case runs counter to prevailing legal doctrine.

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In *K.S. v. the Embassy of the Arab Republic of Egypt*, the District Court in Warsaw dealt with a complaint against the failure to act on the part of the bailiff, who was ordered to attach the bank account of the embassy. It ruled that it would be inadmissible “to accept the situation whereby an employer, acting on behalf of a foreign State, could consistently and efficiently avoid financial liability for remuneration due to a Polish citizen employed on the basis of a labour relation.”¹ The court strongly emphasised that “the bank account of the debtor – The Embassy of The Arab Republic of Egypt in Warsaw – as a party in a civil law transaction and an organizational unit of a foreign State – can by no means be considered as immune from execution. It is obvious that the above-mentioned embassy, entering into the employment contract, is not performing an act of public authority on behalf of the State they represent, but to the contrary acts as a private law party. At the same time, as it is apparent, the embassy is not a diplomatic representative within the meaning of the Vienna Convention on Diplomatic Relations. Consequently, taking into account the above-mentioned scope, the debtor is not protected by immunity from jurisdiction which excludes the possibility of conducting court proceedings against it, followed by Execution.” Such findings are supported, in the opinion of the District Court, by Art. 460, 1111 para. 2 and 1115 of the Polish Civil Procedure Code, and Art. 1e, 22, 24, 31 and 32 of the Vienna Convention on Diplomatic Relations of 1961. Furthermore, there is no opposite rule in Polish law, but instead “a well-established view of the doctrine.” The District Court followed this ambiguous statement (what doctrine?) by referring to two decisions of the Polish Supreme Court confirming restrictive jurisdictional immunity (decisions of the Supreme Court of 11 January 2000, I PKN 562/09, and of 13 November 2003, I CK 380/02).

The District Court rightly recognized the problem as an issue not of a diplomatic immunity, but of foreign State immunity. However, it did not distinguish between immunity from jurisdiction and immunity from execution or enforcement measures. Even if we assume that the court realised the difference, it still applied the same rule for both immunities, reasoning that if the acts of a State were of a private-law nature, they are protected neither by immunity from jurisdiction nor by immunity from enforcement.

At the outset it should be noted that immunity from execution or enforcement measures is distinct from jurisdictional immunity. Jurisdictional immunity is of a procedural nature and restricts the adjudicatory power of a court, while immunity from execution limits its enforcement competence. Differentiating between the two immunities in State practice is a matter of great delicacy, since the application of enforcement measures against the assets of a foreign State may lead to diplomatic

¹ Decision of the District Court for Warsaw Praga-South of 16 August 2011, II Co 3315/0, *K.S. against the Embassy of the Arab Republic of Egypt* (a complaint for failure to act of the bailiff), ordering the bailiff to execute the judgment of the District Court (VI P 2184/06), and the Appeal Court (VII Pa 37/10), in particular, to attach the bank account of the debtor – the reasons for the judgement, pp. 1-2.

tensions or disputes.² That is why, *inter alia*, a waiver of jurisdictional immunity does not automatically extend to execution, for which a separate waiver is required. According to the dominant State practice on restrictive jurisdictional immunity, the nature of the State acts in question determines whether or not immunity will be granted: *acta iure imperii* (sovereign acts) are still protected by immunity from jurisdiction, while *acta iure gestionis* (non-sovereign acts, commercial transactions) are not. With respect to enforcement immunity, however, the purpose of the property against which enforcement measures seek to attach is decisive. In this respect, a distinction can be made between governmental and non-governmental property assets. Foreign State property purported to be used for public/government purposes, including its bank accounts, is immune from any measures of constraint directed against it with a view to the enforcement of a court decision (*execution forcée*) or to secure satisfaction of a judgment in the event a suit is successful (*saisie conservatoire*).

The District Court relying on Polish law and the provisions of the Vienna Convention on Diplomatic Relations and referring to the immunities of diplomatic representatives of a foreign State, concluded that there were no rules regarding a foreign State immunity from execution in the domestic legal order. The Court ignored the general tenor of Polish law, which distinguishes between jurisdictional immunity and the execution immunity of diplomatic representatives of a foreign State (see point 2 below), as well as some other provisions of the Convention, e.g. Art. 25, which contains the principle *ne impediatur legatio*. It also did not consider international customary law as a source of Polish law. Under Art. 9 of the Polish Constitution, “the Republic of Poland shall respect international law binding upon it.” This provision is understood by many scholars, and in court practice, including in the Constitutional Tribunal, as not only declaratory but also a basis of court obligations, e.g. to interpret domestic law in accordance with international law, and to give effect to the provisional application of treaties and apply customary law. In determining the scope of immunity of a foreign State, if there is no domestic law or relevant treaty binding upon Poland, the court should establish whether there exists any international customary law on the matter before it. The District Court instead referred to “*a well-established view of the doctrine*”, but proceeded to refer to judgements of the Supreme Court which did not concern immunity from enforcement. It did not seek the advice of legal scholars nor of the Ministries of Justice or Foreign Affairs, even though the case was clearly of a delicate nature.

2. The current developments in the international law on State immunity have again raised the issue of the feasibility of attachment and execution from an embassy’s bank account. More and more cases are being heard by domestic courts against foreign States. In consequence, the problem of enforcement of judgments ever more frequently arises, and the funds collected in an embassy’s bank account are the most easily recognized assets of a foreign State.

² I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford: 2003, pp. 238-239.

Under Polish law there is no provision expressly providing for attachment and execution from an embassy's bank account. Art. 1111-1116 of the Polish Civil Procedure Code cannot be considered to be relevant in this context. They regard only persons performing diplomatic or consular duties. According to Art. 1115 para. 1 of the Code, "execution cannot be instituted against persons who, pursuant to Art. 1111 para. 1 and Art. 1112 para. 1, are granted court immunity, unless the case is related to matters in which the person is not granted court immunity." It is worth noting, however, that, firstly, Art. 1115 para. 2 of the Code distinguishes between a waiver of jurisdictional immunity and a waiver of execution immunity.³ Secondly, Art. 1115 para. 3 emphasises that: "If execution is allowed, it cannot be performed against property used for governmental purposes, and any measures of constraint may not be applied to the debtor itself." This provision reflects the basic principle of international diplomatic law, which is relevant to the problem analysed herein. Thirdly, in case of doubts with respect to jurisdictional or enforcement immunity, Art. 1116 of the Code provides courts with the right to submit a request for an opinion from the Minister of Justice.

3. The question of attachment and execution from an embassy's bank account is not only an issue of domestic law, but of international law as well. However, the Vienna Convention on Diplomatic Relations of 1961, to which Poland is a party,⁴ is silent on the issue. In particular, Art. 22 of the Convention does not refer to the immunity of bank accounts. Pursuant to Art. 22 para. 3, "[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."⁵ The text of this provision does not allow for the conclusion that an embassy's bank account may benefit from the protection stated therein, as it is located outside the premises of the mission.

Other language is used in Art. 31 para. 3 of the Vienna Convention on Consular Relations of 1963. This Convention refers in general terms to the property of the mission, stating that "the property of the consular mission shall be immune from attachment and execution."⁶ The New York Convention on Special Missions of 1969,⁷ pursuant to Art. 25, accords inviolability to the premises of special missions in terms

³ The provision reads: "Against those persons mentioned in para 1, in relation to whom the sending State or the appropriate international organisation waived jurisdictional immunity, the execution can proceed only in the case of an express waiver of the immunity by the sending State or the appropriate international organisation also in reference to execution proceedings."

⁴ Polish publication in Official Journal 1965, No. 37, item 232.

⁵ In accordance with Art. 45 of the Convention: "If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled: a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives; b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State.(...)"

⁶ Polish publication in Official Journal 1982, No. 13, item 98.

⁷ Polish publication in Official Journal 1985, No. 48, item 245.

which follow Art. 22 of the Vienna Convention on Diplomatic Relations. Nevertheless, para. 3 of Art. 25 expressly extends the immunity from search, requisition, attachment or execution to “other property used in the operation of the special mission.” These provisions cover bank accounts of consular or special missions.

In view of the lack of a similar provision in the Vienna Convention on Diplomatic Relations of 1961, up until the 1980s the views of legal scholars were divergent. While some authors argued for allowing the attachment of embassy bank accounts, in particular, in the cases of mixed accounts, i.e. where the funds had been collected both for governmental and non-governmental (commercial) purposes, the majority rejected any measures of constraint against the bank accounts of embassies.⁸

4. Attachment and execution from an embassy’s bank account is not only a question of diplomatic law. It also has to be viewed in light of sovereign State immunity. Over the last 50 years, most domestic courts, including Polish ones, have adopted the concept of restrictive (as opposed to absolute) jurisdictional State immunity. At present, in those States which favour restrictive jurisdictional immunity, a foreign State is subject to domestic jurisdiction in matters concerning the commercial transactions (*acta iure gestionis*).

The question of enforcement immunity is different, however. Here the domestic courts are much more restrained or even unwilling to order execution of their judgments against foreign States. They either apply the concept of absolute immunity to the immunity from enforcement, or allow the measures of constraint only against the property not intended for non-commercial/public or governmental purposes. The criteria establishing a court’s competence are basically the same for execution and jurisdiction.⁹ However, contrary to jurisdictional immunity, the nature of the act which is the subject of the proceedings is not as essential for enforcement immunity as is the purpose of the property subject to execution. According to the prevailing view on restrictive enforcement immunity, property intended for governmental purposes is immune from enforcement proceedings, while the property of a State used for non-governmental purposes is not immune from attachment and execution. According to this view, an embassy’s bank account which is used for the purposes of operating the diplomatic mission is immune from execution.¹⁰

The Polish District Court in the above-cited case adopted a position somewhat similar to that adopted by a Swiss Federal Court. The Federal Court, in line with

⁸ B. H. Van Houtte, *Towards an Attachment of Embassy Bank Accounts*, 19 *Revue Belge de Droit International* 70 (1986); J. Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 *American Journal of International Law* 820 (1981); *contra*, H. Fox: *Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity*, 34(1) *International & Comparative Law Quarterly* 115 (1985); J. Salmon, S. Sucharitkul, *Les missions diplomatiques entre deux chaises: immunité diplomatique ou immunité d’Etat?*, 33 *Annuaire Français de Droit International* 163 (1987).

⁹ Cf., Brownlie, *supra* note 2, p. 338.

¹⁰ *Ibidem*, p. 339.

well-developed case law, regarded enforcement as a consequence of jurisdiction. It thus denied immunity from execution where jurisdictional immunity had been earlier denied. The argument used by both courts seems similar too: the denial of jurisdiction at the enforcement level would deprive the adjudicatory jurisdiction, granted under a restrictive immunity concept, of its meaning, or as the Swiss Court stated, its “most essential attribute”. The Swiss Court explained that “[a]s soon as one admits that in certain cases a foreign State may be a party before Swiss courts to an action designed to determine its rights and obligations under a legal relationship in which it had become concerned, one must admit also that that foreign State may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. If that were not so, the judgment would lack its most essential attribute, namely, that it will be executed even against the will of the party against which it is delivered.”¹¹ The difference is that Swiss courts respect the immunity of property allocated for the performance of acts of sovereignty.¹²

An embassy's bank account is generally treated as intended for non-commercial, sovereign/governmental purposes.¹³ This trend has been reflected in the provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004. Art. 19 of this Convention allows for taking enforcement measures only in the case where the State has expressly consented to the taking of such measures, or the State has allocated or earmarked property for the satisfaction of the claim which is the object of a proceeding, or if it has been established that the property is specifically used for or intended for use by the State for other than governmental, non-commercial purposes. The formula of Art. 19 underscores the exceptional nature of such a situation. Furthermore, Art. 21 specifies that the “property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences” is not to be “considered as property specifically in use or intended for use by the State for other than government non-commercial purposes.”

By enumerating bank accounts of a diplomatic mission as property immune from execution, on its face UN Convention, if applicable, would seem to resolve the issue.¹⁴ The adopted solution is also consistent with the general duty of receiving States under the Vienna Convention of 1961, i.e. the principle *ne impediatur legatio*. In this context,

¹¹ *Royaume de Grèce v. Banque Julius Bär & Cie* of 6 June 1956 (ATF 82 I 75, 18 ILR 195, at 198). Case cited by A. Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17(4) European Journal of International Law 803 (2006), pp. 809-811.

¹² See the decision of the Swiss Federal Court of 20 July 1979 in the case *République Arabe d'Égypte v. Cinetel*, where the Court held that: “A foreign State which in a particular case does not enjoy jurisdictional immunity is not entitled to immunity from execution either, unless the measures of execution concern assets allocated for the performance of acts of sovereignty” (5 ILR, p. 430. Cited after A. Reinisch, *supra* note 11, p. 808, ft. 32).

¹³ Reinisch, *supra* note 11, p. 833.

¹⁴ H. Fox, *The Law of State Immunity*, Oxford University Press, Oxford: 2008, p. 639.

the explanatory document (*Understanding with respect to certain provisions of the Convention*) attached to the UN Convention is worth mentioning. The Understanding emphasises that Art. 11 of the Convention, on State immunity in disputes concerning employment, should be applied in compliance with the obligation of the receiving State stemming from Art. 38 para. 2 of the Vienna Convention of 1961. The receiving State must exercise its jurisdiction over the members of the staff of the foreign mission or private servants who are nationals of or permanent residents of the receiving State “in such a manner as not to interfere unduly with the performance of the functions of the mission.”

However, the 2004 UN Convention has not entered into force yet, and Poland has not even signed it.¹⁵ Nonetheless, some of its provisions, including Art. 19 and 21 reflect customary law confirmed by decisions of national courts.¹⁶

It should be mentioned that the rule enshrined in Art. 21 para. 1(a) was introduced as early as in the first draft of the International Law Commission of 1986 (then as Art. 23),¹⁷ and retained unchanged in the second draft, following thorough discussion in the VI Committee of the UN General Assembly.¹⁸ By accepting a provision with such a content, the Commission followed the dominant trend in judicial decisions and diplomatic practice. Similarly, the Institute of International Law confirmed, in its session in Basel in 1991, in Art. IV(2) of the resolution on jurisdictional and execution immunity of States (*Les aspects récents de L'immunité de juridiction et d'exécution des Etats*), that property in use by diplomatic missions is immune from execution.¹⁹

5. In order to establish the norms of customary law in relation to attachment of or execution from an embassy's bank account, it is necessary to refer not only to international law doctrine (e.g. the above-mentioned works of the International Law Commission and resolutions of the Institute of International Law), but above all to State practice, in particular domestic court decisions. The leading example of such practice is the famous *Philippine Embassy Bank Account* case, a 1977 decision of the German Federal Constitutional Court.²⁰ The issue in that case was the execution of a default judgment of the Bonn local court, rendered against the Republic of the Philippines for payment due for outstanding rent and expenses for repair and maintenance work of the building rented for the embassy's office. The Republic of the Philippines lodged an objection against the attachment order with the local court, arguing that

¹⁵ The Convention has been signed by 28 States, 13 have ratified it.

¹⁶ Cf., E. Denza, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, Oxford: 2008, p. 159.

¹⁷ ILC Report 1986, vol. II, p. 8.

¹⁸ ILC Report 1989, vol. II, p. 130.

¹⁹ Available on the webpage of the Institute: <http://www.idi-iil.org>.

²⁰ Cf., H. Steinberger: *Immunity Case (German Federal Constitutional Court 1977)*, in: *Encyclopaedia of Public International Law*, Max Planck Institute 1995, pp. 943-945.

the embassy's account was not subject to seizure by German court officials. In the objection proceedings, it presented an affidavit from its *Chargé d'Affaires* in Germany stating that the account designated "Embassy of the Philippines" contained the funds allocated by the government of the Republic of the Philippines as necessary for current operations of the mission; in particular, staff and rent were paid from this account. The attachment of the account had rendered the embassy no longer able to meet its current obligations. The local court decided to stay the proceedings and submitted them to the Federal Constitutional Court for decision of the question whether there is a rule of international law whereby execution, on the basis of a judgment given against a foreign State in relation to its non-sovereign activity, made upon a bank account of that State or of its embassy existing within the country and intended to cover official expenses and costs of the embassy, is inadmissible absolutely, or insofar as constraint would impair the embassy's functionality as a diplomatic representative; and if such a rule exists, whether it is part of German Federal law.

After a thorough examination of the doctrine, which began with Grotius and Bynkershoek and included various international treaties and judgments of the International Court of Justice, as well as practice of the domestic courts of e.g. Austria, Belgium, the Czech Republic, the Netherlands, France, Greece, Norway, United Kingdom, Sweden, Switzerland and USA, the German Federal Constitutional Court concluded that there was a general rule of international law whereby "execution by the forum State arising out of a judicial writ of enforcement against a foreign State issued in relation to a non-sovereign act (*acta iure gestionis*) of that State, upon things of that State located or occupied in the national territory of the forum State, is inadmissible without the assent of the foreign State, insofar as these things, at the time of commencement of the enforcement measure, serve sovereign purposes of the foreign State."²¹ This general principle constituted a part of German law pursuant to Art. 25 of the German Constitution, and thus had to be applied by German courts.

Commenting specifically on the embassy's bank account, the Federal Constitutional Court noted that "receivables from a current ordinary bank account of the embassy of a foreign State existing in the forum State and intended to cover expenses and costs of the embassy are not subject to execution by the forum State."²² It was deemed not even proper for the authorities of the receiving State to question the purposes for which the sending State intended the funds to be used, as this would amount to a prohibited intrusion into the internal operation of the diplomatic mission (*ne impediatur legatio*).²³ Owing to the problems of demarcation in assessing when the proper functioning of a mission is endangered, and because of the possibilities of abuse, general international law draws the protected area very broadly in favour of the foreign State, and focuses on the typical, abstract danger, without imposing a

²¹ *Philippine Embassy Case*, Germany, Federal Constitutional Court, 13 December 1977, 46 BVerfG, 342, 65 ILR, p. 164.

²² *Ibidem*, p. 150.

²³ *Ibidem*, p. 189.

requirement of demonstrating a specific endangerment to the proper functioning of the diplomatic representation.²⁴

The decision of the Federal Constitutional Court was well-principled. Not surprisingly, it played an important role in the process of formation of rules regarding execution proceedings against an embassy's bank account. Courts in many countries have referred to it frequently. In 1984, the British House of Lords in *Alcom Ltd v. Republic of Colombia* considered it as exhaustive, well-reasoned, and fully convincing, and applied its reasoning, noting in particular that a statement of the head of diplomatic mission that the assets in the bank account were not intended for commercial purposes was satisfactory evidence in the case, unless proved to the contrary.²⁵ The House of Lords considered the case at hand within the context of the State Immunity Act of 1978, which allowed execution against property in use, or intended for use, for commercial purposes. That Act contained no provision with respect to embassy bank accounts. The Court interpreted the Act in the light of customary international law and held that unless the account could be shown to be earmarked solely for the settlement of liabilities incurred in commercial transactions, it remained immune from execution under the Act.

In 1986, in the case *L-W Verwaltungsgesellschaft mbH & Co. KG v. DVA*, the Austrian Supreme Court referred to the above-cited judgments and concurred with German Federal Constitutional Court that, due to the difficulty of judging whether the performance of embassy functions was endangered, "international law made the area of protection enjoyed by a foreign State very wide and determined it by reference to the typical abstract danger, and not to a specific threat to its ability to function."²⁶ The Court added that unless a foreign State has consented, mixed accounts, collecting means for the functioning of the diplomatic mission, are also immune in Austria from execution, and the creditor must prove that the embassy bank account "has been used exclusively for private purposes, and hence (...) is not immune from execution."²⁷ Similarly, in 2000 the Appeal Court in Brussels grounded its judgment on a rebuttable presumption that an embassy's bank account was intended for public purposes and as such was immune from execution.²⁸ Courts in the other European countries have also accepted the reasoning of the German Federal Constitutional Court, frequently copying parts of the judgment, sometimes without even referring to it.²⁹

²⁴ *Ibidem*, p. 186.

²⁵ *Alcom Ltd v. Republic of Colombia*, UK. House of Lords, 12 April 1984. [1984] 2 All ER 6, 7411.11, p. 182.

²⁶ 77 ILR 489.

²⁷ *Ibidem*.

²⁸ *Leica AG v. Central Bank of Iraq et Etatirakien*, 15 February 2000 [2001] JT 6; cf., Reinisch, *supra* note 11, p. 833.

²⁹ E.g., The decisions of Dutch courts: of 14 May 1998 in the case *State of Netherlands v. Azeta B.V.*, District Court of Rotterdam, KG 1998, 251 (for English summary see: 31 Netherlands Yearbook of International Law 226 (2000)); of 24 September 1986 in the case *MK. v. State Secretary for Justice*, The Netherlands, Council of State, President of Judicial Division, 94 ILR 357, p. 360; the decision of Italian

The decisions of the US courts³⁰ also confirm the enforcement immunity enjoyed by embassy bank accounts. In the case *Application of Liberian Eastern Timber Corporation v. The Government of Liberia* (1987),³¹ the US District Court based its decision on Art. 25 of the Vienna Convention on Diplomatic Relations (“receiving State shall accord full facilities for the performance of the functions of the mission”)³² and the US Foreign Sovereign Immunities Act of 1976. The court held that the incidental use of a part of an account for commercial purposes does not deprive it of immunity. This position was confirmed in *Cicippio v. Islamic Republic of Iran*,³³ where the plaintiff demanded satisfaction of a claim from Iranian assets frozen in the connection with the taking of American diplomatic hostages in Tehran. The US government argued that protection of a bank account of an embassy continued, on the basis of Art. 45 of the Vienna Convention of 1961, even if diplomatic relations were broken off between two States.

Finally, it is worth mentioning that the German Federal Constitutional Court confirmed the above line of reasoning in a judgment of 6 December 2006,³⁴ and noted that the attachment by a receiving State of a bank account belonging to a foreign State on its territory constituted intensive interference into that State’s sovereignty. However, in international law there is no general ban on execution against a foreign State. In practice, States distinguish between property intended for commercial and non-commercial/governmental purposes. As a rule, property not intended for governmental purposes is not immune from execution and does not require any prior consent or waiver of immunity by the foreign State (e.g. the assets of various institutes in the area of culture, research, commerce and others). On the other hand, the principle *ne impediatur legatio* still remains binding. Funds allocated for the performance of diplomatic functions are always regarded as governmental/non-commercial property.³⁵

Even if there are some contradicting judgments in State practice, the prevailing tendency in case law is, in the absence of consent by a foreign State or a separate

court of 4 May 1989 in the case *Banarnar-Capizzt v. Embassy of the Republic of Algeria*, Court of Cassation, 87 ILR, p. 60; in a similar manner the Swiss Federal Court, in 1990 in the case *Z. v. Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy*, stated that financial resources allocated for the functioning of diplomatic missions are immune from execution. Many other judgements have been quoted by J. Salmon, *Manuel de droit diplomatique*, Bruylant, Brussels: 1994, pp. 202-206; G.M. Badr: *State Immunity. An Analytical and Prognostic View*, Kluwer Academic Publishers, The Hague: 1984, p. 107.

³⁰ On American practice see e.g. J. Sun, *Immunity from Execution of Judgments under the FSIA – Mode-rate Balance to the New UN Convention*, 4(5) US-China Law Review 13 (2007), pp. 22-23.

³¹ 89 ILR 360; in a similar manner, *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations*, Southern District of New York 1992, 99 ILR 138.

³² For details see Denza, *supra* note 16, p. 202.

³³ 18 E Supp. 2d 62 (D.D.C. 1998).

³⁴ During the financial crisis in Argentina private German entities made the loans to the Argentinean government on the grounds of German law. The terms of the loan contracts included a waiver of immunity. One of the creditors obtained a court decision and requested its enforcement against the Argentinean embassy bank account in Berlin, claiming that the provision in the contract waived not only enforcement immunity but also diplomatic immunity.

³⁵ Re 2 BVM 9/03, 46, 342, 364 ff.

allocation of funds as intended for satisfaction of a claim, towards immunity for embassy bank accounts.

As noted above, foreign States can explicitly earmark property situated on the territory of the forum State to satisfy a particular claim or category of claims. The House of Lords, in *Alcom Ltd v. Republic of Colombia*, accepted this exception from enforcement immunity when the embassy had opened a bank account explicitly with a view of carrying out commercial transactions.³⁶ In a similar manner, a French court stated that the immunity is excluded, exceptionally, if the State had the intention to allocate part of its funds for conducting purely commercial activities.³⁷ One example given to the contrary was a case of an ex-mercenary who served in the Congolese army and who did not manage to satisfy his claim from the Congolese embassy's bank account, even though the account had been opened specifically for the purpose of making payments to mercenaries. The court held that the money was allocated for non-commercial/governmental purposes and as such was immune from attachment.³⁸

6. The general rules regarding immunity from enforcement were confirmed by the International Court Justice in a 2012 judgment. In *Germany v. Italy*,³⁹ the ICJ adjudicated on the jurisdictional immunity of Germany in civil proceedings for reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War, and the legality of measures of constraint against Villa Vigoni, German State property located on Italian territory. The measures followed from an Italian judicial decision declaring that judgments rendered by Greek courts, ordering Germany to pay compensation, were enforceable in Italy.

The ICJ emphasised that the immunity from enforcement proceedings regarding the property of a State located on the territory of a foreign State goes further than the jurisdictional immunity enjoyed by the same State before foreign courts. Even if it is lawfully established that a foreign State does not enjoy jurisdictional immunity and a judgment is rendered against that State, it does not necessarily follow that the State can be subject to measures of constraint on the territory of the forum State or on the territory of a third State in order to enforce the court's decision. Consequently, a waiver of jurisdictional immunity before a foreign court does not mean that the State waived its immunity from enforcement in relation to its property located on the forum State's territory. In the opinion of the Court: "The rules of customary international

³⁶ *Alcom Ltd. U. Republic of Colombia*, UK, House of Lords, 12 April 1984, [1984] 2 All ER 6, 74 ILR, p. 182.

³⁷ The decision of First Civil Chamber Cour de cassation of 14 March 1984 in the case *Islamic Republic of Iran v. Société Eurodif and Others*, 77 ILR, p. 515; similar decisions, i.e. of 6 July 2000 in the case *Creighton Ltd v. Minister of Finance of Qatar and Others*, 127 ILR, p. 155.

³⁸ The decision of Supreme Court of the Republic of South Africa of 28 October 1970 in the case *Parkin v. Government of the Republique Democratique du Congo and Others*, 64 ILR, p. 671.

³⁹ ICJ judgment of 3 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, not yet published.

law governing immunity from enforcement and those governing jurisdictional immunity (understood *strict sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately” (para. 113).

In support of its claim, Germany argued that the rules set out in Art. 19 of the UN Convention of 2004 codified, in relation to the issue of immunity from enforcement, the existing rules and its terms are therefore binding inasmuch as they reflect customary law. The ICJ found it unnecessary to decide on that matter, but noted instead that “there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim” (para. 118). The Court supported its findings by referring to the domestic court decisions illustrating “a well-established practice”. The ICJ cited in that regard the decision of the German Constitutional Court of 1977 (*Philippine Embassy case*), the judgment of the Swiss Federal Tribunal of 1986 in *Kingdom of Spain v. Société X*,⁴⁰ the House of Lords *Alcom Ltd v. Republic of Colombia* case, and the judgment of the Spanish Constitutional Court of 1992 in *Abbott v. Republic of South Africa*.

Applying those standards to *Villa Vigoni* case, the ICJ found that Italy had violated its obligation to respect the immunity owed to Germany. Villa Vigoni was the seat of the Italian-German cultural centre, intended to promote cultural exchanges, and functioned on the basis of an agreement between those two countries. It was thus clear to the Court that “the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany’s sovereign functions. Nor has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it” (para. 119).

While the ICJ judgment does not expressly concern measures of constraint against embassy bank accounts, it seems obvious that, seen in its light, the District Court in Warsaw erred in its decision of 2011.

7. The Polish Ministry for Foreign Affairs and an interested foreign State have sought, in some cases, to seek redress by submitting a request to stop the execution to the bailiff or to the relevant bank.⁴¹ Under Polish law all State organs, including bailiffs, are obliged to comply with international law binding upon Poland, and in case of conflict with domestic norms, apply the international law norm. Even more, they

⁴⁰ *Annuaire suisse de droit international*, Vol. 43, 1987, p. 158; *ILLR*, Vol. 82, p. 44.

⁴¹ E.g. the letter of the Deutsche Bank of 22 July 2010 to the Embassy of Kuwait, copy on the file with the author, courtesy of the Ministry of Foreign Affairs.

have to apply customary law in cases not regulated by domestic law, as regards, e.g., State immunities (Art. 9 and 91 of the Constitution of 1997). Both public and private entities may, however, act only within the framework of the procedures established by law. Their competences to correct court decisions are highly limited, if not non-existent. Another issue is the proper determination of the rules of customary law by those subjects. It is worth mentioning that the bailiff in one of the Polish cases held that the embassy was not entitled to immunity from enforcement since the initial case concerned an employment contract.⁴² The opinion followed the court decision in the same case. As a result, such decisions of State organs expose Poland to international responsibility.

State practice and *opinio juris* show that an embassy's bank account is immune from enforcement measures. Such immunity of a foreign State is not, however, absolute. The exception concerns the property intended for use for commercial purposes (*iure gestionis*). Funds collected in an embassy's bank accounts are generally considered as property intended for non-commercial/government purposes (*iure imperii*). The judgements of Polish courts denying immunity to embassy bank accounts create an opposite practice and therefore should be carefully reasoned. The courts have to prove convincingly why, at present, the fundamental principle of international law – *ne impediatur legatio* – should be overruled for the protection of private interests. This opportunity was missed by the District Court in 2011. In addition, it seems that there are no good arguments to support the opinion adopted by the judges. Moreover, the opinion is politically risky, deeply intervening in a foreign state's sovereignty.

A separate issue is whether and how to compensate those individuals who obtain a decision in their favour which may not be enforced before either domestic courts or by diplomatic means. The proposal that the forum State may incur liability under the domestic law regime,⁴³ however attractive it may be for individuals, requires the domestic law to recognise broad State liability. In *Germany v. Italy*, the ICJ emphasised that customary international law does not make the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress (paras. 98-104). Consequently, a forum State may not deprive a foreign State of immunity on the grounds that all other attempts to secure compensation had failed.

⁴² The letter of the bailiff of 10 November 2011 concerning the execution of the court decision in *K.S. v. Embassy of the Arab Republic of Egypt* (copy on the file with the author, courtesy of the Polish Ministry of Foreign Affairs).

⁴³ W. Gloor, *Employer States and Sovereign Immunity: The Geneva Labour Court Practice*, in: W. Heere (ed.), *International Law and The Hague's 750th Anniversary* TMC Asser Press, The Hague: 1999, p. 125.

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SOME REFLECTIONS ON LEGAL AND PHILOSOPHICAL FOUNDATIONS OF INTERNATIONAL ENVIRONMENTAL LAW

Abstract

This article examines the legal and philosophical foundations of international environmental law. It analyses the legal regime of the Common Heritage of Mankind (Humankind) (CHM), Common Concern of Mankind (Humankind) (CCM), and the principles of intra- and intergenerational equity. The regime of CHM covers the Moon and other celestial bodies and the "Area" under the 1982 United Nations Convention on the Law of the Sea. The regime of CCM relates to areas such as climate change and biodiversity. Both CHM and CCM are based on a premise that certain areas of human activities are held in common interest for the whole community of States. In this context, the article claims that the underlying, foundational principles of international environmental law have the common theme of intra- and intergenerational equity.

INTRODUCTION

This article is devoted to certain legal and philosophical concepts underlying the foundations of international environmental law, i.e. principles of the common heritage of mankind (humankind) ("CHM") and common concern of mankind (or humankind) ("CCM") and the principle of intergenerational equity. Both concepts include the element of the common interest of the whole community of States. In broad brushstrokes, the concept of CHM relates to certain areas outside the jurisdiction of States, which cannot be appropriated thereby, and whose exploitation serves all mankind. CCM also denotes the areas of interest for the whole community of States, but its implementation remains under States' sovereignty (such as biodiversity or climate change; for more on both concepts, see further below). All these principles have garnered numerous publications and have been analysed in-depth. However, these principles are

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of a dynamic, evolutionary character and it may be said that decisions of international courts and tribunals further developed their character and the scope of application, in particular in relation to international environmental law.¹ Although all these concepts have a broader scope and areas of concern than just international environmental law, they will be analysed here only in relation to international environmental law.

1. COMMON HERITAGE OF MANKIND (HUMANKIND): GENERAL PRINCIPLES

The concept of CHM has been analysed in numerous publications, especially during the negotiations of the 1982 United Nations Convention on the Law of the Sea and the adoption of the 1994 Implementation Agreement.²

Baslar, the author of a fundamental monograph on the concept of CHM, was of the view that this concept has philosophical foundations, deriving from natural law.³ Consent-based traditional rules of international law governing territorial sovereignty and sovereignty over natural resources limit, in his view, the application of the CHM concept. Baslar made several postulates regarding ways to overcome the limitations of this concept. In broad brushstrokes, he suggested the human rights approach to CHM, more specifically the reliance on the third generation of human rights in this respect.⁴

Baslar was of the view that the applicability of the concept of CHM to environmental law had been met with some difficulties, due to different objectives of the concept of CHM and those of environmental protection.⁵ One of the main difficulties relating to the applicability of the concept of CHM to environmental law is the different

¹ Such as the Advisory Opinion of the Seabed Dispute Chamber of the International Tribunal on the Law of the Sea on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf (last accessed 30 March 2013).

² See e.g., K. Baslar, *The Concept of the Common Heritage of Mankind in International Law*, Kluwer Law International, The Hague: 1998; R. Wolfrum, *The Principle of Common Heritage of Mankind*, 43 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 312 (1983); R. Wolfrum, *The Common Heritage of Mankind*, in: Max Planck Encyclopaedia of Public International Law, available at <http://mpepil.com> (last updated 2009); Ch. C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 *International and Comparative Law Quarterly* 190 (1986); E. Guntrip, *The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?*, 4(2) *Melbourne Journal of International Law* 376 (2003); J. Brunnée, *Common Areas, Common Heritage, and Common Concern*, in: D. Bodansky et al (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford: 2007, pp. 550-574; S. J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 27 *Stanford Environmental Law Journal* 101 (2008); J. E. Noyes, *The Common Heritage of Mankind: Past, Present, and Future*, 40 *Denver Journal of International Law and Policy* 447 (2012).

³ Baslar, *supra* note 2, p. 319.

⁴ *Ibidem*, p. 318.

⁵ *Ibidem*, pp. 277-317.

approaches to environmental protection by developed and developing countries. The theoretical approach of developing countries to environmental protection had to be viewed in the context of the New Economic Order which is a branch of the right to development. This approach to CHM has to do with intra-generational justice, i.e. fairness within one generation. The approach of developed States is inter-spatial, based on the concept of sustainable development of resources, for the benefit of present and also future generations, i.e. the concept of intergenerational equity.⁶ Another problem relates to the territorial application of CHM. CHM applies to natural non-living resources beyond the areas of territorial jurisdiction of States, whereas within their territory States have sovereignty over their natural resources. Baslar also argues that the core element of CHM, viz. sharing of benefits, has no applicability in relation to the environment, in which sharing of responsibilities and burdens are of a fundamental significance.⁷ This argument has been eroded to a certain extent as benefit sharing entered the realm of international environmental law, after the entering into force of the 1992 Convention on Biological Diversity ("CBD")⁸ and the signing of the 2010 Nagoya Protocol on Access and Benefit Sharing (see below).⁹

Finally, Baslar observed that in environmental law, CHM is seen as a manifestation of stewardship and fiduciary responsibilities. Therefore the focus is switched from the concept of non-appropriation of territories to stewardship of resources. This approach is based upon the idea that States as custodians of territories are under the obligation to protect resources under their jurisdiction for the benefit of mankind. Therefore in this context the prohibition of appropriation of natural resources does not constitute an element of CHM.¹⁰

The concept of CHM entered into the realm of legal discourse with the 1967 speech of the Maltese ambassador Arvid Pardo to the United Nations, whereby he proposed that the seabed and ocean floor beyond national jurisdiction be considered the common heritage of mankind.

CHM was included in the 1970 United Nations General Assembly Declaration of Principles, which in para. 1 provided as follows: "[s]ea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind."¹¹

⁶ *Ibidem*, p. 278.

⁷ *Ibidem*, pp. 278-279.

⁸ Convention on Biological Diversity, 5 May 1992, entered into force 29 December 1993, 1760 UNTS 79. The Convention has currently 193 Parties (as of 30 March 2013).

⁹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, concluded on 29 October 2010, not yet in force. The Nagoya Protocol will enter into force 90 days after the date of deposit of the fiftieth instrument of ratification.

¹⁰ Baslar, *supra* note 2, p. 279.

¹¹ Declaration on Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res.2749, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028, at 24 (17 December 1970).

CHM was also included in two international conventions: the 1979 Moon Treaty¹² and the 1982 UN Convention on the Law of the Sea ("UNCLOS").¹³ Article 11 of the Moon Treaty expressly includes the concept of CHM.¹⁴ Article 136 (Part XI) of UNCLOS states that "[t]he Area and its resources are the common heritage of mankind." "Area" is defined as: "[t]he seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." The Area's resources covered by the CHM concept are "solid, liquid or gaseous mineral resources *in situ* in the Area of beneath the seabed, including polymetallic nodules."

In 1983, Malaysia, proposed at the forum of the General Assembly of the United Nations to consider the regime of the CHM for Antarctica.¹⁵ In 1995, in a letter

¹² Agreement Governing Activities of States on the Moon and Other Celestial Bodies, 5 December 1979, entered into force 11 July 1984, 1363 UNTS 3 (hereinafter "the Moon Treaty").

¹³ United Nations Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

¹⁴ Art. 11.1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article.

2. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.

3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the moon or any areas thereof. The foregoing provisions are without prejudice to the international régime referred to in paragraph 5 of this article.

4. States Parties have the right to exploration and use of the moon without discrimination of any kind, on a basis of equality and in accordance with international law and the terms of this Agreement.

5. States Parties to this Agreement hereby undertake to establish an international régime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with article 18 of this Agreement.

6. In order to facilitate the establishment of the international régime referred to in paragraph 5 of this article, States Parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of any natural resources they may discover on the moon.

7. The main purposes of the international régime to be established shall include: (a) The orderly and safe development of the natural resources of the moon; (b) The rational management of those resources; (c) The expansion of opportunities in the use of those resources; (d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.

8. All the activities with respect to the natural resources of the moon shall be carried out in a manner compatible with the purposes specified in paragraph 7 of this article and the provisions of article 6, paragraph 2, of this Agreement.

¹⁵ UN Doc. A/C.1/38/PV.2 (19883), 38th Sess., Malaysia abandoned this suggestion in 2005. There were also other suggestions of the use of the concept of CHM, *see e.g.*, A.-Ch. Kiss, *La Notion de Patrimoine Commun de la L'Humanité*, 175 Recueil des Cours de l'Académie de Droit International 99 (1982).

addressed to the Secretary-General of the United Nations, Malta suggested the transformation of the Trusteeship Council into an organ guarding global commons and the common concerns in the interests of present and future generations, in order to preserve the environment.¹⁶

There are several elements of CHM which are recognised in theory and practice of international law. Noyes lists them as follows:

a prohibition of acquisition of and exercise of jurisdiction over the area and resources therein; the humankind as a whole has the rights to these resources; the area under this regime can only be used for peaceful purposes; protection of natural environment; equitable sharing of benefits deriving from the exploitation of the resources in question, with a particular focus on the interests of developing countries; and the administration of the area under the regime of CHM by a special management regime.¹⁷

It may be noted that all these elements are debatable and subject to divergent interpretations. Comparisons of this regime to the principle of freedom of high seas are conceptually flawed. Freedom of the high seas presupposes exploitation and acquisition of natural resources therein, which is not permitted under the CHM regime. The advantageous position of developing States prevented developed States from the ratification of UNCLOS. After negotiations between developed States and the Secretary-General of the United Nations, the 1994 Implementation Agreement to Part XI was signed.¹⁸ This Agreement changed provisions concerning the transfer of technology from developed to developing States, stating in Section 5 that it will be effected “on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements” therefore abolishing preferential treatment of developing States in this respect, changing the original provisions of Part XI. Art. 144 of the original Part XI provided that the Authority will “promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.”

Such a change in the position of developing States may raise a question whether the regime of governing the Area under UNCLOS is still CHM, if one of its constitutive elements (preferential treatment of developing States) has been substantially altered. At least, we may venture a suggestion that perhaps an evolved notion of CHM does not include a special treatment of developing States.

There is also the difference of opinion referring to sharing benefits under the CHM principle by developing States, concerning their possibly preferential status under this regime. For example some writers are of the view that any benefits resulting from the common spaces would be shared internationally and that the

¹⁶ Letter from the Permanent Representative of Malta to the United Nations Secretary-General (1985), UN Doc. A/50/142, p. 3.

¹⁷ Noyes, *supra* note 2, pp. 450-451.

¹⁸ Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, entered into force 28 July 1996, UN Doc. A/RES/48/263.

preferential treatment of developing States is not a commonly agreed feature of the CHM principle.¹⁹

Other authors, whilst admitting that benefits derived from common spaces should be shared by States, qualify this statement by suggesting that preferential treatment of developing States derives from the development aid philosophy.²⁰

CHM in this article is mainly approached from the point of view of environmental protection. Art. 145 of the LOS Convention states as follows:

Protection of the marine environment:

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:

(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

It is without doubt that the exploration and exploitation of the Area cannot result in environmental degradation. The question which is altogether different is whether environmental protection is a part of the definition of the concept of CHM.

The views of the doctrine are divided, even sometimes contradictory, on this subject as well. As was noted above, Baslar analysed the fundamental conceptual difficulties related to the question of including environmental protection in the concept of CHM, due to different approaches to this issue by developed States (which adhere to the concept of intergenerational equity) and developing States (which are the proponents of intragenerational equity).²¹

A different approach was taken by other authors who not only acknowledge the rights of future generations but also the applicability of the concept of sustainable development to the obligation of environmental protection in the areas under the regime of CHM, even without a specific reference in the Moon Treaty and UNCLOS.²² This approach is not shared by other experts in whose view sustainable development is limited to States' territory or areas under their jurisdiction, and they also note that the deep-bed is not mentioned in Agenda 21. They argue that:

¹⁹ Joyner, *supra* note 2, p. 192.

²⁰ Wolfrum (1983), *supra* note 2, p. 323.

²¹ See also R. St. J. Macdonald, who doubted whether intergenerational equity is part of the concept of CHM due to this concept immaturity (*The Common Heritage of Mankind*, in: U. Beyerlin et al. (eds.), *Recht Zwischen Umbruch und Bewahrung: Festschrift Für Rudolf Bernhardt*, Springer, Berlin: 1995, p. 153).

²² Wolfrum, in: Max Planck Encyclopaedia, *supra* note 2, paras. 22-23.

sustainable development is thus still very much perceived primarily in terms of endogenous economic growth and its linkage to social improvement. When oceans are considered, it is usually from either fisheries/food security perspective or because of concerns relating to marine pollution from ship-based or land based source.²³

Perhaps the approach which is the most practical and realistic in describing the legal status of certain elements such as environmental stewardship; equal participation; rational use of resources; and equitable sharing of financial and economic benefits, is terming them loosely as the “benefits of mankind”, indicating that they are closely related to the concept of CHM, if not actually forming a part of the whole concept.²⁴ The author of this article shares such an approach to various elements connected with CHM, including environmental protection. Even if environmental protection (stewardship) is not *per se* included in core elements of CHM, it is clear that it is an important question pertaining to the exploration of the Area.

Environmental issues are treated very seriously by the Authority which convened many workshops devoted to them and sponsored many scientific research projects. Examples include the Kaplan Project to study species range and biodiversity in Clarion-Clipperton Zone and formulating a comprehensive environmental management plan for this zone, including a proposal for establishing a representative network of areas of “particular environmental interest” as one of the measures formulated to ensure the effectiveness of protection of the marine environment from the harmful effects of deep seabed mining.²⁵

In conclusion of this section, it may be said that environmental matters are one of the “benefits of mankind” closely related to the concept of CHM, even if they do not constitute one of the defining elements of this concept. There are several other concepts which have been enumerated in connection with CHM such as inter- and intra- generational equity and they without any doubt are part and parcel of philosophical and legal foundations of international environmental law (also forming elements of the concept of sustainable development). As noted above, the application of this concept in its entirety to CHM is one of the areas of disagreement in the doctrine of international environmental law. It may be said that the concept of CHM has a potential of enriching the theoretical (legal and philosophical foundations) of international environmental law, especially when the exploitation of the deep seabed will have commenced. Then, the concepts of intra- and inter-generational equity will be further developed.

²³ D. French, *From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on Ocean Floor – The Seabed Disputes Chamber 2011 Advisory Opinion*, 26 *The International Journal of Marine and Coastal Law* 535 (2011).

²⁴ M. W. Lodge, *The Common Heritage of Mankind*, 27 *Journal of Marine and Coastal Law* 738 (2012).

²⁵ The Clarion-Clipperton Zone is an area of the Pacific Ocean stretching between Baja California and Hawaii (approximately 4.4 square kilometres) containing polymetallic nodules.

1.1. Common Concern of Humankind

The concept of CCM, i.e. common concern of humankind, is conceptually different from CHM but is also based on a notion of common interests. The term CCM is used in the CBD (in relation to biological diversity) and in 1992 United Nations Framework on Climate Change ("Climate Change Convention") (in relation to climate change).²⁶ The first time the term CCM was used occurred in relation to climate change in the Resolution of the United Nations General 43/53, in order to avoid the attributing of the status of the CHM to climate change.²⁷ In its Preamble, the CBD affirms "that the conservation of biological diversity is a common concern of humankind." The Climate Change Convention acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind."

The legal and philosophical bases of CCM are different from those of CHM. The legal regime of resources under the CBD is based on national governance and the access to them is not internationalized in the same way as the access to the resources of the Area. The management of biological resources is not dependent on any international body, such as is the case of deep seabed mining (the Authority).²⁸ As was noted above, the common feature of CCH and CCM is that the benefits to access to the resource must be shared equitably, but in a much more restricted manner than under the regime of CCM. It was observed as well that such sharing does not change the status of a resource under the CBD.²⁹ A suggestion has been made that although the questions of managing States' natural resources are under their sovereignty, the regime of CCM legitimises to a limited extent the international interest in States' management of their own resources. This perhaps may give rise to a suggestion that under the regime of CCM each and every State-Party to CBD has standing, even if they are not directly injured States.³⁰ Therefore, it may be said the permanent sovereignty over natural resources is no longer exclusionary but entails the commitment to act for the good and interests of the whole community at large.³¹ One interesting view also differentiated CHM and

²⁶ United Nations Framework Convention on Climate Change, 9 May 1992, entered into force 21 March 1994, 1771 UNTS 107.

²⁷ A. Boyle, *The Rio Convention on Biodiversity*, in: M. Bowman & C. Redgwell (eds.), *International Law and the Conservation of Biological Diversity*, Kluwer Law International, London: 1996, p. 39.

²⁸ *Ibidem*, p. 40.

²⁹ *Ibidem*.

³⁰ *Ibidem*; see also M. Bowman, *Environmental Protection and Concept of Common Concern*, in: M. Fitzmaurice, D. Ong, P. Merkouris (eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishing, Cheltenham: 2010, in particular p. 503. Bowman refers to general international law on State responsibility (Article 48 of 2001 Articles on State Responsibility on the basis of which any State to which duty is owed as a member of a group of States for the protection of whose collective interest the duty was established may invoke liability for breach of that duty and call for cessation of a wrongful conduct, even if a State is not injured directly (p. 514).

³¹ Bowman, *supra* note 30, p. 40; G. Handl, *Environmental Security and Global Change: A Challenge to International Law*, 1 Yearbook of International Environmental Law 32 (1990); E. Hey, *Global Environmental Law and Global Institutions: a System Lacking 'Good Process'*, in: R. Pierik & W. Werner

CCM on basis that CCM relates to equitable sharing of burdens and costs while CHM is related to allocating rights to use state-free areas, in which the idea of utilisation is greater than protection.³²

The rationale underlying CCM was also explained as sharing of responsibility for detrimental effects of the deterioration of the environment for the States Parties to Multilateral Environmental Agreements (MEAs) for developing States, for the well-being of individuals in general, and certain groups and for areas beyond national jurisdiction, and the identification of the need for common but differentiated action by States and private sector. It was also suggested that despite the lack of the reference to CCM many of MEAs are in fact based on this principle.³³

The next question is how CCM contributed to the formulation and development of theories underlying international environmental law. It has contributed to the development and strengthening of the notion of common interest in relation to international environmental law. It relies, however, on a classical principle of sovereignty over natural resources in international law. Nevertheless, its importance should not be underestimated as it refers both to developed and developing States and treats the environment as a common good, in preserving of which all States have an interest.

2. INTRA- AND INTERGENERATIONAL EQUITY

Both intra- and intergenerational equity principles constitute, in the view of the author of this article, foundations of international environmental law and are linked to Common Heritage and Common Concern of Mankind through their relationship with international environmental law. As explained above, they are also elements which are for the “benefits of mankind”. The concept of intragenerational equity is firmly imbedded in the notion of CHM and it is inconvertible that developing States enjoy certain preferential treatment in relation to sharing of benefits in the exploration of the Area. It should be noted, however, some of the elements of preferential treatment were modified by the 1994 Implementation Agreement. As was observed above, the position of future generations (intergenerational equity) is debatable within the notion of CHM. In the view of the present author, significant increase in the importance of environmental protection in relation to the activities in the Area, made plausible the inclusion of the interest of future generations in the concept of CHM. There is no doubt, however, that the concept of CCM is directly linked to intra- and intergenerational equity, as such suggestion is supported by the provisions of various

(eds.), *Cosmopolitanism in Context. Perspectives from International Law and Political Theory*, Cambridge University Press, Cambridge: 2010, p. 50.

³² A.C. Trinidad & D.J. Attard, *The Implications of the ‘Common Concern Issues’ Concept on Global Environmental Issues*, in: T. Iwama (ed.), *Policies and Law on Global Warming: International and Comparative Analysis*, Tokyo, Environmental Research Center: 1991, p. 10.

³³ Hey, *supra* note 31, p. 50.

MEAs, which make direct invocations to intergenerational equity and are based on the principle of common but differentiated responsibilities, which is a core principle of the intragenerational equity.

It may be that the concept of sustainable development in its entirety is not applicable in relation to CHM but some of its elements, such as intra- and intergenerational equity are. The same applies to CCM, even to a much broader extent.

2.1. Intragenerational Equity

Intragenerational equity is related to the relationship between developed and developing States, i.e. the South/North controversy which is focused on issues of distributive justice and post-colonial legacies and unequal relations of power between developed and developing States.³⁴ Intragenerational equity is conceptualised in the principle of common but differentiated responsibilities, formulated in Principle 7 of the 1992 Rio Declaration on Environment and Development:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

This principle means in practical terms that developed States due to their past and major contributions to the deterioration of the environment, their accumulation of wealth and present financial and technological potential, are obliged to take larger burdens in protection of the environment and also transfer technology and financial resources to developing States. However, developing States have to protect the environment within their means. In order to implement the principle of common but differentiated responsibilities, developing States have grace periods for objectives such as eliminating of certain hazardous substances; certain obligations are only imposed on developed States; and certain duties of developing States are conditional upon actions of developed States, such as transfer of technology and funds from them to developing States. The principle of common but differentiated responsibilities is one of the core principles of sustainable development.³⁵

The principle of intragenerational equity, as embodied in common but differentiated responsibilities, is also an expression of solidarity in relation to environmental problems facing the whole of international community, such as climate change and biodiversity decline. From this point of view, intergenerational equity is connected with the principle of common concern of mankind, the core of which is the conflict between sovereignty of States and a desire to protect common interests.³⁶

³⁴ *Ibidem*, p. 53.

³⁵ *Ibidem*.

³⁶ Ph. Cullet, *Common but Differentiated Responsibilities*, in: Fitzmaurice at al. (eds.), *supra* note 30, p. 169.

For the purpose of this article the most important is that there is a link between CHM, CCM and intergenerational equity, as it shows that international environmental law has acquired certain uniformity and continuity, at least in relation to its foundational principles.

2.2. Intergenerational Equity

Intergenerational equity directly links generations to environmental issues. As was explained by Brown Weiss who introduced and elaborated this concept, the use of our natural resources raises at least three kinds of equity problems between generations: depletion of resources for future generations; degradation in the quality of resources; and discriminatory access to use and benefit from resources received from past generations.³⁷ There is a multitude of ways in which depletion of natural resources may occur. Present generations may deplete a more expensive natural resource, thus making it unavailable (or available at higher price for future generations). Natural resources may also be exploited by present generations' ignorance of their potential economic importance. In some cases, present generations may exhaust certain natural resources by destruction of areas of high biological diversity. Depletion of resources may reduce the diversity of resources available for adapting to climate change and the destruction of forests can result in an increase of global greenhouse emissions.³⁸ Degradation of the quality of the environment also poses the questions of equity. The quality of natural environment (globally and locally) has been degraded, in particular in the last fifty years. Pollution which degrades many areas of the environment such as marine; air; fresh water, soil; and land affects the uses that future generations can make of the environment and the cost of doing so.³⁹

Every generation has the right to use the environment and natural resources. The main problem is finding a balance between the rights of use of present generations and future generations, taking into account such factors as poverty, which may prevent certain communities from equitable sharing in their legacy.⁴⁰ Intergenerational equity is formed on the basis of two relationships: the relationship between generations and between human species and natural system. Human species bear the main responsibility for the natural system. The notion of equality is the core of the legal framework connecting generations, in their care and use of the natural system. The concept of intergenerational equity is based on a notion of a partnership between generations themselves and between natural systems and generations. The present generation holds in trust the natural environment for future generations and as its beneficiary with the right to use it. Each generation has an obligation to pass onto future generations the natural environment in

³⁷ E. Brown Weiss, *Implementing Intergenerational Equity*, in: Fitzmaurice et al. (eds.), *supra* note 30, p. 100.

³⁸ *Ibidem*, p. 101. See also E. Brown Weiss, *In Fairness to Future Generations*, United Nations University and Transnational Publishers, New York: 1989.

³⁹ Brown Weiss, *supra* note 37, p. 101.

⁴⁰ *Ibidem*, p. 102.

a state no worse than it had received from past generations.⁴¹ Brown Weiss distinguished three elements of the principle of intergenerational equity: conservation of diversity of natural and cultural resources (or comparable option); conservation of environmental quality (or comparable quality); and equitable or non-discriminatory access to the earth and its resources. The first principle (conservation of diversity) means that each and every generation has an obligation to conserve the natural and cultural diversity resources as not to restrict the options available to future generations to meet their own needs and satisfy their own values. Conservation of quality means that every generation must maintain the quality of the natural environment so it can be passed onto future generations in no worse condition than inherited from past generations. Equitable access means that each generation has a non-discriminatory right to access and benefit from the natural environment.⁴² These principles should meet three criteria. First, they should encourage equality among generations, by introducing the balance in the use of natural resources, i.e. using natural resources in the manner not exclusionary to future generations, on one hand; and no to impose undue burdens of present generation, on the other hand. Secondly, present generation should not interfere with or predict the values of future generation, but rather they should offer flexibility to future generations regarding ways to pursue their own goals and aims. Third, these principles should be reasonably clear as to be applicable in different social and legal systems.⁴³

2.2.1. Practical Application of the Theory of Intergenerational Equity

The rights of future generations and as well as the notion of keeping our planet in trust for future generations are not new ideas. Many MEAs and soft law documents drafted many years ago included at least in their preambles the invocation to future generations.⁴⁴

⁴¹ *Ibidem*.

⁴² *Ibidem*, p. 103.

⁴³ *Ibidem*.

⁴⁴ See e.g., 1946 International Convention for the Regulating of Whaling (161 UNTS 72): "The Governments (...) Recognising the interest of nations of the world in safeguarding for future generations the great natural resources represented by whale stock"; the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (1651 UNTS 333) 15: "The Contracting Parties (...) Aware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilised, is used wisely"; Convention on International Trade in Endangered Species of Wild Fauna and Flora (8249, 993 UNTS 243): "Recognising that wild fauna and flora in their many beautiful and varied forms are irreplaceable part of natural systems of the earth which must be protected for this and generations to come"; the 1979 Convention on Migratory Species of Wild Animals (1651 UNTS 333): "Recognising that wild fauna and constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handled to future generations"; Principle 2 of Stockholm Declaration on Human Environment (11 ILM 1972 1416): "The natural resources of the earth including the air, water, land, and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate"; Principle 3 of the 1992 Rio Declaration on Environment and Development (31 ILM 1992 874): "The right to development must be fulfilled as to equitably meet developmental and environmental needs of present and future generations."

The question of intergenerational equity was also a subject of national and international law case-law. The classical case concerning the application of this principle is the 1993 *Minors Oposa* claim.⁴⁵ It was one of a few cases in which the concept of intergenerational equity was successfully applied, in conjunction, however, with a right to healthful environment as enshrined in the Constitution of the Philippines. The case was originally a civil law action filed in before the court in the Philippines by minors who were the plaintiffs against the Department of Environment and Natural Resources (DENR). The subject matter of the action was a claim to cancel logging permits issued on the basis of the Timber Licensing Agreements (TLAs) and to cease issuing the new ones, as they were the reason for continuing deforestation (they remained effective for 25 years).

The cause of action was the constitutional right to a healthful environment and that the refusal to cancel TLAs was a breach of environmental laws of the Philippines. The plaintiff also claimed that the State should protect citizens in its role as a parent.

The case was rejected by the court of first instance on the grounds of the lack of legal interest and that the cause of action was political not legal. The plaintiff filed a special civil action for *certiorari* and asked the Supreme Court to rescind the order terminating the case. The petitioners added a new element for their pleadings, i.e. that the deforestation affects generational rights of future generations. Therefore, the petitioners pleaded as well on behalf of generations unborn within the context of the right to healthful environment. The Court accepted this argument and stated as follows:

Each generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology (...) The minors' assertion of their right to a sound environment, at the same time, performance of their obligation to ensure the protection of that right for the generations to come.⁴⁶

The Supreme Court supported the petitioners' *locus standi* on the basis of intergenerational rights (responsibility) and the right to a sound environment. However, it has to be said the Judgment was not supported by all Judges. Judge Feliciano in a rather powerful Concurring Opinion raised several legal issues which were pertinent to the case. He observed that the petitioners lack the *locus standi* in this case, as the case class of petitioners was too broad as it: "appears to embrace everyone living in the country whether or now or in the future, it appears to me that everyone who may be expected to benefit from the course of action petitioners see to require respondents to take, is vested with the necessary *locus standi*."⁴⁷

The case is of fundamental importance for the practical implementation of the concept of intergenerational equity. However, in practical terms it has not achieved much as it did not result in cancellation of TLAs; the petitioners did not pursue the

⁴⁵ *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*, Supreme Court of the Philippines, 30 July 1993, 33 ILM (1994), p. 173.

⁴⁶ *Ibidem*, p. 185.

⁴⁷ Concurring Opinion of Judge Feliciano, pp. 200-201.

case. In fact, one of the assessments of the case was very critical and it was stated as follows: “*Oposa* adds barely anything new either to Philippine jurisprudence or to environmental protection and it has faded from practice of law because it does not strengthen the legal arsenal for environmental protection.”⁴⁸

Moreover, it was submitted that the Supreme Court’s statement on *locus standi* on the basis of intergenerational equity (to sue for future generations) is not a binding precedent but an *obiter dictum*. It was also argued that the invocation of intergenerational equity in this case was beside the point, as the Supreme Court would have decided this case in exactly the same manner if the children filed a case only on their behalf, not of future generations, due to the fact that:⁴⁹ “In cases involving the protection of the environment, the distinction between present and future generations is inconsequential – we cannot protect the rights of future generations without protecting the rights of present.”⁵⁰

Another case which is an example of the application of the concept of intergenerational equity is the 2006 *Peter K. Waweru v. Republic of Kenya*, in connection with water pollution from water disposal and sewage. A public Health Officer found out that certain property owners were discharging overflow from their septic tanks to open water. In this case the Court made statements on intra- and intergenerational equity in relation to water:

... water table and the river courses affected are held in trust by the present generation for future generations. Yes, the intergenerational equity obligates the present generation to ensure that health; diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations. We observe that water table and clean rivers are for this and future generations.⁵¹

It must be mentioned, however, that national courts were not always willing to apply this concept. There are several examples of national courts of Pakistan or Bangladesh which rejected its application. In Bangladesh, courts rejected the concept of intergenerational equity on the grounds that neither the constitution nor the national legislation of this country specifically mentioned it. For example in *M. Farooque v. Bangladesh and Others*, petitioners submitted that they were representatives not only of their own generation but of the generations to come. This argument was rejected by the Court. The petitioner relied on the *Minors Oposa* case. The court was of the view that minors have *locus standi* in this case based on the right to a healthful environment in the Constitution of Philippines. Such a right did not exist in the Constitution of the Bangladesh.

⁴⁸ D. B. Gatmayan, *Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 Georgetown International Environmental Law Review 459 (2003).

⁴⁹ *Ibidem*, pp. 459-460.

⁵⁰ *Ibidem*, p. 460.

⁵¹ *Peter K. Waweru v. Republic of Kenya*, High Court of Kenya (2006), HCC 118-2004, see also on this case: Brown Weiss, *supra* note 37, pp. 107-108.

The concept of intergenerational equity was also applied in international case-law. At the international level, the International Court of Justice (“ICJ”) and several of its Judges referred to the concept of intergenerational equity. Judge Weeramantry was a great supporter of this concept. For example, in the *Nuclear Test II* case, he expressed the following views on the role of the Court in the preservation of the rights of future generations:

[the Court] must regard itself as a trustee of those [intergenerational rights] in the sense that a domestic court is a trustee of the interests of an infant to speak for itself. If the Court is charged with administration of international law, or has already done so, this principle is one which must inevitably be a concern of this Court. This consideration involved is too serious to be dismissed as lacking in importance merely because is no precedent on which it rests.⁵²

The Court dealt with this issue in the *Nuclear Weapons Advisory Opinion*:⁵³

[t]he Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment (para. 29) (...) Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations (para. 36).

Judge Weeramantry also supported rights of future generations in the Separate Opinion in the above-mentioned case. He was of the view that:

[a]t any level of discourse, it would be safe to pronounce that no generation is entitled, for whatever purpose to, inflict such damage on succeeding generations. The Court as the principal organ of the United Nations, empowered to state and apply international law with an authority to match by no other tribunal, must take into consideration the interests of future generations.⁵⁴

There are some other examples of this concept before the ICJ. In the *Gabcikovo-Nagymaros Project* the Court also referred to future generations:

[o]wing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a greater number of instruments during the last two decades.⁵⁵

⁵² *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995 (Dissenting Opinion of Judge Weeramantry) [1995] ICJ Rep. 317.

⁵³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep. 1996, p. 226.

⁵⁴ Separate Opinion of Judge Weeramantry, p. 429 et seq.

⁵⁵ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Rep. 1997, para. 140.

One of the lesser-known cases before the ICJ, the *Nauru* case, is an example of the application of the theory of corrective distributive justice (intergenerational justice and trust). The case related to the Trusteeship Agreement for the territory of Nauru, approved by the General Assembly in 1947. The key provision of this Agreement was to impose an obligation on the Administrative Committee to administer the territory in such a way as to achieve a basic objective of the International Trusteeship system, set out in Art. 76 of the United Nations Charter. Art. 5 of the Agreement made a direct reference to present and future generations of Nauru. It may be said that the depletion of natural resources (which was the subject-matter of the case) interfered with the right of future generations on Nauru:

the resources were there, but as a result of a deliberate policy they were not made available, and consequently the advances made, for example, in education, were not related to the legal entitlement of the Nauruan community to access to the financial benefits of the phosphate industry. Political and economic advancement would have provided access to those benefits and a proportionate increase in expenditure on education and other services.⁵⁶

In light of the above examples it may be said that the concept of intergenerational equity featured in some of the judgments of the ICJ and in pleadings before it. However, it must be also observed that the statements of the Court relating to this concept, lead to the conclusion that intergenerational equity was not the main focal point of the Court's considerations and was treated as only one of the elements concerning the requirement of environmental protection. There are also several legal issues concerning the representation of generations unborn before national and international courts, which already emerged in the *Minors Oposa* case, primarily relating to the question of *locus standi* before the Supreme Court of the Philippines. The question of standing before international courts raises also serious legal questions. On what legal grounds can the interests of unborn generations be put forward? Is it in the form of surrogates who represent future interests in negotiations; or perhaps trustees with the *locus standi* to represent the interests of future generations in judicial proceedings?⁵⁷ There is also a question of legal standing of the trustees. It was suggested that the legal basis may be found in the obligations *erga omnes*. This is based on Art. 48 of the Articles on State Responsibility which provides that a State could invoke responsibility for breaching an obligation established for the protection of a collective interest of the group (including the environment), or that is owed to the international community as a whole. In such a case, a State bringing a claim does not have to suffer an injury directly as a State, as it is required by classical international law.⁵⁸ This

⁵⁶ *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Memorial of the republic of Nauru, para. 263.

⁵⁷ V. Lowe, *Sustainable Development and Unsustainable Arguments*, in: M. Anderson, A. Boyle & D. Freestone (eds.), *International Law and Sustainable Development*, Oxford University Press, Oxford: 1996, p. 27.

⁵⁸ Brown Weiss, *supra* note 37, p. 111.

article, however, is a progressive development of international law. Additional difficulties, however, relate to the basis for standing in judicial proceedings, at least before the ICJ, which are currently impossible to circumvent.

It must be observed, however, that in the Advisory Opinion of the Seabed Dispute Chamber, a very far reaching statement as to the *locus standi* in the case of CHM (i.e. with respect to the Area) was made:

[n]o provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act “on behalf” of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility.⁵⁹

As was noted, this important statement would essentially be confirmation of an *actio popularis* in international environmental law.⁶⁰ An even more radical statement argued that:

While the Chamber’s language can be read as hypotocating (“may”), it tends to equate the principle of “common heritage” and environmental protection with the classic examples of *erga omnes* obligations identified by the *Barcelona Traction* and *East Timor* cases – genocide, aggression, slavery, racial discrimination and self-determination.⁶¹

Therefore it is justified to say that this concept suffers not only from, as it seems, insurmountable procedural problems, but also does not have a clear cut normative content. As Lowe observed, the ensuing duty of States to preserve the environment for future generations is quite fuzzy and lacking ways in which duties would be distributed between States in a manner which would secure the interests of future generations equally in all States. At present, international law does not have such a suitable mechanism. Notwithstanding all these problems, the concept of intergenerational equity is firmly established in international environmental law, it may be said is one of its foundations.

2.2.2. Application of the Concept of Intergenerational Equity by States

It may be mentioned that several Constitutions of States contain invocations to future generations. Some authors are of the view this is the manifestation of the concept

⁵⁹ Advisory Opinion of the Seabed Dispute Chamber, *supra* note 1, para. 180.

⁶⁰ D. French, *From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor-The Seabed Disputes Chamber 2011 Advisory Opinion*, 26(4) International Journal of Marine and Coastal Law 525 (2011), p. 546.

⁶¹ D. Anton, R. A. Makgill, and C. R. Payne, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, available at SSRN, ANU College of Law Research Paper No. 11-06 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216&download=yes.

of intergenerational equity.⁶² Three types of clauses relating to intergenerational justice are distinguished: general clauses;⁶³ ecological generational justice;⁶⁴ and financial generational justice.⁶⁵

It is interesting to note that some approaches to intergenerational equity are very extensive as they also include the right to a clean environment. It must be stated that several Constitutions already include such a right, e.g. the Constitution of Hungary and of South Africa. The Constitution of South Africa includes both a right to a clean environment and to generational justice. It may be noted that the right to a clean environment in the Constitution of South Africa is directly actionable.

It may be further observed that in the *Minors Oposa* case, the ground for action was both the right to a clean environment and intergenerational equity.

On of the most important aspects of the Brown Weiss' articulation of the concept of intergenerational equity was the suggestion of the appointment of the ombudsman

⁶² J. Ch. Tremmel, *Establishing Intergenerational Justice in National Constitutions*, in: J. Ch. Tremmel (ed.), *Handbook of Intergenerational Justice*, Edward Elgar Publishing, Cheltenham: 2006.

⁶³ *Ibidem*, p. 191. There are several Constitutions with such clauses: e.g. Poland: Preamble to the Constitution: "Recalling best traditions of the First and Second Republic, obliged to bequeath to future generations that is all valuable from our over thousand years' heritage"; Switzerland: Preamble to the Federal Constitution: "In the name of God Almighty! Whereas, we are mindful of our responsibility to wards creation; (...) are conscious of our common achievements and our responsibility to wards future generations"; Estonia: Preamble: "Unwavering in our faith and with unwavering will to safeguard and develop a state (...) which shall serve to protect internal and external peace and provide security for present and future generations; the Estonian people (...) adopted the following Constitution."

⁶⁴ Numerous clauses, e.g. Art. 41, clause 1 Argentina: "All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall the duty to preserve it. As a first priority environmental damage shall bring about obligations to repair according to law"; Poland, Art. 74, clause 1 of the Constitution: "Public authorities shall pursue policies ensuring ecological security of current and future generations"; South Africa, Section 10 of the Constitution: "Everyone has the right a) to an environment that is not harmful to their health and well-being; and b) to have the environment protected, for the benefit of present and future generations, though reasonable legislature and other measures that prevent pollution and ecological degradation, promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

⁶⁵ The examples are e.g. Estonia, Art. 116: "proposed amendments to the national budget or to its draft, which require a decrease in income, and increase in expenditures, as prescribed in draft national budget, must be accompanied by the necessary financial calculations, prepared by the initiators, which indicate the sources of income to cover the proposed expenditures"; Art. 216, clause 5 of the Constitution: "it shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. The method for calculating the value of the annual gross domestic product and national public debt shall be specified by statute"; Germany, Art. 109, clause 2 of the Basic Law: "The Federation and the Länder shall perform jointly the obligations of the Federal Republic of Germany resulting from legal acts of the European Community for the maintenance of budgetary discipline pursuant to Article 104 of the Treaty Establishing the European Community and shall, within this framework, give due regard to the requirements of overall economic equilibrium" and Art. 115: "The borrowing of funds and the assumption of surety obligations guarantees, or other commitments that may lead to expenditures in future fiscal years shall require authorisation by a federal law specifying or permitting computation of the amounts involved."

representing the interests of future generations. This idea appeared to be quite far fetched, if not unworkable at the time. However, certain States set up special organs whose function is the representation of such interests. In 1993, the Government of France established a Council for the Rights of Future Generations, whose task was to consider issues related to nuclear power. This body, however, lapsed when France resumed nuclear testing in the Pacific.⁶⁶ Another example is Israel, where its Parliament, the Knesset, established a Commission for Future Generations. This body's function was to assess draft bills that were of particular relevance for future generations, within the area of the environment, natural resources, development, health, the economy, planning and construction, education, quality of life, technology and all matters which were determined by the Knesset's Constitution, Law and Justice Committee as being of particular important consequences for future generations. In practice the Commission dealt in practice with protecting children.⁶⁷ In 2007, the Hungarian Parliament enacted legislation establishing an Ombudsman for Future Generations, vested in broad powers, including advising the Parliament on the impact of certain legislation on future generations and intervening to enjoin activities that could have a detrimental impact on future generations.

The above examples show there is a certain degree of concern by States regarding future generations. It may be said, however, that these are not very numerous examples, and one of them (in France) does not exist any more; and the other one (in Israel) is limited. It only protects the rights of existing children and those of the successive generation of children, i.e. "the next baby born tomorrow".⁶⁸

It may be concluded that the concept of intergenerational equity features very prominently in international environmental law, it may be even said that it is a leading concept. However, its normative content and practical application remain ambiguous. It is unclear whether it has acquired a normative content of a principle; or it remains a concept; or perhaps a philosophical theory (see below). Attempts of invoking it before national courts were largely unsuccessful; and before international courts and tribunals, intergenerational equity has not acquired great prominence. Its ambiguous legal content also raises questions of legal standing before courts and tribunals.

2.3. Intergenerational Equity and its Philosophical Background

It is without doubt that the concept of intergenerational equity is firmly rooted in the theory of distributive justice, as embodied in philosophy of John Rawls.⁶⁹ His theory of philosophy formed the background of the Brown Weiss' (see above) concept of intergenerational equity, which had become the leading concept of international

⁶⁶ Brown Weiss, *supra* note 37, p. 110.

⁶⁷ *Ibidem*.

⁶⁸ S. Shoham & N. Lamay, *Commission for Future Generations*, in: Tremmel (ed.), *supra* note 62.

⁶⁹ See J. Rawls, *A Theory of Justice*, Harvard University Press, Harvard: 1971 ("Rawls I"); J. Rawls, *A Theory of Justice* (revised ed.), Harvard University Press, Harvard: 1996 ("Rawls II"); J. Rawls, *Political Liberalism*, Columbia University Press, New York: 1996).

environmental law. Very broadly speaking, Rawls' theory is based on a concept of justice as fairness and of sharing the benefits and burdens in society. Rawls addressed social inequalities in society, the perception of which depends on individuals' characteristics and place in society, so they are biased.⁷⁰ Rawls aimed at discarding these biases. What would be a concept of "just society" if people were deprived of their class status, political beliefs, health, and religion; in other words if they operated from behind the "veil of ignorance".⁷¹ His idea was to divorce decision-makers from the sense of their identity, which would involve them being totally ignorant as to their final position, capabilities etc., in short they would find themselves in a "original position". This would enable them to understand in a different light from that derived from a formal equality approach.⁷² Rawls introduced the so-called "difference principle" which in broad brushstrokes is based on a premise that individuals behind the "veil of ignorance" would find a fair and equal society if the assignment of benefits would result in just distribution and the eradication of economic inequities, in particular in relation to the least advantaged members of society. The final purpose of equal economic distribution is to make everybody better off.⁷³ Rawls' theory was originally applied within the context of a State, relating to individuals in a single society. However, it has been observed that this theory can be also useful in inter-state application, although not without certain difficulties. Some of the difficulties related to the fundamentally procedural character of the Rawlsian theory.⁷⁴ However, the theory of Rawls can be transferred into international level in environmental matters by "melding Rawlsian approaches to economic justice with environmental regulation" by which "developing nations may have effected a particularly important paradigm shift in international relations and foreign policy."⁷⁵ Social justice as an underlying principle of Brown Weiss' theory has an intertemporal dimension, which in fact was also raised by Rawls. In his theory this element appears after a person assumed the "veil of ignorance" (having discarded all prejudices). Not only did Rawls include a time element, but the time element stretched between generations. Intergenerational justice, like Brown Weiss' concept, was based on the "just savings principle", according to which each and every generation has to preserve heritage of previous generations and put aside a suitable amount of capital. As Drumbl observed, generational justice can be applied to the environment:

If people in their "original position" did not know what generation they would be born to, then persons would take better care of the environment if there were risk that they would be born into a generation whose predecessors had desecrated the environment or emptied it of its recourses. International environmental lawyers have gone one step

⁷⁰ Rawls I, pp. 15-19.

⁷¹ *Ibidem*, pp. 136-142.

⁷² *Ibidem*.

⁷³ *Ibidem*, pp. 61, 83.

⁷⁴ M. Drumbl, *Poverty, Wealth, and Obligations in International Environmental Law*, 76 Tulane Law Review 903 (2002), pp. 903-905.

⁷⁵ *Ibidem*, pp. 903-904.

further and have applied intergenerational justice as a rationale for global environmental governance. For example, Edith Brown Weiss writes that intergenerational justice encompasses the duties we owe to future generations to maintain a natural environment capable of sustaining life and civilisation at least to the same standard of living enjoyed today.⁷⁶

The application of the theory of Rawls to international environmental law is, however, not without problems. One of the most fundamental issues is the contractarian or reciprocal character of this theory.

In relation to climate change it was phrased in the following manner:

If reciprocity determines the scope of justice, as writers such as Rawls and Gauthier believe, there seems to be no room for future persons having claims to resources from ancestors – they get what they inherit, and should count themselves lucky to get it!⁷⁷

The question of intergenerational equity (or intergenerational justice) concerns the most fundamental issue: what is the character the rights of future generations and what is their scope. Are these rights moral or legal rights? The majority subject adheres to the view that they are moral rights, but there is no unambiguous answer to this question. However, the question become more complex in the case of the rights of future generations enshrined in various constitutions. Are they still moral rights or legal rights, or both? There is a view expressed that in democratic States most legal norms are also moral norms.⁷⁸ More questions may follow: what is the definition of these rights and obligations and who decides on their definition?⁷⁹

There are also separate categories of interests and needs of future generations. For example, Art. 4 of the Moon Treaty states that “due regard shall be paid to the interest of present and future generations.” The notion of “needs” is contained in the most frequently used definition of Brundland’s Report on Sustainable Development (of which intergenerational equity is part and parcel):⁸⁰ “development which meets the needs of the present without compromising the ability of future generations to meet their own needs.”

The notion of needs was also included by some international environmental agreements, such as the UN Economic Commission for Europe 1992 on the Protection and use of Transboundary Watercourses and International Lakes,⁸¹ which in fact incorporated the Brundland’s definition.

⁷⁶ *Ibidem*, pp. 919-920.

⁷⁷ E.P. Page, *Climate Change, Justice and Future Generations*, Edward Elgar Publishing Cheltenham: 2006, p. 105.

⁷⁸ Tremmel, *supra* note 62, pp. 187-212.

⁷⁹ *Ibidem*, pp. 201-203.

⁸⁰ The 1987 Report of the World Commission on Sustainable Development (so-called Brundland (she chaired this body) Commission). See also on this: H. Ward, *Beyond the Short Term: Legal and Institutional Space for Future Generations*, 22 Yearbook of International Environmental Law 3 (2011), pp. 7-33.

⁸¹ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, entered into force 6 October 1996, 1936 UNTS 269.

The notions of interests and needs of future generations also suffer the same shortcomings as the other elements of it, i.e. the lack of the basic understanding and the ambiguity of what are the interests and needs of future generations and their scope.

CONCLUSIONS

This article analysed some of the foundational principles of international environmental law. It started with an analysis of the concepts of the Common Heritage of Mankind (Humankind), Common Concern of Mankind (Humankind) and Intra- and Intergenerational Equity. The thesis that environmental protection is a part of the definition of CCM remains inconclusive. However, it is incontrovertible that it belongs of the category of “benefits of mankind”, which is constituted of the elements not directly forming a part of the definition, but has an important influence on the development of the concept of CHM. The definition of CHM also has to be treated in an evolutionary manner. Environmental considerations have increased in importance since 1982 and therefore their significance to this concept is also greater. It may also be said that this is the idea of common interests of States which underlines both the CHM and CCM concepts. There were certain doubts as to the application of the concept of intergenerational equity within the context of CCM. In the view of the present author, the changes in attitudes concerning environmental law by developing States and the presence of this concept in many MEAs may justify the view that it has become one of the elements of CHM and CCM. There has never been doubt that the concept of intragenerational equity, in particular due to the New Economic Order, was one of the elements of CCM. The concept of the New International Economic Order lost its currency but at present, intragenerational equity is expressed in the principle of common but differentiated responsibilities. The present author therefore submits that the underlying, foundational principles of international environmental law have the common theme of inter and intra generational equity.

*Susana Camargo Vieira**

GOVERNANCE, GOOD GOVERNANCE, EARTH SYSTEM GOVERNANCE... AND INTERNATIONAL LAW

Abstract

This article is about concepts, circumstances, the impact of technology upon life, the emergence of new problems which bring new challenges to our peoples and our planet in our pursuit of sustainable development. New challenges call for new solutions and different ways of using already existing resources, tools and mechanisms. So we revisit and compare bibliography through time; recall the work (and product) of several ILA International Committees on the subject and especially its New Delhi Declaration of Principles of International Law as Relating to Sustainable Development; turn to new initiatives, namely, the Earth System Governance Project and Future Earth. And conclude on the urgency of bridging “hard” and “social” sciences in the quest for these solutions, given the holistic character of the problem, if we expect them to be democratic and sustainable – bearing in mind, always, that politics creates and law consolidates.

INTRODUCTION

In 1993 I joined the ILA's (International Law Association) International Committee on Legal Aspects of Sustainable Development. I had just finished my Master's in International Law at the University of São Paulo (USP)¹ and was beginning my PhD at the same University. Following my participation in Rio 92,² I had decided to focus on

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¹ In which I had written about international cooperation – the European Community's ECIP (European Community Investment Partners) version for non-ACP countries, under the supervision of Professor Celso Lafer, who also honoured me by supervising my PhD thesis.

² Representing the Brazilian Society of International Law, then presided by the late Ambassador Geraldo Eulálio do Nascimento e Silva, who was also the President of the Brazilian Branch of the International Law Association, very active in international politics and the environment, and who had just written the first book on international environmental law in Brazil, *Direito Ambiental Internacional*, Renovar, Rio de Janeiro: 1992. Ambassador Nascimento e Silva recruited me for the Brazilian Branch of the ILA (few

international law and sustainable development. This then-new ILA Committee met for the first time in March 1994 in a historic conference hosted by Professor Konrad Ginther in his beautiful university in the equally beautiful Austrian city of Graz. Konrad Ginther was also a member of the ILA Committee, which had Kamal Hossain as Chairperson and Nico Schrijver as Rapporteur. I received a letter (emails were still uncommon then!) inviting me to participate and stating the general theme – legal principles of sustainable development and good governance as one of its constitutive elements.

As someone in the early stages of an academic career in what was then still officially a developing country, I needed sponsorship – which the Austrian government offered on a selective basis only, so I had to find a theme that would garner their attention. To be candid, I had never heard or discussed good governance at that time, but decided I'd write on *Sustainable Development as a matter of Good Governance – the case of the Amazon Forest in Brazil*.³ My abstract was selected and, in good measure due to the financial assistance from the Austrian Ministry of Foreign Affairs, I started not only a life-long association with our ILA Committee and its successors, but also to write on this theme which, 17 years later, led me to the Scientific Steering Committee of a very interesting project within the IHDP Programme⁴ – *Earth System Governance*,⁵ in which I might be the only academic member with a law background. This topic interests me not only for its importance in our changing structures and its multidisciplinary character, but for the fact that I get to remind my colleagues (and myself!) of the importance of the role of law in preventing conflict and consolidating what politics creates.

This article approaches the subject of international governance in a changing world, faced with very concrete problems caused (or to be caused) by environmental (mis)management (climate change). These constitute problems which no country will be able to solve alone. They are a challenge to all fields of knowledge, and an opportunity for those of us (in international law) who seek to explore new (or perhaps not so new) themes.

1. ON CIRCUMSTANCES AND JOURNEYS: FROM DEMOCRACY TO GOVERNANCE

One of the many things for which I am grateful to Professor Celso Lafer is for introducing me to Ortega Y Gasset and his famous *I am myself and my circumstances*,

know that our Branch had been created and survived in 1992 almost exclusively thanks to his personal investment) and, because of common friends who knew of my passion for the subject, nominated me to the committee.

³ Later published as chapter 27 (pp. 429-440) of the book which resulted from the conference – the first of many produced by our Committee: K. Ginther, E. Denters and P. J.L.M. de Waart (eds.), *Sustainable Development and Good Governance*, Martinus Nijhoff/Kluwer, Amsterdam: 1995.

⁴ International Human Dimensions Programme on Global Environmental Change of the United Nations University in Bonn.

⁵ Website: <www.earthsystemgovernance.org>.

which I have, since then, adopted as a motto and unfailingly passed on to my students. It is fundamental to try to understand the *context* in which (legal or political) issues emerge if one is to try to address them. So how does this apply to the concepts of *democracy* and *good governance*?

In 1993 Brazil few jurists talked about good governance.⁶ I was referred to Professor Jacques Marcovitch,⁷ who introduced me to David Osborne's *Laboratories of Democracy*. Osborne thus dissected the concept:

Government's primary role is to nourish the elements that make innovation possible: an intellectual infrastructure; a skilled, educated workforce; an attractive quality of life; an entrepreneurial climate; a sufficient supply of risk capital; a healthy market for new products and processes; a commitment to industrial modernization; an industrial culture built upon cooperation and flexibility; and a social system that supports innovation and change. Virtually every state initiative to create economic development falls within one of these categories.⁸

Add to his comments the adjective *international*; link it to the concept of *sustainable development* (which, as will be seen, our Committee did in 2002) and to the current discussions on how to address climate change... and we'll see how vital it remains.

In their Introduction to our Committee's 1995 book, Konrad Ginther and Paul de Waart addressed the issue in light of the 1994 UN Agenda for Development, which they quoted as follows:

The intricate nature of the present world crisis must be grasped in its entirety before effective action to resolve it will be possible. The concepts of collective security, fundamental human rights, international law and social progress for all are being corroded by ethnocentrism, isolationism, cultural animosity and economic and social debilitation. Even the concept of State as the foundation stone of international cooperation is being damaged by those who define it in exclusionary terms and others who question its contemporary relevance and efficacy.⁹

For Ginther and de Waart, the Agenda hits the mark when it states that good government implies "the wisdom and the historical responsibility to know when to let the market forces act, when to let civil society take the lead, and when government should intervene directly." In this connection, it is worth mentioning that democracy

⁶ The country's circumstances had something to do with this – our 1988 Constitution (which we like to refer to as *The Citizen Constitution*) was not yet five years old; our institutions had just proved their strength facing a very big challenge, the impeachment process (finalized in September 1992) of the first democratically elected president in 29 years. Legal challenges abounded, and jurists were really more interested in internal matters at the time.

⁷ From the University of São Paulo's Economics and Management School (yes, the concept of good governance seems to find its origins in business...). Marcovitch was active in Rio 92, and later became the Rector (President) of USP.

⁸ D. Osborne, *Laboratories of Democracy*, Harvard Business School Press, Boston: 1988, p. 5. As quoted in Vieira, *supra* note 3, p. 436 – and easily applicable to the Amazonian challenge.

⁹ How sad it is to note this remains true and not much improved now, 20 years later.

permeates the document as its most frequently used keyword in respect of both national and international levels.¹⁰

And here, in this (out of) time journey, I cannot resist an attempt to establish a fictional dialogue on the subject of democracy between our 1995 book and different works of James Crawford. In his 1993 Inaugural Lecture in Cambridge, *Democracy in International Law* Crawford said, when outlining the problem:

That the will of the people is to be the basis of the authority of government is as good a summary as any of the basic democratic idea. But the idea of democracy reflected in the International Covenant, in the Universal Declaration and in other instruments, is not a simple majoritarian one. It is a reflection of the idea that every person, whether a member of a majority or a minority, has basic rights, including rights to participate in public life.¹¹

Five years later, Crawford and Marks, when discussing the global democracy deficit¹² from a state-centered focus, referred to David Held's project of *cosmopolitan democracy*, the objective of which would be to infuse democratic standards wherever power resides. It includes the deepening of democracy within nation-states, but also "the extension of democracy to the arenas of global and transnational decision making." Democracy must thus be rethought in order to address the expanding framework of political activity. Crawford and Marks also refer to Thomas Franck's reflections on how decision-making in international forums might be made more "fair" if *people*, rather than governments, were to be represented in a second chamber, which "might sit alongside the United Nations General Assembly."¹³

For Ginther and de Waart, the Graz Seminar envisioned good governance as the sustainable management of resources in all terms (legal, institutional, political, economic, social, and ultimately cultural) which is difficult to translate into a concrete operational programme for the world as a whole, given, *inter alia*, cultural diversity and inequality, which exist despite the increasing *de facto* interdependence (the issue of separating the political from the juridical in international law was, in their words, omnipresent).¹⁴

In 1995, Kamal Hossain stressed the inherent character (with respect to the concept of sustainable development) of the need for political systems which provide for effective citizen participation in decision-making and for good governance, or as he put it, the existence and implementation of institutions for policy making and decision-making which meet the needs of sustainable development. He referred to a (then) recent report of

¹⁰ Ginther et al. (eds.), *supra* note 3, p. 4 (Introduction).

¹¹ Revised and reprinted, as explained in footnote 1 of his *International Law as an Open System: Selected Essays*, Cameron May, London: 2002, p. 39 et. seq. Quotation is from p. 40.

¹² *Ibidem*, pp. 137-155.

¹³ *Ibidem*, p. 153. One of the complaints now heard in the NGO community is that the reform of institutions resulting from Rio+20 will make it very difficult for major groups to be heard in/by the UN – but we need to see how this goes.

¹⁴ Ginther et al. (eds.), *supra* note 3, p. 9 (Introduction).

the UN Committee for Development Planning which listed some of these, and identified problems and challenges common to all, despite the widely varying circumstances. He concluded that good governance, in the context of the goal of sustainable development, would imply respecting the Principles of the Rio Declaration in designing development projects and programmes, but also required reducing corruption.¹⁵ In fact, that article already pointed in the direction of what the Committee, seven years of work and three books later, translated into the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development.¹⁶

2. ON GOVERNANCE, GOOD GOVERNANCE AND SUSTAINABLE DEVELOPMENT

The concept of good governance is a qualification of the concept of governance, which arose in the social and political sciences. Winfried Lang analyzed the concept in our Committee's 1995 book, recalling that in 1992 Oran Young deemed it "an outgrowth of the regime theory."¹⁷ Lang saw as the main purpose for this (then) relatively new term "to distinguish between governance systems (regimes) which rely for their realization either on governments or on governance systems (regimes) which are able to function without governments." Lang perceived the merit to this concept (highlighting the possibility that such systems or regimes may perform well, even when not supported by governments), but also that international regimes have to be endowed with an international organization in order to fulfill their functions appropriately.

Lang further referred to James Rosenau, for whom governance is the more encompassing concept, since regimes are restricted to one specific issue/area and constitute more specialized arrangements. For Rosenau, the concept of governance without government is most conducive to the study of world politics, inasmuch as "centralized authority is conspicuously absent from world politics even though a modicum of order is normally present in the conduct of global life."¹⁸

¹⁵ K. Hossain, *Sustainable development: some critical thoughts in the light of the Rio Conference*, in: Ginther *et al.* (eds.), *supra* note 3, pp. 20-22.

¹⁶ Available at the ILA website (www.ila-hq.org) and also from the UN site (in English and French) as UN doc. A/57/329 of 31 August 2002. For a much more complete explanation, N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, Hague Academy of International Law, The Hague: 2008. The full text of the Declaration is included in the Appendix (pp. 251-259), and discussion of it takes place in pp. 171-207.

¹⁷ W. Lang, *Governance and sustainable development in Africa*, in: Ginther *et al.* (eds.), *supra* note 3, pp. 90-91. He refers to Young's article *International Environmental Governance: Building Institutions in an Anarchical Society*, in: IIASA, *Science and Sustainability – Selected Papers on IIASA's 20th Anniversary*, International Institute for Applied Systems Analysis Vienna: 1992, pp. 245-268. Lang's view differs.

¹⁸ J. Rosenau, *Governance, Order and Change in World Politics*, in: J. N. Rosenau, E. O. Czempiel (eds.), *Governance Without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge: 1992, p. 91.

Having quoted Rosenau, Lang went on to remind us that governance would (despite these diverging interpretations) comprise a broad spectrum of functions (in particular those related to standard setting and rule enforcement) which “go well beyond the narrow spectrum of environment”, since sustainable development functions are performed at various levels (local, regional, etc.) and aim at servicing society as a whole. Law, and international law, are among the *tools* to promote sustainable development, to the extent that they are based on a broad consensus at the domestic and international levels; and that the interaction of consensus building *at and between* these levels can be promoted by both law and international law insofar as they provide for efficient rule-making mechanisms and for reliable devices supervising the application of rules. In other words – good governance, one may conclude.

Erik Denters started his chapter by referring to the 1991 European Community Resolution on Human Rights, Democracy and Development,¹⁹ which stipulated four pre-requisites for achieving balanced and sustainable development in developing countries: respect for human rights, promotion of democracy, reduction of excessive military spending, and good governance,²⁰ and proceeded to clarify the meaning of the latter in the Resolution:

good governance specifically addresses the quality of government and covers the following general principles: sensible economic and social policies, democratic decision-making, adequate governmental transparency and financial accountability, creation of a market friendly environment for development, measures to combat corruption, as well as respect for the rule of law, human rights and freedom of expression.

But he proceeded to note that what the Resolution did *not* state was also of interest (no reference to UN efforts in the field of human rights or the establishment of democratic rule), and concluded that it certainly did not contribute to a strengthening of the UN System. In his concluding remarks, he argued that the EC should refrain from applying unilateral standards and procedures for development cooperation and, instead, rely primarily on standards and procedures to be adopted within the UN System. Furthermore, if such standards and procedures be non-existent or poorly defined, then the EC must contribute to their development in a global framework. In his words: “If the ‘rule of law’ is taken seriously, the inclusion of ‘good governance’ in developing cooperation policies must be based on mutually agreed standards and procedures.”²¹

Konrad Ginther, in his chapter *Development and Evolution of Constitutional Orders*,²² defines governance as “the management of the relations between government

¹⁹ E. Denters, *Good governance and development cooperation: towards a global approach*, in: Ginther et al. (eds.), pp. 308–321. The Resolution is included as Appendix II to the book (pp. 480–483).

²⁰ I cannot help but think *why on Earth only in developing countries?* It is not as if development was that sustainable in developed countries, as we recently saw... And who sold the military goods to developing countries, is one allowed to ask?

²¹ Denters, *supra* note 18, p. 321.

²² K. Ginther, *Constitutional orders and sustainable development: the Southern African experience and prospects*, in: K. Ginther et al. (eds.), *supra* note 3, pp. 150–164.

and its populace within a given constitutional order”; and good governance as “the opposite of poor and bad governance... Good governance is called for to de-legitimize and to overcome governmental and administrative malpractices and non-democratic structures withstanding the realization of sustainable development.”²³ He further referred to circumstances which will lead to a variation in the practical meaning of good governance, recalling that, in operational terms, the *realization* of good governance requires that key sectors of society and the people participate, as much as possible in cooperation with government, *inter alia* in *shaping* governance. So the *realization* of good governance calls for action and raises questions at the level of both national and international constitutional orders. Finally, he very appropriately reminded us of the fact that “the promotion of good governance and sustainable development raises the question of the legal *modus* of the interaction between society, law and state – questions which deserve to be dealt with in a broader theoretical framework, in particular with theories of social and legal evolution.”²⁴ Paving the road to the ILA Declaration...

3. THE ILA NEW DELHI DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW RELATING TO SUSTAINABLE DEVELOPMENT

It is important to note, first and foremost, the importance for, and connection, between this ILA Committee and a preceding one, the ILA Committee on Legal Aspects of a New Economic Order. The work of that committee also culminated in a Declaration – the ILA Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order (Seoul 1986), for which the contribution of a distinguished Polish member, ICJ Judge Manfred Lachs, is noted as substantial by the editors of our 1995 book.

The ILA Committee on Legal Aspects of Sustainable Development concluded its work in the 2002 New Delhi (General) Conference. Its fifth (and final) report to the Conference was entitled *Searching For The Contours Of International Law In The Field Of Sustainable Development*.²⁵ Good governance, as fundamental to sustainable development, was outlined in Section V – *The Contours Of An International Law Relating To Sustainable Development* – as follows:

Last but not least, the new international law of sustainable development also embraces good governance, including democratic accountability. Its exact contents may not be very clear in the discourse of politics and development studies. Yet, as a legal concept it has found a place in, among other legally relevant documents, the EU-ACP co-operation

²³ *Ibidem*.

²⁴ *Ibidem*, p. 160.

²⁵ Both the Report and the Resolution are available in their entirety at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> (last accessed 14 April 2013). Nico Schrijver was the Rapporteur, and Kamal Hossain the Chairperson.

treaties (1995 and 2000). The concept of good governance can well be instrumental in integrating the various dimensions of the concept of sustainable development, including global good governance in the sense of the participation of States in international law-making, conference diplomacy and decision-making within international institutions, participation of non-State entities in national and international decision-making, and good national governance. As to the latter, the 1997 UNDP policy document *Governance for Sustainable Development* defines the concept in the following terms: 'Good governance ensures that political, social and economic priorities are based on a broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.' The Cotonou Convention of June 2000 incorporates a further interesting definition: '(...) Good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.' This anti-corruption element is also emphasised in the IMF Guidelines on Good Governance (1997).²⁶

Good Governance is also mentioned in the Concluding Observations. Following ILA procedures, the Committee presented to the Conference a proposal for a Resolution (which upon its approval and adoption by the Conference Plenary became Resolution no. 3/2002), proclaiming the above-mentioned Declaration. Later in the year the Governments of Bangladesh and The Netherlands presented the same resolution to the UN Assembly, which approved it – so the Declaration is now not only an ILA, but also a UN Document.²⁷ The Principle of Good Governance is contained in paragraph number 6, and reads as follows:

6. The principle of good governance

6.1. The principle of good governance is essential to the progressive development and codification of international law relating to sustainable development. It commits States and international organizations:

- (a) to adopt democratic and transparent decision-making procedures and financial accountability;
- (b) to take effective measures to combat official or other corruption;
- (c) to respect the principle of due process in their procedures and to observe the rule of law and human rights; and
- (d) to implement a public procurement approach according to the WTO Code on Public Procurement.

6.2. Civil society and non-governmental organizations have a right to good governance by States and international organizations. Non-state actors should be subject to internal democratic governance and to effective accountability.

²⁶ Fifth (and final) Report, *Searching For The Contours Of International Law In The Field Of Sustainable Development*, undated, p. 11 (footnotes omitted) (hereinafter the "Final Report" or "Report").

²⁷ Cf., fn 16.

6.3. Good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development as well as the full participation of women in all levels of decision-making. Good governance also calls for corporate social responsibility and socially responsible investments as conditions for the existence of a global market aimed at a fair distribution of wealth among and within communities.

Nico Schrijver addressed the subject in his course at The Hague Academy of International Law in 2004.²⁸ He emphasizes that the ILA declared the principle of good governance to apply both to states and to other legal subjects (see point 6.2 of the Declaration), so Non-State actors should be subject to internal democratic governance and to effective accountability; as well as the fact that, in a relatively short period, the principle has become an element of international economic, environmental and development cooperation policy, recorded in substantive multilateral and regional treaties as well as in the internal and external policies of international organizations at the regional and global levels.

More recently, his book *Development without destruction: the UN and global resource management* contains an interesting chapter on the international architecture for environmental governance and global resource management.²⁹ And in *The United Nations of the Future*, the term “good governance” appears in 14 pages, which discuss different aspects of UN activities and challenges.³⁰

The ILA Committee on *Legal Aspects of Sustainable Development* was succeeded by another committee on the subject – *International Law on Sustainable Development* – which concluded its work in the 2012 ILA Sofia Conference. Its mandate included the “assessment of the legal status of principles and rules of international law in the field of sustainable development, with particular reference to the ILA New Delhi Principles (also published as UN Doc. A/57/329), as well as assessment of the practice of States and international organizations in this field.” Thus, it can be seen that the concept of good governance has not disappeared from the radar screen.

In line with this, the Final Report of the Committee focuses on the significance of international courts and tribunals (and, in some instances, quasi-judicial bodies) in giving effect to the principles contained in the New Delhi Declaration.³¹ For this purpose it summarizes the (relevant) jurisprudence, divided by court and tribunal. It then analyses the principles one-by-one, taking into consideration normative

²⁸ N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, Martinus Nijhoff, The Hague: 2008. He addresses Good Governance and the ILA Declaration in pp. 200-203.

²⁹ N. Schrijver, *Development without destruction: the UN and global resource management (with Forewords by J. Crawford and S. Panitchpakdi)*, Indiana University Press, Bloomington: 2010, pp. 114-157. The book was awarded the ACUNS prize in 2012.

³⁰ W. van Genutgen, K. Homan, N. Schrijver and P. de Waart, *The United Nations of the Future*, Kit Publishers, Amsterdam: 2006.

³¹ The Committee had Nico Schrijver as Chairperson and Ximena Fuentes and Duncan French as Rapporteurs. The Report is available at <www.ila-hq.org/en/committees>.

trends and developments that would not be apparent from a court/tribunal-specific analysis.

The Report notes that the International Tribunal on the Law of the Sea (ITLOS), in contrast to other international judicial and quasi-judicial bodies, possesses jurisdiction *ratione materiae* over issues of sustainable development (as part of its mandate as the central body in the International Law of the Sea Convention system for the settlement of disputes). ITLOS's *Seabed Mining Advisory Opinion*³² is considered to be the most relevant in terms of sustainable development³³ – because it was the first advisory opinion of the Seabed Disputes Chamber of ITLOS adopted unanimously (actually described as “historic”³⁴ from the perspective of international law on sustainable development³⁵). The Report considers that, despite the absence of an express reference to sustainable development,

it is far from hyperbolic to suggest that in this Advisory Opinion we see discussion of each of the seven principles identified by the International Law Association (ILA) in its 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development, including the sustainable use of natural resources, the precautionary approach, common but differentiated responsibilities, and the principle of good governance.³⁶

The specific analysis of the application of the principle of good governance by international courts and tribunals occupies two pages of the Report.³⁷ This analysis recalls the central place occupied by this principle in the ILA New Delhi Declaration, as a formative principle in the legal architecture of sustainable development.³⁸ It draws

³² ITLOS (Seabed Disputes Chamber), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in The Area*, Case No. 17: Advisory Opinion (1 February 2011) (“Advisory Opinion”).

³³ This reminds one of Judge Weeramantry's dissenting opinion in the ICJ *Gabcivovo* case, a mark for the sustainable development community, when he refers to sustainable development and to Judge Lauterpacht's remark, quoted by Judge Fitzmaurice, that a tribunal such as the ICJ may well have a duty to go beyond a bare decision, and the issues which consideration will suffice to motivate a decision, in the interest of the parties and of the general interest of the Law. Full Weeramantry's opinion available at <http://www.icj-cij.org/docket/files/97/7567.pdf> (last accessed 20 April 2013).

³⁴ D. Freestone, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 105 *American Journal of International Law* 755 (2011), p. 759.

³⁵ The opinion was sought by the International Seabed Authority Council on the prompting of Nauru and Tonga to ascertain the rights and duties of States, particularly developing countries, when they sponsor exploration of minerals on the deep seabed or the “Area” which is declared by Part XI of the UN Convention on the Law of the Sea to be part of the common heritage of humankind. Final Report, *supra* note 18, pp. 14–15.

³⁶ D. French, *From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber's 2011 Advisory Opinion*, 26 *International Journal of Marine and Coastal Law* 525 (2011), p. 526.

³⁷ Final Report, *supra* note 18, pp. 40–41.

³⁸ The principle of good governance has a central place in the New Delhi Declaration. As the Declaration states: “good governance is essential to the progressive development and codification of international law

attention to the fact that the Opinion uses the language of good governance, and in two different, but equally important, senses (first, when the Chamber discusses its own role in the advisory opinion, and implicitly more widely in dispute settlement.)³⁹ The Report then argues that the Chamber relied upon the tenets of good governance when considering the measures necessary for a sponsoring State to undertake to accomplish *domestically* its international obligations of diligence,⁴⁰ but was keen to state it will not intervene in legitimate areas of state discretion. And finally, the Report considers it worthwhile to quote “general considerations that a sponsoring State may find useful”, and which are worth quoting here in full:

...the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole... Reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring State.⁴¹

As stated above, the Chamber seemed keen to stress it will not interfere in legitimate areas of State discretion,⁴² and the Final Report notes that this seems very sensible in tone, if slightly abstract in nature,⁴³ but concludes this point by saying

relating to sustainable development.” Aspects of this include democratic and transparent decision-making (including the full participation of all major groups), the observation of due process and respect for human rights, and greater moves towards corporate social and investment responsibility. In and of themselves, each of these themes has been the subject of substantive debate over many years, with progress being seen in numerous ways – though undoubtedly this must be set against the general trend of increased marginalisation of many of the issues raised by sustainable development.

³⁹ The Chamber noted that “[t]he functions of the Chamber (...) are relevant for the good governance of the Area”, going on to point out “by answering the questions it will assist the Council in the performance of its activities and contribute to the implementation of the Convention’s regime.” Although a *sine qua non*, this aspect of good governance of natural resource management is easily forgotten, namely the role of judicial bodies to utilise general principles and the rule of law both to resolve disputes (i.e. its contentious jurisdiction) and, as in the present Advisory Opinion, to assist political bodies in the accomplishment of their duties by acting as an “independent and impartial body” (Advisory Opinion, para. 26).

⁴⁰ A central point was whether a State could achieve its obligation to regulate contractors purely through the means of private law and contractual relations. The Chamber ruled that it could not, relying upon good governance justifications for the enactment of law, over and above mere contract law, and then outlining (within the confines of its judicial role) some of the general principles that should guide the content of the law and regulations. As it says, “[t]he ‘contract approach’ would, moreover, lack transparency. It will be difficult to verify, through publicly available measures, that the sponsoring State had met its obligations.” On the question of the content of such binding rules, the Chamber also gives some direction to sponsoring States as to the content of the measures which would “enable it to discharge its responsibilities” (Advisory Opinion, para. 227).

⁴¹ *Ibidem*, para. 230.

⁴² “Policy choices on such matters must be made by the sponsoring State” – to do otherwise would run the risk of using the Chamber as a “[j]udicial bod[y] [to] perform functions that are not in keeping with...[its] judicial character” (Advisory Opinion, para. 227).

⁴³ Quoting from the Report: “Undoubtedly, the special nature of the Area as common heritage of humankind has significantly influenced the Chamber in this regard. Thus, it might be thought that it has

that, nevertheless, one can see similarities with the *dicta* of the International Court of Justice in the *Pulp Mills* case, in which it spoke of due diligence being “an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement.”⁴⁴ These are also core elements of any general understanding of the principle of good governance. Thus, to the extent that the Chamber’s references to reasonableness, non-arbitrariness, and good faith have a generic relevance, this aspect of the Advisory Opinion can be seen to have broader appeal and supports the judicial endorsement of good governance more widely.⁴⁵ For this reason, the Final Report finds that, even if progress has been perhaps much less conspicuous in the judicial endorsement of the notion of good governance as a central theme of sustainable development, and even though judicial authority is sparse, it is not entirely absent.

4. THE EARTH SYSTEM GOVERNANCE PROJECT – FROM NOW ON, ESG...

ESG defines itself as a global research alliance, the largest social science research network in the area of governance and global environmental change – which takes up the challenge of exploring political (and we should add, legal) solutions and novel, more effective, governance mechanisms to cope with the on-going climate change and its consequences. Sustainable development is its normative context, as earth system governance is not only a question of institutional effectiveness, but also of political legitimacy and social justice. Once more resorting to established sayings, since *politics creates and law consolidates*, I find complementarity in the work of the ILA committees on Sustainable Development – especially since the new Committee (which succeeds the *International Law on Sustainable Development*) will discuss the *Role of International Law in Sustainable Natural Resource Management for Development*.

The ESG project was born in 2008⁴⁶ as one of four core projects under the International Human Dimensions Programme on Global Environmental Change (“IHDP”), which in 1996 succeeded the original Human Dimensions Programme in the United Nations University, Bonn Campus. Oran Young, then Chair of the IHDP

little general relevance to the due diligence obligation, for instance, of States in regulating transboundary hazards. Nevertheless, one can see similarities with the *dicta* of the International Court of Justice in the *Pulp Mills* case in which it spoke of due diligence being ‘an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement.’ Final Report, *supra* note 25m, p. 41 quoting the ICJ from *Case concerning Pulp Mills* (2010), para. 197.

⁴⁴ *Case concerning Pulp Mills* (2010), para. 197.

⁴⁵ Final Report, *supra* note 25, p. 41.

⁴⁶ See on this subject, F. Bierman et al. (eds.), *Earth System Governance: People, Places and the Planet. Science and Implementation Plan of the Earth System Governance Project*. ESG Project 1, IHDP Report 20, Bonn: IHDP: The Earth System Governance Project. Also available at the website: <http://www.earthsystemgovernance.org/publications/science-plan> (last accessed 16 April 2013).

Scientific Committee, described this evolution in an article written for a special edition of IHDP UPDATE.⁴⁷

The Institutional Dimensions of Global Environmental Change (“IDGEC”), one of the IHDP’s four original core projects, began (formally) in 1998, and completed its cycle in 2007. Much as in the case of ILA Committees, however, this did not mean the end of IHDP’s interest in the role of institutions (seen both as sources/causes of problems arising from human-environment relations, as well as mechanisms for solving or alleviating problems with respect thereto).

IDGEC drew IHDP’s attention to the importance of the human-dimensions community as cross-cutting themes, by raising awareness that institutions play significant roles in many issue areas, but do not account for all of the variance in human-environment relations in any one area. Young gives, *inter alia*, the example of severe depletions of fish stocks, explaining that if one wants to understand the issue, the study of institutions is an important part of, but never quite the whole, story. For instance, it is also about the demands of growing populations for protein and the development of technologies that increase fishing power.

Applying this to the rise in greenhouse gases emissions (“GHG”), IDGEC realized that one was constantly “thinking about ways to tease out the signal of the causal role of institutions from the noise of other driving forces and finding oneself wrestling with problems featuring complex causality, in the sense of situations in which a number of driving forces interact with one another to produce the outcomes one seeks to avoid or promote.”⁴⁸ So, within the work of IDGEC, it became increasingly clear that coming to terms with complex causality would be a high priority in analyzing the institutional dimensions of large scale environmental changes; that many familiar empirical (especially statistical) methods are somewhat limited in their ability to address such matters; and that people dealing with other issues within the same context (global change research) share many concerns. As a result, the ESG focus is *not* limited to standard institutional concerns, like property rights, regulatory instruments, and voting systems, but also draws attention to, *inter alia*, the role of alternative-knowledge systems in shaping human-environment relations, and the extent to which cultural considerations play a role in the design and implementation of governance systems.

ESG identified the carbon cycle, food systems, and water systems as attractive areas in which to explore, empirically, its interest in matters of architecture, agency, adaptation, allocation, and accountability, and it would be difficult to disagree with Young’s conclusion that “recognizing the potential of this convergence (coupled with a modest push from a number of key players), could carry us some way toward fulfilling our common goal of joining together the intellectual capital of the natural and social

⁴⁷ O. Young, *Institutions, Governance, and the Evolution of IHDP*, 3 IHDP Update7 (2009).

⁴⁸ *Ibidem*. Not legal but scientific language, which reminded me, when I first read the article, of something we teach early to law students about the difference of the principles of causality (in natural sciences) and imputability (in legal sciences), and their consequences. Could this be at the source of misunderstanding and non-appreciation between these communities?

sciences, to navigate the sustainability transition on a global scale.”⁴⁹ Young’s words bring to one’s mind the discussions on the ILA New Delhi Declaration and the choice of subject for the new ILA Committee mentioned at the end of the first paragraph of this section.

So ESG research strategy is organized around five analytical problems, generally known as “the five A’s”: the overall *Architecture* of earth system governance; of *Agency* beyond the state and of the state; of the *Adaptiveness* of governance mechanisms and processes and of their *Accountability* and legitimacy; and of *Allocation & Access* (taken together as one *A*) in earth system governance. These problems were identified and are grounded in an analysis of the current state of research, recent theoretical developments, and societal demands.

ESG is, as already said, by nature inter- and trans-disciplinary. The research strategy emphasizes four cross-cutting themes – all of them crucial not only for the study of each of the 5 A’s, but also for the integrated understanding of earth system governance, i.e. the roles of power, knowledge, norms, and scale. Seen in this context, Principle 7 (and its importance) of the ILA New Delhi Declaration – The Principle of Integration and Interrelationship, in Particular in Relation to Human Rights and Social, Economic and Environmental Objectives – immediately comes to mind.

ESG is *not* a random initiative. It follows a Science Plan,⁵⁰ and is organized as a network, both global and dynamic, reflecting the interdisciplinary, international and multi-scale challenge of developing effective systems of governance to ensure sustainable development within the confines of planetary boundaries. It is one of the new forms society is developing to deal with new problems – which, as seen in previous sections, is fundamental to earth governance for sustainable development.

ESG is chaired by Frank Biermann (University of Amsterdam), with Ruben Zondervan as its Executive Director. It operates under a Scientific Steering Committee (SSC), the role of which is to guide the implementation of the Science Plan; but the Lead Faculty (defined as a group of scientists of high international repute from all areas of knowledge, who share the responsibility for developing research on particular analytical problems, crosscutting themes, or flagship activities) and Research or Senior Research Fellows (early to mid-level career scientists, from different areas of knowledge, who seek to link their own projects with the broader questions involved) are at its core, which results in a very pluralistic bottom-up approach that facilitates research, debate, and dissemination of information, very much in line with the *public participation* requisite for good governance. Until 2012 it was based in UNU Bonn, and since then it has been based in Lund University (Sweden). The support of these (and other, especially the ISSC and ICSU) institutions has been crucial to the project’s success and survival.

⁴⁹ Here Young refers also to an article by W.V. Reid, C. Brechignac & Y.T. Lee, *Earth system research priorities*, 325 Science 245 (2009).

⁵⁰ Available in English, Japanese and Spanish at www.earthsystemgovernance.org.

In 2009 ESG promoted its first Conference, the Amsterdam Conference on Earth System Governance (*People, Places and the Planet*); in 2011 it held its Second Conference, the Colorado Conference on Earth System Governance (*Crossing Boundaries and Building Bridges*); in 2012 the Lund Conference on Earth System Governance (*Towards a Just and Legitimate Earth System Governance: addressing inequalities*); and in 2013 the Earth System Governance Tokyo Conference (*Complex Architecture, Multiple Agents*). In all of these conferences, and in many other not directly promoted but endorsed by ESG in different continents, the number of abstracts submitted exceeded the conference's physical capacities, thus not all could be accepted and the double-blind peer review system was adopted for selection. A visit to the ESG website will allow for an interesting perspective, both in terms of geographical participation (although participation by Latin Americans and Africans needs to be further encouraged in the search for a truly international perspective – and this is by no means a problem exclusive to ESG) and multi-disciplinarity.

The ESG website is also interesting as a source for all sorts of academic papers and events pertaining to the subject. Furthermore, ESG's Scientific Steering Committee has produced a series of joint papers (often jointly with Lead Faculty), and special mention is made of those produced for the Planet under Pressure London 2012 and UN 2012 Conference Rio+20, one of which, *Navigating the Anthropocene*, was published in *Science*.⁵¹

As a participant in both in the ILA Committees and ESG, it is interesting to note that both have yielded substantive intellectual production, but the way in which this production is disseminated reflects the difference in circumstances – time, technology and politics wise. ESG seems to be going “viral” on the web, while the ILA Committees remain more traditional.⁵² I certainly feel privileged to participate in both, and see “with my own eyes” how their work and different perspectives cross-fertilize.

To take just one example, dealing with the consequences of rising sea levels will call for solutions – legal, political and scientific – to the problem of displaced populations. Political refugees have been a problem for many centuries, while economic refugees became an important problem in the twentieth century. Given the growth in inequalities, in the twenty-first century the world is dealing/will have to deal with unthinkable numbers of environmental catastrophes and refugees – and this when the stress upon earth's physical resources and production capacity has done nothing but increase (think droughts, floods, earthquakes, fires, tsunamis etc.). People are more aware of their rights, yet suffer the consequences of economic crisis and injustice (which, thanks to technology, they are reminded of daily). The call for “greener” economies, and for developing a culture of solidarity and cooperation, is more urgent now than ever before.

⁵¹ No small feat for a Project originating in Social Sciences. See F. Biermann *et al.*, *Navigating the Anthropocene: Improving Earth System Governance*, 335 *Science* 1306 (2012).

⁵² The ILA was founded in 1873.

The traditional prescription is environmental education and technological development. But technology can be used for both good and bad – and the recent news that the US (leader in research and innovation and the country where promising research and investment in alternative “green” energy sources takes place) has developed new technologies (such as *fracking*, which by the way one hears could lead to more earthquakes and tsunamis) which would allow for cheaper exploitation of oil, putting governments under increased pressure to keep betting on the surpassed and unsustainable model of oil-based energy, is anything but encouraging.

5. WHERE ARE WE HEADING TO? CONCLUDING THOUGHTS...

The world is changing faster than ever before. The impact of technological development upon rates of growth,⁵³ production (resource-based), and consumption patterns seriously affects the planet’s prospects of sustainability. The effects of climate change, despite all attempts at discrediting and disqualifying the work of the intergovernmental panel on the subject, are being felt on a daily basis (and with a geographically equitable distribution), giving rise to new problems to be faced in all areas of science. In the meantime, not all governments (or should we say, most of them?) seem to be convinced enough to face the challenge of reorienting development goals and creating governance mechanisms conducive thereto (yet, one hopes...). To this mix should be added the fact that it still remains national governments that decide on the priorities of international institutions.

We need to find ways to bring together “hard” and “social” sciences (and convince researchers of the advantage of joint thinking and writing); we need to democratize access to information resulting from this cooperation (and this would include researchers/writers resorting to language which can be understood by non-researchers/scientists); we need to educate people at all levels of government and in international organizations, as well as society as a whole, on what sustainable development is all about (bring to life Agenda 21?), what it calls for, and on the urgency of their action; we need to foster civil society participation at the national and international levels of decision-making (and yes, this means empowering stakeholders to put pressure upon them).

But we also need to make people aware that there *is* hope, and it’s closer than one might think! So much is happening, in very different places and circumstances, that points to “yes, it is possible, (...) if we just cooperate.” That’s where the advent of *Future Earth*,⁵⁴

⁵³ In terms of population – fewer of us die, and we live longer; of availability of different products; consumption; and exploration of natural resources so far unattainable – and their consumption.

⁵⁴ Which defines itself as “a new 10-year international research initiative that will develop the knowledge for responding effectively to the risks and opportunities of global environmental change and for supporting transformation towards global sustainability in the coming decades. Future Earth will mobilize thousands of scientists while strengthening partnerships with policy-makers and other stakeholders to provide sustainability options and solutions in the wake of Rio+20”; see <<http://www.icsu.org/future-earth>> (last accessed 18 April 2013).

establishing bridges, integrating knowledge and communities, science and financing, national and international institutions and stakeholders, continents and cultures, can make a difference. New forms of governance for new needs and circumstances will be fundamental if we want to attain the dream of achieving, preserving, and improving the values we've been pursuing for so many centuries, and at such great cost.

International organizations must become "more active, less glamorous", says Jan Klabbers;⁵⁵ and Crawford asserts that "reports on the death of sovereignty are much exaggerated" (because not only does the state remain free to exercise it, but the protection of its interests practically requires it), and states may (and do) choose to enter into a variety of political relations which involve associations with other states.⁵⁶ This is how we will face what Bulkeley and Newell define as the challenge of governing climate change, "which complexity stems of the multiple scales of political decision-making involved; the fragmented and blurred roles of state and non-state actors; and the deeply embedded nature of many of the processes that lead to emissions of GHG in everyday processes of production and consumption."⁵⁷

Cooperate and survive – that should be the name of the game (...) and remember that good governance is essential to the survival of democracy (or the pursuit of global democracy?) in a world, the sustainability of which we all strive for. And in which the construction/organization function of Law (national and international) can and should be used to its fullest and best.

⁵⁵ J. Klabbers, *International Institutions*, in: J. Crawford and M. Koskenniemi, *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge: 2012, pp. 240-241.

⁵⁶ J. Crawford, *Sovereignty as a legal value*, in: Crawford & Koskenniemi, *supra* note 54, p. 132.

⁵⁷ H. Bulkeley, P. Newell, *Governing Climate Change*, Routledge, London: 2010, pp. 1-2.

Alice de Jonge*

WHAT ARE THE PRINCIPLES OF INTERNATIONAL LAW APPLICABLE TO THE RESOLUTION OF SOVEREIGN DEBT CRISES?

Abstract

This article explores the accepted and emerging international law principles applicable to the resolution of sovereign debt crises. The need for agreement on a set of guiding principles and mechanisms for resolving such crises is highlighted. The history of debt moratoriums, exchange controls and bailouts as instruments for dealing with sovereign debt crises is first outlined. The article then turns to an examination of alternatives to these policy options. Both market based and statutory approaches to sovereign debt restructuring are examined. The article ends with recommendations on a set of guiding principles for choosing between the various policy options available when a sovereign debt crisis is threatened.

INTRODUCTION

Sovereign insolvency has early precedents.¹ Philip II of Spain had to declare moratoriums on the repayment of Spanish debt in 1557, 1560, 1575 and 1596 – largely due to the rising costs of various military enterprises.² Many other sovereigns have defaulted on payment of international debts since that time. On each occasion, almost

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¹ It can be argued that technically speaking, a sovereign cannot be declared bankrupt or insolvent. There are no insolvency laws which apply to a (state) sovereign. However, the International Law Association called its study group on the problems of sovereign financial distress the “Sovereign Insolvency Study Group” and the term “sovereign insolvency” is used here to refer to the situation where a sovereign is in a distressed or insolvent financial condition, as opposed to one of a legal nature.

² For discussion and detail see M. Drelichman & H.-J. Voth, *Lending to the Borrower from Hell: Debt and Default in the Age of Philip II*, ebook, available at <http://econ.as.nyu.edu/docs/IO/12549/Voth20paper.pdf> (last accessed 12 February 2013). See also M. Drelichman and H.-J. Voth, *The sustainable debts of Philip II: A reconstruction of Spain's fiscal position, 1560-1598*, http://www.crei.cat/people/voth/voth_sustainabledebts.pdf (last accessed 12 February 2013).

without fail, extensive debate over the legal and economic aspects of sovereign debt crises have followed, just as they have followed recent financial crises in Iceland and Greece. Given the likelihood that such crises, and such debates, will continue to occur in the future, there is an evident need for agreement to be reached on a coherent set of guiding principles and procedures to facilitate the resolution of such crises.

In its 2010 report to the International Law Association's Hague Conference, the ILA Sovereign Insolvency Study Group identified four broad policy pathways forward when it comes to handling sovereign debt crises:

- First, there is the option of doing nothing, so that sovereign debt defaults or financial difficulties continue to be dealt with exclusively by voluntary negotiation and agreement between creditors and debtor state; as has happened for the last one thousand years at least.
- Second, a minimal layer of legal rules to govern the conduct of the insolvency could be created in the form of a limited provision for creditor voting on a debt restructuring plan.
- Third, a more comprehensive layer of legal rules could be put into place which would reflect relevant aspects of private sector insolvency reorganisation regimes. The rules would not have any mandatory application and in many cases would not be used, just as occurs in the corporate arena when financial difficulties are dealt with by way of private agreement ("workouts"). The sovereign insolvency reorganisation regime would provide a background against which debtor-creditor negotiations would take place.
- Fourth, a different style of insolvency regime could be designed which would emphasise stronger creditor rights and in which debtor protections would not be the kind of feature they are in domestic insolvency regimes. Again, the legal regime would most be there as a background against which negotiations take place.³

The aim of this article is to explore the (international law) principles which should be taken into account when choosing amongst these policy options, and in reaching agreement on a global mechanism for resolving sovereign debt crises. The principles explored are those of general international law. In asking what international law has to say about the way in which sovereign debt crises should be handled I turn to the various sources of international law as recognised in article 38 of the Statute of the International Court of Justice.⁴

Part 1 of this article examines existing treaties and other international instruments in order to establish whether or not they are based on a common set of principles relevant to the handling of sovereign debt crises. Part 2 then turns to examine international custom (state practice and *opinio juris*) related to sovereign debt crises. Such an examination

³ Sovereign Insolvency Study Group (Ph. Wood Q.C., Chair), *State insolvency: options for the way forward*, International Law Association, The Hague Conference (2010), pp. 5-6.

⁴ Statute of the International Court of Justice, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

provides an insight into the history of the way in which such crises have been handled – an insight which is particularly important given the scarcity of internationally accepted codifications governing this area of international relations. It also allows for a more in-depth discussion of the published scholarship on the topic of how sovereign debt crises should be dealt with.

1. TREATY-BASED RULES AND PRINCIPLES RELEVANT TO THE RESOLUTION OF SOVEREIGN DEBT CRISES.

In this part I argue that with globalization and increasing interdependence among countries, the need for multilateral “rules of the game” in various dimensions of economic relations has become an increasing preoccupation of international treaties and other instruments. An examination of these instruments allows me to isolate the following principles as universally agreed upon grounds upon which a future regime for managing sovereign debt crises might be built:

1. respect for the sovereign equality of all nations and good faith cooperation in the resolution of such crises;
2. recognition that all states share responsibility for ensuring sovereign debt crises are resolved in a manner which best protects the human rights of all those affected;
3. recognition that such shared responsibility may impose common but differentiated obligations on states depending upon the particular circumstance of each sovereign debt crisis.

The United Nations (UN) Charter provides a good starting point. In particular, the Charter imposes an obligation on all members to cooperate in good faith in finding solutions to economic and related problems. Art. 55 provides:

With a view to the creation of conditions of stability and well-being which are necessary for the peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(...)

higher standards of living, full employment, and conditions of economic and social progress and development;

solutions of international economic, social, health and related problems.

Issues of economic sovereignty rose to prominence during General Assembly (GA) debates of the New Economic Order in the mid 1970s. In 1974 the GA voted on the exercise of sovereignty over economic activities in the *Charter of Economic Rights and Duties of States* (the ERD Charter).⁵ The ERD Charter was passed by 120 votes in

⁵ General Assembly Resolution 3281 (XXIX) A/RES/29/3281 (12 December 1974) 29th Sess., Agenda item 48.

favour, 6 against (Belgium, Denmark, GDR, Luxembourg, the UK and the USA) and 10 abstentions. The ERD Charter asserts that:

Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without any outside interference, coercion or threat in any form whatsoever.⁶
Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.⁷

The ERD Charter further elaborates on the sovereign equality of states in the management of financial and other resources and in the resolving of financial and monetary problems (most notably in Art. 2, 8, 10, 17 and 32).

Art. 11 of the ERD Charter refers to the duty of all States to cooperate in adapting international organisations to the changing needs of international economic co-operation. Art. 34 then seeks to ensure that the ERD Charter is included on the GA agenda at every 5th session for discussion, an undertaking which was honoured at every 5th session for the next 30 years.⁸ In June 2004, the Secretary General recommended, in a Report to the Economic and Social Council, that the GA and the Security Council should consider discontinuance of the quinquennial review of the ERC Charter's implementation.⁹ The recommendation was made on the basis that consideration of the ERD Charter could be deemed implicit in the overall framework of implementing the outcomes of major UN conferences and summits.¹⁰ In particular, it was suggested that the biennial high-level dialogue established to monitor the implementation of the Monterrey Consensus of the International Conference on Financing for Development was more than adequate as a mechanism for dealing with issues raised within and by the ERD Charter. Since that date, references to the Charter have disappeared from GA agendas.¹¹

The legal status of the ERD Charter is highly disputed, with at least some parts of it considered by many to have been essentially discredited as forming part of international customary law.¹² Art. 2 of the ERD Charter has been a particularly notable target

⁶ *Ibidem*, Art. 1.

⁷ *Ibidem*, Art. 2(1).

⁸ See e.g. A/RES/39/163, 17 December 1984, Meeting No 103, Charter of Economic Rights and Duties of States.

⁹ Implementation of the Charter of Economic Rights and Duties of States: Report of the Secretary-General, UN Doc A/59/99 – E/2004/83, General Assembly Economic and Social Council, GA 59th Sess., Item 12 of the preliminary list A/59/50 and Corr. 1 and 2 (18 June 2004).

¹⁰ *Ibidem*, para. 3.

¹¹ Based on a website search conducted in November 2012. *But see* Towards a New International Economic Order, GA Res A/Res/64/209 (on the report of the Second Committee (A/64/422/Add.1), 64th Sess., item 55(a) (12 March 2010), indicating that the concerns of the ERD Charter still come before the GA on a regular basis. See also Unilateral economic measures as a means of political and economic coercion against developing countries, GA Res A/Res/64/189 (on the report of the Second Committee (A/64/418/Add. 1), 64 Sess. (9 February 2010).

¹² See e.g. C.N. Brower & J.B. Tepe Jr, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?* 9(2) International Lawyer 295 (1975).

of attack.¹³ It purports to recognise a sovereign right of states to expropriate foreign property, subject only to the payment of compensation in accordance with the laws of the expropriating state. In *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libya*,¹⁴ the tribunal found that, at least on the issue of compensation standards, the 1962 *Declaration on Permanent Sovereignty over Natural Resources* (Resolution 1803 (XVII))¹⁵ was to be preferred as a source of customary international law. Resolution 1803 (XVII) had received consensus not just from a majority of states, but from a majority of states belonging to relevant representative groups, including both capital exporting and capital importing nations. In the view of the tribunal, this was enough to indicate “without the slightest doubt universal recognition of the rules therein incorporated.”¹⁶ In accordance with these rules, the tribunal applied an international standard, rather than a national standard, for the payment of compensation in cases of expropriation, and held that the appropriate remedy was *restitutio in integrum*.¹⁷

As the tribunal noted in the *Texaco* arbitration, when the Group of 77 first submitted its draft ERD Charter to the GA, the GA was invited to adopt the ERD Charter as “a first measure of codification and progressive development” within the field of international law of development. However, because of the opposition of several states, this description was deleted from the text submitted to the vote of the assembly, thereby further detracting from its potential value as a source of customary international law.¹⁸

Yet the ERD Charter also contains principles that do command a wide degree of adherence. As the Economic and Social Council noted in 2004, the Charter was initiated with a view to improving the functioning of the global economic system and, to this end, seeks to codify a number of principles, rules and norms, relating to international economic relations.¹⁹ Two principles are particularly important in this context – first, the principle of respect for the sovereign equality of all nations, including substantive equality in treaty relations. Second, the 1974 *Declaration on the Establishment of a New International Economic Order*, expressly calls upon the world community to recognise the need for “[p]referential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible.”²⁰ The 1974 Declaration also recognises the idea that obligations can be “common but differentiated” when it calls for “[t]he strengthening, through individual

¹³ See e.g. B.H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth* 75(3) *American Journal of International Law* 437 (1981).

¹⁴ 17 ILM 1 (1978).

¹⁵ GA Res 1803 (XVII), 17th Sess., (14 December 1962), adopted 87 votes to 2, with 12 abstentions.

¹⁶ 20 ILM 1 (1981), p. 87. Also published at 53 ILR 389 *et seq.*

¹⁷ *Ibidem*.

¹⁸ 20 ILM 1 (1981), p. 88.

¹⁹ GA Economic and Social Council, A/59/99-E/2004/83 (18 June 2004), *supra* note 9, para. 2.

²⁰ Declaration on the Establishment of a New International Economic Order, Sixth Special session, GA Doc A/RES/S-6/3201 (1 May 1974), para. 4(n).

and collective actions, of mutual economic, trade financial and technical cooperation among the developing countries, mainly on a preferential basis.”²¹

The principle of common but differentiated obligations is, perhaps, most well known in the area of international environmental law.²² The idea that developed and developing countries have different roles to play in the amelioration of environmental problems was formalized in principle 7 of the 1992 Rio Declaration on Environment and Development.²³ Principle 7 recognises that “[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.”²⁴ It then continues: “[t]he developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”²⁵

The principle of common but differentiated responsibilities was also incorporated into the UN Framework Convention on Climate Change.²⁶ Its relevance to sovereign debt crises lies in the answer it provides to those who insist that debts must be paid, regardless of the hardships thereby imposed on the debtor state and its citizens. The principle of common but differentiated responsibilities says that all parties involved, both creditors and debtor, have responsibilities in ensuring that the crisis is resolved in a manner that is best able to protect human rights and preserve a decent standard of living amongst those affected by the crisis.

Nor can it be argued that the principle of common but differentiated responsibilities, while relevant to international efforts aimed at combating climate change, is not relevant to purely economic relations or to arms length economic transactions. For the principle

²¹ *Ibidem*, para. 4(s). The NIEO sought to put into place projects such as the 1976 Integrated Programme for Commodities and its companion Common Fund for Commodities established in 1980 (see G. Corea, *Taming Commodity Markets – The Integrated Programme and the Common Fund*, UNCTAD (1992)); and the Industrial Development Cooperation Agreement adopted by the UN Industrial Development Organization in 1980: see Third General Conference of the United Nations Industrial Development Organization, Thirty-fifth session, Industrial development co-operation, GA Doc A/RES/35/66/.

²² Ph. Sands, *Principles of International Environmental Law* (2nd ed.), Cambridge University Press, New York: 2003, p. 231. See also T. Stephens, *Multiple International Courts and the ‘Fragmentation’ of International Environmental Law*, 25 Australian Yearbook of International Law 227 (2007), pp. 236–42.

²³ United Nations Declaration on Environment and Development (13 June 1992) 31 ILM 874, reproduced in P.W. Birnie & A. Boyle (eds.), *Basic Documents on International Law and the Environment*, Oxford University Press, Clarendon: 1995, pp. 9–14.

²⁴ *Ibidem*.

²⁵ *Ibidem*.

²⁶ United Nations Framework Convention on Climate Change (9 May 1992) 1771 UNTS 165. This treaty, which seeks the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” (Art. 2). Art. 3(1) provides that the Parties will protect the climate system “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”

is one which is increasingly found in the economic area, most notably in international trade conventions. Examples include:

- Modification of Article XVIII of the General Agreement on Tariffs and Trade (the GATT)²⁷ in 1954-55 to include Article XVIII-B which allowed developing countries to use quantitative restrictions for balance of payments purposes.
- Establishment of the United Nations Conference on Trade and Development (UNCTAD) in Geneva, 1964,²⁸ and the creation of the Committee on Trade and Development in the GATT.
- Addition of Part IV of Trade and Development in GATT in 1965. Part IV expressly recognises both the link between trade and development and (in Article XXIV) the fact that “there is a wide gap between standards of living in less-developed countries.” Article XXIV then goes on to provide, *inter-alia*, that:

Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favourable and accepted conditions of access to world markets for these products (...)

The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.

- Adoption of the Enabling Clause in 1979 at the end of the Tokyo Round, signifying political recognition by developed countries that special and differential treatment is an essential part of attracting and retaining developing countries within the system.²⁹
- The Agreement on the Global System of Trade Preferences among Developing Countries, which expressly recognises the principle that least developed countries are not required to make concessions on a reciprocal basis.³⁰
- Similarly, the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) refers, in Art. 66, to “the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base”, and allows such Member countries additional time to implement

²⁷ Article XVIII of GATT expressly recognises that it may be necessary for states “in the early stages of development” to take protective or other measures affecting imports “in order to implement programmes and policies of economic development.”

²⁸ See further <http://www.unctad.org/>.

²⁹ Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries. Decision of 28 November 1979 (L/4903), available at the WTO official website http://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf.

³⁰ Art. 3.f of the Agreement on the Global System of Trade Preferences among Developing Countries, Belgrade, opened for signature 13 April 1988, reprinted in 27 International Legal Materials (1988), p. 1204 (entered into force in 1989, now with 44 ratifications): see History of UNCTAD at <http://www.unctad.org/>.

the provisions of the TRIPs Agreement.³¹ The needs of least developing and least developed WTO Members are also recognised in Art. 67, which provides for developed countries to provide various forms of technical assistance to their less fortunate counterparts.³²

As regards the particular problem of sovereign debt, the inception of the Heavily Indebted Poor Countries (HIPC) Initiative in 1996 and the ensuing reforms in the policy and practice of official development financing, about which more shall be said below, marked a turning point in international economic relations.³³ The HIPC Initiative and its siblings, the Enhanced HIPC Initiative and the Multilateral Debt Relief Initiative (MDRI) led to unprecedented cancellations of debt stock for low-income countries and provoked widespread public interest in the issues of debt and development. The HIPC and MDRI initiatives both demonstrate how and why the principle of common but differentiated obligations is relevant to sovereign debt situations.

The HIPC Initiatives and the MDRI both recognise that the World's two major sovereign credit suppliers, the World Bank and the International Monetary Fund (IMF), have certain obligations built into their Articles of Agreement to support member nations burdened by debt. The Articles of Agreement of the World Bank and the IMF also provide guidance as to how creditor nations might approach their relationship with debtor nations facing fiscal crises – that is, with flexibility and respect for the sovereign right of debtor nations to control the making and implementation of their own economic policies within the boundaries of international law. Article IV, Section 4 of the Bank's Articles of Agreement provides that a member state suffering “from acute exchange stringency” may apply to the Bank for a relaxation of the conditions of payment. If the Bank is satisfied that such relaxation is justified, it may, *inter alia*, “... make arrangements with the member concerned to accept service payments on the loan in the member's currency for periods not to exceed three years upon appropriate terms.”³⁴

In a situation where a member state defaults on one or more loans made, participated in, or guaranteed by the Bank, Art. IV Section 7 provides that the Bank “shall make such arrangements as may be feasible to adjust the obligations under the loans, including

³¹ GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, Geneva: 1994, Annex IC, pp. 365-403.

³² *Ibidem*. The 1994 International Tropical Timber Agreement provides another example of differential treatment, but one where states are not differentiated according to their level of economic development. Instead, votes for producer countries are allocated partly according to their respective shares of the world's total tropical forest resources: International Tropical Timber Agreement, Geneva, 26 January 1994, reprinted in 33 ILM 1014 (1994).

³³ For details see IMF Factsheet, *Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative* (September 2011), available at <http://www.imf.org/external/np/exr/facts/hipc.htm>; *The Enhanced HIPC Initiative – Overview*, The World Bank, available at <http://web.worldbank.org>; and IMF Factsheet, *The Multilateral Debt Relief Initiative* (September 2011), available at <http://www.imf.org/external/np/exr/facts/mdri.htm>. For discussion see C. Tan, *Life, debt and human rights: Contextualising the international regime for sovereign debt relief*, University of Warwick School of Law, Legal Studies Research Paper No. 2011-09.

³⁴ IBRD Articles of Agreement, Article IV, Section 4(c)(i) (as amended at 16 February 1989).

arrangements under or analogous to those provided in Section 4(c) of this Article.” Section 4(c) of Art. IV specifically provides that:

If a member suffers from an acute stringency, so that the service of any loan contracted by the member or guaranteed by it or one of its agencies cannot be provided in the stipulated manner, the member concerned may apply to the Bank for a relaxation of the conditions of payment. If the Bank is satisfied that some relaxation is in the interests of the particular member and of the operations of the Bank and of its members as a whole, it may take action under either, or both, of the following paragraphs with respect to the whole, or part, of the annual service:

(i) The Bank may, in its discretion, make arrangements with the member concerned to accept service payments on the loan in the member's currency for periods not to exceed three years upon appropriate terms regarding the use of such currency and the maintenance of its foreign exchange value; and for the purchase of such currency on appropriate terms.

(ii) The Bank may modify the terms of amortization or extend the life of the loan, or both.

The IMF Articles of Agreement is one of the most widely subscribed international conventions existing today.³⁵ Art. XV.2 of the GATT expressly recognises that it is the IMF which is the primary international organisation responsible for investigating, providing advice and making determinations regarding the resolution of problems concerning monetary reserves, balances of payments or foreign exchange arrangements.³⁶ IMF instruments and practices thus provide an important source of guidance on the problem of sovereign state indebtedness. In particular, IMF deliberations on the problem of sovereign debt crises have consistently emphasised the need to achieve “cooperative solutions negotiated between the debtor country and its creditors, building on effective dialogues established in advance.”³⁷ Meeting this need certainly appears to be a major aim of the SDRM proposal which emerged from the IMF in the earliest years of the 21st century.

The IMF Articles recognise that states have a sovereign right to implement their own economic policy measures, including fiscal, exchange and monetary measures, in order to deal with any crisis or other situation that may arise. For example, Art. VIII,

³⁵ Articles of Agreement of the International Monetary Fund (adopted 27 December 1945, entered into force 27 December 1945) UNTS 39. 187 members as at November 2011.

³⁶ Para. 2, “In all cases in which the Contracting Parties are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultation, the Contracting Parties shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Article of the [Fund] (...)”

³⁷ IMF, *Involving the Private Sector in the Resolution of Financial Crises – Restructuring International Sovereign Bonds*, prepared by the Policy Development and Review and Legal Departments, presented at the Executive Board Meeting 01/8, 24 January 2001, Part V Concluding Observations, p. 27.

Section 2 of the IMF's Articles of Agreement impliedly recognises, while imposing limits on, member states' ability to put into place measures which restrict payments and transfers for current transactions. Examples of measures which restrict payments for current transactions include where a government centralizes all foreign exchange transactions, and as a result the hard currency needed by local institutions to service their foreign currency debts falls into arrears. Exchange guarantee regulations, whereby the government promises to make exchange available in the future to debtors at preferential rates if local debtors forego the opportunity to satisfy foreign-exchange debt obligations sooner, have a similar effect.³⁸ In such cases, the exchange control regulations effectively impose a moratorium or stoppage on the payment of the international debt. Art. VIII, Section 2(a) of the IMF Articles provides, in relevant part, that "...no member shall, without the approval of the fund, impose restrictions on the making of payments and transfers for current international transactions."

It is therefore open for the IMF to approve the imposition of exchange controls by a heavily indebted nation so as to effectively defer the making of payments on foreign debt. Moreover, should such approval be given, creditors could not seek to enforce payments in violation of approved exchange control regulations. This is because article VIII Section 2(b) provides: "[e]xchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territory of any member ...".³⁹

In 1984, Debevoise argued in favour of the potential for Art. VIII(2)(b) to be used to stay creditor actions against debtor countries. He argued that IMF approval of exchange controls under Art. VIII(2)(a) should be enough to ensure that courts would refuse to enforce any payment contract in contravention of such controls.⁴⁰ Courts have had problems in reaching a consistent interpretation of the term "exchange contract"; some applying a "narrow" construction and other adopting a "broad" construction. As Debevoise notes, some courts have refused to rely on Art. VII(2)(b) to stay creditor actions against debtor countries typically because the court has refused to regard the term "exchange contract" as sufficiently broad to cover loan agreements. Other refusals have relied on a finding that "the defendant had not met its burden of demonstrating that the currency regulations relied upon were 'maintained or imposed

³⁸ M. Pearce, *Moratoriums on Foreign Sovereign Debts: A study of the public international law relating to moratoriums on foreign sovereign debts imposed unilaterally by the debtor state*, a sub-thesis submitted in partial fulfilment of the degree of Masters in International Law, Australian National University, December 1987, 2.4.

³⁹ See also Decision No. 1034-(60/27), adopted June 1, 1960. For discussion see H. Elizalde, *The International Monetary Fund and Current Account Convertibility*, paper presented at the IMF Seminar on Current Developments in Monetary and Financial Law (Washington DC, 24 May – 4 June, 2004).

⁴⁰ See further, W. Debevoise, *Exchange Controls and External Indebtedness: A Modest Proposal for a Deferral Mechanism Employing the Bretton Woods Concepts*, 7 Houston Journal of International Law (1984), pp. 157-68.

consistently with the Fund Agreement’.”⁴¹ Debevoise identifies a number of ways to overcome these legal obstacles. For example, IMF approval of exchange controls could be accompanied by a statement that the subject member’s exchange restrictions, including those on the making of payments and transfers for certain current international transactions, were maintained or imposed consistently with the Fund Agreement. Second, an official IMF interpretation of Art. VIII(2)(b) could be used to provide greater legal certainty for courts asked to enforce foreign payment contracts. The interpretation could clarify a broad interpretation of the term “exchange contract” in Art. VIII(2)(b) “to include any contract providing either for payment or transfer of foreign exchange, or for an international transfer or payment (that is, a payment between a resident and a non-resident, or a transfer of funds from one country to another).”⁴²

The other provision in the IMF’s Articles of Association relevant to sovereign nations experiencing financial instability is Art. VI. It provides that Members may not use the Fund’s general resources to meet a large or sustained outflow of capital (with one exception). Instead, the IMF may “request a member to exercise controls to prevent such use of the general resources of the Fund.” The members of the IMF have thus recognised that the imposition of capital controls is to be preferred as a means of preserving financial stability when there is a “large or sustained outflow of capital.” Art. VI (Section 3) expressly guarantees that “Members may exercise such controls as are necessary to regulate international capital movements” (subject to certain important limitations⁴³). Capital controls imposed with IMF imprimatur under Art. VI have the benefit that they seem not to be subject to the problems of domestic court interpretation suffered by Art. VIII capital controls. Art. VI (Section 2) further ensures that IMF members are entitled to make reserve tranche purchases to meet capital transfers where necessary. This is another possible avenue for alleviating sovereign financial distress that perhaps should be made more use of.

The ILC’s 2001 Draft Articles on Responsibility of States for internationally wrongful acts (the Draft Articles)⁴⁴ also provides a valuable framework of principles within which the rights and responsibilities of states struggling to deal with sovereign debt crises can and have been considered. In the Argentine Gas Sector cases of the middle-late

⁴¹ K. Rogoff & J. Zettelmeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001*, 49(3) IMF Staff Papers 470 (2002), p. 479.

⁴² *Ibidem*, pp. 479-480, noting that in January 1988, the IMF Legal Department did in fact propose, in an internal report, “that consideration be given by the Executive Board to the adoption of an authoritative interpretation of Article VIII, Section 2(b)”, using the wording cited here.

⁴³ Section 3 goes on to provide that “no members may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b) and in Article XIV, Section 2.”

⁴⁴ Adopted by the International Law Commission at its 56th Sess. (2001), available in *Report of the International Law Commission on the work of its Fifty-third session*, Official Records of the General Assembly, Fifth-sixth session, Supplement No. 10 (A/56/10) chp. IV.E.1.

2000's⁴⁵ for example, the ICSID tribunals considering those cases agreed that Art. 25 of the Draft Articles reflected the relevant rules on the defence of necessity in customary international law. The tribunals differed on how they dealt with Argentina's "necessity defence", however, and only the *LG&E v Argentina* tribunal accepted Argentina's argument that the country was in a state of necessity at least for a certain period for which reason it should be (at least partially) exempted from responsibility for any losses caused by its actions in response to an economic crisis.⁴⁶

Force Majeure was not argued in the Argentine *Gas Sector* cases, but if climate change or some other "irresistible force or (...) unforeseen event" should trigger a sovereign debt crises in future, then Art. 23 of the Draft Articles may well provide an important basis upon which the world community might craft its response to such a crisis. The scope of this article does not allow for a more detailed discussion of how debtor states have or might defend themselves against the claims of persistent creditors, but the potential for the principles of necessity and force majeure, as enshrined in the Draft Articles, to play an important role in any discussion of legal rights and liabilities needs to be highlighted. Other principles enshrined in the Draft Charter, such as those dealing with compensation, might equally prove important in such discussions.

2. INTERNATIONAL CUSTOM, AS EVIDENCE OF A GENERAL PRACTICE ACCEPTED AS LAW

Since the earliest days of Westphalian sovereignty,⁴⁷ nations have dealt with international debt crises in a variety of different ways. Indeed, responses to sovereign debt

⁴⁵ Action taken by the Argentine government in response to its 2001 economic and political crisis resulted in the greatest wave of claims by foreign investors against a single host country in recent history. Of the over forty claimed filed by the end of the decade, four involved claims under the US-Argentina BIT by four US investors in Argentina's gas transportation and distribution utilities – CMS, Enron, Sempra, and LG&E. In all four cases, ad hoc tribunals established under the World Bank's International Centre for Settlement of Investment Disputes (ICSID) rules found Argentina liable for its actions. The damage awards, three of which exceeded \$100 million, were among the highest ever rendered by an ICSID tribunal: *CMS Transmission Co. v Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005); *LG&E Energy Corp. v Argentine Republic*, ICSID Case No. Arb/02/1, Decision on Liability (3 October 2006); *Enron Corp., Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. Arb/01/3, Award (22 May 2007); *Sempra Energy Int'l v Argentine Republic*, ICSID Case No. Arb/02/16, Award, P 391, 28 September 2007. For a (very) detailed discussion of these cases see J. E. Alvarez & K. Khamsi, *Chapter 10: The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in: K.P. Sauvant (ed.), *The Yearbook on International Investment Law and Policy* 2008/2009, pp. 379–478.

⁴⁶ *LG&E Energy Corp. v Argentine Republic*, ICSID Case No. Arb/02/1, Decision on Liability (3 October 2006), paras. 239–242. For discussion see C. Frutos-Peterson, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic* (ICSID Case No. ARB/02/1), *Introductory Note*, Cases, ICSID Review-Foreign Investment Law Journal (2006), pp. 150–154.

⁴⁷ R.H. Jackson & P. Owens, *The Evolution of World Society*, in: J. Baylis & S. Smith (eds.), *The Globalization of World Politics: An Introduction to International Relations*, Oxford University Press, New York: 2005, p. 53.

crises, by both debtor states and their creditors, have been as diverse as the many paths leading to such crises in the first place. While numerous calls have been made for the establishment of a single set of consistent principles for dealing with sovereign debt crises,⁴⁸ so far the world community has not been able to agree even on the need for such a set of principles. And so sovereign debt crises continue to end up in default, either partial or total (e.g. Argentina, Mexico, Peru and other south American states in the 1980s),⁴⁹ bailout (as with Greece in 2010-2012) and/or one of a variety of approaches to sovereign debt restructuring.⁵⁰

2.1 Debt moratoriums, exchange controls and bailouts

2.1.1 Debt moratoriums

One common response to impending or actual sovereign insolvency has been the unilateral declaration of a debt moratorium by the debtor state, sometimes, but not always, following consultation with creditors. A debt moratorium is a delay in the payment of debts or obligations. It may take the form of a complete cessation of debt payments, either permanently or for a limited period of time, or a partial cessation.⁵¹ A debt moratorium can (usually) be seen as a unilateral attempt by a debt-burdened state to bring about a restructuring of its debt.⁵²

A state-declared suspension in the payment of international debts can be the by-product of wars, revolution or civil conflict. For example, Turkey, Bulgaria and Austria-Hungary suspended debt payments to enemy country creditors at the beginning of World War I; Italy, Turkey and Japan did the same at the beginning of World War II. Mexico (1914), Russia (1917), China (1949), Czechoslovakia (1952), and Cuba (1960) repudiated their debts after revolutions or communist takeovers. Some countries, such as Austria (1802, 1868) and Russia (1839), defaulted after losing wars; others, such as Spain (1831) and China (1921)), defaulted after enduring major civil wars.⁵³ However,

⁴⁸ See the literature summarized in Rogoff & Zettelmeyer, *supra* note 51, pp. 470-502.

⁴⁹ For discussion see O. Sunkel & S. Griffith-Jones, *Debt and Development Crises in Latin America: The End of an Illusion*, Oxford University Press, New York: 1986; M. Pastor, *Managing the Latin American Debt Crisis: The International Monetary Fund and Beyond*, in: G.A. Epstein, J. Graham & J. Gordon Nembhard (eds.), *Creating a New World Economy: Forces of change and plans for action*, Temple University Press, Philadelphia: 1993.

⁵⁰ See the summary of existing approaches to sovereign debt restructurings in International Monetary Fund, *Reviewing the Process for Sovereign Debt Restructuring within the Existing Legal Framework* (prepared by Policy Development and Review, International Capital Markets, and Legal Departments), 1 August 2003.

⁵¹ Early examples include Turkey in 1876, Argentina and Uruguay in 1890. For discussion see F. Sturzenegger & J. Zettelmeyer, *Debt Defaults and Lessons from a Decade of Crises*, MIT Press, Massachusetts: 2006.

⁵² S. L. Schwarcz, *Sovereign Debt Restructuring Options: An Analytical Comparison*, Harvard Business Law Review, Fall 2011 (Draft dated 12 July 2011 downloaded at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1872552), pp. 9-12.

⁵³ Sturzenegger & Zettelmeyer, *supra* note 51, p. 4.

a majority of sovereign defaults and debt restructurings that have occurred since the early nineteenth century – including almost all that have occurred since the late 1970s – do not in fact belong to this category, but reflect more subtle interactions between domestic economic politics and shocks to the economy, including changes in the external environment.⁵⁴ Sturzenegger and Zettelmeyer have noted the way in which defaults of this type are bunched in temporal and sometimes regional clusters, corresponding to boom-bust cycles in international capital flows.⁵⁵ For example, a number of Latin American countries defaulted or restructured debt when the post-World War I lending boom ended in the bust of the 1930s. The mid 1980s saw another cluster of defaulting states – including Argentina, Cuba, Dominican Republic, Ecuador, Mexico, Panama and Venezuela in 1982, and Brazil, Chile, Costa Rica, Peru and Uruguay in 1983. This cluster of defaults followed the 1970s boom in bank lending to developing countries.⁵⁶ Elsewhere in the world, capital flows to Africa in the 1970s were triggered by African decolonisation and independence – followed again by defaults and/or restructurings throughout that continent – Liberia in 1980, followed by Madagascar, Senegal and Uganda in 1981; Malawi in 1982, Morocco, Niger, Nigeria, Senegal and Zambia in 1983 and Tanzania in 1984.⁵⁷

Debt moratoriums have typically been partial in nature, aimed at significantly reducing rather than stopping debt payments altogether. Examples include Peru in 1985 when the government of President Alan Garcia refused to allow more than 10% of export earnings to be used for debt payment (the so-called “Ten Per Cent Solution”).⁵⁸ Other states have similarly reduced the amount of interest they were willing to pay – Serbia in 1895,⁵⁹ Portugal in 1892⁶⁰ and Greece in 1893.⁶¹ A unilaterally declared debt moratorium may also affect only a percentage of the debtor country’s creditors, leaving some unaffected. For example, Ecuador entered a technical moratorium on

⁵⁴ *Ibidem*.

⁵⁵ *Ibidem*, pp. 4–10.

⁵⁶ The 1970s lending boom was not only kept alive but reinvigorated after the oil price shock of 1973–74 led to high oil earnings in search of investment: *ibidem*.

⁵⁷ Dates taken from Table 1.1 in Sturzenegger & Zettelmeyer, *supra* note 51, p. 7.

⁵⁸ Discussed as a “tragic failure” by W. G. Tarpley, *Only a Debt Moratorium Can Save Iceland*, published at [rense.com](http://www.rense.com), downloaded on 1 November 2011 at <http://www.rense.com/general87/nly.htm> (p. 10 of 18).

⁵⁹ W. A. Dunaway, *Emerging Issues in the 21st Century World System: New theoretical directions for the 21st century world-system*, Greenwood Publishing Group, Westport, Connecticut: 2003, p. 98, noting that almost all of the Serbian debt accumulated between 1878 and 1895 was converted to a new loan carrying smaller interest charge in 1895.

⁶⁰ *Ibidem*, noting that Portugal received more favourable treatment from its creditors than either Serbia or Turkey at the time, benefiting from both a reduction of interest to 3 percent and a reduction of capital owed to between 50 to 75 percent of the original issues.

⁶¹ E. Borchard & J. S. Hotchkiss, *State Insolvency and Foreign Bondholders: General Principles*, Yale University Press, New Haven: 1951, p. 124, noting that for many years after 1893, Greece paid only 30% of its coupon interest. Also noting that Portugal’s reduction of interest payments for several years after 1891 amounted to two-thirds reduction of total interest owing.

its foreign debt on 14 November 2008.⁶² President Rafael Correa stopped payments on 3.2 billion in bonds due 2012 and 2030 in December 2008 and March 2009, saying the securities were “illegitimate” and “illegal”.⁶³ Ecuador did, however, continue payments to its 2015 bondholders, thereby minimising the reputational costs of a more comprehensive default.⁶⁴

A moratorium on sovereign debt payments might conceivably be suggested or offered by or on behalf of creditors.⁶⁵ Such proposals are rare, however, and the role of creditors is usually restricted to trying to reduce their overall potential losses and maximising the gains to be achieved from negotiating a restructuring of debt – as was seen when Pakistan’s debt was rescheduled in 2001.⁶⁶

Proponents of debt moratoriums argue that it is a sovereign decision by the government of a nation to suspend payment of debt to its creditors, in the event that to do otherwise would do irreparable harm to the welfare of its citizenry.⁶⁷ For example, a number of commentators called for Iceland (in 2009) and Greece (2010–2012) to universally declare a debt moratorium as a preferable alternative to the imposition of harsh austerity measures imposed as part of a debt rescheduling and/or bailout arrangement.⁶⁸

Even putting aside questions about their legality, unilaterally declared sovereign debt moratoriums present obvious problems. First, debtor nations who default, even if only partly, on their debt, must bear the reputational costs of such default – costs which may make access to finance difficult for many years to come. Where fresh finance

⁶² P. Cailleteau, *Rating Action: Moody’s downgrades Ecuador’s ratings*, 14 November 2008, available at <http://www.moody.com>. See also S. Kueffner, *Correa Defaults on Ecuador Bonds: Seeks Restructuring* (Update4), Bloomberg 12 December 2008, available at <http://www.bloomberg.com>; F. Salmon, *Market Movers: Ecuador’s Idiotic Default*, Bloomberg, 12.12.2008, available at <http://www.Portfolio.com>. For more detailed discussion see A. C. Porzecanski, *When Bad Things Happen to Good Sovereign Debt Contracts: The Case of Ecuador*, 73 *Law and Contemporary Problems* 251 (2010).

⁶³ MercoPress, *China loans and oil prices boost Ecuador economy two years after default*, MercoPress, 26.06.2011, available at <http://en.mercopress.com>.

⁶⁴ *Ibidem*.

⁶⁵ For example, Reverend Tim Costello called for creditors to allow a two year moratorium on Pakistan’s debt following devastating floods in 2010 to allow that nation to assist those displaced by the floods, and noting that Pakistan in 2010 was spending three times as much servicing its debt as it was spending on health services for its own people: Making Health Global, *Tim Costello’s Plea for Pakistan*, 01.09.2010, available at <http://makinghealthglobal.com.au>. Reporting on the 63rd UN DPI NGO (Department of Public Information Non-Government Organisations) Conference held in Melbourne, 31 August – 1 September 2010.

⁶⁶ For discussion and other examples see IMF, Policy Development and Review Department, *Cross-Country Experience with Restructuring of Sovereign Debt and Restoring Debt Sustainability*, 29 August 2006.

⁶⁷ See e.g. K. Raffer, *An International insolvency procedure for sovereign States*, in: E. Dommen (ed.), *Debt Beyond Contract: finance and the common good*, *supp no. 2*, Observatoire de la Finance, Geneva: 2001, pp. 69–78.

⁶⁸ Tarpley, *supra* note 58. See also *Address on Iceland and the IMF Debt Moratorium Tobin Tax*, Delivered by Birgitta Jonsdottir of The Movement in the Icelandic Parliament, 5 October 2009.

is accessible, it typically becomes so at a more expensive rate, since the risk of future default will be priced into the cost of credit. New loans also raise questions about the point at which (new and old) creditors should be informed and/or consulted about the possibility of a debt moratorium, as well as questions about the need to ensure that all creditors are treated equally following the imposition of such a moratorium.

Moreover, as Schwarcz notes, unilaterally declared debt restructurings not only pose systemic risks, but tend to be disorderly as well:

Because unilateral debt restructuring is merely default cloaked in semantics, it could pose the same threat of systemic risk as any other manifestation of default. Furthermore, given anticipated creditor opposition, any unilateral restructuring attempt could well be disorderly, generating multiple lawsuits. I therefore regard unilateral debt restructuring by a sovereign debtor as a normatively undesirable alternative to a bailout.⁶⁹

2.1.2. Exchange Controls

As Paul Krugman has noted exchange controls used to be the standard response of countries faced with balance-of-payments crises: “[e]xporters were required to sell their foreign-currency earnings to the government at a fixed exchange rate; that currency would in turn be sold at the same rate for approved payments to foreigners, basically for imports and debt service.”⁷⁰

There is no doubt that countries are free to impose exchange controls to protect the value of their local currency, so long as such controls are imposed consistently with that country’s existing international obligations. Exchange controls and other moratory laws prohibiting or restricting payments of foreign debt are often associated with periods of social, political and/or economic stress. For example, the French moratory laws passed on several occasions during the 1870-71 Franco-Prussian War. In *Roquette v Overman*,⁷¹ the English High Court upheld the legality of a French moratory law in a suit upon a bill of exchange accepted and payable in France.

The principle of sovereign equality of states implies that all states are entitled to implement whatever fiscal, monetary and exchange measures they see fit. This is recognised, *inter alia*, by several provisions of the IMF Articles of Agreement. Art. VIII, for example, expressly recognise the right of all sovereign states to impose exchange controls and to cooperate with each other in making exchange control regulations more effective. When Malaysia was threatened with fallout from the Asian financial crisis of 1997-98, the response of the Mahathir government was to impose foreign exchange

⁶⁹ Schwarcz, *supra* note 52, pp. 10-11; citing A. Gelpern, *What Bond Markets Can Learn From Argentina*, 24 *International Financial Law Review* 19 (2005), p. 21; noting that Argentina faced thousands of lawsuits, including dozens in New York and over a hundred in Europe, during and after its unilateral debt restructuring.

⁷⁰ M. Khor, *Asia should impose foreign exchange controls says Krugman*, Third World Network, citing television interview, CNBC programme *Asia in Crisis* on 29 August 1998 and citing 192 *Third World Economics* (September 1998), pp. 1-15.

⁷¹ (1875) LR 10 QB.

restrictions (September 1998) aimed at protecting the integrity of the local economy and the value of the Ringit. Michael Camdessus, then Managing Director of the IMF, the IMF itself, and other commentators as well, complained bitterly at the imposition of these restrictions.⁷² Despite the fuss, however, in the end critics had to recognise that regardless on their own views on the wisdom of the Malaysian measures, the country had only exercised its IMF membership rights, including the right to exercise sovereign autonomy in domestic financial policy making.⁷³

China also escaped the most negative impacts of the Asian Financial Crisis, and was in fact able to cut interest rates during the crisis so that financial activity remained buoyant.⁷⁴ China maintained a fixed exchange rate at the time, and was able to cut interest rates without threatening its money supply because it maintained a non-convertible currency – in other words, exchange controls. While China's exchange controls have often been evaded, and have been a source of corruption,⁷⁵ during the Asian financial crisis they did give China a degree of policy flexibility that other countries envied.

Likewise, no one has challenged the legality of decisions by America and other governments to engage in measures such as monetary (quantitative) easing in response to trade-related and other debt burdens. The argument here is that the use of fiscal, monetary and exchange rate policy tools needs to be kept in mind as a possibility whenever the need to deal with a sovereign debt crises is being considered. For example, when a sovereign debt restructuring is being negotiated, negotiators should consider the possibility of allowing the debtor state to pay at least some of what is internationally owed in its own currency. Such arrangements are already possible in the case of World Bank loans under Art. IV of the Bank's Articles of Agreement, as discussed in part 1 above.

⁷² M.-A. Tourres, *The Tragedy That Didn't Happen: Malaysia's Crisis Management and Capital Controls*, Institute of Strategic and International Studies (ISIS), Kuala Lumpur, Malaysia: 2003. See also S.D. Sharma, *The Malaysian Capital Control Regime of 1998: Implementation, Effectiveness, and Lessons* 27(1) Asian Perspective 77 (2003); and M. Billington, *Malaysia's Challenge to IMF: A Lesson on 'Method'*, Executive Intelligence Review (13 August 2004); a review of this essay is available at http://www.larouchepub.com/other/2004/book_reviews/3132malaysia_v_imf.html (last accessed 10 April 2013).

⁷³ M. Khor, *Malaysia institutes radical exchange, capital controls*, Third World Network, citing 192 Third World Economics (1-15 September 1998). See also E. Kaplan & D. Rodrik, *Did the Malaysian Capital Controls Work?* (revised, February 2001, John F Kennedy School of Government, Harvard University, Cambridge), available at <http://www.hks.harvard.edu/fs/drodrik/Research%20papers/Malaysia%20controls.PDF> (last accessed 10 April 2013) and J. N. Bhagwati, *In Defense of Globalization*, Oxford University Press, New York: 2007, p. 206.

⁷⁴ R.C.K. Burdekin, *China and the Depreciating US Dollar*, 79 Asia Pacific Issues (January 2006) (East-West Center). See also E. Denters, *Manipulation of Exchange Rates in International Law: The Chinese Yuan*, ASIL Insights (November 2003); and C. D. Zimmermann, *Congress Continues to Attack Currency Manipulation as China Defuses G-20 Pressure For Now: the International Law Issues*, 14(19) ASIL Insights (30 June 2010). See also Khor, *supra* note 70.

⁷⁵ *China's capital controls lead to corruption*, The Globe and Mail, 19.06.2011.

2.1.3 Bailouts

The recent financial woes of Greece, Ireland, Portugal and other nations have re-invigorated debate over the circumstances in which defaulting countries should be bailed out, if at all.⁷⁶ As Schwarcz explains, the problem in the case of Greece was that an orderly debt restructuring was impractical, while a default was believed to have the potential to bring down the world financial system. This is a growing problem. As global capital markets increasingly embrace sovereign bonds, the potential for a nation's debt default to trigger a larger systemic collapse increases as the network of debtor-creditor relationships spreads. This, in turn, gives rise to the problem of "too big to fail".⁷⁷ Advanced economies are now familiar with the problem of the large bank which is perceived as being too big to fail because its default could trigger an economic domino effect. The result is that such banks are often the ones to receive a bailout from public funds. This can foster moral hazard: anticipating a bailout, the bank may lack incentive to take a prudent economic course. Likewise, nations – even those as small as Greece – can be seen as too big to fail if their default could trigger a wider economic collapse. This too can foster moral hazard – indeed sovereigns are arguably more likely to engage in morally hazardous behaviour than banks, which can be liquidated. The Greek government, for example, did little to impose fiscal austerity even as debts accumulated.⁷⁸

Bailouts can also be extremely expensive – in both financial and human terms. The initial Greek bailout costing USD 110 billion in 2010 eventually needed to be supplemented by further allocations of bailout funds bringing the total cost to over USD 300 billion by some estimates.⁷⁹ The European Union (via the European Financial Stability Facility) and the IMF have essentially shared the costs of the Greek bailout, so that the burden is shared between a large number of countries, generating unrest amongst those who do not see why their own country should pay such costs. The hardships imposed on the people of Greece as a result of the strict austerity measures that are the other part of the bailout package also need to be factored into the costs equation. The rest of this article explores debt-restructuring alternatives to bailouts. The

⁷⁶ E. Kirschbaum, *Germans overwhelmingly oppose Greek bailout: poll*, Reuters, Business & Financial News, Breaking US & International News (26 February 2012), available via <http://www.reuters.com/>; Shearman & Sterling LLP, *Euro Rescue Package Backed by German Federal Constitutional Court – German Parliament Approves Plan to Boost the Lending Capacity of the Eurozone Bailout Fund (EFSF)* (3 October 2011).

⁷⁷ S. Schwarcz, *Facing the Debt Challenge of Countries That Are 'Too Big To Fail'*, in R. W. Kolb (ed.), *Sovereign Debt: From Safety to Default*, Robert W. Kolb Series, Book 605, John Wiley & Sons, Inc., Hoboken, New Jersey: 2011.

⁷⁸ *Ibidem*; see also Papandreou Tries to Prop Up the Pillars, Economist, 19.12.2009, p. 48.

⁷⁹ T. Durden, *The Cost of The Combined Greek Bailout Just Rose To Euro320 Billion in Secured Debt, Or 136% of Greek GDP*, Zero Hedge 11.02.2012, available at <http://www.zerohedge.com/news/>. See also C. Greenberg, *McMorris Rodgers Calls on Administration to Vote Against New Greek Bailout at Thursday's IMF Meeting*, Conservative Outlooks, 12.03.2012, available at <http://conservative-outlooks.com/>; and EFSF contributes Euro 109bn to Greek bailout, Irish Times, 16.03.2012, available at <http://www.irishtimes.com/>.

inquiry is important because the world is now at the stage where it cannot just allow the problem of sovereign debt to keep recurring; each time being dealt with on an *ad hoc* basis. The potential consequences of failure to properly manage such crises in future are too devastating to rely on such arbitrary approaches.

2.2. Reaching a new consensus: Market based solutions or a statutory framework?

As noted above, the current system for sovereign debt restructuring is characterized by a diversity of approaches reflecting the diversity in the circumstances of each sovereign restructuring event.

In 2002 Kenneth Rogoff and Jeromin Zettelmeyer examined in detail the history of ideas relating to procedures for resolving sovereign debt crises.⁸⁰ They find a growing consensus on what the underlying problems and causes of sovereign debt crises are, but no consensus on how to resolve them. Proposals have ranged from contract based solutions (also referred to as market based solutions) to statutory solutions; and from approaches focussing on reforming national laws to proposals emphasising the need for an international law approach. As the debate continues, recent sovereign debt crises continue to demonstrate “the limitations of our current framework for dealing with”⁸¹ such crises. As Waibel notes, there is an urgent need to “upgrade our toolbox to deal with a potential wave of sovereign defaults in many parts of the world.” In this section I explore state practice in sovereign debt restructurings and identify five key features that any future attempt to create a more coherent framework for resolving sovereign debt crises should possess. I also argue that these features should preferably be agreed upon in the form of an international instrument, which does not need to be in the form of a detailed treaty, but which should be recognised as codifying generally accepted custom on the question of how sovereign debt crises should be resolved.

2.2.1. Market based solutions

In the absence of any agreement on a uniform approach to resolving sovereign debt difficulties, the market has been relied upon almost entirely in handling such problems. “Market-based” debt reduction schemes became more common during the 1980s,⁸² a period in which many South American countries were encouraged to take the initiative in reducing their debt stock by buying back debt at discounted prices, swapping bank loans for local currency that had to be invested in domestic equity (debt-equity swaps), or exchanging loans against discounted “exit bonds” with

⁸⁰ Rogoff & Zettelmeyer, *supra* note 41.

⁸¹ M. Waibel, *Iceland's Financial Crisis – Quo Vadis* 14(5) ASIL Insight (1 March 2010).

⁸² See J. Williamson, *Voluntary Approaches to Debt Relief*, Institute for International Economics, Washington: 1988; and J. Sachs, *Testimony to the Subcommittee on International Trade of the Committee on Finance*, United States Senate, US Govt Printing Office, Washington: 13 May 1986, pp. 58-90.

lower principal or interest.⁸³ Buybacks characterised the approach taken by Bolivia and Brazil in the late 1980s, while debt-equity swaps were used in Argentina, Brazil, Chile, and Mexico and exit bonds used in Mexico and Argentina.⁸⁴ However, such approaches soon came under criticism from several angles. Some authors argued that any efficiency gains from market-based solutions would mostly benefit creditors, not debtors.⁸⁵ In addition, it became clear that market-based schemes suffered from a similar free-rider problem as unilateral debt-forgiveness or negotiations with uncoordinated creditors: participation in the scheme had the effect of increasing the repayment probability to the holdouts that chose *not* to participate.⁸⁶ Indeed, the pure market-based approach mostly failed to achieve large scale debt reduction and the approach most commonly preferred has been one which combines some market-based elements with coordinated negotiations and public sector/official avenues of fresh financing. Examples include the Brady plan, the London Club (BAC) and the Paris Club. Recent (since 2000) research emerging from the IMF has concerned itself with how to more systemically resolve sovereign debt crises through better coordination of public and private sector involvement.⁸⁷

2.2.2. Statutory solutions

Recognising the deficiencies and risks inherent in the current approach of relying on a variety of *ad hoc* free market solutions, a number of commentators have called for the

⁸³ Often such approaches were justified by an argument that it was in the interests of both debtor and creditors to eliminate “debt overhang” as quickly as possible through speedy debt reduction. The debt overhang argument is that so long as the burden of potential future debt repayments exceeds the ability of a debtor nation to pay, investment becomes so expensive to make it viable. The debt servicing burden creates such a deterrent to investment (either domestic or from international creditors) that efficient economic growth becomes virtually impossible: see J. Sachs, *The Debt Overhang of Developing Countries*, in G. Calvo et al. (eds.), *Debt, Stabilization and Development: Essays in Memory of Carlos Diaz-Alejandro*, Basil Blackwell for WIDER, Oxford: 1989, pp. 80-102; P. Krugman, *Financing v Forgiving a Debt Overhang*, 29 *Journal of Development Economics* 253 (1988); P. Krugman, *Market-Based Debt Reduction Schemes*, in: J.A. Frenkel, M.P. Dooley & P. Wickham (eds.), *Analytical Issues in Debt*, IMF, Washington: 1989, pp. 258-78.

⁸⁴ W.R. Cline, *International Debt Re-examined*, Institute for International Economics, Washington: 1995, pp. 212-15.

⁸⁵ J. Bulow & K. Rogoff, *The Buyback Boondoggle*, 2 *Brookings Papers on Economic Activity* 645 (1988); J. Bulow & K. Rogoff, *Sovereign Debt Repurchases: No Cure for Overhang*, 106 *Quarterly Journal of Economics* 1219 (1991); and M. Dooley, *Buy-Backs, Debt-Equity Swaps, Asset Exchanges and Market Prices of External Debt*, in: J. A. Frenkel, M.P. Dooley & P. Wickham (eds.), *Analytical Issues in Debt*, IMF, Washington: 1989, pp. 130-50.

⁸⁶ E. Helpman, *Voluntary Debt Reduction: Incentives and Welfare*, in: J.A. Frenkel, M.P. Dooley & P. Wickham (eds.), *Analytical Issues in Debt*, IMF, Washington: 1989, pp. 279-310; and J. Sachs, *Efficient Debt Reduction*, in: I. Husain & I. Diwan (eds.), *Dealing with the Debt Crisis: A World Bank Symposium*, World Bank, Washington: 1988, pp. 239-57.

⁸⁷ IMF Policy Development and Review and Legal Departments, *Involving the Private Sector in the Resolution of Financial Crises – Restructuring International Sovereign Bonds*, IMF, Washington: January 2001; IMF Policy Development and Review Department, *Cross-Country Experience with Restructuring of Sovereign Debt and Restoring Debt Sustainability*, IMF, Washington: 29 August 2006.

establishment of a single set of consistent principles for dealing with sovereign debt crises, preferably enshrined in a single international convention or other instrument.⁸⁸ Several such proposals have called for the establishment of an international debt reorganization procedure modelled on national reorganization laws for (insolvent) incorporated entities (e.g. Chapter 11 of the US Bankruptcy Code)⁸⁹ and bankrupt municipalities (e.g. Chapter 9 of the US Bankruptcy Code).⁹⁰ Schwarcz identifies two main models that have been proposed for sovereign debt restructuring. First, Schwarcz himself has proposed the establishment of a sovereign debt restructuring convention (SDRC).⁹¹ Second, the IMF has also recognised the need for a set of generally accepted principles for resolving sovereign debt difficulties. The IMF's then First Deputy Managing Director, Anne Krueger, proposed in November 2001 the establishment of a sovereign debt restructuring mechanism (SDRM).⁹² Both models are based on the same research, and the two are essentially the same although different in some details. The differences are, however, instructive and provide clear options for debate and choice in the development of a statutory scheme for sovereign debt restructuring. According to Schwarcz, the main differences are first, that the SDRM excludes claims from foreign governments, whereas the SDRC allows such claims but provides that each such claim constitutes its own separate class. Second, the SDRM requires the debtor nation to decide in advance which debts to restructure there-under and which debts, if any, to either not restructure or to restructure outside the SDRM, whereas the SDRC allows the debtor nation to decide how to restructure its debts at the time it files its debt restructuring plan. Third, a more significant difference, is that the SDRM, unlike the SDRC, includes a procedure that could implement a temporary stay on litigation against the sovereign.⁹³ Schwarcz argues

⁸⁸ See the literature summarized in Rogoff & Zettelmeyer, *supra* note 41.

⁸⁹ E.g. K. Raffer, *The Necessity of International Chapter 9 Insolvency Procedures*, in Eurodad (ed.), *Taking Stock of Debt, Creditor Policy in the Face of Debtor Poverty*, Brussels: 1998, p. 25. See also B.C. Barnett, S.J. Galvis & G. Gouraige Jr, *On Third World Debt*, 25 *Harvard International Law Journal* 83-151 (1984); A. Pettifor, *Chapter 9/11? Resolving International Debt Crises: The Jubilee Framework for International Insolvency* (January 2002), available at <http://www.jubilee2000uk.org>; S.L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 *Cornell Law Review* 101 (2000).

⁹⁰ E.g. A.N. Malagardis & M. Nitsch, *Living with Sovereign Debtors: The Debt Crisis of Developing Countries and International Insolvency Rules*, Interdependence, Special Issue, Foundation for Development and Peace, Bonn: 1988; K. Raffer, *International Debts: A Crisis for Whom?*, in: H.W. Singer & S. Sharma (eds.), *Economic Development and World Debt*, Macmillan Press, London: 1989, pp. 51-62; and K. Raffer, *Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face*, 18(2) *World Development* 301 (1990). Whether or not Chapter 9 is in fact a better guide for sovereign bankruptcy than Chapter 11 remains controversial.

⁹¹ Schwarcz, *supra* note 89, noting especially the draft SDRC provided in the appendix at 1020-22. See also S. L. Schwarcz, *Idiot's Guide to Sovereign Debt Restructuring*, 53 *Emory Law Journal* 1189 (2004).

⁹² A. Krueger, *A New Approach to Sovereign Debt Restructuring*, Address given at the Indian Council for Research on International Economic Relations, New Delhi, India, 20 December 2001. See also International Monetary Fund, *Proposals for a Sovereign Debt Restructuring Mechanism (SDRM)*, available at <http://www.imf.org/external/np/exr/facts/sdrm.htm> (A Factsheet, January 2003).

⁹³ Schwarcz, *supra* note 52, pp. 13-14.

that such a stay is not essential, because of the nature of debtor nation sovereignty and the limited ability of creditors to seize national assets, even those that may be located outside of a debtor nation.⁹⁴ Accepting that a stay on litigation is not necessary, however, does not mean that it remains undesirable. A stay on litigation may be desirable, as a matter of principle, even if only to reinforce the need for cooperative action on all sides of the restructuring plan.

While some commentators consider that the SDRM/ SDRC is a proposal that has died a natural death and is no longer seriously considered feasible, others, including Schwarcz, have renewed their advocacy of such a statutory scheme for sovereign debt restructuring with vigour, arguing that the recent financial woes of Greece, Ireland, Portugal and other nations have demonstrated yet again the need for such an alternative to the current invidious choice between expensive bailouts or inefficient, cumbersome and time-consuming market-based debt restructuring negotiations.⁹⁵

Perhaps the closest the world has so far come to agreeing on a standardised approach to resolving sovereign debt crises is the HIPC initiative, introduced partly as a result of the Jubilee 2000 campaign of the 1990s.⁹⁶ The Jubilee campaign called for a framework based on the work of Professor Kunibert Raffer from the University of Vienna who had long been calling for an international insolvency framework modelled on Chapter 9 of the US Bankruptcy Code.⁹⁷

HIPC was launched in 1996 and followed soon thereafter by enhanced HIPC (sometimes referred to as HIPC II) in 1999. The enhanced HIPC Initiative was aimed at providing faster, deeper, and broader debt relief and at strengthening the links between debt relief, poverty reduction, and social policies. To be considered for HIPC assistance, a country must fulfil four key conditions.⁹⁸ The first two conditions – eligibility to borrow from World Bank and IMF interest-free and subsidized loan programs and the existence of a unsustainable debt burden that cannot be addressed through traditional debt relief mechanisms – are aimed at identifying countries most in need of assistance. The third and fourth conditions – the need to establish a “track record of reform and sound policies through IMF and World Bank supported programs” and the need to develop a “Poverty Reduction Strategy Paper through a broad based participatory process in the country” – appear aimed at reassuring creditors that the debtor country is “deserving” of assistance.⁹⁹

⁹⁴ *Ibidem*.

⁹⁵ Schwarcz, *supra* note 52.

⁹⁶ The Jubilee 2000 campaign generated the first global petition – a petition which called for the cancellation of the unpayable debt of the poorest countries by the year 2000 under a fair and transparent process, and was signed by 24 million people.

⁹⁷ A. Pettifor, during a Panel discussion at the IMF’s Sovereign Debt Restructuring Mechanism (SDRM) Conference, Washington DC, 22 January 2003, transcript available at <http://www.imf.org/external/np/exr/seminars/2003/sdrm/index.htm> (last accessed 10 April 2013).

⁹⁸ IMF Factsheet, *Debt Relief under the Heavily Indebted Poor Countries (HIPC) Initiative* (September 2011), available at <http://www.imf.org/external/np/exr/facts/hipc.htm>.

⁹⁹ *Ibidem*.

The requirement to develop and implement a Poverty Reduction Strategy to qualify for HIPC assistance can facilitate transparency and civil society participation in countries where both are in short supply.¹⁰⁰ A PRS can also serve to link local stakeholder knowledge and views together with advice from independent experts, thereby avoiding some of the pitfalls of Structural Adjustment Programmes which became evident following the 1997 Asia Crisis and the 1998 Reviews of the Enhanced Structural Adjustment Facility (ESAF) lending framework.¹⁰¹ Yet PRSPs have also been extremely problematic, and can be complicated by local factors in unforeseen ways.¹⁰²

Moreover, when legal and policy reforms are put into place simply because they are required as a condition of receiving IMF/World Bank assistance, they are often less than successful.¹⁰³ Condition 3 of enhanced HIPC requires a country to demonstrate that it “has established a track record of reform and sound policies through IMF and World Bank supported programs” in order to reach “decision point”. In order to reach “completion point”, the country must demonstrate a “further track record of good performance under programs supported by loans from the IMF and World Bank”, and show that it has implemented satisfactorily key reforms agreed at the decision point. These requirements allow the IMF and World Bank to impose conditionalities on countries seeking HIPC relief without any formal requirement to consult beforehand.¹⁰⁴

¹⁰⁰ Pettifor, *supra* note 97.

¹⁰¹ K. Christiansen & I. Hovland, *The PRSP Initiative: Multilateral Policy Change and the Role of Research*, Working Paper 2003/216, Overseas Development Institute, London, August 2003, p. viii; available at <http://www.odi.org.uk/resources/download/145.pdf> (last accessed 10 April 2013). See also *Making Poverty Reduction Strategies Work – Good Practices, Issues and Stakeholder Views*, A Contribution of German Development Cooperation for the 2005 PRSP Review (May 2005) available at http://siteresources.worldbank.org/INTPRSP1/Resources/PRSP-Review/gtz_makingprswork.pdf (last accessed 10 April 2013); and M.J. Sizya, *The role cooperatives play in poverty reduction in Tanzania*, paper presented at the UN in observance of the International Day for the Eradication of Poverty, 17 October 2001.

¹⁰² A detailed discussion is not possible here, but see E. Zuckerman, ‘Engendering’ Poverty Reduction Strategy Papers (PRSPs): the issues and the challenges, 10(3) *Gender and Development* 88 (2002); N. Hunter, J. May & V. Padayachee, *Lessons for PRSPs from Poverty Reduction Strategies in South Africa*, paper presented at the Third Meeting of the African Learning Group on the Poverty Reduction Strategy Papers, 3-5 December 2003, Addis Ababa, Ethiopia (Economic Commission for Africa, 2002).

¹⁰³ C. H Lee, *To thine ownself be true: IMF conditionality and erosion of economic sovereignty in the Asian Financial Crisis*, 24(4) *University of Pennsylvania Journal of International Economic Law* 875 (2003).

¹⁰⁴ The power that this places in the hands of the IMF and World Bank becomes even more open to criticism because the two bodies are so often perceived as undemocratic in their decision making: A. Giron, *International Monetary Fund: From Stability to Instability: The Washington Consensus and Structural Reforms in Latin America*, 29 March 2011, available at <http://www.aliciagiron.com/2011/03/29/international-monetary-fund-from-stability-to-instability-the-washington-consensus-and-structural-reforms-in-latin-america/>. See also P-P. Kuczynski & J. Williamson, *After the Washington Consensus: Restoring Growth and Reform in Latin America*, Institute for International Economics, Washington DC: 2003. See further G.A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103(4) *American Journal of International Law* 647 (2009), and M. Darrow, *Between Light and Shadow: The World Bank, the IMF, and International Human Rights Law*, Hart Publishing, Oxford: 2003.

The HIPC Initiative has also been criticised for taking so long to provide significant relief to countries burdened by debt and for failing to provide the kind of exit relief that was promised at the beginning of the process. For example, Ann Pettifor points out that countries such as Argentina and Uganda remained in deep economic trouble even after several IMF programs involving loan disbursements and conditionalities.¹⁰⁵ It remains true, however, that other driving forces, including historical and structural ones, rather than deficiencies in the HIPC process as such, were arguably at fault.¹⁰⁶ Moreover, by the end of 2011, of the 39 countries eligible or potentially eligible for HIPC initiative assistance, 32 countries (nearly all from Africa or Central America), were receiving full debt relief from the IMF and other creditors¹⁰⁷ after reaching their “completion point”.¹⁰⁸ Four other countries (Chad, Comoros, Cote d’Ivoire, Guinea) had reached their decision points and were receiving some interim debt relief, while three further countries identified as potentially eligible for HIPC assistance had not yet reached their decision points (Eritrea, Somalia and Sudan).¹⁰⁹ In these countries, many challenges remain, including meeting the basic requirements of peace and stability, delivery of basic services and reasonable levels of corruption free governance.¹¹⁰ But the successes and failures of the HIPC initiative provide valuable lessons. For example, one challenge still remains ensuring that eligible countries get full debt relief from *all* their creditors, not just the IFIs.¹¹¹

2.3. Extracting principles from state practice

The rest of this Part argues that five requirements for any future agreement on how to deal with sovereign debt crises can be identified from the experience of state practice in this area:

1. an enforceable requirement of collective action by all creditors, such that minority creditors would be bound by a restructuring once it was agreed to by a large enough majority;

¹⁰⁵ Pettifor, *supra* note 97.

¹⁰⁶ *Ibidem*. See also C.M. Reinhart, K. Rogoff & M.A. Savastano, *Debt Intolerance*, National Bureau of Economic Research Working Paper, 2003/9908 (August 2003), available at <http://www.nber.org/papers/w9908>. Specifically on the case of Argentina, see R. Olivares-Caminal, *Legal Aspects of Sovereign Debt Restructuring*, Sweet & Maxwell, Andover: 2009.

¹⁰⁷ About 45 percent of HIPC funding comes from the IMF and other multilateral institutions, with the remaining amount coming from bilateral creditors: IMF Factsheet, *Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative*, (information current as at December 2011), available at <http://www.imf.org/external/np/exr/facts/pdf/hipc.pdf> (last accessed 10 April 2013).

¹⁰⁸ IMF Factsheet, *Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative*, (information current as at December 2011), available at <http://www.imf.org/external/np/exr/facts/pdf/hipc.pdf> (last accessed 10 April 2013).

¹⁰⁹ IMF Factsheet, *The Multilateral Debt Relief Initiative*, September 2011, available at <http://www.imf.org/external/np/exr/facts/mdri.htm> (last accessed 10 April 2013).

¹¹⁰ *Ibidem*.

¹¹¹ Pettifor, *supra* note 97, pointing out that smaller multilateral institutions, non-Paris Club official bilateral creditors and commercial creditors, together accounting for around 25% of total HIPC costs, had only delivered a small share of their expected debt relief by late 2003.

2. an enforceable, indefinite stay on any attempted legal action in national courts by a “hold-out” creditor demanding repayment during the negotiation process;
3. the ability of the debtor nation to obtain fresh finance quarantined from the restructuring process;
4. the right of the debtor state to design and propose its own policies and appropriate policy undertakings, with safeguards to ensure that creditors are treated properly; and
5. the establishment of an independent umpire body, either permanent or on an *ad hoc* basis, to oversee negotiations, the creditor voting process, compliance with undertakings and dispute resolution.

I do not seek to argue that these principles have the status of customary law, but rather that they are principles around which state practice appears to be gradually coalescing. In addition, part III of this paper will argue that they are principles which find support, and are grounded within, more general principles of international law found in widely accepted international treaties and other instruments.

2.3.1. Collective action requirement

At least since the 1820s, creditors have sought to coordinate in their negotiations with debtor states nearing or in default. Weak coordination across creditors and prolonged negotiation periods made early efforts inefficient, but this changed after 1868 when the British Corporation of Foreign Bondholders (CFB), the most institutionalised and powerful creditor association in history was established.¹¹² The power of the CFB came from its ability to use specialised committees to negotiate agreements with individual debtor countries,¹¹³ and also because the London stock exchange adopted a practice where it would refuse to list new bonds by debtors that the CFB advised were in default. The CFB model proved so successful that similar organisations were eventually set up in France and Belgium (1898), Switzerland (1912), Germany (1927), and the United States (1933).¹¹⁴ The CFB and its counterpart organisations in other countries remained active until the 1950s, when the last defaults of the 1930s¹¹⁵ were settled.

The structure of international lending shifted after 1950 from bonds dispersed among thousands of holders in a handful of creditor countries to loans by a few

¹¹² Sturzenegger & Zettelmeyer, *supra* note 51, p. 11, citing P. Mauro and Y. Yafeh, *The Corporation of Foreign Bondholders, Issues 2003-2007*, IMF Research Department Working Paper, 2003 and P. Mauro, N. Sussman & Y. Yafeh, *Emerging markets and financial globalization: Sovereign bond spreads in 1870-1913 and today*, Oxford University Press, New York: 2006, Chapter 7.

¹¹³ These agreements were then presented to a general meeting of bondholders for approval. While the agreement, if approved, was not legally binding on individual bondholders, “holdouts” did not generally pose a problem, in part because the changes of successful legal action against sovereigns were much lower than they are today. As a result, the CFB effectively had control over the sovereign debtor’s access to the London market: Sturzenegger & Zettelmeyer, *supra* note 51, p. 11.

¹¹⁴ R.P. Esteves, *Qui custodiet quem? Sovereign Debt and Bondholders’ Protection Before 1914*, University of Oxford, Department of Economics, Economics Series Working Paper, 2007/323, available at <http://www.economics.ox.ac.uk/Research/wp/pdf/paper323.pdf> (last accessed 10 April 2013).

¹¹⁵ Except for those of some Soviet bloc countries that had repudiated their pre-war debts: F. Sturzenegger & J. Zettelmeyer, *supra* note 51, p. 12.

hundred commercial banks. By the mid-1970s most bank lending was channelled through syndicates involving groups of typically ten to twenty banks. In the late 1970s when several developing country debtors began to experience debt servicing difficulties, a coordinated negotiating procedures for the restructuring of commercial bank debt began to emerge: the Bank Advisory Committee (BAC), also referred to as the “London Club”. The London Club process works in a very similar fashion to the CFB, and continues to play a role today.¹¹⁶ However, most debt crises and restructurings between 1998 and 2010 have focused on sovereign bonds held by a heterogeneous group of mostly non-bank creditors. And most bondholder representation in restructurings since 1998 have been, at best, *ad hoc*. A number of approaches have been used to rapidly achieve broad creditor agreement to restructuring proposals. Examples include take-it-or-leave-it offers to exchange existing bonds for new ones with payment streams of lower present value. These offers have often been preceded by informal discussions with creditors, but rarely formal negotiations. They have worked well so long as the terms of the exchange offer – usually designed with the help of an investment bank as financial advisor – were more attractive than the alternatives of uncertain litigation or sale at depressed prices.¹¹⁷ Another powerful mechanism to maximise coordinated creditor agreement is to make bond swap offers contingent on their acceptance by a supermajority of creditors (typically 75% but sometimes up to 85%). While not removing altogether the free-rider problem, this does allow creditors to be reassured that any bond swap agreement which eventuates will in fact reduce the debtor country’s debt burden by a large enough amount to ensure a corresponding improvement in debt service capacity. Other devices that have helped achieve high participation rates include the use of majority amendment clauses (e.g. in Ukraine’s debt exchange) and changes in the *non-payment* terms of the old bond contracts (exit consent).¹¹⁸

Exit consent is a device which has been used to increase the acceptance rate amongst creditors and to discourage hold-outs. Exit consent is the technique developed in Ecuador’s sovereign debt restructuring in 2000 (and later used in the Uruguay sovereign debt restructuring), by which the holders of defaulted bonds who agree to swap their old bonds in an exchange offer, at the moment of accepting such exchange offer, grant their consent to amend certain terms of the old bonds. The amendments to the terms of the old bonds automatically come into effect when the required majority of bondholders have accepted the exchange offer. The amendments inevitably make the old bonds less attractive, forcing remaining bond holders to enter into the exchange agreement.¹¹⁹

¹¹⁶ For example, both the Russian and Pakistani debt crises were resolved, in large part, through agreements with BACs: *ibidem*.

¹¹⁷ *Ibidem*, pp. 14–15.

¹¹⁸ *Ibidem*.

¹¹⁹ For more detailed discussion, see the analysis of exit consents in sovereign bond exchanges undertaken by Buchheit and Gulati: L.C. Buchheit & G.M. Gulati, J. Garcia-Hamilton Jr., R. Olivares-Caminal & O.M. Zenarruza, *The Required Threshold to Restructure Sovereign Debt*, 27 *Loyola of Los Angeles International and Comparative Law Review* 101 (2005).

Collective action clauses and exit consents are useful tools in helping to limit the holdout problem and encourage private creditors to act collectively. It is worth noting that in the course of difficult sovereign debt restructuring negotiations, private creditors acting collectively have also had the support of their own government, which will usually have an interest in early resolution of the debt crisis.¹²⁰ So far as sovereign creditors are concerned, at least since the 1950s coordination has typically been achieved by working through the Paris Club. The Paris Club is an informal forum, serviced by the French Treasury, at which the major creditors agree to take a common approach to restructuring the repayment schedules on each of the individual loans owed to each of the member countries' government agencies or offices, or sometimes they agree to reduce the amount of outstanding debt itself.¹²¹ The obvious problems with this mechanism are first, that not all creditor governments are members of the Paris Club. Second, the Paris Club mechanism excludes consideration of debts owed to the multilateral institutions, although it does demand "comparable treatment" from all other creditors including commercial banks and private creditors. Moreover, debtor countries express genuine concern about the effectiveness and lack of impartiality of the Paris Club, the heavy cost in terms of time consumed in individual negotiations with many creditors, and the fact that creditors can apply pressure in bilateral rescheduling.¹²²

A number of authors have stressed the need for a mechanism enabling a super-majority of creditors of all types (public and private, and across the broad range of credit instruments) to make the terms of a restructuring binding on all other creditors.¹²³ This is necessary, it is argued, as the only sure way to reduce unnecessarily prolonged negotiations and to prevent free-rider problems.¹²⁴ Some writers have suggested that the free rider problem could adequately be addressed by more ambitious use of collective action clauses in debt contracts. This was the approach preferred by Glenn Hubbard, then Chairman of President Bush's Council of Economic Advisers, in a speech given in January 2003 at an IMF conference in Washington.¹²⁵ Drawing on ideas put forth by John Taylor,

¹²⁰ For example, when the UK government intervened diplomatically during CFB settlement negotiations with countries like Honduras and Guatemala. The CFB was also able to successfully negotiate settlements with major problem debtors including Spain, Portugal, Greece, Turkey, Peru, Mexico, Brazil and Argentina with various forms and guises of British government involvement and support: P. Mauro & Y. Yafeh, *The Corporation of Foreign Bondholders*, IMF Research Department Working Paper, May 2003.

¹²¹ See further E. Cosio-Pascal, *The Emerging of a Multilateral Forum for Debt Restructuring: The Paris Club*, UNCTAD Discussion Paper No. 192 (November 2008) (UNCTAD/OSG/DP/2008/7).

¹²² *Ibidem*.

¹²³ Ch.G. Oeschli, *Procedural Guidelines for Renegotiating LDC Debts: An Analogy to Chapter 11 of the U.S. Bankruptcy Reform Act*, 21(2) Virginia Journal of International Law 305-341 (1981); B.J. Cohen, *Developing Country Debt: A Middle Way*, in: *Princeton Essays in International Finance*, Princeton University Press, Princeton: 1989, p. 173.

¹²⁴ Schwarcz, *supra* note 52.

¹²⁵ Discussed in: S. Vaknin, *The Bankrupt Sovereign: The Sovereign Debt Restructuring Mechanism (SDRM)* (Written 24 January 2003, updated April 2005, January and August 2011), pp. 2-3, available at <http://samvak.tripod.com/brief-sovereigndebt01.html>. See also Sovereign Debt Restructuring Mechanism (SDRM) Conference, 22 January 2003, Washington DC, keynote address by G. Hubbard, agenda available at <http://www.imf.org/external/np/ext/seminars/2003/sdrm/index.htm> (last accessed 10 April 2013).

then Treasury Undersecretary for International Affairs, Hubbard proposed to modify all sovereign debt contracts pertaining to all forms of debt to allow for majority decision making, the pro-rata sharing of disproportionate payments received by one creditor among all others and structured, compulsory discussions led by creditor committees.

Yet such a contractual approach suffers from serious flaws. It is not clear why creditors would voluntarily forego their ability to extort from other lenders and from the debtor an advantageous deal by threatening to withhold their consent to a laboriously negotiated restructuring package. Nor would a contractual solution tackle the thorny issues of encompassing different debt instruments and classes of creditors, or coordinating action across jurisdictions. These complexities explain much of the weakness of current collective action clauses in debt contracts.¹²⁶ Such clauses are typically confined to certain types of sovereign bonds, whereas what is wanted is a more comprehensive restructuring across a broad range of indebtedness, potentially including different types of bonds issued under different jurisdictions, bank loans and trade credits. It would be theoretically possible to develop a “super collective action clause” that would provide for restructuring of a give instrument on the basis of an affirmative vote by a super-majority of all creditors of all types. But creditors are unlikely to agree to the uniform inclusion of such a clause in all relevant instruments, and even were this unlikely result achieved, there would be no guarantee that the clause would be uniformly interpreted and applied across a range of national jurisdictions.¹²⁷

Given the persistent legal obstacles to the smooth implementation of sovereign debt restructurings, Krueger proposes the establishment of a statutory basis for collective action through universal treaty obligation. This would ensure uniformity of text and allow a single institution to be given the authority to ensure uniformity of interpretation, thereby avoiding problems of forum shopping and free-riding by creditors seeking to avoid inclusion in the wider restructuring agreement.¹²⁸

The most obvious problem identified with the idea that collective action is necessary is that different types of creditors and different types of debt may demand and/or require different treatment. For example, to what extent should official creditors (multilateral institutions) or government creditors be treated differently to private creditors?¹²⁹ Should sovereign debt owed to domestic creditors be treated differently to international

¹²⁶ A.O. Krueger, *New Approaches to Sovereign Debt Restructuring: An Update on Our Thinking*, address delivered at the Conference on *Sovereign Debt Workout: Hopes and Hazards*, Institute for International Economics, Washington DC, 1 April 2002.

¹²⁷ *Ibidem*.

¹²⁸ *Ibidem*.

¹²⁹ According to the IMF Policy Development and Review Committee: “No one category of private creditors should be regarded as inherently privileged relative to others in a similar position. When both are material, claims of bondholders should not be viewed as senior to claims of banks” (IMF Policy Development and Review and Legal Departments, *Involving the Private Sector in the Resolution of Financial Crises – Restructuring International Sovereign Bonds*, (IMF, Washington: 24 January 2001), p. 27).

The committee does not go further, however, to suggest that official and/or government creditors should be treated on an equal basis with private creditors.

debt? Any new sovereign bankruptcy mechanism would have to find a way of dealing with each of these different types of creditors with their different debt instruments. As will be further argued below, this would probably best be achieved by establishing a specialised panel or tribunal capable of overseeing, coordinating and evaluating all relevant creditors and their different claims.

2.3.2. Stay on legal action

Today, sovereign debt defaults typically lead to years of haggling amongst bankers and bondholders. It is a costly process, injurious to the distressed country's future ability to borrow. Moreover, both creditors and debtors have a perverse incentive to aggravate the situation. The more calamitous the outlook, the more likely are governments and international financial institutions to step in with a bailout package, replete with soft loans, debt forgiveness, and generous terms of rescheduling. This encourages the much-decried "moral hazard" and results in reckless borrowing and lending.¹³⁰ A carefully thought-out international sovereign bankruptcy procedure with a well-managed stay on legal action will take away the ability of any single creditor to "blackmail" the debtor and other creditors using the threat of a holdout, and should also serve to impose time limits on the negotiation process. That is, a legal stay on actions against the debtor should be automatic and universally binding, but it should also be time limited. The discipline of such a time limit would provide an incentive for the debtor to enter and conclude negotiations in good faith and as effectively as possible. It should always be possible for the debtor and a super-majority of creditors to extend the legal stay on action if it expires when negotiations are nearing a conclusion.

A 1985 court decision, *Allied Bank International v Banco Credito Agricola de Cartago*,¹³¹ illustrates both the possibility that a single creditor can "hold out" and the tenuous nature of protections against the claims of such a creditor. In 1981 Costa Rica had suspended debt payments to a 39-member bank syndicate. A restructuring agreement was subsequently reached with all creditors but one, Fidelity Union Trust of New Jersey, which sued through an agent, Allied Bank. A US Court of Appeals initially upheld a lower court ruling in favour of three Costa Rican banks that had acted on behalf of Costa Rica, arguing that:

Costa Rica's prohibition of payments of its external debt is analogous to the reorganization of a business pursuant to Chapter 11 of our Bankruptcy Code (...) Costa Rica's prohibition of payment of debt was not a repudiation of the debt but rather was merely a deferral of payments while it attempted in good faith to renegotiate its obligations.¹³²

¹³⁰ Vaknin, *supra* note 125; see also *A New Approach to Sovereign Debt Restructuring: An IMF Proposal*, Transcript of an IMF Economic Forum, Panel discussion at the IMF's Sovereign Debt Restructuring Mechanism (SDRM) Conference, Washington DC, 22 January 2003, available at <http://www.imf.org/external/np/tr/2003/tr030122.htm> (last accessed 10 April 2013).

¹³¹ 566 F. Supp. 1440. US District SDNY (8 July 1983). Discussed in M. Leigh, *Allied Bank International v Banco Credito Agricola de Cartago*, 78 American Journal of International Law 441 (1984).

¹³² *Ibidem*.

Upon rehearing the case in March 1985, however, the court reversed itself after the US Department of Justice argued that contrary to the court's initial assumptions, the US government did not agree with "Costa Rica's attempted unilateral restructuring" but instead supported an IMF-guided renegotiation procedure, "grounded in the understanding that while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable." In the end, the court ruled that "The Costa Rican government's unilateral attempt to repudiate private, commercial obligations is inconsistent with the orderly resolution of international debt problems."¹³³ While validating the claim of a holdout creditor, however, the decision still left the problem of how to find and attach assets within the forum not protected by sovereign immunity. Holdout creditors have not been slow in finding ways to overcome these obstacles, as the Elliott case of 2000 (discussed below) demonstrated.

Holdout creditors have arguably become *the* major problem for sovereign debt restructuring since the early 1990s, when the international financial architecture for sovereign borrowing changed from syndicated bank loans to sovereign bonds. The new bond-based structure led to the creation of a secondary market for such instruments and consequently to an exponential growth in the number of bondholders. Under the New York laws applicable to most sovereign bond instruments, bondholders are not obliged to negotiate restructurings of the debt or to accept the terms of an exchange offer. The Elliott case has further demonstrated how a single creditor can undermine a sovereign debt restructuring scheme through persistent legal actions. The case concerned the New York-based hedge fund Elliott Associates, LP chasing recovery of a distressed debt owed by the Republic of Peru.

In October 1995, Peru's government announced its Brady deal, under which the relevant Bank Advisory Committee had agreed to exchange Peru's defaulted commercial bank loans for "Brady Bonds". Following this announcement, between January and March of 1996, Elliott purchased a total of USD 20.7 million (face value) in commercial bank loans¹³⁴ at the distressed price of about USD 11.4 million.¹³⁵ Immediately after completing its acquisition, while Peru was still negotiating with the Bank Advisory Committee the term sheet of its Brady deal, Elliott started making demands for full payment. When in October 1996 Peru issued instructions to execute the Brady Exchange Agreement, Elliott refrained from participating in the proposed Agreement, and instead filed suit against Peru. However, the court refused Elliott's motion to attach

¹³³ 757 F2d 516 (2d Cir 1985), para. 26. See further B. Trubitt, *International Monetary Fund Conditionality and Options for Aggrieved Fund Members*, 20 Vanderbilt Journal of Transnational Law 665 (1987).

¹³⁴ In the form of 1983 Letters of Agreement of *Banco de la Nación* and *Banco Popular del Perú* which had been guaranteed by Peru.

¹³⁵ See Ambassador Philip S. Kaplan, Patton Boggs LLP, *Memorandum prepared by Peru's outside counsel addressed to Peru's Minister of Economy, Mr Carlos Bologna, about the Elliott Associates Settlement*, p. 1. Available at http://www.mef.gob.pe/Caso_E/frame_pdf.htm. See also Ministry of Economy and Finance of Peru, *Final Report About the Elliott Associates case*, p. 1, available at http://www.mef.gob.pe/Caso_E/frame_pdf.htm3 (last accessed 10 April 2013).

the collateral for the Brady deal closure, and also denied a summary judgment motion subsequently filed by Elliott. The Brady Exchange Agreement was thus able to proceed to closure on 7 March 1997.¹³⁶

On 22 June 2000 the district court for the Southern District of New York finally rejected Peru's defences (which had been through a number of hearings) and ordered judgment in favour of Elliott. In its decision, the court authorised Elliott to recover from the defendants the sum of USD 55,660,831.56, representing the principal amount and past due interest up to judgment date. The court also authorized the execution of the decision against any property of the defendants used for commercial purposes in the United States.¹³⁷ As a result of this decision, Peru was forced to adopt a completely new strategy for receiving funds and satisfying international financial obligations otherwise than through financial centres in the US. Peru's attempts to develop such a strategy was further hampered by Elliott's renewed attempts to attach Peruvian assets abroad, including in Germany, Holland, Belgium, England, Luxembourg and Canada.¹³⁸

Not wanting to risk having the money attached by Elliott, Peru failed to lodge its first Brady body coupon interest payment with the Chase Manhattan Bank (its fiscal agent) on 6 September 2000 for payment to bondholders as required by the terms of the Brady deal. This failure triggered a 30 day grace period, placing Peru's legal advisers under pressure to find a way of getting interest monies to bondholders otherwise than through a US bank before the deadline of 7 October 2000.¹³⁹ On 21-22 September 2000, Elliott filed an *ex parte* motion in New York seeking restraining orders against Chase, the Bank of New York, Morgan Guaranty Trust Company of New York and Depository Trust Company of New York – one of the three clearing houses charged under the Brady plan with distributing the Brady bond interest payments. Also on 22 September, Elliott filed an *ex-parte* motion before the Commercial Court of Brussels, Belgium in order to prevent Euroclear of Belgium – another of the three clearing house distributors of Brady bond payments – from receiving or paying out cash from Peru intended to pay interest on the Brady bonds. Although the court denied Elliott's motion at first instance, Elliott's appeal in the 8th Chamber of the Brussels Court of Appeals was successful, and the restraining order against Euroclear and against Chase Manhattan was granted in the terms requested by Elliott. The key argument presented by Elliott and accepted by the Brussels Court of Appeals was that Peru was trying to use Euroclear to violate the principle of equal treatment of creditors, allegedly derived from the *pari passu* clause contained in the original loan agreements held by Elliott.¹⁴⁰

¹³⁶ E.L. Sandoval, *Sovereign Debt Restructuring: Should we be worried about Elliott?*, in: H. Scott & H. Jackson (eds.), *Harvard Law School International Finance Seminar*, Cambridge, MA, May 2002, pp. 9-10, available at <http://www.law.harvard.edu/programs/about/pifs/llm/sp44.pdf> (last accessed 12 February 2013).

¹³⁷ *Elliott Associates L.P. v Banco de la Nacion*, 2000 WL 1449862 S.D.N.Y., 29 September 2000.

¹³⁸ Sandoval, *supra* note 136, pp. 12-15.

¹³⁹ *Ibidem*, p. 15.

¹⁴⁰ *Ibidem*.

What the Allied Bank case and the Elliot case demonstrate is the need for any stay on legal action by holdout creditors to be enforceable across all relevant jurisdictions. It is difficult, if not impossible, to achieve this aim even in the most well drafted contractual agreement. As recognised by the IMF Legal Department in 1995, an international treaty or other similar instrument is necessary to ensure a uniform approach between legal systems.¹⁴¹

The IMF's 2001 SDRM proposal for a statutory approach to handling sovereign debt crises¹⁴² expressly recognises the importance of ensuring that the debtor is protected from legal action after the suspension of payments and while negotiations take place. There needs to be a stay on legal action – of fixed duration, but preferably one which could be renewed if the restructuring was not agreed within the original stay period. Creditors would need to be given adequate assurances that their interests were being protected during the period of the stay. In particular, the indebted sovereign would have to undertake that resources would not be dissipated e.g. by making payments to non-priority creditors before agreement was reached with all creditors.

2.3.3. Economic policy undertakings

Krueger's 2001 SDRM proposal also envisages a requirement that:

the debtor would have to conduct its economic policies in a way that would help put the country back on the road to growth and viability. Implementation of an IMF-supported program would be one way to provide these assurances. Creditors would have an interest not only in monetary, fiscal and exchange rate policies, but also in bank restructuring, the integrity of the domestic payments system, the operation of the domestic bankruptcy regime, and the nature of any exchange and capital controls.¹⁴³

This is the most controversial part of the Krueger proposal, and brought an immediate response from NGO spokespersons such as Ann Pettifor from Jubilee Research. The essence of the objection to requiring debtor nations to enter into economic policy undertakings is the damage it inflicts on any idea of state sovereignty. Respect for state sovereignty requires that a state be free to independently make its own domestic economic policy decisions. When other aspect of the debt restructuring mechanism, such as the power to determine what level of debt servicing by the sovereign debtor is sustainable, are also under IMF control, then for Pettifor and others, the SDRM simply places far too much power in the hands of the IMF. Pettifor accuses the SDRM of being a “self-defeating rescheduling mechanism”:

We believe that this process is being driven by institutional self-interest because the sovereign debt restructuring mechanism would enhance the role of the Fund and would

¹⁴¹ International Monetary Fund Legal Department, *Note on an International Debt Adjustment Facility for Sovereign Debtors*, EBS/95/90, 26 May 1995 (unpublished, Executive Board Internal Report); cited in Rogoff & Zettelmeyer, *supra* note 41, p. 486.

¹⁴² Krueger, *supra* note 92.

¹⁴³ *Ibidem*, p. 5.

enshrine the international role of the Fund in law.¹⁴⁴ (...) we believe the sovereign debt restructuring mechanism is not fair (...) because the IMF shapes the outcome (...) in advance of the process. (...) the IMF by determining debt sustainability in advance pre-empts the process. The IMF effectively under the SDRM writes the plan, the composition plan. As IMF determines economic policies, the IMF not the debtor, or even a combination of the debtor and the creditor, writes the economic plans.¹⁴⁵

IMF and/or creditor-imposed conditionalities arguably detract from a number of international law principles, particularly those given prominence during General Assembly debates of the New Economic Order in the mid 1970s (discussed below). While creditors may justifiably ask to be satisfied that the debtor nation does have a strategy for moving forward towards solvency, they should not be able to simply impose policy conditionalities as they (the creditors) see fit. Debtors, just as much as creditors, have an interest in ensuring that national economic policies are conducted in a way calculated to put the country back on the road to viability. The point has been made that many debtor countries lack (because they cannot afford), the expertise needed to implement good quality economic policies.¹⁴⁶ This is where the World Bank and the IMF could prove useful, as they could provide independent advisers to work with debtor governments on the design and implementation of economic policy, including poverty reduction strategies. The key seems to lie in reaching a balance between retaining the sovereign independence of the debtor on the one hand, and providing reassurance for creditors that the economic system they are exposed to is being properly run on the other.

2.3.4. Availability of fresh finance

Fresh money is nearly always useful, if not vital, to a crisis-ridden sovereign debtor in a number of ways. It can help to limit economic dislocation, provide trade credit, finance payments to priority creditors, and provide resources for a return to generalized debt servicing. The need for new financing has been recognised as part of a number of previous proposals for a debt restructuring mechanism.¹⁴⁷ For example, in 1979 when the Group of 77 developing countries drew up a proposal for the creation of an "International Debt Commission" during a meeting in Arusha, the proposal included a particular emphasis on new financing.¹⁴⁸ Sachs and Schwarcz observed at the time that the under-provision of new private finance had led to an over-reliance on IMF and public-sector crises lending, with all the moral hazard implicit in such

¹⁴⁴ Pettifor, *supra* note 97. Transcript of an IMF Economic Forum: "A New Approach to Sovereign Debt Restructuring: An IMF Proposal", Panel discussion at the IMF's Sovereign Debt Restructuring Mechanism (SDRM) Conference, Washington DC, 22 January 2003, 6, available at <http://www.imf.org/external/np/tr/2003/tr030122.htm>.

¹⁴⁵ *Ibidem*.

¹⁴⁶ B. J. Cohen, *A Global Chapter 11*, 75 Foreign Policy 109 (1989).

¹⁴⁷ For discussion see Rogoff & Zettelmeyer, *supra* note 41, pp. 472-3.

¹⁴⁸ Group of 77, *Arusha Programme for Collective Self-Reliance and Framework for Negotiations*, reprinted as Annex IV in *Proceedings of the United Nations Conference on Trade and Development*, Fifth Session, Manila, Volume I, Reports and Annexes, 127-77 (1979).

bailouts.¹⁴⁹ Over 20 years later, in order to encourage and facilitate the provision of fresh finance, the IMF's proposed new SDRM recognised the need to encourage the provision of fresh finance by requiring that any new financing provided by private creditors after the introduction of a stay would be quarantined from the restructuring.¹⁵⁰

It was not until a policy initiative introduced during the 1980s that the IMF was willing to lend into arrears. The IMF's policy prior to 1986 was to lend only if the projected balance of payments needs of a country were fully financed. In other words, if bank creditors refused to reschedule a country's debts, the Fund would normally suspend access to its own money. IMF lending into arrears first appear in the context of a stand-by arrangement with Bolivia in June 1986, and was formally adopted as part of the IMF's debt strategy in May 1989.¹⁵¹ Under the new policy, arrears to commercial banks were generally tolerated. By 1998, the policy was extended to include tolerance for arrears to bondholders. From the perspective of solving the collective action and incentive problems associated with sovereign debt restructuring, this had two consequences. First, in principle, debtors could now receive IMF support after a payments suspension, while negotiations with creditors were in progress. This made the prospect of declaring a unilateral moratorium less daunting and weakened the bargaining position of private creditors, who were "no longer allowed to determine whether an [IMF] arrangement would be approved." Second, it gave the IMF an instrument with which to exert leverage over a defaulting debtor. Cooperative debtor behaviour during negotiations with creditors could be rewarded through lending into arrears.¹⁵²

One possibility would be the establishment of a special fund to support the implementation of a new SDRM. The fund could provide fresh finance to countries needing to restructure their debt under the terms of a new SDRM, and could also be used to pay for the operations of an independent body charged with overseeing such restructurings. The fund could even be financed by a "Robin Hood" tax (sometimes referred to as a Tobin Tax)¹⁵³ imposed on international financial transactions and recommended by some as a means of curbing harmful speculative financial flows.¹⁵⁴ To

¹⁴⁹ Sachs, *supra* note 86; Schwarcz, *supra* note 89.

¹⁵⁰ Krueger, *supra* note 92.

¹⁵¹ J.M. Boughton, *Silent Revolution: The International Monetary Fund, 1979-1989*, IMF, Washington: 2001, pp. 485-98.

¹⁵² A. Haldane & M. Kruger, *The Resolution of International Financial Crises: Private Finance and Public Funds*, Bank of Canada Working Paper 2001/20 (November 2001), p. 8. Rogoff & Zettelmeyer, *supra* note 41, p. 479.

¹⁵³ After the original proposal for a currency transaction tax (as a means of enhancing the efficacy of macroeconomic policy) made by James Tobin in his Janeway Lectures in 1972 (published as J. Tobin, *The New Economics One Decade Older: The Eliot Janeway Lectures on Historical Economics in Honour of Joseph Schumpeter*, 1972, Princeton University Press, Princeton: 1974.

¹⁵⁴ M. ul Haq, I. Kaul & I. Grunberg (eds.), *The Tobin Tax: Coping with Financial Volatility*, Oxford University Press, New York: 1996. See also P. Wahl & P. Waldow, *Currency Transaction Tax – a Concept with a Future: Chances and Limits of Stabilising Financial Markets Through the Tobin Tax*, World Economy, Ecology and Development Working Paper (Bonn, 2001).

those who argue that “easy” access to fresh finance serves to reduce the cost of default for debtors and thus make defaults more frequent, Rogoff and Zettelmeyer point out that this may well in fact be an improvement over the current situation.¹⁵⁵ It may be better – more efficient – to have occasional low-cost debt restructuring than more infrequent but disastrous crises. If that is the case, it is not obvious that the cost of capital would rise, because even though the likelihood of debt restructurings might rise, creditor losses contingent on debt restructurings would fall. Moreover, even if the cost of capital does increase, and the average volume of capital flows declines, this may be welfare improving if it goes along with a higher stability of capital flows.¹⁵⁶

A reduced volume of more stable capital flows may also help to restore, or at least may reflect, the kind of market discipline that exists when “creditors bear the consequences of the risks they take”. As the IMF Policy Review and Development Committee has noted: “[p]rivate credit decisions need to be based on an assessment of the potential risk and return associated with a particular investment, not in the expectation that creditors will be protected from adverse outcomes by the official sector.”¹⁵⁷ In other words, banks which have lent to sovereign debtors beyond that debtor’s ability to repay should not expect to be bailed out.

2.3.5. Independent oversight and dispute-resolution

One of the earliest proposals for sovereign debt restructuring that recognised the need for an independent oversight body was the Group of 77 1979 proposal for the creation of an International Debt Commission. As put forward to the 5th UN Conference on Trade and Development (UNCTAD) in June 1979, the Debt Commission would consist of:

eminent public figures with recognised knowledge and experience of debt problems and economic development. Any interested developing country which believes it has, or may have a debt problem could address itself to the Commission. The commission will: (i) Examine the debt and development problems of the requesting country; (ii) In the light of such examination (...) make recommendations on measures required to deal with the debt problem in the broader context of development including measures of debt reorganisation and additional bilateral and multilateral finance; (iii) Convene a meeting of all parties concerned with a view to implementing the recommendations under (ii) above.¹⁵⁸

Two years later, in 1981, Christopher Oeschli also emphasised the need for a independent “examiner, a monitoring party which does not displace the debtor from control of its business” as part of a sovereign debt restructuring mechanism that would

¹⁵⁵ Rogoff & Zettelmeyer, *supra* note 41, pp. 497-98.

¹⁵⁶ *Ibidem*.

¹⁵⁷ IMF, *Involving the Private Sector in the Resolution of Financial Crises – Restructuring International Sovereign Bonds*, Prepared by the Policy Development and Review and Legal Departments, presented at the Executive Board Meeting 01/8, 24 January 2001, Part V Concluding Observations, p. 27.

¹⁵⁸ Group of 77, *supra* note 148.

be based on Chapter 11 of the US Bankruptcy Reform Act of 1978.¹⁵⁹ In 1995, the IMF Legal Department favoured the establishment of a semi-independent arbitration body to oversee sovereign debt restructurings – a body which, it was suggested, could be established through an amendment of the IMF's Articles of Agreement.¹⁶⁰ This was the same year that Jeffrey Sachs delivered an influential lecture in which he suggested that the IMF was so inefficient in its lending role that it should instead be reorganised to assume the role of an international bankruptcy court.¹⁶¹

Other commentators, including Barnett, Galvis and Gouraige¹⁶² and Cohen¹⁶³ have called for the creation of a new permanent International Debt Restructuring Agency established by multilateral convention. Others have proposed that *ad hoc* facilitation panels could be established as part of each sovereign debt restructuring process.¹⁶⁴ In each case, the role of the independent oversight body would be to verify creditor claims, supervise voting processes, resolve disputes and oversee the reaching and implementation of a final restructuring agreement. A number of commentators have emphasised the need for the new body to be independent of the multilateral institutions, especially the IMF. James Hurlock, for example, rejected suggestions for an IMF-based bankruptcy tribunal on the grounds that “the Fund is ill-suited to the role of neutral arbiter of sovereign debt disputes because of its political nature and voting structure.”¹⁶⁵

In 2001, Anne Krueger, discussing an IMF proposal for an SDRM, recognised the need for “independent arrangements for the verification of creditors' claims, the resolution of disputes, and the supervision of voting.”¹⁶⁶ If the new, independent body established to fulfil these functions also has the job of overseeing access to a pool of fresh lending to crisis-ridden states (funded via a Tobin tax), then the body will need to be a permanent one. If not, then *ad hoc* arbitration bodies could be established, possibly appointed via an IMF dispute settlement understanding modelled on the WTO Dispute Settlement Understanding.¹⁶⁷

¹⁵⁹ For discussion see Rogoff and Zettelmeyer, *supra* note 41, pp. 473–4.

¹⁶⁰ IMF, *Note on an International Debt Adjustment Facility for Sovereign Debtors*, EBS/95/90, 26 May 1995 (unpublished, Executive Board Internal Report).

¹⁶¹ J. Sachs, *Do We Need an International Lender of Last Resort?*, Vol 8 Frank D. Graham Lecture at Princeton University, (20 April 1995). “IMF practices should be reorganized such the IMF plays a role far more like an international bankruptcy court and far less like the lender of last resort to member governments.” (p. 14), available at <http://www.hks.harvard.edu/cid/>.

¹⁶² Barnett et al., *supra* note 89.

¹⁶³ Cohen, *supra* note 123, p. 173. See also Cohen, *supra* note 146.

¹⁶⁴ A. de Jonge, *An international debt-relief forum*, in: E. Dommen (ed.), *Debt Beyond Contract*, Observatoire de la Finance, Geneva: 2001, 79, pp. 91–93.

¹⁶⁵ J. Hurlock, *The Way Ahead for Sovereign Debt*, Euromoney (August 1995), pp. 78–9.

¹⁶⁶ Krueger, *supra* note 126, p. 6. According to Krueger, this would “help reassure investors that they need not worry about the potential for fraud, for example if a country were deliberately to issue debt to friendly creditors in sufficient quantities to give them a supermajority to impose a big haircut on all creditors.”

¹⁶⁷ Annex 2 of the WTO Agreement, in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 ILM 1225 (1994).

The need for flexibility in developing solutions to sovereign debt crises was emphasised above. It can be argued that the creation of a permanent oversight body or set of rules could lead to a lack of flexibility as such legal institutions have a tendency to become fixed and more rigid in their ways and procedures over time. It may well be that *ad hoc* independent arbitration – plain vanilla style international law – is therefore to be preferred. The Jubilee campaign has drawn on Raffer's scholarship to demand a fair, transparent arbitration procedure in the resolution of sovereign debt crises.¹⁶⁸

Existing arbitral tribunals that are well accepted internationally and have good track records offer possible fora for independent (fair and transparent) arbitrations. The World Bank's International Centre for the Settlement of Investment Disputes (ICSID) is one such forum. On 4 August 2011, the ICSID Panel decided (by a majority of two to one) to accept jurisdiction and proceed to a hearing on the merits in a dispute between the government of Argentina and a class of 60,000 holders of defaulted Argentine bonds.¹⁶⁹ The dispute being arbitrated arose following the Argentine government's 2001 declaration of a moratorium on service of its outstanding debts owed to foreign creditors. As Argentina emerged from the devastating economic crisis that led to the moratorium, in 2005 the government offered to exchange the defaulted debt for new debt instruments, paying approximately thirty-five cents in the dollar. Although about 76% of Argentina's creditors participated in the restructuring, the debt held by creditors that refused to participate was still massive.

The hold-out creditors filed hundreds of lawsuits against Argentina in New York, Germany, Italy and elsewhere to collect on the defaulted debt, but they have found the judgments in their favour hard to enforce. The Argentine government has refused to pay, and many creditors could not find attachable Argentine assets to levy against. Other holders of defaulted Argentinian debt have sought arbitration of their claims. Arbitration has several advantages over litigation – arbitral awards can be enforced under the 1958 New York Convention or ICSID Conventions, with simpler procedures and broader reach than the procedures for enforcing a foreign judgment. There are hundreds of bilateral investment treaties (BITs) providing for arbitration of investor claims against sovereigns, either before ICSID or under other rules. ICSID arbitration

¹⁶⁸ See e.g. K. Raffer, *Debt Relief for Low Income Countries: Arbitration as the Alternative to Present Unsuccessful Debt Strategies*, WIDER Discussion Paper 2001/113 (October 2001), World Institute for Development Economic Research, UN University, Helsinki/Helsingfors, <http://www.wider.unu.edu/conference/conference-2001-2/conference2001-2.htm> (last accessed 10 April 2013). See also A. Krueger, *Sovereign Debt Restructuring and Dispute Resolution* (6 June 2002), available at <http://www.imf.org/external/np/speeches/2002/060602.htm> (last accessed 10 April 2013); and K. Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17(3) *American Review of International Arbitration* 335 (2006).

¹⁶⁹ *Abacat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), available at <http://italaw.com/documents/AbacialDecisionJurisdiction.pdf> (last accessed 10 April 2013). Discussed in K. Halverson Cross, *Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims Against Argentina*, 15(30) *ASIL Insights* (21 November 2011).

also has the advantage that ICSID awards generally have enjoyed a high rate of voluntary compliance.¹⁷⁰

Beginning in March 2006, Task Force Argentina (TFA), an association of eight major Italian banks, distributed to Italian holders of defaulted Argentine debt a request to sign a mandate for TFA to represent them in pursuing an ICSID arbitration claim against Argentina. In September 2006, after over 180,000 bondholders had accepted TFA's mandate, TFA filed on their behalf a request for arbitration against Argentina. Argentina contested the tribunal's jurisdiction to hear the bondholders' claims.

In May 2010, Argentina initiated a second offer in exchange defaulted debt for new debt instruments. Sixty-six percent of the hold-out creditors participated in this offer. Claimants that participated in the 2010 exchange offer withdrew from the ICSID claim, leaving approximately 60,000 bondholders.¹⁷¹

Until *Abaclat and Others (formerly Giovanna a Beccara and Others) v Argentine Republic*, no tribunal had ever addressed whether bonds constitute an "investment" for the purposes of the ICSID Convention. Nor had any tribunal addressed the question of whether consent to investor-state arbitration in a BIT (such as the Italy-Argentina BIT at issue in the case) extended to mass claims, let alone the further question of whether ICSID's procedural rules allow for a mass claims (or class action) procedure.¹⁷²

The ICSID tribunal in *Abaclat* found, first, that the sole criterion as to whether the bonds at issue constitute an 'investment' for purposes of the ICSID Convention is whether the bonds fall within the definition of investment provided for in the relevant BIT (i.e. the Italy-Argentina BIT). This approach departs from previous ICSID decisions that articulate additional criteria, including the duration of the investment and the significance of the investment to the host state's development.¹⁷³

Second, the tribunal acknowledged that the ICSID framework is silent as to mass proceedings, but found that it would run counter to the purpose of the Italy-Argentina BIT and to the spirit of ICSID to interpret such silence as a prohibition on mass proceedings. Similarly, while the tribunal acknowledged that it would not be able to examine group claims in the same careful way it could with individual claimants, this consideration was weighed against the consequences of rejecting the bondholders' claims for lack of admissibility – an outcome which could, in the tribunal's view, result in a "shocking" denial of justice to the claimants. It should be noted that this finding stands contra to the approach taken by the US Supreme Court in the context of commercial arbitration. In *Stolt-Nielsen SA v Animal Feeds Int'l Corp.*,¹⁷⁴ the Court found that "the differences between bilateral and class-action arbitration are too great for arbitrators

¹⁷⁰ Halverson Cross, *supra* note 169.

¹⁷¹ *Ibidem*.

¹⁷² *Ibidem*.

¹⁷³ *Ibidem*, citing *Abaclat*, pp. 362-367; See also Ch.H. Schreuer, *The ICSID Convention: A Commentary* (2nd ed.), Cambridge University Press, Cambridge: 2009, pp. 128-34, and M. Waibel, *Sovereign Defaults before International Courts and Tribunals*, Cambridge University Press, Cambridge: 2011.

¹⁷⁴ 130 S. Ct. 1758 (2010).

to presume (...) that the parties mere silence on the issue (...) constitutes consent to resolve their dispute in class proceedings.”¹⁷⁵ It should also be noted that Georges Abi-Saab, the arbitrator Argentina appointed to the Abaclat tribunal, issued (on 28 October 2011) a strong dissent from the majority’s decision concluding that the tribunal lacked jurisdiction to hear the bond-holders claims, *inter-alia* on the ground that devising new procedures to handle mass claims would both exceed the tribunal’s powers and deprive Argentina of its procedural rights to individual adversarial examination of differentiated claims.¹⁷⁶ Argentina had also argued, as a point of policy, that allowing arbitration would only encourage hold-out creditors, and thereby further complicate efforts to modernize the sovereign debt restructuring process.¹⁷⁷

Yet used properly, arbitration in sovereign debt disputes may have the very opposite effect. Arbitration clauses in sovereign debt instruments may be more acceptable to creditors than, for example, collective action clauses but could be structured to have a similar effect in precluding hold-out creditors. An agreement to abide by the results of mass action arbitration would be seen as fair and transparent, and if made binding on all holders of debt issued by a particular sovereign, or on all holders of a particular debt type, could be used to preclude legal action by hold-out creditors.

Any panel established to resolute disputes in a sovereign debt restructuring would need to have an agreed basis of legal authority. It should have authority not only to evaluate creditor claims, but also any challenges by the debtor to the legal validity of the original debt. For example, it may need to investigate whether or not the debt properly belongs to the sovereign challenging the existence of an obligation, or whether coercive measures were involved in the original contracting of the sovereign debt.¹⁷⁸

The final part of this article examines widely accepted international instruments containing principles relevant to the resolution of sovereign debt crises.

CONCLUSION

Sovereign debt crises are not going to disappear, from the landscape of global economic relations. In this article, I have attempted to identify principles of international law, drawn from treaties and state practice, which should be kept in mind in the resolution of sovereign debt crises, and in designing a new mechanism to bring about such resolution. These are:

1. respect for the sovereign equality of all nations, including respect for state sovereignty in debtor-country economic policies moving forward, with the help of independent expert advice when requested;

¹⁷⁵ *Ibidem*, p. 1776.

¹⁷⁶ Abaclat, *supra* note 169, Professor Georges Abi-Saab, Dissenting Opinion, p. 48 (28 October 2011), available at http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf (last accessed 10 April 2013).

¹⁷⁷ Halverson Cross, *supra* note 169, p. 3.

¹⁷⁸ See e.g. claims that Iceland was “pressured” into bailing out its banks in favour of international creditors: Waibel, *supra* note 81; Tarpley, *supra* note 58.

2. a requirement of good faith cooperation in the resolution of sovereign debt crises, including a collective action requirement for creditors;
3. recognition that all states share responsibility for ensuring sovereign debt crises are resolved in a manner which best protects the human rights of all those affected;
4. recognition that such shared responsibility may impose common but differentiated obligations on states depending upon the particular circumstance of each sovereign debt crisis;
5. an extendible, fixed-period stay on legal action by creditors;
6. access to fresh financing when certain conditions are met, with access overseen by an independent body; and
7. the establishment of an independent body to oversee all other aspects of resolving the crisis, including dispute resolution.

While principles 1-4 listed above are widely accepted, their precise meaning and how they should be implemented remains open to debate. Principles 5-7 listed above can be considered more in the nature of *lex ferenda* than *lex lata*, and will probably need to be enshrined in a widely-ratified treaty before they are accepted as part of international law. The politics surrounding the negotiation of such a treaty may well depend on the vagaries of the international financial system and its continued stability. Attempts from within the IMF to formulate such a treaty have not so far been successful. It may well be that the ILC, as a forum relatively free from politics, may be a more appropriate place within which the foundations of such a treaty might be laid down. Yet the history of attempts at crisis prevention suggests that the opposite is true, and that in the future debt crises may well continue to be dealt with as a political problem, rather than as a legal issue.¹⁷⁹ The example of the European Union in the years since 2008 demonstrates the difficulties that even this group of economically and politically rather homogenous States has experienced in establishing rules for their national fiscal and economic policies. Moreover, the impact of each crisis at the global level appears to have been escalating ever since the first Mexican crisis of the early 1980s. In such a climate, States typically become more defensive and less able and willing to cooperate. It is to be hoped that before this happens, the world community will realise that the “band-aid” style of handling sovereign debt crises – by addressing specific problems and loopholes in existing mechanisms only as they are highlighted by each new crisis – will no longer suffice.

¹⁷⁹ Ch. Walter, *Debt Crisis*, in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, New York: 2011, para. 47.

Mia Swart*

THE *LUBANGA* REPARATIONS DECISION: A MISSED OPPORTUNITY?

Abstract

In March 2012 the ICC delivered its first and long-awaited judgment in Prosecutor v Lubanga. Trial Chamber I found Thomas Lubanga guilty as co-perpetrator of the war crimes of conscripting and enlisting children into the armed forces. The guilty verdict was followed by a reparations decision on 7 August 2012. This article examines the extent to which the ICC has successfully fulfilled its mandate to formulate reparations principles. The position of reparations within international law generally is discussed. This is followed by an explanation of how the ICC reparation regime functions. The bifurcated reparations mandate of the ICC is also explained. The focus of the article is on a critical assessment of the Lubanga reparations decision. The Court's treatment of the harm requirement and the requirement of causation is examined. It is argued that the Court's failure to clarify the requirements of "harm" and "causation" meant that it did not fulfil its mandate to formulate reparations principles.

INTRODUCTION

They expect something that will really help them to heal, to help them to recover from the loss of their childhood, their education.¹

The International Criminal Court (ICC) is the first international criminal court or tribunal with an explicit mandate to provide reparations to victims.² The ability to

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¹ Bukeni Waruzi, an expert on child soldiers and the programme manager for Africa and the Middle East at the NGO Witness, cited in *Thorny Issue of Reparations for Lubanga's victims*, The Guardian 12 April 2012.

² Art. 75 of the ICC Statute states:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

order reparations to victims is one of the most innovative and exciting aspects of the Court's mandate.³ Whereas other international courts such as the Cambodia Tribunal⁴ have the ability to make reparations, the emphasis on reparations in the ICC Statute is unique. This is a cause not only for celebration but for scholarly attention. In March 2012 the ICC delivered its first and long-awaited judgment in *Prosecutor v Lubanga*.⁵ Trial Chamber I found Thomas Lubanga, a former Congolese rebel leader, guilty as co-perpetrator of the war crimes of conscripting and enlisting children into the armed forces and actively using the children under age 15 in the hostilities. The judgment breaks new ground: it was the first to be delivered by a permanent international criminal court; and it was the first time an international court focused exclusively on the crimes of conscripting, enlisting and using child soldiers.⁶ The guilty verdict was followed by the Court's first sentencing judgement on 10 July 2012⁷ and a reparations decision on 7 August 2012.⁸ Under the Rome Statute a perpetrator's liability for reparations is based on his criminal responsibility. The guilty verdict in this case is therefore the trigger that allows the ICC to order reparations.⁹ But how did the ICC fare in its first reparations decision?

The reparation decision did not make any order of financial or symbolic reparations but outlined some principles to guide the ordering of reparations to victims. The Trial Chamber affirmed that victims of war crimes, crimes against humanity, and genocide have a fundamental right to receive reparations. The Trial Chamber also recommended that a new trial chamber be established and the actual concrete order of reparations was delegated to a Trial Chamber that is yet to be established. The decision to lay down principles of reparations is consistent with the mandate

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79

³ The emphasis on victims is evident from the preamble of the ICC Statute. It states: "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." Rome Statute of the International Criminal Court, Preamble, 17 July 1998, 2187 UNTS (hereinafter "Rome Statute").

⁴ Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ("Extraordinary Chambers" or "ECCC").

⁵ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-1/06, 14 March 2012 (hereinafter "*Lubanga Judgement*").

⁶ See however the jurisprudence of the Special Court for Sierra Leone on child soldiers, e.g., *Prosecutor v Alex Tamba Brima et al*, Case No. SCSL-04-16-T, Trial Chamber Judgment, 20 June 2007; *Prosecutor v Issa Hassan Sesay et al*, Case No. SCSL-04-15-T, Trial Chamber Judgment, 2 March 2009.

⁷ *Decision on Sentence Pursuant to Article 76 of the Statute*, ICC-01/04-01/06, 10 July 2012.

⁸ *Situation in the Democratic Republic of the Congo, Prosecutor v Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06, 7 August 2012 (hereinafter "Reparations Decision").

⁹ C. McCarthy *Reparations and Victims Support in the International Criminal Court*, Cambridge University Press, Cambridge: 2012, p. 188.

contained in Art. 75 of the ICC Statute and the fact that it was the first reparation decision of the ICC. The decision stated that reparations “go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims.”¹⁰ The ICC’s reparations decision however did not fulfil its the mandate to formulate principles in a satisfactory way and or live up to the expectations of victims or academic commentators.

This article examines the extent to which the ICC has successfully fulfilled its mandate to formulate reparations principles in its judgement in the *Lubanga* case. The position of reparations within international law generally is discussed. This is followed by an explanation of how the ICC reparation regime functions. The bifurcated reparations mandate of the ICC is also explained. The focus of the article is on a critical assessment of the *Lubanga* reparations decision. In this context, specific attention is paid to the Court’s mandate to formulate reparations principles. The Court’s treatment of the harm requirement and the requirement of causation is examined. It is argued that the Court’s failure to clarify the requirements of “harm” and “causation” meant that it did not fulfil its mandate to formulate reparations principles. The *Lubanga* reparations decision was a moment of great symbolic importance in international criminal law and it seems that the ICC missed an opportunity to lay a firm foundation for future reparations decisions.

The reparations regime of the ICC is treated within the broader context of international law and international criminal law. Because of the fact that the Court itself relies on practices and precedents from international courts and on the work of academic experts in international law, the article occasionally refers to the practice of other international courts such as the *ad hoc* International Criminal Tribunals for Yugoslavia (ICTY)¹¹ and Rwanda (ICTR).¹²

Koskenniemi has stated that victims do not so much expect punishment as recognition of the fact that what victims were made to suffer was wrong, and to have their moral grandeur sufficiently affirmed.¹³ The creation of the ICC’s scheme of victim redress offers with it the possibility of symbolic affirmation of the wrong. Crucially, it creates the possibility to provide a measure of justice to a much wider range of victims

¹⁰ Reparations Decision, para. 177.

¹¹ The full denomination for the ICTY is the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia since 1991, established by the Security Council through Resolution 827 (1993) of 25 May 1993 and functioning under a statute originally published as an Annex to the Report of the Secretary General pursuant to para. 2 of Security Council resolution 808 (1993) S/25704, 3 May 1993.

¹² The full name of the ICTR is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1995.

¹³ M. Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck Yearbook of United Nations Law 11 (2002).

than is possible through prosecution and punishment. In a sense it extends and expands the reach of justice.

1. LUBANGA: BACKGROUND AND JUDGMENT

The background to the *Lubanga* case is as follows: The *Union des Patriotes Congolais* (“UPC”) was created on 15 September 2000. Thomas Lubanga was one of the UPC’s founding members and its first President. The UPC and its military wing, the *Force Patriotique pour la Libération du Congo* (FPLC) took power in Ituri in September 2002.¹⁴ Ituri is a region in the rain forested eastern DRC. The prosecution argued that that Lubanga visited and inspected FPLC military training camps, oversaw the conduct of military affairs and appointed the senior ranks within the FPLC, secured financing for the UPC/FPLC, and negotiated the provision of their weapons and other military equipment. It was the view of the prosecutors that Lubanga personally took part in recruiting child soldiers, had them trained, and used them in armed conflict.

Lubanga was arrested in March 2005 and transferred from the DRC to the ICC in March 2006. The charges against him were confirmed in January 2007. The start of the trial was plagued by delays but it eventually started in June 2008.

The charges in the *Lubanga* case centered on the crimes contained in Art. 8(2) of the Rome Statute: the conscripting, enlisting and use of children under the age of fifteen in armed conflict.¹⁵ But the trial did not proceed smoothly. From very early on, it encountered particularly serious procedural obstacles. This is illustrated by the fact that the trial was “stayed” or suspended twice.¹⁶

On 14 March 2012 Trial Chamber 1 unanimously convicted Thomas Lubanga. The judges found that Lubanga and his co-perpetrators¹⁷ participated in a common plan to build an army for the purpose of establishing military control of Ituri.¹⁸ This resulted in the conscription and enlistment of children under the age of fifteen and their active use in the hostilities. The accused satisfied the mental element of the crime by

¹⁴ *Prosecutor v Thomas Lubanga Dyilo*, Public Summary of the Judgment Pursuant to art 74 of the Statute, ICC 01/04-01/06 (hereinafter “Public Summary”).

¹⁵ Art. 8(2)(e)(vii) of the Rome Statute prohibits “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”

¹⁶ The trial was initially suspended when the prosecutor failed to disclose information to the defense. The trial was suspended for a second time when the prosecutor refused to disclose the identity of an intermediary. The first stay was imposed on 13 June 2008 and lifted on 18 November 2008. The second stay was imposed on 8 July 2010 and lasted until 8 October 2010. See also A. Cole, K. Askin, *Thomas Lubanga: War Crimes Conviction at the First Case before the International Criminal Court*, 16(2) *Insights*, American Society of International Law (2012).

¹⁷ With regard to the mode of liability, the allegations concerned Art. 25(3) of the Rome Statute, which included “co-perpetration” by referring to commission “jointly with each other”. Lubanga was charged with committing the crimes through coordination with other leaders within the UPC.

¹⁸ *Lubanga* Judgement, para. 1351.

being aware of the fact that children were recruited, conscripted, and used in military operations.¹⁹

The Trial Chamber found that “conscripted” and “enlistment” are both forms of recruitment in that they refer to “coercive” and “voluntary” incorporation, respectively, into an armed group. The crimes of conscripting, enlisting and using child soldiers were said to constitute three distinct crimes.²⁰

The ICC developed the jurisprudence on the use of child soldiers by finding that the crime of enlisting child soldiers is committed as soon as the child joins the armed group “with or without compulsion”. As Alison Cole comments, this sets a high threshold by prohibiting any use of children in armed forces.²¹ Children are prohibited from participating even when families or the children themselves may appear to support the child’s participation due to the coercive circumstances of armed conflict.

The judgment also sets a high threshold for the protection of children who have an “indirect” role in armed conflict, such as children who may be forced to conduct domestic duties or general support activities which may not include taking up arms. The decisive factor in deciding if an “indirect” role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.²²

Although the prosecutor had not specifically charged Lubanga with sexual violence and rape,²³ a decision which has been severely criticised,²⁴ the judges paid particular attention to the experience of girl soldiers who suffered from sexual violence.²⁵ During the trial, the Court rejected an attempt by the victims participating in the case to amend the charges to include gender crimes. But in the course of presenting evidence, witnesses repeatedly raised the abuse of girls and women as sex slaves.

The Trial Chamber further commented on the controversial issue of the prosecution’s use of intermediaries, which had a disruptive effect on the trial. The ICC has defined an intermediary as “someone who comes between one person and another; who facilitates contact and who provides a link between one or more of the organs or units of the Court or Counsel on the one hand and victims, witnesses, beneficiaries

¹⁹ *Ibidem*, para. 1350.

²⁰ Public Summary, para. 23.

²¹ A. Cole, *Lubanga Judgment marks milestone in the path to accountability*, The Guardian, 14 March 2012.

²² Public Summary, para. 24.

²³ See in this regard *Prosecutor v Lubanga (Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, entitled ‘Decision Giving Notice to the Parties and Participants That the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court’)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 15 OA 16, 8 December 2009).

²⁴ See Ch. de Vos, *Someone Who Comes Between One Person and Another: Lubanga, Local Cooperation and the Right to a Fair Trial*, 12(1) Melbourne Journal of International Law 217 (2011).

²⁵ The evidence also established that children, mainly girls, were used to carry out domestic work (Public Summary, para. 29).

of reparations and/or affected communities on the other.”²⁶ Intermediaries currently assist with functions such as communicating with victims/witnesses in situations where direct contact with the Court could endanger the safety of victims and witnesses.²⁷ Intermediaries also liaise between legal representatives and victims for the purpose of victim reparations.²⁸

Whereas the Chamber acknowledged the need to make use of intermediaries, it stated that the prosecution should not have delegated its investigative responsibilities to intermediaries.²⁹ The Chamber acknowledged a link between the unsupervised use of intermediaries and the unreliable testimony of many of the witnesses.³⁰ According to the Chamber, the intermediaries “were potentially able to take advantage of the witnesses.”³¹

2. REPARATIONS: THE NEW FRONTIER IN INTERNATIONAL CRIMINAL LAW

The emphasis on the interests of victims and the new respect for the obligation to pay reparations in international law can be described as a new frontier in international law and international criminal law. The emphasis on victims fits within the paradigm shift from the state to the individual in the context of international criminal law. The enactment of the Rome Statute indeed marks a shift from an emphasis on prosecution and individual criminal responsibility to a paradigm where the latter is combined with respect for victims’ concerns.³²

Following the definition in the *Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*,³³ the term “reparations” in this article refers to the range of measures that may be taken in response to an actual or threatened violation of international human rights law and international humanitarian law (embracing both the substance of relief as well as the procedure through which it may be obtained). The Rome Statute itself does not define reparations. Whereas in domestic systems reparations do not usually

²⁶ *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, April 2012 p. 5 See de Vos, *supra* note 24.

²⁷ *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, *supra* note 26, p. 6.

²⁸ *Ibidem*.

²⁹ *Ibidem*, p. 17.

³⁰ *Lubanga* Judgement, paras. 499-502.

³¹ *Ibidem*, para. 205.

³² See e.g. V. Spiga, *No Redress without Justice*, 10(5) *Journal of International Criminal Justice* 1377 (2012).

³³ The Basic Principles and Guidelines state: *Convinced* that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity. Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

flow from a criminal conviction,³⁴ under the Rome Statute a perpetrator's liability for reparations is directly tied to his criminal responsibility.

Significantly, the duty to make reparations is recognised in many regional human rights instruments. The Inter-American Court of Human Rights (in implementing the American Convention of Human Rights) has been at the forefront of a legal revolution with regard to reparations awards.³⁵ Art. 13 of the European Convention on Human Rights recognises the right to an "effective" remedy.

The movement to highlight the payment of reparations to victims of serious human rights violations goes hand-in-hand with the international movement to give greater recognition to victims in international law.³⁶ Reparations have also been acknowledged as a core ingredient of Transitional Justice.³⁷ Ruti Teitel describes calls for reparations as indicative of post Cold War Transitional Justice attempts to undo history and construct alternative historical narratives after massive catastrophe.³⁸ As a general rule however, international courts have not been active in ordering financial reparations. The movement to recognize victims' rights in international criminal law has not yet translated into concrete monetary awards to victims.³⁹ Even courts that have the mandate to award reparations, such as the ECCC⁴⁰ are often not mandated to award *financial* reparations. Rule 23 of the Internal Rules of the Cambodia Tribunal provides for the possibility of "moral" or collective reparations, but excludes financial reparations.⁴¹

In spite of the growing recognition given to reparations in many prominent international conventions, there is however still no universal consensus on the question

³⁴ Whereas some jurisdictions allows for compensation claims flowing from criminal conviction, compensation is usually paid in cases involving civil wrongs such as tort or delict. Under Cambodian law, civil parties may claim compensation in criminal cases for damages they suffered from the crimes being tried. In French law, a civil action can be brought jointly with a penal action before a criminal court. According to Art. 2 of the Code of Criminal Procedure, civil action for damages caused by a crime, misdemeanour or offence is open to all who have personally suffered damage as a direct result of the offence. See C. Howard, *Compensation in French Criminal Procedure*, 21(4) *The Modern Law Review* 387 (1958).

³⁵ See *Velasquez Rodriguez v Honduras*, Int-Am Ct HR (Ser. C) No. 4 1988, 29 July 1988.

³⁶ E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, Norton, New York: 2000.

³⁷ P. de Greiff, *Justice and Reparations*, in: P. De Greiff (ed.), *Handbook of Reparations*, Oxford University Press, Oxford: 2006, p. 454.

³⁸ R. Teitel, *Transitional Justice*, Oxford University Press, Oxford: 2000, p. 86.

³⁹ This has been in contrast with the tendency to pay financial reparations in the context of Mass Claims Procedures.

⁴⁰ Although the judges of the ECCC have decided that individual financial compensation will not be possible, the judges may award collective and moral reparations such as an order to fund any non-profit activity or service that is intended for the benefit of victims. See <http://www.eccc.gov.kh/en/faq/willvictims-be-entitled-compensation> (last accessed 10 April 2013).

⁴¹ Moral and collective reparations are measures that:

- a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and
- b) provide benefits to the Civil Parties which address this harm. These benefits shall not take the form of monetary payments to Civil Parties.

whether a general right to reparation exists. Tomuschat takes a hesitant view and writes that establishing an individual right to reparation would be a “progressive development of the law and not [a] codification of existing rules.”⁴² Kamminga, on the other hand, has argued that such an entitlement already exists under international law.⁴³ It is indeed difficult not to recognise the increasing support for an individual entitlement to reparations under modern international law.⁴⁴ Although these statements are not made in the specific context of criminal convictions, statements made about reparations in international law generally are still relevant for the work of the ICC. This is evident from the fact that the Court itself relies on the work of academic experts in international law.

Reparations have however been a neglected area of the field of international criminal law.⁴⁵ The Statutes of the *ad hoc* ICTY or ICTR and the Special Court for Sierra Leone (“SCSL”) did not cater for victims in the form of victim participation⁴⁶ and did not make provisions for reparations.⁴⁷ Interestingly, ICTY President Patrick Robinson recognised this omission in the design of the ICTY when he called for the creation of a Trust Fund for Victims at the ICTY in 2011.⁴⁸ In contrast, the ECCC has catered for victims and victim participation. Victim participation at the ECCC seems to be a

⁴² Ch. Tomuschat, *Reparations for Victims of Grave Human Rights Violations*, 10 *Tulane Journal of International and Comparative Law* 157 (2002).

⁴³ M. Kamminga, *Legal Consequences of an Internationally Wrongful Act of a State against an Individual*, in: B. Barkhuizen et al. (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*, Martinus Nijhoff, The Hague: 1999. See also M. Kamminga, *Towards a Permanent International Claims Commission for Victims of International Humanitarian Law*, 25 *Windsor Yearbook of Access to Justice* 23 (2007).

⁴⁴ See F. Rosenfeld, *Collective Reparation for Victims of Armed Conflict*, 92 (879) *International Review of the Red Cross* 731 (2010); R. P. Mazzechi, *Reparation claims by individuals for state breaches of humanitarian law and human rights: an overview*, 1 *Journal of International Criminal Justice* 339 (2003), p. 343; A. Randelzhofer, *The legal position of the individual under present international law*, in: A. Randelzhofer, Ch. Tomuschat (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, Martinus Nijhoff, The Hague: 1999, p. 231; M. Sassoli, *State responsibility for violations of international humanitarian law*, 84(846) *International Review of the Red Cross* 401 (2002), p. 419; L. Zegveld, *Remedies for victims of violations of international humanitarian law*, 85(851) *International Review of the Red Cross* 497 (2003).

⁴⁵ Reparations have also been neglected in the field of Transitional Justice. See R. Mani, *Remedies As a Component of Transitional Justice: Pursuing Reparative Justice in the Aftermath of Violent Conflict*, in: K. de Feyter et al. (eds.), *Out of the Ashes. Reparation for Victims of Gross Human Rights Violations*, Intersentia, Antwerp, Oxford: 2005.

⁴⁶ Neither the ICTY nor the ICTR allows victims to participate in their own right (cf., M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6(2) *Human Rights Law Review* 203 (2006)).

⁴⁷ Anne Marie de Brouwer has however recognized that the ICTR has made progress in providing medical assistance, including anti-retroviral treatment, to victims who have appeared as witnesses. See A.M. de Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and Their Families*, 20(1) *Leiden Journal of International Law* 207 (2007).

⁴⁸ Robinson made this suggestion at the ICTY Legacy Conference in The Hague in November 2011. In light of the fact that the ICTY will soon be wrapping up its work, the creation of such fund seems unlikely.

tremendous success, with large numbers of victims participating and large numbers of the public attending the trials.⁴⁹

3. THE ICC REPARATIONS REGIME: A BRIEF SUMMARY

For many, the ICC is the focus of future hopes and aspirations for international criminal justice. The work of the ICC can have a substantial impact on the lives of tens of thousands of victims. In spite of this, little is currently known about how the ICC reparations regime will operate in practice. This is due in part to the fact that the documents governing the ICC establish the scheme in very general terms, and in part to the fact that the scheme is *sui generis*.

The issue of reparations at the ICC is governed by Art. 75 of the Rome Statute. The Statute caters for victims in two principal ways. Firstly, Art. 68(3) allows victims to participate in proceedings.⁵⁰ Participation before the Court may occur at various stages of the proceedings and may take different forms. The judges have the discretion to give directions as to the timing and manner of participation.⁵¹

The second way in which the Rome Statute caters for victims is to provide for the possibility of the payment of reparations. The Court can make an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries.⁵² This reparation may take the form of restitution, indemnification or rehabilitation. The Court may order reparations to be paid through the Trust Fund for Victims (TFV), which was created by the Assembly of States Parties.

The ICC has the important mandate to establish principles relating to reparations. The reference in Art. 75(2) to the establishment of “principles relating to reparations”

⁴⁹ Victims who have suffered physical, psychological and material harm as a result of a crime investigated by the ECCC may apply to become civil parties. Civil parties have the right to choose a lawyer. If needed, the ECCC helps them organise common legal representation. Civil parties can also organise their civil party action by becoming members of an association of victims. See Ch. Turnbull, *The Victims of Victims Participation in International Criminal Proceedings*, 29 Michigan Journal of International Law 777 (2007-2008).

⁵⁰ Art. 68(3) states: As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

⁵¹ This means that victims may file submissions before the Pre-Trial Chamber when the Prosecutor requests its authorisation to investigate. They may also file submissions on all matters relating to the competence of the Court or the admissibility of cases. More generally, victims are entitled to file submissions before the Chambers of the Court at the pre-trial stage, at trial, and during the appeals process. Participation in the Court's proceedings will in most cases take place through a legal representative and will be conducted “in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.”

⁵² Art. 75 (2) of the Rome Statute.

was intended to be an indirect reference to the UN Basic Principles of Justice for Victims of Crime and Abuse of Power and the then-draft UN Basic Principles on the Right to Reparation for Victims.⁵³

In terms of Art. 75(2), the ICC can make an order directly against a convicted person specifying appropriate reparations with respect to victims. To trigger the ICC's jurisdiction to award reparations it is necessary that a person must be convicted of a crime within the jurisdiction of this court. The fact that the Rome Statute ties the payment of reparations to the guilt or innocence of an accused raises a larger concern. It can be asked whether sympathy for the needs of the victims could not potentially put pressure on the court to convict the accused.⁵⁴ This concern should however not be exaggerated, since victims can be assisted by the Trust Fund in the absence of a guilty verdict.

As explained earlier, the Court can only order reparations once a guilty verdict has been reached. The Trust Fund for Victims however has a more flexible mandate. It is mandated to make reparations to victims whose injury cannot be causally linked to the responsibility of the convicted persons (assuming one can always make such a clear distinction) and it can do so at any time – before or after the verdict.⁵⁵ Under the non-court ordered general assistance mandate the TFV has already assisted thousands of victims in concrete and meaningful ways.⁵⁶

In terms of the implementation of the TFV's reparations mandate, the ICC may order money and other property collected through fines or forfeiture from a convicted person to be transferred to the TFV to be used for the implementation of the reparations reward.⁵⁷ The TFV has the mandate to complement such resources through voluntary contributions from donors.⁵⁸

The reparation mandate of the TFV is a part of its bifurcated mandate. In addition to its role in assisting the Court after a reparations order has been made, the TFV also has the mandate to provide general assistance to victims and their families. Such general assistance can consist of providing physical rehabilitation, material support, and psychological rehabilitation.⁵⁹

⁵³ UN Basic Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, UN. Doc. A/Res/40/34. See Ch. Evans, *Reparations for Victims in International Criminal Law*, in: J. Grimheden, D. Karlsson, R. Ring (eds.), *On-line Festschrift in honour of Katarina Tomasevski*, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund: 2011, p. 10.

⁵⁴ M. Swart, *Was the ICC's Lubanga judgment a fair one?*, Business Day 19 March 2012.

⁵⁵ Redress Trust, *Comments to the Trust Fund for Victims on the Progressive Realisation of its Mandate*, 22 March 2010, pp. 5 and 13 (available at http://www.redress.org/downloads/publications/REDRESS_Paper_for_TFV_Board_22March2010.pdf (last accessed 20 March 2013)).

⁵⁶ For more information on the various projects of the Trust Fund for Victims in Africa see <http://www.trustfundforvictims.org/>.

⁵⁷ *Ibidem*.

⁵⁸ For more on the politics surrounding donors see S. Kendal, *Donor's Justice*, (2011) 24 *Leiden Journal of International Law* 585 (2011).

⁵⁹ *Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations*, available at <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf> (last accessed on 20 March 2013).

The work of the TFV has been under-publicised.⁶⁰ It is a little known fact that the TFV is currently involved in 13 active projects and has assisted more than 80,000 victims so far, mostly in the DRC and Northern Uganda.⁶¹ The TFV has assisted in arranging reconstructive surgery for victims and has assisted thousands of victims of sexual violence. The establishment of the Trust, in combination with the reparations function of the TFV, has been hailed as unprecedented in international law.⁶²

4. REPARATIONS IN *LUBANGA*

The *Lubanga* judgment was widely celebrated.⁶³ Apprehensions remained however about how the ICC would approach the post-judgment phase of reparations.

Historically, no victim redress regime was created within the statutory framework of the Nuremberg Tribunal or of the ICTY or ICTR.⁶⁴ In a departure from this conventional approach in international law, the interests of victims formed an integral part of the *Lubanga* trial. This was particularly evident from the degree of victim participation in the case. Although it is important that the Rome Statute makes provision for victim participation in Art. 68, this article focuses on reparations and not participation and the issue of participation will therefore not be fully elaborated on here.⁶⁵ It is worth mentioning however that 129 victims participated in the *Lubanga* case.⁶⁶ Victims applied to participate for the purposes of introducing evidence, questioning witnesses, and advancing oral and written submissions.⁶⁷ To facilitate the process of victim participation, the Victims Participation and Reparations Section (VPRS) was established in the Registry of the ICC to assist victims and facilitate their access to the

⁶⁰ Frederic Megrét writes that the TFV has been shrouded in mystery. Its existence is anticipated by a single article in the Rome Statute, it has been quite discreet about its activities and its regulations took a long time to be adopted. See F. Megrét, *Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 Brooklyn Journal of International Law 123 (2010).

⁶¹ Press Release 23 March: *ICC Trust Fund For Victims Assists Over 80 000 Victims, Raises Reparations Reserve*, <http://reliefweb.int/report/democratic-republic-congo/icc-trust-fund-victims-assists-over-80000-victims-raises> (last accessed on 1 April 2013).

⁶² P. de Greiff & M. Wierda, *The Trust Fund for Victims of the International Criminal Court*, in: K. de Feyter (ed.), *supra* note 45, p. 25.

⁶³ J. Stewart, *Lubanga Decision Roundtable, Lubanga in Context*, Opinio Juris blog 18 March 2012, available at <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-lubanga-in-context> (last accessed 12 August 2012). See also the more measured tone of T. Lieflander, *The Lubanga Judgment of the ICC: More than just the first step?* 1(1) Cambridge Journal of International and Comparative Law 191 (2012).

⁶⁴ McCarthy, *supra* note 9, p. 46.

⁶⁵ For more on victim participation, see Spiga *supra* note 32, and E. Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90(870) International Review of the Red Cross 409 (2008).

⁶⁶ *Lubanga* Judgement, para. 16.

⁶⁷ This number includes 34 female victims and 95 male victims. See Summary of the Judgment, *Situation in the Democratic Republic of the Congo, Prosecutor v Thomas Lubanga Dyilo*, 14 March 2012, 5. ICC-01/04-1/06.

ICC.⁶⁸ When participating, victims pursue their own interest independently from the parties to the case.⁶⁹ It is expected that many more victims will participate in the next trial to be heard by the ICC, the *Katanga* trial.⁷⁰ Germain Katanga is the next accused, after Thomas Lubanga, to face charges before the ICC with respect to the situation in the Ituri district of the DRC.

The interests of victims were also injected directly into the trial in the form of the participation of Paolina Massada, Principal Counsel of the Office of Public Counsel for Victims (OPCV),⁷¹ who represented victims during the closing arguments in the *Lubanga* trial.

Massada stressed the proactive contribution of victims throughout the trial.⁷² She also highlighted the indirect harm suffered by the parents due to the moral and psychological suffering they experienced by the abduction and enlistment of their children.

To assist the Court in formulating its reparations order and to honour its undertaking to include victims in the process, the verdict in the *Lubanga* case was followed by a consultation process in The Hague. In late March 2012, subsequent to the Trial Chamber judgment, the ICC asked various “interested” parties to make submissions on whether they would prefer individual or collective reparations etc. The parties to the case and victims were asked to make submissions on reparations soon thereafter. Massada explained the reason for the consultation procedure as follows:

It is possible then for the court to start reparations proceedings, but there is no clear established procedure – which is the reason why the judges are asking participants [in the case] to provide observations, among other things, on whether reparations should be awarded collectively or on an individual basis, to whom, and how harm could be assessed.⁷³

The *Lubanga* Trial Chamber’s observation on reparations (issued in advance of the reparations decision) deals extensively with children.⁷⁴ The Trial Chamber makes the point that the Court should ensure access to reparations for the most vulnerable

⁶⁸ F. McKay, *Victim Participation in Proceedings before the International Criminal Court*, p. 2 (available at www.wcl.american.edu/hrbrief/).

⁶⁹ *Ibidem*.

⁷⁰ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, ICC-01/04-01/07.

⁷¹ The OPCV was established in order to effectively assist victims in exercising their rights, or to represent them before the Chambers, as provided for in the Regulations of the Court. See http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Content.aspx?NRMODE=Published&NRNODEGUID={007C8D7C-8B11-4E11-8D92-57E1326E40C1}&NRORIGINALURL=/Menus/ICC/Structure+of+the+Court/Victims/Office+of+Public+Counsel+for+Victims/Frequently+Asked+Questions.htm&NRCACHEHINT=Guest#Q_4 (last accessed 10 April 2013).

⁷² Massada mentioned the fact that in May 2009 victims sought to modify the legal characterisation of the facts supporting the charges brought against the accused so as to include additional charges of sexual slavery and cruel and inhuman treatment. N. Bounakhla, *Closing statements in the Lubanga case, what the victims had to say*, 21 September 2011 (available at <http://www.vrwg.org/home/home/post/26-closing-statements-in-the-lubanga-case-what-the-victims-had-to-say/>), accessed on 12 August 2012).

⁷³ *DRC: Thorny Issue of Reparations for Lubanga’s victims*, The Guardian, 12 April 2012.

⁷⁴ Observation on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-1/06, paras. 35-39 (available at <http://www.icc-cpi.int/iccdocs/doc/doc1404406.pdf>).

victims.⁷⁵ Vulnerable victims include women and girls, rural and slum inhabitants, the disabled, mutilated persons, orphans, the elderly, and the illiterate.⁷⁶ The Trial Chamber stated that it might order affirmative measures to address inequalities.⁷⁷ This approach by the Court is in accordance with advice by non-governmental organisations such as REDRESS,⁷⁸ which has emphasised that the Court should expressly recognize that there is no one-size-fits-all approach to reparations. Rather, the individual circumstances of each case must be considered.⁷⁹

5. THE LUBANGA REPARATIONS DECISION

In the reparations decision of 7 August 2012 Trial Chamber 1 set out the following five purposes of reparations: (i) relieving the suffering caused by Lubanga's crimes (ii) afford justice to the victims by alleviating the consequences of crimes; (iii) deter future violations; (iv) contribute to the effective reintegration of child soldiers and (v) promoting reconciliation between the convicted person, the victims of the crimes, and the affected communities.⁸⁰

The Trial Chamber emphasised the following important points regarding reparations:

- i) Reparations should be of a collective nature, addressing the harm victims have suffered on an individual and collective basis.⁸¹
- ii) Victims as well as the families of victims and their communities should all play a role in the reparations process.⁸²
- iii) The needs of vulnerable victims including children and women should be addressed as a priority.
- iv) Reparations should promote reconciliation as far as possible.⁸³
- v) The explicit recognition of the need for child and gender-sensitive measures to ensure equal access to justice.⁸⁴
- vi) Both direct and indirect victims should benefit from reparations. Indirect victims may include the family of direct victims (child soldiers) and those who intervened to try to help the victims.⁸⁵

⁷⁵ *Ibidem*, para. 23.

⁷⁶ *Ibidem*, para. 28.

⁷⁷ *Ibidem*, para. 29.

⁷⁸ REDRESS is a non-governmental organisation based in London that works for obtaining justice for torture survivors.

⁷⁹ *Case-Based Reparations at the International Criminal Court*. This report formed part of a series of reports by the War Crimes Research Office at the American University Washington College of Law, available at <http://www.wcl.american.edu/warcrimes/icc/documents/report12.pdf> (last accessed 12 August 2012).

⁸⁰ Coalition for the International Criminal Court, Informal Q & A, available at www.iccnw.org.

⁸¹ Trust Fund for Victims, *Programme Progress Report*, Winter 2012, p. 37.

⁸² Reparations Decision, paras. 32, 36, 161.

⁸³ *Ibidem*, para. 21.

⁸⁴ *Ibidem*, paras. 25, 61, 62, 111, 143, 159.

⁸⁵ *Ibidem*, para. 195.

- vii) The following procedure was set out: a community based and participative approach for assessing harm and identifying appropriate reparations was recommended. The process was to be carried out in the affected localities in Ituri under the guidance of the Trust Fund for Victims.⁸⁶
- viii) The outcome of the consultative process described in (vii) is to be presented to a newly constituted Trial Chamber for approval. The newly constituted Trial Chamber will assist in the implementation.⁸⁷ Reparations will then be implemented through the resources of the Trust Fund. The judges did not quantify the amount of reparations the Trust Fund should use for funding reparations in this case.
- ix) Awards of reparation should be aimed at reconciling the victims and their families.⁸⁸ At the same time the reparations should not intrude on the dignity and privacy of the victims.

The principles and approach taken by the Trial Chamber apply only to the *Lubanga* trial.⁸⁹ The Court is free to establish other principles, which may be established in other trials. One may ask whether it would not have promoted consistency and coherence in the law if the ICC formulated principles to be applied to all cases before the court.

In terms of implementation, the Chamber will rely on the TFV. Both Parties to the Rome Statute and non-states parties will be required to cooperate to give effect to the reparations awards. The Court stated that it declined to issue specific orders to the TFV on the implementation of reparations. This of course means that the Court did not state any specific amount to be paid to victims. This leaves the TFV with a great deal of responsibility, and it can be asked whether it is good for the court to defer the specificities regarding a matter as important as financial reparations to a non-judicial body. It is unclear whether the Court did so because it felt the TFV had greater expertise in this regard, or whether the Court lacks the confidence and expertise to specify reparation awards.

The jurisdiction of the ICC over crimes such as genocide, war crimes and crimes against humanity implies the existence of vast numbers of victims. This triggers the obvious question: how will the reparations payments be funded? The responsibility to pay for reparations firstly lies with the accused. Since Lubanga has been found to be indigent,⁹⁰ the Trial Chamber did not order Lubanga himself to pay reparations.

⁸⁶ *Ibidem*, para. 161.

⁸⁷ *Ibidem*, para. 286.

⁸⁸ In the Introductory section of the decision the Court recognised that it should also address the “philosophical questions” related to the right of victims of international crimes to reparations. One such question is the relationship between reparations and reconciliation (*ibidem*, para. 21).

⁸⁹ http://www.iccnw.org/documents/Informal_CICC_Q_and_A_on_Reparations_Principles_-_Lubanga_case_15_August_2012.pdf (last accessed 10 April 2013).

⁹⁰ Elizabeth Rehn, Chair of the TFV Board of Directors, has emphasised the importance of the “perpetrator pays” principle as well as the fact that states should make intensified efforts to identify and freeze assets of persons accused before the ICC.

The Trial Chamber stated that the Trust Fund will need to receive sufficient voluntary contributions in order to be able to implement the reparations programme in a meaningful and efficient way.

The Trust Fund has launched a funding appeal to donors and State parties and international actors to raise money.⁹¹ The TFV currently has just over 3.2 million euros in its account – a modest figure given the potential number and needs of the victims. The Trust Fund set aside 1.2 million euros for the first two cases before the ICC (*Lubanga* and *Katanga*)⁹²

6. ASSESSMENT OF THE REPARATIONS DECISION

The Chamber stated that special attention should be paid to victims of sexual and gender-based violence,⁹³ and those former child soldiers who need to be rehabilitated into their communities. This is in accordance with the statement by the Trial Chamber in the *Lubanga* judgment that the needs of vulnerable victims – including women and girls, rural and slum inhabitants, the disabled, mutilated persons, orphans, the elderly and the illiterate – should be prioritised in the reparations order.⁹⁴

The Court stated that it considered it necessary to set out competing points of view on the issue of reparations before it turned to its conclusions.⁹⁵ The Chamber then proceeded to spend the bulk of the decision summarising the views of various interested groups.⁹⁶ The Court has thus shown its sensitivity to issues such as victim involvement by undertaking an extensive consultation process.

It has been said many times that it can be dangerous to award reparations in a manner that fails to consider all the parties involved. Such an approach can do more harm than good. Paying reparations without sensitivity to the concerns of victims and of the particular context can lead to fresh resentments, further litigation, and even history repeating itself.⁹⁷ It can however be argued that the most marginalised victims are typically neglected by the consultative processes because these victims lack the means of communicating to groups such as NGO's.

The reparations decision gives every indication that it is very unlikely that cash payouts will be made. The Chamber stated that “there are very limited financial resources

⁹¹ Thirty countries have contributed to the TFV since 2004. See *Mobilising Resources and Supporting the Most Vulnerable through Earmarked Funding* in: The Trust Fund for Victims, *supra* note 81.

⁹² *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC- 01/04-01/07.

⁹³ Reparations Decision, para. 207.

⁹⁴ *Lubanga* Judgement, paras. 605 and 617.

⁹⁵ Reparations Decision, para. 20.

⁹⁶ Ranging from the UNICEF to Women's Initiatives, as well as the International Centre for Transitional Justice.

⁹⁷ E. Kristjansdottir, *International Mass Claims Processes*, in: C. Ferstman, M. Goetz (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity*, Martinus Nijhoff, The Hague: 2009.

available in this case.”⁹⁸ This is not surprising. Prior to the reparations decision experts warned that it is unlikely that the ICC would order cash payouts. Bukeni Waruzi, an expert on child soldiers, expressed the concern that this will be disappointing to the former child soldiers, who are largely uneducated and untrained.⁹⁹ Many suffer from drug addiction or diseases, including HIV. Others have been victims of sexual violence.¹⁰⁰ Whereas symbolic reparations and reparations such as education and rehabilitation may be meaningful to victims, financial reparations are a particularly potent form of reparation.

7. SYMBOLIC REPARATIONS

Although some have feared that the ICC would not order symbolic reparations,¹⁰¹ the Trial Chamber stated that symbolic and transformative reparations are appropriate forms of reparations.¹⁰² The Chamber suggested the following forms of symbolic reparations: campaigns, issuing certificates of acknowledgement that victims suffered harm, outreach and promotional activities, and education programs aimed at reducing stigmatisation, marginalisation and discrimination against the victims.¹⁰³ The Chamber stated that the wide publication of the decision may also serve to increase awareness of the crime of enlisting child soldiers, and that this may have a deterrent effect.¹⁰⁴ The Trial Chamber also stated that it is to be hoped that Lubanga will voluntarily offer an apology to the victims, either on a public or confidential basis.¹⁰⁵ Although the court states that victims should not be stigmatized, it does not state which measures will be taken to avoid such stigmatisation. It is not clear for example whether the ICC will take measures to ensure witness protection and confidentiality. Elisabeth Rehn, Chair of the Board of Directors of the Trust Fund for Victims, has commented that especially children and victims of sexual crimes are in need of support to help them deal with possible stigma.¹⁰⁶

⁹⁸ Reparations Decision, para. 288.

⁹⁹ Bukeni Waruzi is the programme manager for Africa and the Middle East at the NGO Witness (The Guardian, *supra* note 73).

¹⁰⁰ *Ibidem*.

¹⁰¹ See F. Megrét, *The International Criminal Court and the Failure to Mention Symbolic Reparations*, 16(2) International Review of Victimology 127 (2009).

¹⁰² Reparations Decision, para. 222.

¹⁰³ *Ibidem*, para. 239.

¹⁰⁴ *Ibidem*, para. 238.

¹⁰⁵ See in this regard M. Swart, *Sorry seems to be the Hardest Word: Apology as Form of Symbolic Reparations*, 1 South African Journal on Human Rights 50 (2008).

¹⁰⁶ Keynote speech, Elisabeth Rehn, *Ten Years of International Criminal Court: A Focus on Victims*, Trust Fund for Victims p. 10 September 2012, available at http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/Speech_ER_Tallinn_Sept_2012.pdf (last accessed 10 April 2013).

8. THE “HARM” REQUIREMENT

The ICC should give more concrete content to the term “harm”. The problem with existing interpretations of “harm” is that they are overly inclusive and broad. In this early stage of the ICC’s work, the very open and abstract “harm” requirement creates difficulties for the ICC reparation regime. Since the concept of harm plays a crucial role in various aspects of the decision-making process relating to reparations, delineating and defining the harm requirement could clarify much of the current uncertainty surrounding the question of reparations. The term “victim” under the Rome Statute is also defined by reference to the concept of harm, thus without a clear definition of “harm” it is also not possible to define the term “victim”.¹⁰⁷ In light of the extent and the diversity of the harm to which crimes such as genocide and crimes against humanity and war crimes give rise, the Court’s task is particularly complex. McCarthy argues that the ICC needs to establish an analytical framework for the concept of harm under the Rome Statute.¹⁰⁸ In his view the concept of harm should be treated as an autonomous concept within the framework of the Court.¹⁰⁹ This means that the ICC should not give too much deference to the reparations decisions of domestic courts. Whereas it is desirable that the ICC’s approach to the concept of harm should be consistent with the approach of other international tribunals, it is not crucial that the ICC’s definition of harm should correspond with the meaning of harm in domestic jurisdictions.

Questions relating to harm that need clarification include the distinction between “pecuniary” and “non-pecuniary” harm. In the *Lubanga* reparations decision the Court merely distinguished between three different kinds of harm namely physical harm, moral damage, and material damage.¹¹⁰ It has been suggested that the Court should clearly state that for the purpose of reparations it would take the same broad approach to the concept of “harm” as it has taken to the concept of participation.¹¹¹ This would mean that harm will include “physical, material and psychological” harm¹¹² and that it can attach to both “direct” and “indirect” victims.¹¹³ This approach will be consistent with both the UN Basic Principles on Reparations

¹⁰⁷ Rule 85(a) stipulates that “victims” means “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”

¹⁰⁸ McCarthy, *supra* note 9, p. 95.

¹⁰⁹ *Ibidem*, p. 99.

¹¹⁰ Reparations Decision, para. 230.

¹¹¹ *The Case-Based Reparations Scheme at the International Criminal Court*, War Crimes Research Office, Washington College of Law, June 2010, p. 36.

¹¹² *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeals of The Prosecutor and The Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06, para. 32 (Appeals Chamber, 11 July 2008).

¹¹³ The Lubanga Trial Chamber clarified that “indirect victims” are persons who have “suffer[ed] harm as a result of the harm suffered by direct victims.” Lubanga, Redacted Version of Decision on “Indirect Victims” (Trial Chamber, 8 April 2009).

and the approach of the Inter American Court of Human Rights.¹¹⁴ The UN Basic Principles expressly recognize that “victims” include those who have suffered physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.¹¹⁵

The Chamber simply stated that the concept of harm denotes “hurt, injury and damage.”¹¹⁶ It did not provide a sufficiently comprehensive definition and discussion of the “harm” requirement.

9. CAUSATION

The element of causation is not defined in the Rome Statute. Causation is dealt with very briefly in the Rules of Procedure and Evidence. Rule 85(a) requires only that an individual suffered harm “as a result of” crimes “within the jurisdiction of the Court.”¹¹⁷ But because the Trial and Appeals Chambers may only award reparations against persons convicted by the Court, it is clear that the “damage, loss and injury” forming the basis of a claim of reparations must have been caused by the crime or crimes for which the perpetrator was convicted.

The Rome Statute’s silence on the question of causation is unsurprising in light of the fact that there is currently no settled view in international law on the appropriate standard for causation.¹¹⁸ The drafters of the Rome Statute might have also preferred to defer to the ICC judges on the question of principles such as reparations.

Tests for causation that can successfully be applied in domestic contexts do not always work in the context of international criminal law. In terms of factual causation, the “but for” test which is commonly applied presents difficulties in the context of co-perpetration (when a crime is committed “jointly with another”). This is but one example where the “but for” case does not provide a workable or appropriate means of determining whether harm was factually caused by an accused’s conduct.¹¹⁹ Given the frequency with which other international tribunals (most notably the ICTY) have employed doctrines of co-perpetration, it might happen fairly regularly that the “but

¹¹⁴ See Inter American Court of Human Rights, *Las Dos Erres Massacre v Guatemala*, Judgment of 24 November 2009, para. 226.

¹¹⁵ Principle 8, United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law, Principle 8, Commission on Human Rights, Res. 2005/35 of 19 April 2005.

¹¹⁶ Reparations Decision, para. 228.

¹¹⁷ International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, R. 85 (2000) Rule 85(a).

¹¹⁸ M. Henzelin, V. Heiskanen, G. Mettraux, *Reparation to Victims before the International Criminal Court: Lessons from International Mass Claims Processes*, 17(3-4) Criminal Law Forum 317 (2006), p. 325.

¹¹⁹ McCarthy, *supra* note 9, p. 139. The “but for” test has also been said to be inappropriate where the harm caused by the crime has multiple sufficient causes.

for” test will not be the appropriate test. As an alternative to the “but for” test, McCarthy suggests that the Court take into account a range of factors which assist in assessing the extent of an individual’s contribution to the harm caused by the crime.¹²⁰

Most legal systems do not merely require factual causation but consider legal causation a necessary further enquiry. On the question of legal causation it has been suggested by scholars such as Dinah Shelton that the proximate cause standard is the most appropriate standard to use in this context.¹²¹ Proximate cause is “generally considered to be a relative term meaning ‘near’ or ‘not remote’ and to include concepts of foreseeability and ‘temporal proximity’.”¹²²

Rule 85(b) states that “victims may include organizations that have sustained direct harm ...”. Although the standard of “direct harm” has often been applied by international courts and tribunals,¹²³ McCarthy points out that the concept of directness has been controversial in international law.¹²⁴ He is of the view that international courts and tribunals have not been consistent in determining whether a form of harm is “direct” (and therefore recoverable) or “indirect” (and not recoverable).¹²⁵

The *Lubanga* reparations decision can be criticised on the basis that the Court spent only four paragraphs on the centrally important question of causation.¹²⁶ Whereas the Court briefly mentions the ‘but for’ and the ‘proximate cause’ tests of causation, it fails to support one of these tests. The Court mentions that there is no settled view in international law on the meaning of causation,¹²⁷ but does not contribute substantially to formulating a definition or test there for.

CONCLUSION

According to Ferstman, the inclusion of reparations for victims in the ICC system is revolutionary in international criminal law.¹²⁸ The latest developments in the *Lubanga*

¹²⁰ *Ibidem*, p. 155.

¹²¹ D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford: 2001, p. 231.

¹²² A. Rovine, G. Hanessian, *Towards a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission*, in: R.B. Lilich (ed.), *The United Nations Compensation Commission (Thirteenth Sokol Colloquium)*, Transnational, New York: 1995, p. 243. See also *The Case Based Reparations Scheme at the International Criminal Court*, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, June 2010.

¹²³ See *Trail Smelter Arbitration (United States v Canada)* 3 RIAA 1905 1931. The European Court of Human Rights has also referred to “direct causal connection” in determining the extent of the harm attributable to a responsible state. See *Cakici v Turkey*, Merits, Grand Chambers, 8 July 1999, 31 EHRR 133 para. 127.

¹²⁴ McCarthy, *supra* note 9, p. 154.

¹²⁵ *Ibidem*.

¹²⁶ Reparations Decision, paras. 247-250.

¹²⁷ *Ibidem*, para. 248.

¹²⁸ C. Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15(3) *Leiden Journal of International Law* 667 (2002).

judgment suggest that the reparations phase of a judgment can potentially be just as significant and important for the development of international criminal law as the judgment itself. It was stated in the *Lubanga* reparations decision that “the reparations phase is an integral part of the trial proceedings”.¹²⁹ With respect to the future reparations practices at the ICC, fairness and consistency will be essential in creating and maintaining the legitimacy of the Court.

The ICC should embrace its mandate to formulate principles of reparations. One of the reasons for the existing uncertainty surrounding the ICC’s reparations mandate is the lack of clear principles with regard to reparations. The Rome Statute merely provides a framework for reparations and contains many *lacunae*. It is the task of the judges to formulate principles that will suit the distinct legal context of the ICC. The lack of clarity with regard to reparations is illustrated by the fact that the Court has still not provided a clear definition of the harm requirement and the element of causation. The concept of harm is particularly important since it forms a cornerstone of the Rome Statute reparations process, and without that cornerstone the house cannot stand. Although the inclusive and consultative nature of the *Lubanga* decision is praiseworthy, the decision leaves many burning questions unanswered and defers many important questions to the TFCV. The ICC missed an opportunity to lay a firm foundation for future reparations decisions. Although the ability to formulate principles has been interpreted as limiting a court to the formulation of principles for a specific case before it, it is submitted that the formulation of general principles that would apply to all cases before the court would promote legal certainty, consistency and coherence.

Scholars such as de Greiff and Wierda have argued that it is important to “temper” expectations on what the TFCV can do for victims.¹³⁰ The ICC faces the challenge of designing and implementing a comprehensive reparations policy that will not only be satisfactory to victims, but also realistic and acceptable to states and governments. The policy formulated by the Court in the *Lubanga* reparations decision cannot, however, be yet described as comprehensive and leaves much ground uncovered and questions unanswered. A comprehensive reparations policy will be attractive both to victims as well as to potential donor countries that will be approached to contribute funds to the TFCV. State parties may also feel more comfortable contributing money to the Trust Fund if they knew that there is a comprehensive and principled reparations policy in place.

The importance of reparations is heightened in the *Lubanga* case because of the fact that most of the victims are children. The Trial Chamber in *Lubanga* could have been bolder in formulating reparations principles for the ICC. Whereas the loss of a childhood can never be repaired, the failure to place the child victims on the road to recovery would be unconscionable.

¹²⁹ Reparations Decision, para. 267.

¹³⁰ Greiff, Wierda, *supra* note 62, p. 226.

*Adam Bodnar, Irmina Pacho**

TARGETED KILLINGS (DRONE STRIKES) AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

More and more Member States of the Council of Europe are becoming interested in drone technology. Currently, a number of them either possess or wish to obtain unmanned aerial vehicles equipped with missiles. Due to the increased number of targeted killing operations committed with the use of drones by countries such as the United States or Israel, there is a probability that Member States might also use them for such operations, especially if their forces will be subject to joint command. Although the issue of targeted killings with the use of drones has not yet been subject to the scrutiny of the European Court of Human Rights, there are two main reasons why this may change in the near future. First, the Court has already ruled on the extraterritorial applicability of the European Convention on Human Rights, and second, the Convention places strict limits on any attempts to carry out targeted killings and leaves only a limited space for their use, even in the context of warfare. In this article we assess whether the Member States of the Council of Europe might be ever justified under the European Convention on Human Rights to carry out targeted killing operations using drones.

INTRODUCTION

In recent years the number of targeted killing operations has increased significantly. Taking into account their extensive use by Israel in the Occupied Palestinian Territories and by the United States in Afghanistan, Pakistan and Yemen, targeted killing operations have raised serious concerns on moral, policy, and legal grounds. These controversies

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form an integral part of the issue of the lawfulness of targeted killing operations, especially if conducted outside a state's territory and in countries that are far away from any battlefield. This legal ambiguity results from the absence of transparent domestic and international rules that dictate when, where, and against whom targeted killings can be authorized. States, sometimes clandestinely and sometimes openly or formally, have adopted policies of targeted killing, but have in most instances refused to provide either legal justification or sufficient information on the safeguards applied to such operations.

Different states and security forces have used targeted killings for many years, so the issue as such is not new. However, in contemporary times the question of targeted killings has become much more relevant and important in connection with the use of unmanned aerial vehicles, popularly known as drones. While targeted killings using air missiles dispatched by a typical fighter plane may cause a lot of damage to a civilian population, they are more difficult to carry out and riskier, due to possible attacks on the planes and the potential loss of pilots. Drones are extremely efficient in making surgical strikes with the potential for minimal consequences to a civilian population. Significant interest in the use of drone technology by states for the purpose of, *inter alia*, targeted killings, has also risen among Member States of the Council of Europe that already have or are in the process of seeking or obtaining drones equipped with missiles.

The aim of this article is to assess whether the European Convention on Human Rights (ECHR) can be applied to targeted killings conducted by Member States of the Council of Europe. For this purpose, we would like to first raise the question of the lawfulness of these operations in current asymmetric wartime conditions under international humanitarian law and, subsequently, focus on how the Convention applies to three different situations: times of peace, a state of emergency, and times of armed conflict.

1. GENERAL REMARKS ON THE LAWFULNESS OF TARGETED KILLINGS

1.1. Background

An analysis of the lawfulness of targeted killing begins with ascertainment of the variety of contexts in which targeted killings may take place. They may be performed by States and their agents in both times of peace or armed conflicts, or by non-state organized armed groups in armed conflicts. The methods by which targeted killings are carried out may also vary. They include, *inter alia*, sniper fire, shooting at close range, missiles from helicopters or gunships, clandestinely planted explosive devices, poison, drones, or any other means in a manner that does not give the targeted victim a realistic opportunity to surrender.¹

¹ P. Alston, *Study on targeted killings, UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 28 May 2010, A/HRC/14/24, p. 4; N. Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford: 2008, p. 413.

In recent years, some states have adopted policies of targeted killing as a response to terrorist threats and have deemed them a necessary response to the demands of asymmetric warfare.² However, as has been indicated, it is common for states to fail to acknowledge the existence of such policies. They also fail to present transparent rules with respect to the scope and nature of the conflict they are engaged in, who may be targeted, what the legal and policy implications are, or who is conducting the targeting.³

At the outset, it is crucial to note that the notion of “targeted killing” has not yet been defined under the international law.⁴ Instead, the parameters of the term are provided by commentators, according to whom the term refers to the intentional killing by a state of an individual identified in advance and who is not in the state’s custody.⁵ It is often indicated that targeted killing does not fit neatly into any particular international legal framework, and it therefore remains unclear whether such conduct is consistent with international regulations.⁶ The question also arises to what extent the international lawfulness of targeted killings operations shall be governed by international humanitarian law (IHL) or human rights law.⁷ This dilemma is directly related to the debate on the two competing models for assessing governments’ responses to terrorism: the armed-conflict model and the law-enforcement model.⁸ Some authors also indicate that since there is current legal uncertainty concerning targeted killing, international law should draw a sharper line than it does at present between combat during war and conduct outside of war.⁹

1.2. Targeted Killing and the Council of Europe Member States

The issue of potential responsibility under the ECHR for targeted killing operations performed by the Member States of the Council of Europe may become crucial in the near future, since more and more European states are becoming interested and involved in drone technology. Some of them, namely the United Kingdom, France, Turkey,

² Alston, *supra* note 1, p. 3. P. Alston indicates countries like the United States, Israel and Russia.

³ *Ibidem*, pp. 5-9.

⁴ *Ibidem*.

⁵ See Melzer, *supra* note 1, pp. 3-4; see also C. Finkelstein, J. D. Ohlin, A. Altman (eds.), *Targeted Killings. Law and Morality in an Asymmetrical World*, Oxford University Press, New York: 2012, p. 5.

⁶ Alston, *supra* note 1, pp. 5-9.

⁷ See Melzer, *supra* note 1, p. 56.

⁸ See M. Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict*, Cambridge University Press, Cambridge: 2010, pp. 103-111; Finkelstein et al., *supra* note 5, pp. 5-8. The authors, in the introduction indicate, that “[o]ne of the notable features of the debate over targeted killing is that each side regards the other as proposing an approach that is not merely sub-optimal but unacceptable. The proponents of the law-enforcement model do not simply say that targeted killing is less than the best way to respond to terrorism; rather they reject it as morally and legally impermissible. On the other side, defenders of the armed-conflict model insist that for a state threatened by terrorists to forego the practice, when the state has the requisite means, is an unacceptable abdication of its responsibility to its citizens.”

⁹ R. V. Meyer, *The Privilege of Belligerency and Formal Declaration of War*, in: Finkelstein et al., *supra* note 5, pp. 183-221.

Russia, and recently Germany and Poland, already have or are seeking to obtain drones equipped with missiles.¹⁰ For instance, unmanned air vehicles are used by the United Kingdom as part of its official military mission against the Taliban in Afghanistan. According to the respected blog *Drone War UK*, the British Ministry of Defense had carried out 248 drone strikes in Afghanistan as of 29 February 2012. Out of this number, 60% were secret and unreported. Recently, human rights lawyers brought a case in British court on behalf of a Pakistani individual whose father was killed in an American missile strike in 2011. The aim of the case is to force the British government to admit whether or not it has a policy of sharing intelligence with the United States that could be used in drone strikes.¹¹

Russian authorities have reportedly been conducting targeted killing operations against Chechens in order to combat terrorism directed against Russia.¹² In 2006, the Russian parliament approved a law that permits the killing of alleged terrorists on the territory of other states if previously authorized by the Russian President.¹³

Moreover, Polish media recently reported that the Ministry of National Defense is going to acquire 41 unmanned aircraft by the year 2018, including two sets of combat drones that are similar to American Predators and equipped with missiles. Poland currently uses drones purely for surveillance purposes, mostly in the Ghazni province of Afghanistan. In its official statement, the Minister of National Defense confirmed that drone technology is currently a priority and that Polish authorities are planning to create a separate military unit to deal with and operate drones, since the technology falls outside the framework of traditional troop deployments.¹⁴

The possession of drones is not synonymous with their exclusive use for the purposes of targeted killing operations, the legality of which is currently uncertain. Drones might also be used for the purpose of conducting military operations, such as supporting infantry, artillery, or other forces on the ground. However, due to the dramatically increased number of targeted killing operations conducted using drones¹⁵ by, *inter alia*, the United States,¹⁶ one may speak of the possibility, if not probability, that Council

¹⁰ Alston, *supra* note 1, p. 9.

¹¹ D. Haynes, *Pressure on Britain over deadly drone attacks*, The Times, 26 May 2012, available at: <http://www.theaustralian.com.au/news/world/pressure-on-britain-over-deadly-drone-attacks/story-fn-b64oi6-1226367308557> (last accessed 2 May 2013).

¹² Alston, *supra* note 1, p. 8.

¹³ Federal Law No. 35-FZ of 6 March 2006 on Counteracting Terrorism.

¹⁴ Letter of the Ministry of Defense, ref. no. 3403/DPZ, 31.08.2012 in response to a letter of the Helsinki Foundation for Human Rights, ref. no. 1995/2012/PSP/MSZ, 14.08.2012, available at: <http://www.hfhr.pl/mon-polskie-prawo-nie-stoi-na-przeszkodzie-zakupu-dronow> (last accessed 2 May 2013).

¹⁵ Alston, *supra* note 1, p. 9.

¹⁶ E.g. S. Ackerman, *'Unprecedented' Drone Assault: 58 Strikes in 102 Days*, 17 December 2010, available at: <http://www.wired.com/dangerroom/2010/12/unprecedented-drone-strikes-hit-pakistan-in-late-2010> (last accessed 2 May 2013); see S. Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, 24 November 2012, The New York Times, available at: <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html> (last accessed 2 May 2013).

of Europe Member State countries possessing combat drones may use them for such operations, especially if the forces of the European members of NATO will be directed under the joint command. Therefore, the assessment of potential application of the ECHR to targeted killing operations is well justified.

2. TARGETED KILLING AND INTERNATIONAL HUMANITARIAN LAW

In order to comprehensively assess the potential application of the ECHR to targeted killings, we would like to first consider some aspects of the lawfulness of these operations in light of international humanitarian law.

The assessment of targeted killings under the international humanitarian law creates a number of significant problems. First of all, targeted killings might not be illegal under international humanitarian law in the context of the world history of military conflicts, which contains numerous examples of targeted killings or assassinations. However, this context changes significantly in times of asymmetric warfare. In the modern world, war has taken the form of a conflict between the regular armed forces of states, on the one side, and the irregular forces of non-state groups and movements on the other. The latter tend to not abide by the requirements concerning uniforms, insignia, and carrying arms openly, and often do not distinguish themselves from civilian populations.¹⁷ Instead, they adopt tactics that are forbidden by international law, namely the deliberate killing of civilians. Additionally, there is a significant technological advantage and organizational strength of one side of the military conflict over the other.¹⁸ Hence the tactics of the “defending side” differ in comparison to historical military conflicts.¹⁹

According to the First Additional Protocol to the Geneva Conventions, targeted killings may be considered as legal only upon fulfillment of several conditions. First of all, they can be applied during international armed conflicts and must concern only combatants.²⁰ Second, during non-international armed conflicts targeted killing might be lawful if directed towards civilians directly participating in hostilities.²¹

However, in practice these pre-conditions might be interpreted in a way that contravenes the protective character of the humanitarian norms. It has been pointed out that the most important source of legal uncertainty regarding targeted killings in the context of armed conflict is the question of who determines whether a target qualifies as lawful, and where and when a person may be targeted.²²

¹⁷ See Finkelstein, et al., *supra* note 5, p. 2.

¹⁸ *Ibidem*; Gross, *supra* note 8, pp. 109-111.

¹⁹ *Ibidem*, pp. 100-121.

²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Art. 48 and Art. 51(2).

²¹ *Ibidem*, Art. 50(1) and Art. 51(3).

²² Alston, *supra* note 1, p. 19.

The first issue is thus the definition of armed conflict. In light of the lack of an international standard, states tend to provide different justifications to target and kill individuals, some of which would not necessarily be willingly followed by other countries. A situation therefore arises where states create a personalized legal framework, depending on their own interpretation of international law.²³ For instance, the current position of the United States administration is that the United States is engaged in an armed conflict against al Qaeda, the Taliban, and associated forces, a conflict which is not connected with a particular battlefield. This line of reasoning is used to provide a justification for the American forces' resort to targeted killings outside the typical zone of conflict.

US State Department Legal Advisor Harold Hongju Koh stated, in March 2010, that:

as a matter of international law, the U.S. is in armed conflict with al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day... that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.²⁴

Koh's description of the conflict against al Qaeda, the Taliban, and associated forces represents the Obama Administration's departure from President George W. Bush's "global war on terror." First, it limits the scope of the conflict to one against particular entities and their representatives, or persons associated therewith. Second, it refers to a non-international armed conflict, which finds support in terms of humanitarian law. What is significant about Koh's statement is the assumption that the use of lethal force can be justified on alternative legal grounds: armed conflict and self-defense.

In this manner the question, or dilemma, arises as to who defines what qualifies as an "armed conflict". It is asserted by some that the United States' case is an example where the definition of "armed conflict", within the context of terrorist groups' activities, is currently abused.²⁵ At the very least it must be said that the United States unilaterally adopts its own definition of the term, which is not subject to review by outside judicial bodies.

The second dilemma is the geographical scope of the armed conflict. It is well known that the United States performs targeted killing operations outside the borders of its military intervention zone, in countries such as Pakistan, Somalia and Yemen.

²³ *Ibidem*, p. 3.

²⁴ H. Koh, *Legal Advisor U.S. Department of State, Speech at the Annual Meeting of the American Society of International Law*, 25 March 2010, available at: <http://www.state.gov/s/l/releases/remarks/139119.htm> (last accessed 2 May 2013).

²⁵ Alston, *supra* note 1, p. 18.

It is probable that drone attacks will be used in Mali. What is crucial for the United States is the fact that a person is named in a list of targets. Actual location, which might be far away from the current theater of military activities, is less important. As some commentators have pointed out, targeted killings are openly designated as killings. In asymmetric warfare, putting certain names on a target list serves the same function as traditional uniforms or insignias which allowed soldiers to identify one another. Therefore, such a list replaces the traditional way of determining affiliation, allowing the identification and tagging of named, listed persons as combatants.²⁶

The third dilemma refers to the potential victims of targeted killings. According to the humanitarian law requirements, targeted killings should not be used with respect to civilians, as opposed to combatants. However, in asymmetric armed conflicts, it can be difficult to identify a combatant according to the traditional distinction between combatants and civilians. In some countries where targeted killings are carried out, potential victims may change “costumes”. One day they are combatants, while the next day they may blend into the civilian population. They usually do not wear uniforms, which was the technique used in past war conflicts as an identification sign for combatants. Also, whether or not person is armed is not necessarily the distinguishing factor between civilian and non-uniformed combatants.²⁷ In some cultures, carrying arms is a part of a tradition of self-defense, and does not necessarily mean an intention to participate in military conflict. Arms might also be necessary to use against local guerrillas or insurgents, and not necessarily against a party (e.g. NATO forces) in conditions of asymmetric warfare. In such situations, those states with the capacity to implement targeted killings may encounter difficulties in determining whether an individual’s status is combatant or civilian.

This dilemma, although present in international humanitarian law, was resolved by the United States by using an extensive definition of unlawful combatants or unprivileged combatant/belligerents. As a consequence, the United States authorities created for themselves a broad authorization to use targeted killings. The Israeli High Court of Justice, on the other hand, carefully analyzed the practice of conducting targeted killing operations and rejected the statement that terrorists are unlawful combatants subject to attacks at any time.²⁸

The fourth dilemma focuses on the requirement that targeted killings should meet the test of necessity and proportionality. As the Israeli High Court of Justice underlined, states are not allowed to carry out targeted killings if less harmful means are available, and such operations must be absolutely necessary and proportional. The Court stated that if a terrorist taking direct part in hostilities can be arrested, interrogated, and tried, such means should be employed.²⁹ It is also indicated that although international

²⁶ Gross, *supra* note 8, pp. 107-109.

²⁷ *Ibidem*.

²⁸ Israel High Court of Justice, *The Public Committee Against Torture et al. v. The Government of Israel et al.*, HCJ 769/02, Judgment of 14 December 2006 (PCATI).

²⁹ *Ibidem*, para. 40; *but see* Gross, *supra* note 8, p. 106.

humanitarian law does not expressly regulate proportionality and necessity, it envisages the use of less-than-lethal measures.³⁰

It should be also noted that there are also domestic law dilemmas connected with the use of drones for targeted killings. While under European standards it does not matter whether a potential victim (target) is a citizen of a given country, in the United States it might be a serious concern. Put simply, human rights, including (perhaps especially) right to life, should be enjoyed by “every” person, and not only by citizens of a particular country. In the United States it is argued that only US citizens who may be potentially subjected to a targeted killing enjoy the due process rights guaranteed in the US constitutional system.³¹

The above dilemmas make the debate over the legality of use of drones for purposes of targeted killing extremely complex. The development and use of this technology calls for the need to adopt an international treaty (maybe a new generation of the Geneva Conventions). The United States takes advantage of the lack of precise norms in this area, and there is no clear international law authority to control such abuses. However, this does not mean that the Member States of the Council of Europe can follow such an approach. First of all, they are bound by the norms of international humanitarian law and should not abuse these norms, nor interpret them in a similar fashion to the US. Secondly, they are parties to international human rights conventions and treaties, most notably the European Convention on Human Rights, and must abide by the agreed upon laws and regulations inherent in the Treaty and their membership in the Council of Europe.

3. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND LAWFULNESS OF TARGETED KILLING OPERATIONS

The permissibility of targeted killing operations in the context of the right to life has to be examined under main international human rights conventions and the jurisprudence of their implementing bodies.³² Additional guidance might be also found in the practice of the United Nations Charter-based institutions.³³ However, the analysis in this paper

³⁰ Alston, *supra* note 1, pp. 22–24.

³¹ This issue was discussed in the context of targeted killing of the US citizen and alleged Senior Officer of Al-Qa’ida Anwar Al-Awlaki: M. Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16(2) *Journal of Conflict and Security Law* 385 (2012). See also Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al Qa’ida or An Associated Force*, disclosed in February 2013. The White Paper is available at <http://www.guardian.co.uk/commentisfree/2013/feb/05/obama-kill-list-doj-memo> (last accessed 2 May 2013).

³² Melzer, *supra* note 1, p. 58; until now, there were pronouncements by UN officials regarding the assessment of targeted killings under the International Covenant for Civil and Political Rights, see Alston, *supra* note 1.

³³ Melzer, *supra* note 1, p. 59.

of the compliance of targeted killings with international standards will focus exclusively on the standards of the European Convention on Human Rights.

Importantly, until now this issue has not been the subject of assessment by the European Court of Human Rights. However, in the near future it may become crucial for the Court to rule on the issue in light of the ECHR. For instance, Poland is currently engaged in missions in Afghanistan, and several European NATO members are part of the International Security Assistance Force (including the United Kingdom, which uses lethal drone technology). Similarly, Turkey might potentially use drones in their territory or in Northern Iraq in their conflict with Kurdistan Workers' Party, and Russia may use them for the purpose of killing alleged terrorist suspects.

3.1. The Scope of Jurisdiction

The assessment of targeted killing operations by Member States of the Council of Europe is inevitably linked to the question of the scope of the jurisdiction under the ECHR. The prevailing opinion is that the temporal and territorial scope of the applicability of human rights law is one of the central preliminary questions to be addressed in the judicial discussion on the permissibility of targeted killing operations.³⁴

Interventions or possible interventions made by Council of Europe Member States in the territories of other countries have raised previously unknown issues. This, consequently, has forced the European Court of Human Rights (ECtHR) to develop new interpretations under the European Convention of Human Rights regarding states' accountability.³⁵ In 2011, the Grand Chamber of the ECtHR delivered two milestone judgments regarding the conduct of ECHR Member States during the occupation and armed conflict in Iraq: *Al-Skeini and others v. The United Kingdom* and *Al-Jedda v. The United Kingdom*. In the first judgment the ECtHR clarified the issue of the extraterritorial application of the ECHR; in the latter, the ECtHR expanded the application of ECHR to acts of Member States operating under multi-national forces.

3.1.1. Extraterritorial Application of the ECHR

The case of *Al-Skeini and others v. The United Kingdom* constitutes a comprehensive summary of the previous ECtHR jurisprudence on jurisdictional issues. In this respect, the ECtHR began by pointing out that according to Art. 1 of the ECHR, it is presumed that the states' jurisdiction is exercised normally throughout the state's territory,³⁶

³⁴ *Ibidem*, p. 58.

³⁵ See M. A. Nowicki, *Al-Skeini i inni przeciwko Wielkiej Brytanii (orzeczenie – 7 lipca 2011 r., Wielka Izba, skarga nr 55721/07)* (*Al-Skeini and others against United Kingdom (judgment – 7 July 2011, Grand Chamber, application no. 55721/07)*), available at: http://www.hfhr.pl/wp-content/uploads/2011/07/omowienie_orzeczenia_Al_Skeini_przeciwko_Wielkiej-Brytanii.pdf (last accessed 2 May 2013).

³⁶ *Soering v. United Kingdom* (14038/88), ECHR 7 July 1989, para. 86; *Banković and Others v. Belgium and Others* (52207/99) Grand Chamber (dec.), ECHR 12 December 2001, paras. 61, 67; *Ilaşcu and Others v. Moldova and Russia* (48787/99) Grand Chamber, ECHR 8 July 2004, para. 312.

and only in exceptional circumstances might acts performed overseas amount to extraterritorial jurisdiction under the ECHR.³⁷

The ECtHR went on to present several justifications for extraterritorial jurisdiction. First of all, the Court underlined that the acts of state authorities which produce effects outside the state's own territory, such as acts of diplomatic and consular agents, may constitute examples of exceptions to the territorial principle of Article 1 of the ECHR. Furthermore, extraterritorial jurisdiction appears when a state exercises all or some of the public powers usually exercised by the government of a particular territory, whether on the basis of the previous consent of such government consent, invitation, or acquiescence. The ECtHR also underlined that when, according to a custom, treaty or other agreement, a Member State of the Council of Europe carries out executive or judicial functions overseas, such state might be held responsible for ECHR violations.³⁸ Another exception to territorial jurisdiction might be justified by the principle of "effective control" over another state's territory, as a result of either lawful or unlawful military action.³⁹

Importantly, in *Al-Skeini* the Grand Chamber moved away from the *Banković v. Belgium* case, which had previously been the leading authority on the extraterritorial application of the ECHR. The Court evoked the doctrines of personal and state agent authority and the control model of jurisdiction,⁴⁰ which refer mainly to situations where an individual is arrested and taken into a state's custody overseas.⁴¹ The Court underlined that:

whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be divided and tailored.⁴²

In the particular case of *Al-Skeini v. the UK*, the ECHR underlined that the United Kingdom exercised, in the occupied city of Basrah in Iraq, some public powers normally reserved to a sovereign government. It was deemed that the United Kingdom had authority for maintenance of security in South East Iraq in difficult security conditions.

³⁷ See *Al-Skeini and Others v. United Kingdom* (55721/07) Grand Chamber, ECHR 7 July 2011, paras. 131-132.

³⁸ *Ibidem*, paras. 133-135.

³⁹ *Ibidem*, paras. 138-139.

⁴⁰ See M. Zgoniec-Rozej, *Al-Skeini v. United Kingdom*, 106(1) American Journal of International Law, 131 (2012).

⁴¹ *Al-Skeini and Others v. United Kingdom*, para. 136; see also *Öcalan v. Turkey* (46221/99) Grand Chamber, ECHR 12 May 2005, para. 91; *Al-Saadoon and Mufidhi v. United Kingdom* (dec. no. 61498/08), ECHR 2 March 2010, paras. 86-89, *Medvedyev and Others v. France* (no. 3394/03) Grand Chamber, ECHR 29 March 2010, para. 67. All cases available at: <http://www.echr.coe.int>.

⁴² *Al-Skeini and Others v. United Kingdom*, para. 137. This statement was previously confirmed in *Banković and Others v. Belgium and Others*, para. 75.

Due to these circumstances, the ECtHR assumed that the United Kingdom, when performing public powers, was obliged to respect the provisions of the ECHR.⁴³

Some commentators underscore that although this judgment constitutes a major development in the concept of extraterritorial jurisdiction, the ECtHR did not provide clear and consistent basis for this concept. For instance, the ECtHR has not explained yet the term “public powers”. Therefore, extraterritorial jurisdiction must be still determined on a case-by-case basis, with reference to the particular facts of a given case.⁴⁴

Equally important, when considering the extraterritorial application of the Convention’s provisions and rights arising therefrom, it is crucial to take into account the concurring opinion of Judge Bonello to this judgment. According to Judge Bonello, the proper test should be the “functional jurisdiction” test, based on two questions. The first question is: Was the issue whether the alleged violation would or would not be committed dependant on the agents of the state? The second question is: Was it within the power of the state to punish the perpetrators and to compensate the victims? If the answers to both these questions are positive, it means that a state was exercising its jurisdiction.

As Judge Bonello underlined, applying doctrines other than the above may in practice lead to some absurdities. The jurisdiction should not be seen solely as territorial or extraterritorial, but should be mainly functional.⁴⁵ Judge Bonello’s concurring opinion is of a significant nature with respect to disputes relating to issues of extraterritorial jurisdiction. It clearly defines the kinds of situations where a state may be held accountable for human rights infringements. It provides a direction which the future line of case law may follow.

3.1.2. ECHR application to Member States’ operations within multi-national forces

In the attempt to answer the question regarding the potential application of the ECHR to targeted killing operations, it is crucial to take into consideration the Grand Chamber judgment in *Al-Jedda v. United Kingdom*. This case clearly expands the application of the ECHR to the conduct of the Council of Europe Member States which act under the auspices of multi-national forces.

In the *Al-Jedda* case, the ECtHR focused primarily on the question of extraterritorial jurisdiction of the ECHR with respect to detention operations carried out by the United Kingdom in Iraq. The ECtHR stated that the internment of an Iraqi civilian for more than three years in a detention centre in Basrah, Iraq, run by British forces acting as part of the Multi-National Force, may not be attributable to the United Nations, nor to the nations contributing troops.⁴⁶ Countries whose military forces are part of the multi-national forces remain accountable for the actions of their soldiers.

⁴³ *Ibidem*, para. 149.

⁴⁴ E.g., Zgonec-Rozej, *supra* note 40, p. 137.

⁴⁵ *Al-Skeini and Others v. United Kingdom*, paras. 10-11, 16.

⁴⁶ *Al-Jedda v. United Kingdom* (27021/08) Grand Chamber, ECHR 7 July 2011, para. 80, available at: <http://www.echr.coe.int>.

The ECtHR ruled that the United Kingdom may not rely on the argument that the United Nations Security Council's resolutions, delivered at the time of American and British occupation in Iraq, imposed an obligation to conduct internments. The ECHR stated that, due to the purposes of the United Nations, clear and explicit language would be required in resolutions if the Security Council intended for states to undertake actions that are contrary to their obligations under international human rights law.⁴⁷

Additionally, the ECHR carried out a deep examination of the implications of international humanitarian law. Its conclusion was that in the situation of the United Kingdom's occupation in Iraq, the Geneva Convention relative to the Protection of Civilian Persons in Time of War did not constitute an independent legal basis for internment for imperative reasons of security. The ECtHR expressed the argument that international humanitarian law imposed no obligation on an occupying power to use indefinite internment without trial. It stated that such internment should be perceived as a measure of last resort.

Taking into consideration the arguments described above, there was no specific legal basis for conducting internment which would exclude the application of the ECHR. Therefore, in the *Al-Jedda* case, such indefinite detention conducted in armed conflict overseas under the auspices of the Multi-National Force was in breach of Article 5.1 of the ECHR (the right to liberty), as none of the exceptions allowing for such detention listed in the article were applicable.

3.2. Protection from Intentional Deprivation of Life

The prevailing opinion is that human rights law, apart from specifically permitted derogations, is applicable and protects all human beings at all times, including in times of armed conflict or other national emergency.⁴⁸ However, in order to assess targeted killings under the ECHR, a differentiation must be made between various circumstances: times of peace, a state of emergency, and lawful acts of armed conflict.

3.2.1. Time of Peace

In general, in time of peace the general norms of the ECHR apply. According to Art. 2 of the ECHR, the High Contracting Parties have an obligation to protect life. Further, no one shall be deprived of his life intentionally. However, Art. 2(1) of the ECHR provides for the possibility to deprive one of life in the execution of a death penalty adjudicated by the court on the grounds of a sentence following conviction. In this respect, it should be mentioned that Protocol No. 6 to the European Convention on Human Rights, ratified by all member states of the Council of Europe, provides for abolition of the death penalty, hence the original text of Art. 2(1) of the ECHR has become moot.

⁴⁷ *Ibidem*, para. 102.

⁴⁸ Melzer, *supra* note 1, p. 58.

The material scope of Art. 2(1) of the ECHR is further developed by the jurisprudence of the European Court of Human Rights. Of crucial importance with respect to the subject matter of this article is the practice of the Court relating to intentional extra-custodial killings carried out during law enforcement operations in conditions not amounting to hostilities.⁴⁹

Under the jurisprudence of the European Court of Human Rights, it is clear that any arbitrary deprivation of life by the state is prohibited. Art. 2 of the ECHR clearly states that “no one shall be deprived of his life intentionally.” In consequence, any targeted killing, being an example of an extrajudicial killing, would be found to be contrary to the absolute prohibition of the intentional deprivation of life. A Member State of the Council of Europe may not create a list of persons who present a danger to the state and order the extrajudicial killings of those persons. Member States cannot use targeted killings as a form of retaliation.⁵⁰

Although targeted killings would be prohibited under Art. 2 of the ECHR in times of peace, one cannot exclude the possibility that missiles fired from drones could be found justified in certain situations. In particular, Art. 2(2) of the ECHR stipulates exceptions to the absolute protection of life. One of these exceptions provides that the deprivation of life could be justified when it happens “in action lawfully taken for the purpose of quelling a riot or insurrection” (Art. 2(2)(c) ECHR). One can imagine a situation when the state authorities (e.g. police) would use lethal drones in order to protect themselves from possible riots or other forms of mass violence. At present, law enforcement authorities are using drones for the purposes of surveillance activities.⁵¹ However, one may not exclude that in the future they could be used for similar purposes as police helicopters or other armed aerial vehicles. For instance, in the case of *Isayeva, Yusupova and Bazayeva v. Russia*, the ECtHR stated that in circumstances of riots states may undertake measures that

could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2.⁵²

In such cases, the question whether a deprivation of life is arbitrary will depend on certain conditions. There must be a sufficient legal basis in the member states’ domestic

⁴⁹ *Ibidem*, p. 102.

⁵⁰ For example, one cannot imagine a situation whereby the Polish state would order its secret services to operate a targeted killing of the murderers of the Polish engineer, located in Pakistan. *Cf.*, case of Piotr Stańczak, who was murdered by Pakistani Taliban. As a follow up to this Minister of Foreign Affairs of Poland made a statement that it is fortunate that murderers will be adjudicated in Pakistan, since the death penalty is valid there. See also statement of the Helsinki Foundation for Human Rights of 18 July 2009.

⁵¹ For example, in London during the Olympic Games 2012.

⁵² *Isayeva, Yusupova and Bazayeva v. Russia* (57947/00, 57948/00 and 57949/00), EHCR 24 February 2005, para. 178, available at: [available at: http://www.echr.coe.int](http://www.echr.coe.int).

laws for acts of lethal force, and the deprivation of life must be absolutely necessary and proportional. Generally speaking, having in mind the above-mentioned circumstances, it seems that the potential execution of targeted killings in light of Art. 2 is strictly connected with a reaction to extreme circumstances constituting a serious threat to public order.⁵³

Thus, according to the first requirement, the terms and conditions of such a use of force must be precisely regulated in domestic legal provisions. And such law(s) must abide by international regulations such as the United Nations' Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and must also provide for regulations that control and limit the circumstances of deprivation of life.⁵⁴ National law should be publicly available and must provide an obligation to carry out certain procedures when making the decision to use lethal force.⁵⁵

Any deprivation of life, in order to be in compliance with Art. 2 of the ECHR, must be "absolutely necessary". Accordingly, the use of lethal force must be proportionate to the achievement of one of the legitimate purposes described in Art. 2(2) of the ECHR,⁵⁶ and it must be indispensable.⁵⁷ This means that any deprivation of life would need to be justified using a higher threshold of necessity and proportionality than in the application of other provisions of the ECHR.⁵⁸ The requirement of necessity might be evaluated under three different aspects. First, qualitative necessity means that the legitimate aim(s) of the operation cannot be achieved without resorting to potentially lethal force; second, quantitative necessity refers to the fact that the degree and the manner in which lethal force is applied must not exceed that absolutely necessary to achieve a legitimate aim; and third, temporal necessity indicates that the use of potentially lethal force must be absolutely necessary at the time of its application in order to achieve the legitimate aim.⁵⁹

Finally, the proportionality requirement directs that the nature of the threat must justify putting human life at risk.⁶⁰ Thus, deprivation of life might be justified solely when it serves to achieve aims stipulated in Art. 2(2) of the ECHR, and these

⁵³ L. Garlicki, *Komentarz do Art. 2 EKPCz* (Commentary to Art. 2 of the ECHR), in: L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Vol. 1, CH Beck, Warszawa: 2010, pp. 73-4; *McCann and Others v. United Kingdom* (18984/91) Grand Chamber, ECHE 27 September 1995, para. 148.

⁵⁴ *Ayetkin v. Turkey* (22880/93), ECHR 23 September 1998, para. 108; *Makaratzis v. Greece* (50385/99) Grand Chamber, ECHR 20 December 2004, para. 59, 67 and 70; *Nachova and Others v. Bulgaria* (43577/98 and 43579/98) Grand Chamber, ECHR 6 July 2005, para. 90. All cases available at: <http://www.echr.coe.int>.

⁵⁵ *Nachova and Others v. Bulgaria*, paras. 96-97.

⁵⁶ *Ibidem*, para. 94; *McCann and Others v. United Kingdom*, para. 149.

⁵⁷ *Handyside v. United Kingdom* (5493/72), ECHR 7 December 1976, para. 48, available at <http://www.echr.coe.int>.

⁵⁸ Garlicki, *supra* note 53, p. 78.

⁵⁹ See Melzer, *supra* note 1, p. 116; *Nachova and Others v. Bulgaria*, para. 108.

⁶⁰ Melzer, *supra* note 1, p. 116; *Nachova and Others v. Bulgaria*, para. 95, *McCann and Others v. United Kingdom*, para. 192.

exceptions must be interpreted narrowly. Furthermore, lethal force may be used only for preventive purposes, not as a sanction for past offenses. Also, it is never permissible that the foremost purpose of the use of lethal force is the deprivation of life. According to ECtHR jurisprudence, all circumstances of intentional killing, either in mass scale or of individuals, clearly constitute a violation of Art. 2 of the ECHR.⁶¹

Finally, Art. 2 of the ECHR also contains a procedural obligation to investigate any deprivation of life. This means that in the case of death by intentional killing, the state has a due process obligation to explain the circumstances of the deprivation of life. Such an investigation shall be broad so that it may enable the investigating authorities to analyze the conduct of state agents and the overall circumstances in order to determine whether the use of lethal force was necessary and proportionate. During such an examination it should be assessed whether there were any alternative tools for achieving a state's particular goal, and whether the use of force constituted an arbitrary killing.⁶² What is crucial is that this obligation applies to any acts of extrajudicial and arbitrary killings.⁶³

It is important to note that under the ECHR the obligation to protect life (and thus to prohibit any targeted killings) would also extend to situations of internal war, which is not recognized by the international community as a legitimate armed conflict. This is best illustrated by the cases concerning Russia's responsibility for its acts during the Chechnya war. In the case *Isayeva v. Russia*, the ECtHR critically evaluated the dropping of a high-explosion aviation bomb on a village located outside the zone of conflict. According to the ECtHR, although the army planned the action earlier, it did not warn the civilian population and should have foreseen the consequences of dropping the bomb. Interestingly, the ECtHR made a statement concerning potentially different standards in times of war, a state of emergency, and times of peace, stating that:

The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no State of emergency has been declared in Chechnya, and no derogation has

⁶¹ See *Khashiyev and Akayeva v. Russia* (57942/00 and 57945/00), ECHR 24 February 2005, paras. 140-142; *Issak v. Turkey* (44587/98), ECHR 28 September 2006, paras. 115 and 119; *McCann and Others v. United Kingdom*, paras. 174-84; *Mahmut Kaya v. Turkey* (22535/93), ECHR 28 March 2000, para. 9. All cases available at: <http://www.echr.coe.int>.

⁶² *Al Skeini v. United Kingdom*, para 163; *McCann and Others v. United Kingdom*, para. 161.

⁶³ As observed by the ECtHR: "The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State (*McCann and Others v. United Kingdom*, para. 161).

been made under Article 15 of the Convention (...). The operation in question therefore has to be judged against a normal legal background.⁶⁴

To conclude this part of our analysis, in times of peace and non-engagement in military conflict, one cannot imagine the lawfulness, under the European Convention on Human Rights, of the use of targeted killings, including those carried out with the use of drone technology. The only possibility to legalize such use would be to refer to the exceptions provided in Art. 2 of the ECHR. However, in such a case it would be extremely difficult for the state to justify reference to such measures and to demonstrate their proportionality.

3.2.2. State of Emergency

Another perspective that needs to be taken into account when examining the potential performance of targeted killing operations by Council of Europe Member States are the circumstances which could constitute a state of emergency. Art. 15 of the ECHR provides for a possibility to derogate from the obligations arising under the ECHR in times of war or other public emergency threatening the life of the nation. In order for such a derogation to be justified, certain conditions must be fulfilled (Art. 15(1) ECHR). First, such a derogation must be applied strictly and only to the extent required by the exigency of the situation. Second, measures undertaken by the states must be compatible with other obligations under international law (such as, for instance, international humanitarian law). Third, formal requirements concerning the obligation to notify the Council of Europe about the introduction of a state of emergency must be fulfilled (Art. 15(3) ECHR).

Art. 15(2) of the ECHR provides that the so-called “core” rights under the Convention are not subject to derogation even in times of emergency (i.e. the right to life, prohibition of torture, inhuman or degrading treatment, prohibition of slavery, *nullum crimen sine lege*). However, with respect to the right to life, Art. 15(2) of the ECHR introduces an exception from this general non-derogation clause, which is “deaths resulting from lawful acts of war.”

This indicates that even in a state of emergency, which is not a state of “lawful war”, any targeted killing would be found to be contrary to the Convention, since the general principles would still apply.⁶⁵ This means that, under the European Convention for Human Rights, states may not intentionally deprive anyone of life in times of civil war, rebellion, or war on terror, because the general principles under Art. 2 of the ECHR will still apply.⁶⁶ It should also be noted that there is no possibility to derogate from Art. 2 of the Convention in circumstances where there is only a state of “imminent

⁶⁴ *Isayeva v. Russia* (57950/00), ECHR 24 February 2005, available at: <http://www.echr.coe.int>.

⁶⁵ B. Latos, *Klauzula derogacyjna i limitacyjna w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności* (Derogation and limitation clauses in the European Convention on Human Rights and Fundamental Freedoms), Wydawnictwo Sejmowe, Warszawa: 2008, p. 112.

⁶⁶ L. Garlicki, *Komentarz do Art. 15 EKPCz* (Commentary to Art. 15 of the ECHR), in: Garlicki (ed.) *supra* note 54, pp. 802-803.

threat of war.” The notion of “lawful acts of war”, as used in Art. 15(2) of the ECHR, should be distinguished from the wording used in Art. 3 Protocol No. 6 of the ECHR, which concerns abolition of the death penalty and creates an exception from its application in “time of war and imminent threat of war.”⁶⁷

3.2.3. Armed Conflict

As it was previously mentioned, Art. 15(2) of the ECHR provides for the possibility to derogate from the ban on the deprivation of life in the context of deaths resulting from lawful acts of war. This provision should be read broadly, as also encompassing the possibility to apply the death penalty in times of war. Protocol No. 6 to the Convention abolishes the death penalty, but only in times of peace (by not excluding the application of such penalty with respect to acts committed in time of war or of imminent threat of war). This deficiency of the Council of Europe’s human rights system was supposed to be repaired by Protocol No. 13 to the Convention, which abolishes the death penalty “in all circumstances”. However, this Protocol has not yet been ratified by four member states of the Council of Europe – Armenia, Azerbaijan, Poland,⁶⁸ and Russia.

This means that, with respect to most of the Council of Europe Member States, in situations of war or imminent threat of war targeted killings, for example with the use of drones, or any other form of arbitrary deprivation of life, cannot replace the death penalty. In fact, the only possibility for such states to carry out intentional killings legally is to rely on the derogation provided in Art. 15(2) of the ECHR, as this is the only provision that allows for the deprivation of another person’s life, and is applicable in times of “lawful act of war.”

This provision creates a connection between the European Convention on Human Rights and international humanitarian law. During military conflicts which could be considered as “lawful acts of war”, killing enemies is a natural consequence of using force. However, this does not mean that military actions incurring resultant deaths can be carried out with impunity. Quite the opposite. The limits of proportionality and necessity, as previously indicated, although not expressly regulated by international humanitarian law, seem to be envisaged by these regulations. Additionally, in cases of the exercise of control over a certain territory by a given Member State of the Council of Europe, the limits on their actions might be also established by Art. 2 of the ECHR.⁶⁹

⁶⁷ *Ibidem*, p. 803.

⁶⁸ According to Grażyna Bernatowicz, under-secretary of state in the Ministry of Foreign Affairs, the lack of ratification of Protocol No. 13 to the European Convention on Human Rights by Poland is a result of a conflict of competences and visions between the Ministry of Foreign Affairs and the Ministry of Justice – see Minutes from the meeting of the Sejm Commission on Foreign Affairs of 13 December 2012, available at [http://orka.sejm.gov.pl/Zapisy7.nsf/0/D1C6B9293A16DB0DC1257AE2004F246D/\\$file/0133307.pdf](http://orka.sejm.gov.pl/Zapisy7.nsf/0/D1C6B9293A16DB0DC1257AE2004F246D/$file/0133307.pdf) (last accessed 2 May 2013). See also K. Sękowska-Kozłowska, R. Wieruszewski, *Zaległości ratyfikacyjne Polski w dziedzinie praw człowieka* (Poland’s ratification backlog in the area of human rights), 3 Europejski Przegląd Sądowy 4 (2013).

⁶⁹ See *Al-Skeini and Others v. United Kingdom*.

Additionally, it is worth noting that in a situation where international humanitarian law does not provide a regulation, the rule is unclear, or its meaning cannot be determined, human rights law may still be applied.⁷⁰ In such a situation, human rights law shall be treated as a guideline and complementary system that influences humanitarian law.⁷¹ Human rights law and humanitarian law may thus reinforce one another.⁷²

Accordingly, targeted killings would be justified under the ECHR only if they were, firstly, carried out within the scope of “lawful acts of war”, with the norms of international law applied to determine whether a given military conflict could be regarded as a “lawful war”, e.g. on the basis of a resolution of the Security Council. Secondly, the targeted killing operations would have to be strictly connected with lawful military operations. Thirdly, the targeted killings must meet the criteria of absolute necessity.

Principles that would be applicable in cases of acts of war and the use of weapons have been expressed in an opinion of the International Court of Justice, which stated that:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.⁷³

In this place, the traditional dilemmas connected with the targeted killings appear, such as concerns regarding the definition of combatants and geographical scope of the conflict. As has been mentioned, these notions tend to be overly broadly interpreted by, for instance, the practice of the United States authorities. It is certain that Member States of the Council of Europe cannot use similar justifications as those posited by the United States, as they are bound by international agreements setting higher standards of human rights’ protection, such as the ECHR, and could possibly be the subject of scrutiny by the ECtHR.

⁷⁰ See also the International Court of Justice’s *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons* of 1996 and the *Advisory Opinion the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004, which states the rules of international humanitarian law and human rights law apply in the context of both non-international and international armed conflict.

⁷¹ See also Alston, *supra* note 1, p. 10.

⁷² C. Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, The Hebrew University of Jerusalem Faculty of Law, December 2007, available at: <http://www.icrc.org/eng/assets/files/other/interplay-article-droegge.pdf> (last accessed 10 April 2013), pp. 343–4.

⁷³ *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons*, para. 78.

In passing, it should be noted that in *Al-Skeini v. the United Kingdom*, the ECtHR underlined that with respect to the positive obligation to protect life, states shall conduct an investigation which is broad enough to allow the investigating authorities to analyze the conduct of state agents and the overall circumstances in order to determine whether the use of lethal force was necessary and proportionate. In the course of the investigation, it shall be assessed whether there were any other alternative tools for achieving the particular state's goal, and whether the use of force constituted an arbitrary killing. Importantly, the ECtHR indicated that the obligation to conduct an investigation under Art. 2 of the ECHR also applies in difficult security conditions, including the context of armed conflict.

With respect to potential consequences for a civilian population, the use of drones for the purposes of targeted killing raises concerns. There are no standards in this sphere yet, but some instruction may flow from the judgment of the ECtHR in the case of *Isayeva v. Russia*.⁷⁴ In that case, the ECtHR critically evaluated the dropping of a high-explosion aviation bomb on a village located outside the zone of conflict. According to the ECtHR, although the army had planned the action earlier, it did not warn the civilian population and should therefore have foreseen the consequences of dropping the bomb.⁷⁵

It should be noted that this case was assessed by the ECtHR against the background of a time of peace. As was mentioned earlier, the Chechnya war did not have any international authorization and therefore Russia could not justify its actions by derogating from its general obligations under the ECHR. Nevertheless, one may argue that the rationale used by the ECtHR in this case could be presented in the case of targeted killings even when a state is at war, participates in non-international armed conflict, or is participating in a military intervention. Once again, the proportionality principle appears in this context. Even if the state decides to conduct such an operation (and would find it to be justified under laws of war), the state should still take into account the consequences to the civilian population of a projected air strike. Ignoring concerns with respect to the potential fate of a civilian population could be one more factor contributing to a violation of the ECHR in this context.

CONCLUSIONS

Targeted killings carried out with the use of drones currently constitutes one of the most challenging problems for international humanitarian law and international

⁷⁴ *Isayeva v. Russia*.

⁷⁵ "Even when faced with a situation where, as the Government submits, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents" (*Ibidem*, para. 176).

human rights law. Due to the ease with which they may be used, their extensive present use, and the growing potential for their future use in asymmetric warfare, the need for international regulation becomes ever more urgent and pertinent. It should be noted that this problem is not only a matter of the practice of states such as the United States or Israel. Member States of the Council of Europe are not immune from potential violations of human rights as a consequence of the use of drones. As has been demonstrated, the major human rights instrument for Europe – the ECHR – puts strict limits on any attempted targeted killings and leaves only a limited scope or area where they could be acceptable. Even in the case of targeted killings in the context of a conflict amounting to a legal state of war, the Member States of the Council of Europe should be aware that their activities could be subject to scrutiny by the European Court of Human Rights. As of now there are no judgments of the ECtHR specifically concerning targeted killings with the use of drones, but we should expect such cases soon, taking into account the scope of extraterritorial applicability of the Convention laid out by the ECtHR. Also, the standards of the ECHR should be taken into account when the Council of Europe Member States regulate and supervise their involvement in international military interventions or participate in decisions determining the kinds of weapons that can be used. It may also appear that some states prohibit any use of drones in their armed forces, due to moral, ethical, and legal constraints.

Aleksandra Dłubak*

PROBLEMS SURROUNDING ARREST WARRANTS ISSUED BY THE INTERNATIONAL CRIMINAL COURT: A DECADE OF JUDICIAL PRACTICE

Abstract

Certain aims of international criminal justice, such as prosecution and the punishment of perpetrators of international crimes, can be achieved through the international institutions created to administer justice. However, one of the essential requirements is to ensure the suspect's presence at trial. The measures provided for in the Rome Statute to facilitate the International Criminal Court in fulfilling this condition and initiating proper proceedings include the issuance of arrest warrants and subsequent requests for arrest and surrender.

Although a binding legal obligation exists under the Rome Statute with respect to States Parties, nonetheless inter-state cooperation has proven extremely difficult to obtain. There are many reasons for this, however problems of a legal and political nature are identified as the two main areas of obstacles.

There are some measures that can be taken in order to prevent the occurrence of problems relating to arrest warrants. The Office of the Prosecutor and the Pre-Trial Chambers have certain powers that can positively affect the execution of arrest warrants. These organs aim to establish a positive cooperation network, both with the States Parties and non-Party States. By using the powers of external bodies, the ICC may attempt to establish favourable circumstances which would increase the effectiveness of arrest warrants.

INTRODUCTION

International criminal justice serves many laudable objectives. Just as the aims are diverse, so too are the means to the ends. International criminal law (ICL) is one of

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the most commonly known methods of achieving justice.¹ It has been asserted that the existence of criminalisation and punishment translates into the protection of people's rights to the highest level.² In order for ICL to perform its role, a trial must be conducted and the perpetrator has to be found guilty and punished. In turn, in order to be able to hold a trial, the accused's presence has to be secured by whatever legal means are available. Given the gravity of international crimes and the unique characteristics of the situations giving rise to their commission, arrests are necessary to ensure that the suspected person does not avoid criminal responsibility, as determined by the international criminal institutions such as the International Criminal Court (ICC or the Court).

During their ten years of judicial activity, the Pre-Trial Chambers (PTCs, singular PTC) of the ICC have issued a number of arrest warrants (AWs, singular AW) in situations of international concern. Many of the identified suspects are still at large, and their apprehension is unlikely in the near future and may even be impossible. The reasons are of a twofold nature. As will be seen below, it is a combination of law and politics that frequently render AWs ineffective.

1. THEORY AND LEGAL BASIS FOR ARREST WARRANTS WITHIN THE ROME STATUTE

1.1. Rationale and theoretical basis for arrest warrants

The Rome Statute³ (hereinafter sometimes the Statute or the ICC Statute) does not give a definition of the notion of an arrest warrant. Its meaning seems to be considered common knowledge: it may be understood as an official legal document issued by a court allowing (warranting) an arrest of a particular person. Being a "specialised type of court order"⁴ it gives rise to the possibility of legally arresting a person, i.e. depriving one of one's personal liberty.⁵

Whilst Art. 58 of the Statute lacks a detailed description of the notion, it enumerates the purposes for which an arrest warrant can be issued. These are, alternatively: to ensure the individual's presence at trial; to prevent him/her (the masculine tense will be used

¹ For a comprehensive theory on the origins of the objectives of law, including international criminal justice in relation to the International Criminal Court in particular, and the inherent tension between them; see M. Klamberg, *What are the objectives of international criminal procedure? – reflections on the fragmentation of a legal regime*, 79 Nordic Journal of International Law 279 (2010).

² Ch. Bassiouni, *The proscribing function of international criminal law in the processes of international protection of human rights*, 9 Yale Journal of World Public Order 193 (1982) p.193; I. Bantekas, *International Criminal Law*, Hart Publishing, Oxford: 2010, p. 19.

³ Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force 1 July 2002) 2187 UNTS 90.

⁴ G. Boas, J. Bischoff, N. Reid, B.D. Taylor III, *International Criminal Law Practitioner Library. International Criminal Procedure, Vol. III*, Cambridge University Press, Cambridge: 2011, p. 208.

⁵ D. Nsereko, *Cooperation with the Court on matters of arrest and surrender of indicted fugitives: lessons from the ad hoc Tribunals and national jurisdictions* in J. Doria, H.-P. Gasser, Ch. Bassiouni (eds.), *The Legal Regime of the International Criminal Court. Essays in Honour of Professor Igor Blisshchenko*, Martinus Nijhoff Publishers, Leiden: 2009, p. 976.

generically in the remaining part of this article) from hampering the investigation or the court proceedings; or to stop a suspect from committing further crimes of the same nature (i.e. crime prevention).⁶ Nsereko points out that the first reason is particularly important because it lets the accused defend himself against the charges posed by the court.⁷ When a suspect⁸ is inclined to cooperate with the Court, an AW would be unnecessary and his obligatory presence at trial⁹ may be achieved in another fashion. If there are sufficient reasons to presume that the person will voluntarily submit himself to the Court, the Prosecutor may ask the PTC to simply issue a summons to appear.¹⁰

Although neither are specifically provided for in the Statute of the ICC nor in the Rules of Procedure and Evidence¹¹ (RPE),¹² two types of arrest warrants have evolved in practice: sealed and public. The former, also known as a non-disclosure AW, is secretly transferred to selected entities, often those that have the direct opportunity to make the arrest.¹³ There are various reasons for which an AW may be sealed. Since the main purpose of arrest warrants is to capture the suspect, keeping them secret adds an element of surprise to their execution. Such was the case in *Bemba*, when the defendant was arrested in Belgium while visiting relatives the day after his AW was issued in May 2008.¹⁴ Being a few steps ahead of the person at large, who might want to avoid his responsibility, increases the chances of his apprehension by a cooperative State.¹⁵ Additionally, keeping AWs secret allows the States to take essential steps in order to locate and freeze the assets of a suspect, as occurred in the *Lubanga* case, where the defendant was already in custody at the time his arrest warrant was issued.¹⁶ To date, the majority¹⁷ of the AWs issued by the PTC have been sealed.

A sealed AW is unsealed once it is clear that the arrest has been successful – the AWs issued with respect to the situations in the Democratic Republic of the Congo (DRC), Cote d'Ivoire, and the Central African Republic (CAR) may serve as examples.

⁶ Art. 58(1)(b) of the ICC Statute.

⁷ Nsereko, *supra* note 5, p. 976.

⁸ A person becomes an accused when the Pre-Trial Chamber has confirmed the charges against them (Art. 61 of the ICC Statute).

⁹ Art. 63 of the ICC Statute.

¹⁰ Art. 58(7) of the ICC Statute. See also C. Hall, *Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Beck, München: 2008, pp. 1143-5.

¹¹ Rules of Procedure and Evidence, 9 September 2002, ICC-ASP/1/3 (Part II-A).

¹² W. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge: 2007, p. 261.

¹³ C. Ryngaert, *The international prosecutor: arrest and detention*, Leuven Centre for Global Governance Studies Working Paper No. 24, 2009, p. 23.

¹⁴ ICC Press Release, ICC-OTP-20080524-PR316, 24 May 2008.

¹⁵ C. Gosnell, *The request for an arrest warrant in Al Bashir. Idealistic posturing or calculated plan?*, 6 Journal of International Criminal Justice 841 (2008), p. 845.

¹⁶ Schabas, *supra* note 12, p. 260; *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest of 10 February 2006, ICC-01/04-01/06-8, para. 140.

¹⁷ For a statistical summary of the ICC's arrest warrants see Section 4 of this article.

Apart from making sure that the risk of abscondment is low, unsealing might also mean that certain measures to protect witnesses have already been taken.¹⁸ Ryngaert also lists a number of other reasons for which the ICC Prosecutor has decided to request the unsealing of AWs, among them for instance the risk that “the suspect may flee or seek refuge in other (neighbouring) countries, (...) which may be decreased when the international actors are officially informed of the existence of the warrant.”¹⁹

Other arrest warrants are made public straight away. Paradoxically, from the point of view of capturing the suspect, this may be also beneficial as it facilitates international cooperation and quick responses if the defendant attempts to flee.²⁰ According to Gosnell, public AWs usually indicate that the State(s) concerned are not willing to cooperate, and additional attention from the international community might be required to exert influence on them. Therefore, the Prosecutor decides to increase the chances of capturing the suspect in the long term, even though a public AW may have negative outcomes in the short term.²¹ It should be mentioned that the same applies to sealed warrants that have subsequently been made public, even in situations where they have not yet resulted in securing a suspect’s arrest, as occurred in the cases of with respect to the situation in Uganda.

The issuance of arrest warrants is linked to many objectives and values. On one hand, international criminal justice promotes values such as obtaining justice for the victims and the punishment of the perpetrators, as well as an active pursuit towards transitional justice and post-conflict reconciliation. These factors have to be carefully weighed against each other when deciding on the next step in an international prosecution. On the other hand, international criminal law has its own set of aims, related to criminal law: crime prevention, incapacitation, rehabilitation, deterrence, and retribution. But it also addresses the international aspect of crimes: national reconciliation and providing a historical record of atrocities.²² The aims of the ICC are articulated in the Preamble to the Statute and include strictly legalistic aims (such as “effective prosecution”) as well as moral ones (e.g. “peace, security and well-being of the world”). Arguably, this proves that the moral values and objectives that international criminal justice, ICL and the ICC are striving for have to be prioritised as it may be impossible to achieve them simultaneously.

The issuance of AWs, being one way of pursuing international criminal justice, may conflict with other aims. For instance, in some cases amnesties may be more effective than blindly imposing criminal justice and thus escalating a particular conflict.²³

¹⁸ *Situation in Uganda*, Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest of 13 October 2005, ICC-02/04-01/05, para. 14.

¹⁹ Ryngaert, *supra* note 13, pp. 23–24.

²⁰ *Ibidem*, p. 24.

²¹ Gosnell, *supra* note 15, p. 845.

²² Bantekas, *supra* note 2, p. 29.

²³ Among other ways of achieving justice are truth commissions, amnesties, and financial aid for weak societies; *ibidem*, p. 14. The international community might not even need a trial, as sometimes an indictment may have sufficient effects for the communities concerned; *Cf.* Ryngaert, *supra* note 13, p. 20.

However, the arrest warrants are indispensable if the ICC is to achieve its objectives. Thanks to them the legalistic aims can be realised and lawful punishment administered. Since AWs often automatically follow an indictment, it is clear that the effectiveness and successful execution of AWs is of crucial importance.²⁴ It may be argued that in practical terms they initiate the Court proceedings.²⁵

In order to increase the chances of arresting a suspect, the ICC Statute provides for the obligation of States to cooperate with the Court in matters concerning arrest warrants and the surrender of persons.²⁶ However, the lack of ICC enforcement powers makes it wholly dependent on the changing interests of States (especially political interests) and their cooperation. It thus depends on the States whether the values and objectives of international criminal law and justice will be realised and respected²⁷ in a particular case, or whether they will “remain elusive”.²⁸ As a result, whereas the obligation to cooperate is the ICC’s strongest point, its lack of enforcement powers undermines it significantly.²⁹

1.2. The legal framework concerning arrest warrants

1.2.1. Pre-issuance: prosecutorial discretion and policy considerations

The Prosecutor and the Office of the Prosecutor (OTP) enjoy wide discretion in determining whether a particular situation will be addressed in front of the ICC (Art. 53 ICC Statute), and also which person(s) will be prosecuted. If it chooses not to investigate, for whatever reason, the OTP is arguably in the position of having decisive power over the administration of justice in such situations.³⁰

Moreover, a range of policy considerations have to be taken into account.³¹ An important question is the timing for issuing an AW. This is directly related to the duration of a conflict, which is a problem particular to the ICC compared to the previously established *ad hoc* tribunals, which were established as an internationally-sanctioned reaction to an ongoing conflict. Again it should be stressed that AWs may, depending on the circumstances, either improve the relations between conflicting

²⁴ B. Swart, *Arrest and surrender*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, p. 1640.

²⁵ Boas et al., *supra* note 4, p. 209.

²⁶ Art. 89(1) of the ICC Statute.

²⁷ G. Sluiter, *The surrender of war criminals to the International Criminal Court*, 25 Loyola Los Angeles International and Comparative Law Review 605 (2002-2003), p. 606; A. Cassese, *On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law*, 9 European Journal of International Law 2 (1998), p. 13.

²⁸ Ryngaert, *supra* note 13, p. 4.

²⁹ W. Burke-White, *Proactive Complementarity: the International Criminal Court and national courts in the Rome System of International Justice*, 49 Harvard International Law Journal 53 (2008), p. 65.

³⁰ A.M. Danner, *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, 97 American Journal of International Law 510 (2003), p. 521.

³¹ See generally, M.R. Brubacher, *Prosecutorial discretion within the International Criminal Court*, 2 Journal of International Criminal Justice 71 (2004), pp. 80-84.

parties by causing the person sought by a warrant to make some concessions during peace negotiations, or inflame the conflict by weakening the political stability of the region.³² Ryngaert therefore suggests that before AWs are issued, already during peace negotiations the OTP should address the matters related to the AW's execution. The timing of the application for an arrest warrant may also derive from purely practical reasons, such as giving the OTP more time to prepare the case, especially if the suspect is already in detention, as in the *Lubanga* case.³³

Naming the right addressee of the AW may also be of crucial importance for the future peace process. The general guideline stemming from the Rome Statute itself is that the Prosecutor should focus on those persons who can be held responsible for the commission of the most serious international crimes, so that the gravity requirement is met.³⁴ However, capturing persons who may be highly placed in the hierarchy of a State, especially incumbent officials, has proven extremely difficult. This was recognised by the Office of the Prosecutor in its policy paper from 2003, where the overall interests of an entire case is stressed.³⁵ This is also in line with the suggestions of scholars, who point out advantages of such targeting less important officials, e.g. the higher likelihood of States being willing to sacrifice them,³⁶ which may increase the Court's legitimacy for prosecuting further crimes in the same region.³⁷

The OTP, when filing a formal application to the PTC in accordance with Art. 58 of the ICC Statute, has to ensure that three requirements are met. Turone suggests that, *a contrario* from Art. 53(2), a request for an arrest warrant is only allowed when there are reasonable grounds to believe there was or has been a crime within the Court's jurisdiction committed by the suspected person;³⁸ there are no reasonable grounds to believe that the case is inadmissible; and it conforms to the interests of justice. In complying with these parameters, the prosecutorial discretion varies, reaching the widest range with reference to the 'interests of justice'.³⁹ Additionally, the Prosecutor's application for an AW should contain, *inter alia*, the relevant data on the suspect, a summary of the facts and evidence⁴⁰ as well as the reasons for the application (Art.

³² Ryngaert, *supra* note 13, pp. 28-30.

³³ Schabas, *supra* note 12, p. 264.

³⁴ Preamble paras. 4-5, Art. 5, Art. 17(1)(d) of the ICC Statute.

³⁵ Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor* (2003), <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Paper+on+some+policy+issues+before+the+Office+of+the+Prosecutor.htm>, (accessed 29 January 2013).

³⁶ Ryngaert, *supra* note 13, p. 26.

³⁷ Gosnell, *supra* note 15, pp. 847-8.

³⁸ According to the Regulations of the OTP, this is supposed to be "based on [a] solid factual and evidentiary foundation", Regulation 53, *Regulations of the Office of the Prosecutor* (2009) ICC-BD/05-01-09.

³⁹ G. Turone, *Powers and duties of the Prosecutor*, in: A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, pp. 1172-4.

⁴⁰ The amount of the evidence disclosed to the PTC has been a subject of discussion in *Lubanga*, where the PTC required the Prosecutor to provide additional information; *Lubanga*, 2006, p. 9.

58(2)). Turone describes the application for an AW as “a sort of provisional indictment” in which the Prosecutor reveals his intention to prosecute the case.⁴¹

1.2.2. The Court’s powers to issue arrest warrants

The Prosecutor’s application for an AW undergoes the first stage of judicial review when the AW reaches the Pre-Trial Chamber.⁴² The Chamber reviews it in accordance with Art. 58(1) of the Rome Statute, which identifies the test to be applied: a certain standard of proof suggesting that a crime within the Court’s jurisdiction has been committed by the suspected person and the necessity of the arrest. These requirements are exhaustive⁴³ and no additional obligations are provided in the Regulations of the OTP.⁴⁴

The first element is the existence of “reasonable grounds,” and the evidentiary standard at this stage is lower than during the confirmation of the charges or, of course, during the trial. Nevertheless, this level cannot be abstractly evaluated with respect to the ICC standards only. If the Court wants to ensure that the suspect is detained, it should look at the evidentiary standard of the State to which the AW will be directed for execution.⁴⁵ This entails certain consequences. Firstly, if the national authorities are not satisfied with the background information provided, this can serve them as an excuse to refuse cooperation. Secondly, this implies that close cooperation and the exchange of information should exist both between the OTP and PTC, as well as between the Court itself and the States, so that the ICC is aware of the requirements laid down by the respective national laws. Thirdly, the Court’s organs must be future-oriented in every procedural step they take in order to maximise the likelihood of the successful apprehension of the suspect and bringing him to trial. Additionally, the issuance of AWs may be slowed down if the Prosecutor has not provided sufficient information regarding the suspect’s criminal responsibility. The PTC needs to be supplied with strong grounds to justify the deprivation of personal liberty⁴⁶ in order to comply with Art. 21(3), which refers to internationally recognised human rights. Therefore, the PTC may ask for additional evidence at this point.

The arrest must appear necessary in order to ensure the presence of the accused at trial, which in national jurisdictions means no less than to prevent that person from fleeing.⁴⁷ Another reason to arrest might exist if the person could obstruct the proceedings or interfere with the investigation. The rationale behind all these reasons is of preventive nature.

⁴¹ Turone, *supra* note 39, pp. 1177-8.

⁴² Boas *et al.*, *supra* note 4, p. 209.

⁴³ S. Zappalà, *Rights of persons during an investigation*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, p. 1198.

⁴⁴ Hall, *supra* note 10, p. 1136.

⁴⁵ Swart, *supra* note 24, p.1691. This obligation stems in particular from Art. 91(2)(c) of the ICC Statute.

⁴⁶ Boas *et al.*, *supra* note 4, p. 183; Sluiter, *supra* note 27, p. 617.

⁴⁷ Sluiter, *supra* note 27, p. 619.

If the conditions of Art. 58 are fulfilled, this automatically means that the PTC will issue an AW. Hall observes that there is no space for judicial discretion for either political or ideological reasons.⁴⁸ Therefore, when the application meets the legal requirements, the Registry is to prepare a request to the custodial State for the arrest and surrender of the suspect,⁴⁹ the route to which is opened up by Art. 58(5). The PTC in *Lubanga* clearly stated that it is the Chamber itself that can transfer the request for arrest and surrender for further action, doing so through the Registry.⁵⁰ It denied the Prosecutor's continuing initiative in this respect and marked this moment as commencing the AW execution stage.

1.2.3. Procedural safeguards for cooperation with respect to the Court's request to arrest and surrender

It is observed in the literature that the ICC represents a unique mixture of horizontal and vertical regimes.⁵¹ As far as the cooperation mechanism is concerned, the ICC Statute employs the vertical model.⁵² It is precisely this fact that creates certain safeguards ensuring the effectiveness of arrest warrants, which are included in a number of provisions of the Statute.

After the issuance of an arrest warrant, the Court may either request selected entities or, if the AW is made public, may generally ask all State Parties (SPs) to arrest and surrender the suspect.⁵³ SPs are legally obliged to follow such a request. Generally, the execution of the ICC's request is regulated in Part 9 of the Statute,⁵⁴ with the key Art. 89. Note that it does not use the word "order" to describe the obligatory nature of the Court's request. Instead it talks only of a "request for the arrest and surrender of a person," perhaps suggesting voluntary compliance and a more horizontal approach.⁵⁵ However, the provision becomes much stricter when it describes its desired effect: "States Parties *shall*, in accordance with the provisions of this Part and the procedure under their national law, *comply* with requests for arrest and surrender" (Art. 89(1) *in fine*, emphasis added).

Art. 102 of the Statute provides another method for facilitating cooperation. By distinguishing between extradition ("delivering up of a person by one State to another as provided by treaty, convention or national legislation") and surrender ("delivering up of a person by a State to the Court, pursuant to this Statute"), Art. 102 definitively eliminates the grounds for refusal to cooperate if a traditional extradition was requested,

⁴⁸ Hall, *supra* note 10, p. 1138.

⁴⁹ Boas *et al.*, *supra* note 4, p. 208.

⁵⁰ *Lubanga*, 2006, para.117.

⁵¹ R. Rastan, *Testing co-operation: the International Criminal Court and national authorities*, 21 Leiden Journal of International Law 431 (2008), p. 432.

⁵² *Ibidem*; see also C. Kreß, K. Prost, *Surrender of persons to the Court*, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Beck, München: 2008, pp. 1539-1540.

⁵³ With respect to the three cooperation regimes under the ICC Statute, see generally, Sluiter, *supra* note 27, pp. 609-610.

⁵⁴ Cf. Swart, *supra* note 24, p. 1677.

⁵⁵ Rastan, *supra* note 51, p. 433.

for which it has been positively praised.⁵⁶ As a result, provisions prohibiting the rendition of a State's own nationals for the purposes of extradition,⁵⁷ as well as the political offence exception and the double criminality requirement⁵⁸ are invalid in relation to the ICC. The Court therefore moved away from extradition models to the extent necessary to ensure the coherent interpretation of domestic laws of States in accordance with the Statute, without requiring changes in national laws.⁵⁹

Art. 92 also safeguards the execution of AWs by placing provisional arrest at the Court's disposal. Foreseen as an appropriate measure in urgent cases, provisional arrest allows the ICC to require the arrest of a person before the obligatory documents supporting a normal request for arrest and surrender are sent. This may be seen as a way of obtaining more time to gather the necessary documents, and in fact the OTP normally asks the Court to request a provisional arrest before issuing the formal request for arrest and surrender.⁶⁰ The arrival of supporting documents must occur within 60 days following a provisional arrest (Rule 188 RPE). Upon the expiry of that period without the issuance of an official AW, the suspect provisionally arrested may be released (Art. 92(3)). However, the wording of the provision suggests that a corresponding arrest warrant should be issued before.⁶¹

Unfortunately, notwithstanding this supra-state cooperation regime between the Court and SPs, the enforcement mechanisms available to the ICC are limited.⁶²

2. THE INFLUENCE OF ARREST WARRANTS ON SELECTED AREAS OF INTERNATIONAL LAW AND INTERNATIONAL CRIMINAL LAW

2.1. Obligations of States Parties

2.1.1. Complementarity issue

One of the reasons for which AWs may remain outstanding is the negative attitude of States affected by their issuance. The issue of complementarity is raised here. The key problem is well described by Benvenuti:

⁵⁶ D. Rinoldi, N. Parisi, *International co-operation and judicial assistance between the International Criminal Court and States Parties*, in F. Lattanzi, W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. I, Il Sirente, Fagnano Alto: 1999, p. 347; B. Swart, *International cooperation and judicial assistance. General problems*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, p. 1596.

⁵⁷ Schabas, *supra* note 12, p. 265.

⁵⁸ Sluiter, *supra* note 27, pp. 638-9; see generally Swart, *supra* note 24, pp. 1648-54.

⁵⁹ Especially if the purpose of surrender and extradition is the same, i.e. removing a person from one State's jurisdiction to another. Swart, *supra* note 24, p. 1680, 1697.

⁶⁰ Ryngaert, *supra* note 13, p. 27.

⁶¹ Swart, *supra* note 24, p. 1692.

⁶² Kreß, Prost, *supra* note 52, p. 615; see more in Section 3.1 herein.

These States are usually the most connected with the crime (territorial State, nationality State, detention State) and consequently they are precisely those whose cooperation is essential to effective prosecution. Why would these States, genuinely unwilling to carry out investigation or the prosecution, be subsequently cooperative with the Court?⁶³

Due to the principle of complementarity, the SPs are primarily obliged to prosecute, and only if they are unwilling, unable or inactive,⁶⁴ within the meaning of Art. 17, does the Court take over jurisdiction. This is essentially linked to the admissibility of a case. Should the Court decide that a State is inactive, unwilling or unable to prosecute, the case is admitted. Arguably, the decisive factor is whether there are or have been proceedings carried out in the national state.⁶⁵ When an AW is issued, the suspect may bring a claim on the basis of *ne bis in idem* to the national court (Art. 89(2)). This court is obliged to consult with the ICC to check whether it has ruled on admissibility. Only if the admissibility proceedings are pending or they have not yet taken place (Art. 95), may the surrender and, in the latter case, even the arrest be delayed.⁶⁶ Most notably, this is the current status of the AW issued against Saif Gaddafi, execution of which was postponed until the admissibility challenge is decided.⁶⁷ Therefore, in order to ensure that the suspect is surrendered to the Court, the PTC should preferably decide upon admissibility at an earlier stage. Given that there is a chance to preliminarily assess admissibility when the OTP's application for issuance of an AW is examined, the Court's decision in *Lubanga* deserves mentioning. The judges in that case decided that "an initial determination on whether the case (...) falls within the jurisdiction of the Court and is admissible is a prerequisite to the issuance of a warrant of arrest",⁶⁸ strengthening their previous approach in *Kony* of simply "being satisfied (...) and without prejudice to subsequent determination, the case (...) appears to be admissible."⁶⁹ This is a positive development which eliminates the challenges to arrest requests which could take place under Art. 95 of the Statute.

Notwithstanding, there are still problems related to complementarity, particularly visible in the *Situation in Uganda*. After Uganda had referred itself to the ICC, hopes for its cooperation were high. However, in 2008 (three years after the Kony AW was issued) the Government of Uganda established the High Court, which was to independently

⁶³ P. Benvenuti, *Complementarity of the International Criminal Court to national criminal jurisdictions*, in F. Lattanzi, W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. I, Il Sirente, Fagnano Alto: 1999, p. 50.

⁶⁴ With respect to the common omission of inactivity as a factor, see D. Robinson, *The mysterious mystery of complementarity*, 21 Criminal Law Forum 67 (2010); cf. also, I. Stegmiller, *Complementarity thoughts*, 21 Criminal Law Forum 159 (2010).

⁶⁵ Robinson, *supra* note 64, pp. 68-72.

⁶⁶ Rinoldi, Parisi, *supra* note 67, pp. 350-1.

⁶⁷ *Gaddafi and Al-Senussi*, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute of 1 June 2012, ICC-01/11-01/11-163.

⁶⁸ *Lubanga*, 2006, para. 18.

⁶⁹ *Kony*, Warrant of Arrest for Joseph Kony of 8 July 2005, amended 27 September 2005, ICC-02/04-01/05, para. 38.

try persons indicted by the ICC.⁷⁰ In such an event, obviously questions concerning complementarity and the *ne bis in idem* principle specifically arose, and it is difficult to avoid the suspicion that it could have been an act designed to remove the ICC's jurisdiction. Significantly, in September 2009, the Appeals Chamber confirmed that the case is admissible.⁷¹ It still cannot be excluded, however, that once proceedings against the suspects commence in Uganda, the ICC will have to drop the investigation and permit trial there.

Burke-White suggests a solution to the problem of complementarity. Instead of spending resources on trying to bring a case in the Court, he proposes the notion of "proactive complementarity," which would exploit the mechanisms inherent in the Statute in the opposite direction. Since the Statute confirms the State's duty to investigate in the first place, then, according to Burke-White, "the ICC can and should encourage, and perhaps even assist, national governments to prosecute international crimes".⁷² If the Court adopts this approach, there will be fewer AWs issued and there is a chance that they will become more effective, because the international efforts could concentrate on a smaller number of existing cases. This could indeed be a promising approach. However, it would not solve the problem of allegations against the highest officials in situations when they still hold incumbent positions and have direct influence over the State's policy of prosecutions. Moreover, the OTP for now seems to have chosen a completely opposite path in its policies, and instead of increasing the chances of a prosecution in national courts, self-referrals are promoted.⁷³ This can pose problems for the ICC. If the Court is incapable of obtaining the suspects even in case of self-referrals, this may have potential negative effects on both its image and legitimacy among the international community.

2.1.2. Conflicting obligations

There is a significant possibility that a State to which the ICC has directed as request for arrest and surrender may find itself in a situation where it has to choose between conflicting obligations. Firstly, such a State may be simultaneously requested to arrest and transfer the sought-after person to another State, which may be either a SP or a non-Party State to the Statute. Secondly, there may be some other international obligations that the requested State is bound by, and which may prevail over the Court's request.

The first situation is directly dealt with by Art. 90 of the Statute, and the solution is linked to the previously discussed problem of admissibility. Again, as long as the PTC

⁷⁰ Case information sheet – The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (2010), <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Related+Cases/ICC+0204+0105/Background+information/> (accessed 29 January 2013).

⁷¹ *Kony*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under Article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408.

⁷² Burke-White, *supra* note 29, p. 56.

⁷³ W. Schabas, *Complementarity in practice: some uncomplimentary thoughts*, 19 Criminal Law Forum 5 (2008), p. 9.

has ruled the case admissible and in doing so has taken all the relevant information into consideration, the ICC's request is given priority over another SP's request (Art. 90(2)). A delay may occur if the proceedings on admissibility are pending (para. 3).

Although only SPs are addressees of Article 90(2), which stems from the principle of *pacta tertiis nec nocent nec prosunt*, para. 4 of this provision deals with the situation when a second request comes from a non-Party to the Statute. Priority is given to the Court only if the requested State is under no binding international obligation to extradite and the ICC has admitted the case. When admissibility has not yet been decided upon, the requested State is free to proceed with the competing request (para. 5). It is also allowed to make its own decision on compliance with the duty to extradite (para. 6). The same solution as regards the request for extradition by a non-Party State is suggested in the Statute to resolve the problem of conflicting requests for the same person, but for different conduct.

This provision visibly favours the obligations towards the ICC,⁷⁴ and it is hoped that this will be reflected in reality. Extradition agreements very often contain a provision giving the requested State a choice as to which request should be obeyed in the event of conflicting requests. Hence, theoretically it is very easy to give preference to the ICC's request and execute an AW.⁷⁵ Some authors are not so positive however. Problems may arise in a situation where a "chain of requests" has taken place, and the person sought by the Court may have already been extradited to a requested State by another State.⁷⁶ On the other hand, the ICC may not proceed with the request for surrender if the SP would have to act inconsistently with its international obligations (Art. 98(2)).

The Prosecutor should arguably sometimes put pressure on the custodial State to choose surrender to the ICC over extradition. This may be necessary to ensure that the SP gives priority to the ICC's request. A territorial State requesting extradition might not itself be interested in prosecuting the perpetrators, and they might request their extradition in order to shield those persons from international prosecution. This brings up the problem of conflicting interests in international criminal justice. Therefore, the OTP should make full use of its diplomatic skills, obtaining the strong support of the international actors.⁷⁷

2.2. Obligations of non-Party States

2.2.1. Acceptance of jurisdiction *ad hoc* and agreements with non-Party States

The *pacta tertiis* principle bears particular relevance in relation to AWs issued for nationals of those States which remain outside ICC jurisdiction. It creates an obvious limitation to the Court's ability to administer justice, especially in a case when many international crimes have been committed in a non-Party State, or a suspect sought for

⁷⁴ Rinoldi, Parisi, *supra* note 67, p. 355.

⁷⁵ Sluiter, *supra* note 27, p. 630.

⁷⁶ See generally, Swart, *supra* note 24, p. 1681.

⁷⁷ Rynjaert, *supra* note 13, pp. 45-7.

arrest flees to such a country. However, the Statute provides for certain measures that allow the Court to cooperate with such non-Party States.

First of all, a non-Party State may accept the ICC's jurisdiction *ad hoc* on the basis of Art. 12(3). This may be necessary when either an SP has referred a situation, or the Prosecutor has initiated an investigation *proprio motu* (Art. 13). The latter indeed took place in 2003, when Côte d'Ivoire submitted a declaration accepting the ICC's jurisdiction.⁷⁸ Subsequently, an AW in *Gbagbo* was issued under seal⁷⁹ in November 2011, and was unsealed once the suspect was transferred to the ICC a week later by the Ivorian authorities. Gbagbo's prompt apprehension not only highlighted the willingness of Côte d'Ivoire to allow the investigations, but also its commitment to execute the ICC's decisions. As Art. 12(3) provides for a duty to cooperate in accordance with Part 9 of the Rome Statute, Côte d'Ivoire was bound by the provisions therein, including the key Art. 89. It has so far fulfilled its obligations towards the ICC, and time will show whether this state of affairs will continue, in particular with respect to other prosecutions that follow.⁸⁰ While this example is promising, there are no other instances to compare to it. Nevertheless, it is striking that a non-Party State may be more willing to closely cooperate with the Court than a SP.

Apart from the *ad hoc* acceptance of jurisdiction, Art. 87(5)(a) provides that "[t]he Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State, or any other appropriate basis."⁸¹ Since the Court does not have the necessary enforcement powers and it is for its members to implement such arrangements, an invitation to provide assistance on an *ad hoc* basis is issued by the Court on behalf of the SPs.⁸² This means that even though an agreement may be signed, the Court cannot ensure its effectiveness and relies on the SPs to use the means at their disposal instead. On the other hand, according to para. (b), in the case of non-cooperation the matter may be referred to the Assembly of States Parties (ASP), which discusses it and can possibly agree on measures to be taken by the SPs individually towards the non-cooperating third State.⁸³ Additionally, it should be noted that agreements under Art. 87(5) may not be as effective as acceptance of jurisdiction under Art. 12. Whilst the latter obliges the third State to comply with Part 9 of the Statute in its entirety, the former provides the non-Party State with the freedom to establish the limits of cooperation offered to the

⁷⁸ The Declaration, available at <http://www.icc-cpi.int/NR/rdonlyres/9CFE32D1-2FCB-4EB4-ACA0-81C2343C5ECA/279844/ICDEENG7.pdf>, (accessed 16 January 2013), was later reconfirmed in 2010 and 2011.

⁷⁹ *Gbagbo*, Situation in the Republic of Côte d'Ivoire, Warrant of Arrest for Laurent Koudou Gbagbo of 23 November 2011, ICC-02/11-01/11-1.

⁸⁰ The OTP announced that more cases are being investigated. OTP Statement of 30 November 2011.

⁸¹ Art. 87(5)(a) of the ICC Statute. Notably, Art. 87(6) creates the same competence to enter into agreements with international organisations.

⁸² G. Palmisano, *The ICC and third states*, in F. Lattanzi, W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. I, Il Sirente, Fagnano Alto: 1999, p. 406.

⁸³ *Ibidem*.

ICC. Thus the obligations of arrest and surrender may be excluded from the scope of assistance, and the Court does not have the authority to impose them.⁸⁴

There are however other options available as a remedy in such situations. Firstly, SPs are free to rely on extradition agreements which bind them and third States, both multilateral and bilateral. Through these they may request the extradition of a suspect in order to try them for the international crimes committed.⁸⁵ Even though this might not be successful, and the requested State may refuse extradition, such an internationally visible State action may put the non-cooperative State under international pressure. As a result they may feel forced either to prosecute the case themselves or in some circumstances (albeit unlikely) to surrender the suspect to the ICC.⁸⁶

Secondly, the OTP may exploit “cooperation frameworks” existing in a particular situation⁸⁷ on the basis of Art. 54(3)(c) and (d) of the Statute. According to these provisions, “the Prosecutor may seek cooperation of any State” and enter into such “arrangement or agreements” as may be necessary to improve the prospects of cooperation, as long as they are consistent with the Statute. The OTP may make an informal international deal with States involved in the prosecution of international crimes, whether SP or non-Party State.⁸⁸ This may be particularly helpful if there are bilateral extradition agreements in force between State A (making a deal with the OTP) and State B (where a suspect is located). However, AWs against such persons must be issued from both of these States. The crux of such a deal is usually that the OTP promises for a certain time not to seek enforcement of an AW against a person from State A, if this State in turn uses its powers to apprehend another suspect from State B.⁸⁹

Such an exchange of favours could increase the Court’s ability to prosecute, but simultaneously it prioritises certain crimes and suspects over others. It is also highly dependent on the prevailing political climate.

2.2.2. Security Council’s referral

The Security Council (SC) holds a very special position in the ICC regime. Being a part of the United Nations (UN), the SC not only has a unique role, as it holds enforcement powers, but its relationship with the Court adds special legitimising features to the ICC as an international organisation. Because the decisions of the SC taken under Chapter VII of the UN Charter are binding on the members of the UN by virtue of Art. 25 and Art. 48,⁹⁰ the scope of the ICC jurisdiction may be considerably stretched not only over SPs, but also over non-Party States. According to Art. 13(b)

⁸⁴ Swart, *supra* note 56, p. 1617.

⁸⁵ Swart, *supra* note 24, p. 1686.

⁸⁶ *Ibidem*, p. 1687.

⁸⁷ Ryngaert, *supra* note 13, p. 15.

⁸⁸ *Ibidem*.

⁸⁹ *Ibidem*.

⁹⁰ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (hereinafter the UN Charter).

of the Rome Statute, the SC can refer *any* situation to the Prosecutor and the ICC is allowed to exercise jurisdiction over it. This means that even if the situation concerns a non-Party State, the OTP is free to investigate and the State concerned has to obey the duties imposed on them by the SC in the referring resolution. Arguably, they may even exceed the scope of obligations to cooperate inherent in Part 9 of the Statute.⁹¹ Additionally, it seems that in the event of a conflict between the SC's decisions and the Rome Statute, the former would be binding on the SPs, as it originates from the UN Charter and therefore enjoys precedence over other treaty obligations.⁹² These powerful competences of the SC with respect to the ICC are generally perceived to enhance cooperation,⁹³ although the reality does not seem to confirm this perception. Not only has the Court's experience been beset with problems, but the difficulty of reaching consensus within the SC also demonstrates that referrals may prove problematic. It does nevertheless eliminate the need for the additional agreements previously discussed, and an SC referral suffices to establish a duty to cooperate.

To date two SC referrals have taken place – for the situations in Darfur and in Libya.⁹⁴ Neither of them has so far brought about the expected results of surrendering the suspects, and the AWs issued remain outstanding. Both resolutions, using the same wording, impose an obligation on the respective authorities:

to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and (...) urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.⁹⁵

The duty of cooperation with the ICC is therefore created solely on the basis of these resolutions, and does not derive from the Rome Statute. Non-Party States are thus also bound by it and are responsible for non-compliance and subject to possible measures undertaken by the SC in exercise of its powers under Chapter VII of the UN Charter.⁹⁶ This causes certain problems concerning the actual status of non-Party States, which seem to effectively be treated as *quasi*-States Parties. However, a SC referral of a situation to the ICC ought not to be understood as imposing “on all UN member States the acceptance of the jurisdiction of a permanent tribunal established by a pre-existing treaty to which not all these States are parties.”⁹⁷ Rejection of such a thesis arises especially when the SC Resolutions are vague and their addressees are not sufficiently determined.

⁹¹ Schabas, *supra* note 12, p. 252.

⁹² Art. 103 UN Charter; Rastan, *supra* note 51, p. 443.

⁹³ *Ibidem*, p. 441.

⁹⁴ Darfur: SC Resolution 1593 (2005), S/RES/1593; Libya: SC Resolution 1970 (2011), S/RES/1970.

⁹⁵ SC Res. 1593, operative para. 2; SC Res. 1970, operative para. 5.

⁹⁶ *But see* Benvenuti, *supra* note 63, p. 41; Rastan, *supra* note 51, p. 442; *see also* L. Condorelli, S. Villalpando, *Can the Security Council extend the ICC's jurisdiction?*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, pp. 571-582.

⁹⁷ G. Palmisano, *supra* note 82, p. 418.

Nonetheless, the ICC may potentially gain much from its unique relation to the SC. Arrest warrants may be subject to the binding decisions of this organ, and hence be effected quicker. They may be addressed to any State that is capable of apprehending suspects, and the ICC does not have to limit itself to its States Parties. Moreover, the Court is empowered to notify the SC of a non-cooperative State (Art. 87(5)(b) *in fine* and 87(7)) and has done so numerous times with respect to Sudan. Additionally, international attention is necessarily drawn to a SC referral, which may simply put pressure on the uncooperative State to comply with its obligations towards the ICC.⁹⁸

Although the SC Resolutions are binding, SC referrals of a situation in a non-Party State have so far proven ineffective. Whilst Libya at least filed an admissibility challenge which consequently postponed the execution of the AW for Saif Gaddafi and Al-Senussi, Sudan has been almost totally uncooperative. Since the issuance of AWs (in some cases as long as five years ago) ordering the arrest of Al Bashir and other Sudanese citizens, their execution continues to appear unlikely. For this reason, the OTP may want to try other ways of ensuring cooperation. By making “internal deals” with Sudan, the Prosecutor could offer not to pursue the immediate execution of AWs for high State officials in return for apprehending lower rank suspects sought by the ICC.⁹⁹

Such measures are not only useful to obtain suspects and proceed with prosecutions, but they also may help to secure the Court’s legitimacy. The ICC is faced with a difficult problem when the States over which it enjoys jurisdiction are not willing to cooperate and continuously oppose its actions, and this diminishes its ability to fulfil the objectives it was created for. This may cause that the ICC is perceived by the public as not successful. Therefore, the Court must ensure that its actions are visible in the international arena and a belief is created that it is impossible to avoid justice.

2.3. Immunities of high State officials whose arrest is sought

Immunities¹⁰⁰ may create a significant obstacle to the execution of AWs. Originating from customary law, they prevent the Court from exercising jurisdiction over persons who enjoy immunity protection. These are mainly heads of States and other officials who represent their States in the international arena and fulfil diplomatic functions. Since in international criminal law the perpetrator often holds an official position, immunities may bar the courts from administering justice (at least as far as incumbent officials are concerned, as they enjoy personal immunities).¹⁰¹

⁹⁸ Ryngaert, *supra* note 13, p. 14.

⁹⁹ *Ibidem*, p. 15.

¹⁰⁰ This section deals with immunities in a general way. See generally A. Dlubak, *The immunity of high state officials in relation to their individual criminal responsibility in international criminal law*, University of Wrocław Digital Library (2012), <http://www.bibliotekacyfrowa.pl/Content/38596/001.pdf>, (accessed 18 January 2013).

¹⁰¹ Personal immunity covers both official and private acts when committed prior to or whilst holding the office and ends with cessation of tenure in the office. Functional immunity, on the other hand, covers only acts committed in the official capacity that are within the normal functions and does not end with the tenure.

In response to this all-too-typical obstacle, the drafters of the Rome Statute included a specific Article to deal with immunities, namely Art. 27. There is agreement among scholars that this provision eliminates the possibility of invoking both personal and functional immunities by SPs when acting in front of the ICC. This constitutes a novel approach to this issue – by ratifying the Rome Statute, the SPs agreed to waive the immunities enjoyed by their officials if they face the Court.¹⁰²

However, it is important to note that this provision binds SPs only, and that officials of non-Party States are still entitled to immunities.¹⁰³ This argument is supported by the existence of another provision of the Rome Statute that directly relates to the problem, and which no other international source of law has dealt with in this way. Art. 98(1) explicitly mentions the issue of conflicting obligations under international law which may arise when a SP is requested to arrest and surrender a person protected by immunities by virtue of the fact that they come from a non-Party State. The ICC has to ensure that a SP is not put in a situation of conflicting obligations, and in order to achieve this the Court should “first obtain the cooperation of that third State for the waiver of the immunity.”¹⁰⁴ This procedural requirement is further strengthened in Rule 195(1) of the RPE, which enables the requested State to provide any and all necessary information to the ICC signalling that there exist contrary obligations of this kind.

Immunities still remain an extremely difficult issue with respect to non-Party States, and surprisingly for SPs too. What was envisioned as being resolved as a simple procedural matter in the Rome Statute instead poses tricky questions interlinked with politics and inter-State loyalty. The situation in Darfur serves as a painful remainder of how intricate and difficult cooperation front of the ICC can be in certain cases.

Although the wording of the SC Resolution referring the Sudanese situation to the ICC is strong and obliges Sudan and other UN Member States to assist the Court, it is not observed by its addressees. Not only Sudan, whose status as a non-Party State could serve as somewhat of an explanation, but also Malawi and Chad, i.e. ICC States Parties, have failed to cooperate with the Court and arrest Al Bashir, the sitting President.

There are voices in the literature that argue that the Sudanese President is not entitled to immunity. Some believe that the SC Resolution implicitly stripped him of this protection,¹⁰⁵ while others suggest that the referral itself changes a non-Party

¹⁰² P. Gaeta, *Official capacity and immunities*, in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, New York: 2002, p. 991; D. Akande, *International law immunities and the International Criminal Court* 98 American Journal of International Law 407 (2004), p. 420.

¹⁰³ The International Court of Justice in the case of *DRC v Belgium* issued a much-criticised (*inter alia* due to the lack of a distinction between personal and functional immunities) decision on immunities, which however should not be lost sight of. According to the Court, immunities cease to protect high state officials when they face the possibility of being prosecuted by international criminal courts; see *International Court of Justice: Arrest Warrant of 11 April 2000 (DRC v Belgium) (Judgement)* [2002] ICJ Rep 2002 p.3, para. 61 *in fine*.

¹⁰⁴ Art. 98(1) *in fine* of the ICC Statute.

¹⁰⁵ M. Ssenyonjo, *Case comment: the International Criminal Court arrest warrant decision for President Al Bashir of Sudan*, 59 International and Comparative Law Quarterly 205 (2010), p. 212.

State into a *quasi*-SP, which is thus bound by all the provisions of the Rome Statute, including Art. 27.¹⁰⁶ The PTC took a different approach in its recent decision against Malawi regarding its failure to cooperate with the Court. Invoking numerous sources of international law, whether binding or merely declaratory, it came to a conclusion that “customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes.”¹⁰⁷ This bold statement, together with its reasoning, has been widely criticised by many scholars on various grounds. Although such a legal development would normally be greeted enthusiastically, it appears that the PTC has either gone too far or could have used a better reasoning in reaching its conclusion.¹⁰⁸

In particular, one may point PTC’s use of incorrect sources of law whilst being bound by a list contained in Art. 21(1)(a);¹⁰⁹ its failure to consider potential counter-arguments;¹¹⁰ a complete obliviousness to the purpose of Art. 98(1);¹¹¹ and finally an attempt to establish the existence of a customary rule without proving the necessary State practice (and against the clear opposition of States like Malawi or Chad). Most controversial however was the PTC’s disregard of the role of Art. 98(1), which was introduced to the Statute precisely because the drafters “deemed it necessary (...) that customary and treaty rules concerning respect for State and diplomatic immunity *are to prevail* over the duty of States Parties to implement the Court’s request for cooperation and judicial assistance”¹¹² (emphasis added). It is undisputable that a norm conflict still exists, despite the PTC’s decision to the contrary. As pointed out by Akande, the customary law rules pronounced by the Chamber might remove Bashir’s immunity in front of the ICC, but they remain active as far as the national authorities of Malawi

¹⁰⁶ D. Akande, *The legal nature of Security Council referrals to the ICC and its impact on Al Bashir’s immunities*, 7 Journal of International Criminal Justice 333 (2009), p. 342. Interestingly, the PTC in a recent decision denied the validity of this argument: *Al Bashir* Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad al Bashir of 13 December 2011, ICC-02/05-01/09-136-Corr, para. 18.

¹⁰⁷ *Al Bashir*, 2011, para. 43. See also P. Gaeta, *Does President Al Bashir enjoy immunity from arrest?*, 7 Journal of International Criminal Justice 315 (2009), pp. 324-5.

¹⁰⁸ C. Kreß, K. Prost, *Cooperation with respect to waiver of immunity and consent to surrender*, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court. Observers’ Notes, Article by Article*, Beck, München: 2008, pp. 1611-1613.

¹⁰⁹ D. Jacobs, *A sad homage to Antonio Cassese: the ICC’s confused pronouncements on state compliance and head of state immunity*, <http://dovjacobs.blogspot.co.uk/2011/12/sad-hommage-to-antonio-cassese-iccs.html> (2011) (accessed 19 January 2013).

¹¹⁰ W. Schabas, *Obama, Medvedev and Hu Jintao may be prosecuted by International Criminal Court, Pre-Trial Chamber concludes*, <http://humanrightsdoctorate.blogspot.co.uk/2011/12/obama-medvedev-and-hu-jintao-may-be.html> (2011) (accessed 19 January 2013).

¹¹¹ Jacobs, *supra* note 109, <http://dovjacobs.blogspot.co.uk/2011/12/sad-hommage-to-antonio-cassese-iccs.html>; D. Akande, *ICC issues detailed decision on Bashir’s immunity (at long last) but gets the law wrong*, <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/> (2011) (accessed 19 January 2013).

¹¹² Palmisano, *supra* note 82, p. 410; emphasis added.

(and any other SPs) are concerned.¹¹³ According to him, the Court failed to distinguish the lack of immunities from the legal ability to arrest and surrender. The former, ruled by Art. 27, applies only to the ICC as an international court, and the latter, being governed by Art. 98(1), relates to the States and their international obligations.

The Court cannot simply pretend that the problem does not exist, especially if its constitutive instrument may provide a legal solution to it. By doing so it can bring about negative consequences for the outstanding AWs, as the ICC as an international criminal justice institution will lose legitimacy in the eyes of the SPs, possibly hindering future cooperation even further. It is thus imperative that the Court tries to establish positive relations with the States concerned and aims at effectuating the AWs. Due to the difficult situation in Sudan, the preferred option of the ICC may be to exercise patience and wait until Bashir's popularity decreases and he leaves the office which grants him immunity.¹¹⁴ Such a strategy appears to have been behind the OTP's decision to issue a public AW, instead of keeping it secret and seeking to obtain the swift arrest of Bashir.¹¹⁵

The ideal scenario would be that, whenever the OTP is dealing with suspects from a non-Party State, the Court should first ensure that this State waives the immunities of their officials.¹¹⁶ Alternatively, the Security Council may use its powers under Chapter VII and lift the immunities of the suspects,¹¹⁷ although so far it has not done so and has been rather reluctant in this regard. Had either of these actions been taken, the ICC could have proceeded to transmit the AW to the chosen States in accordance with Art. 89, and without the need to worry about the possible consequences of the invocation of Art. 98.

3. POLITICAL CHALLENGES TO ISSUED ARREST WARRANTS

3.1. Enforcement of arrest warrants

Once AWs are issued, frequently the ICC is faced with inaction on the part of State addressees. In such situations, Art. 87(7) empowers the ICC to make a *finding* on non-compliance with the Court's requests and further refer it to the ASP or, where appropriate, i.e. when resulting from a referral by the SC, to refer the matter to the SC. The lack of cooperation should rise to the level of preventing it from "exercising its functions and powers" – there is no doubt that failure to arrest a suspect fulfils this requirement. Similarly, as pointed out before, Art. 87(5)(b) entitles the Court to *inform* those respective bodies (the ASP or SC) of the lack of compliance with respect to formerly concluded agreements or arrangements on cooperation.¹¹⁸

¹¹³ Akande, *supra* note 111, <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%9999s-immunity-at-long-last-but-gets-the-law-wrong/>.

¹¹⁴ Ryngaert, *supra* note 13, p. 11.

¹¹⁵ *Ibidem*, p. 25.

¹¹⁶ Kreß, Prost, *supra* note 108, p. 1613.

¹¹⁷ Rastan, *supra* note 51, p. 443.

¹¹⁸ C. Kreß, K. Prost, *Requests for cooperation: general provisions*, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Beck, München: 2008, p. 1525.

The purpose of such a finding is to bring the matter to the attention of a plenary body which is able to discuss the problem and publicise it.¹¹⁹ It is often asserted that the ASP's possible reaction is limited mainly to "naming and shaming".¹²⁰ While it can consider questions related to non-cooperation (Art. 112(2)(f)), it does not have any direct means to enforce such cooperation.¹²¹ Officially, the Assembly's general approach to non-cooperation is to issue 'a formal response, including some public elements' and 'depending on the specifics of the case, there may be merit in pursuing an informal and urgent response as a precursor to a formal response, in particular where it is still possible to achieve cooperation.'¹²² However, the ASP does not appear to be precluded from invoking the responsibility of a State that is obliged to cooperate with the Court and fails to do so.¹²³ It should be borne in mind that both the UN and the ICC are international organisations composed of States. Bringing a matter to the ASP or the SC may thus encourage States to take some steps and measures on their own, such as imposing political pressure, conducting inter-state negotiations and diplomatic conferences, or even imposing economic sanctions in the event the non-cooperative State is a SP.¹²⁴

Unlike the ASP, the SC is supported by the extremely powerful Chapter VII of the UN Charter, and acting under its scope it can impose sanctions on non-cooperative States as well as issue legally binding orders. Additionally, if the SC has referred the situation to the ICC and thus imposed a duty to cooperate with it onto the UN Member States, an *erga omnes* obligation is created. Should one State refuse to cooperate, collective countermeasures may be undertaken by the rest of the international community since they have an interest and legal right to do so.¹²⁵

Another indirect enforcement measure is the "status conference", which may be convened by the PTCs. This was done in the cases concerning the situations in Uganda and the DRC, when the PTC expected to be updated on the current status of proceedings.¹²⁶ This gives the Court the opportunity to actively seek State cooperation, even if only by publicising the problem.¹²⁷ The Prosecutor may also utilise its discretionary powers and seek to conclude cooperation agreements with some States or international organisations (Art. 54(3)(c)), which may be necessary if the lack of relevant domestic legislation constitutes the reason for non-cooperation.¹²⁸

¹¹⁹ Schabas, *supra* note 12, p. 252.

¹²⁰ *Ibidem*.

¹²¹ Sluiter, *supra* note 27, p. 616.

¹²² ASP, Report of the Bureau on potential Assembly procedures relating to non-cooperation of 30 November 2011, ICC-ASP/10/37, para. 10.

¹²³ Krefß, Prost, *supra* note 118, p. 1526.

¹²⁴ *Ibidem*, p. 1530.

¹²⁵ *Ibidem*, p. 1526.

¹²⁶ Schabas, *supra* note 12, p. 262.

¹²⁷ M. Miraglia, *The first decision of the ICC Pre-Trial Chamber. International criminal procedure under construction*, 4 Journal of International Criminal Justice 188 (2006).

¹²⁸ Rastan, *supra* note 51, p. 441.

In fact, the ICC is aware of its need for additional support from States, and specifically the aims to achieve this. The Report of the Bureau on cooperation from the tenth ASP session includes a draft resolution on cooperation to be adopted by the ASP, which specifically stresses the need of increasing State support.¹²⁹ Moreover, the Prosecutorial Strategy for the years 2009 to 2012 states, in its fourth objective, that the OTP should “continue to enhance cooperation with States and relevant actors, in particular for the execution of arrest warrants issued by the Court.”¹³⁰ Para. 48 explicitly sets forth ways of galvanising arrest efforts. These include proactive negotiations at various levels in order to obtain enforcement of the Court’s decisions, assisting States both operationally and financially to perform operations when they lack the necessary capacity, as well as aiming to marginalise the suspects from their societies by limiting their access to funds.¹³¹

3.2. States’ reluctance to cooperate

Due to the unique nature of the ICC – as an international organisation engaged in prosecutions of often incumbent high State officials who allegedly committed atrocious crimes against the populations of their own countries – it naturally causes much controversy. Inevitably, some States refrain from assisting the Court and even purposely prevent it from exercising its functions. Such behaviour is not limited solely to the non-Party States – it frequently includes SPs as well. In fact, the example of Côte d’Ivoire offering voluntary cooperation shows that in some instances non-Party States are more eager to cooperate than SPs.

There may be more reasons for optimism if a case originates from a self-referral by a SP. Foregoing its own jurisdiction is an acknowledged method for the ICC to obtain jurisdiction over a situation, and is provided for in Art. 14 of the Statute. By issuing AWs with respect to the situations in Uganda, DRC and Central African Republic (all of which originated from the respective States) the PTCs have proven that self-referrals are legally accepted and the cases are admissible. The behaviour of those States suggests that they are interested in bringing the perpetrators of atrocities to justice, but for whatever reasons they are unable or do not want to investigate themselves, and decide to waive the requirement of complementarity.¹³² Logically, this could imply that these SPs are more likely to cooperate and assist the Court in its proceedings. According to Roper and Barria, this indeed enhances the chances of the ICC’s effectiveness, due to “the need to follow through with their referral commitment.”¹³³ This is only partly supported

¹²⁹ ASP, Report of the Bureau on cooperation of 22 November 2011, ICC-ASP/10/28, Annex I.

¹³⁰ OTP, Prosecutorial Strategy 2009-2012 of 1 February 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (accessed 22 January 2013, paras. 41-47).

¹³¹ *Ibidem*, para. 48.

¹³² M. El Zeidy, *Critical thoughts on Article 59(2) of the ICC Statute*, 4 Journal of International Criminal Justice 448 (2006), p. 463.

¹³³ S.D. Roper, L.A. Barria, *State co-operation and International Criminal Court bargaining influence in the arrest and the surrender of suspects*, 21 Leiden Journal of International Law 457 (2008), p. 464.

however by the experience of the Court to date, with the arrest of Bemba (although in Belgium, not the CAR), significant cooperation in the DRC situation, and a complete lack of assistance on the part of Uganda.¹³⁴ Moreover, the cases in Uganda and the DRC (perhaps with the exception of the *Lubanga* case) were declared admissible, but on the basis of unwillingness, not inability.¹³⁵ Burke-White refuses to accept Roper and Barria's thesis and firmly concludes that there is no such thing as a moral duty to pursue previous decisions taken by a referring State. As an argument against their thesis, he points out the time lapse between the referral and issuance of an AW, and the lack of knowledge on the part of referring states of the possible suspects which may in the future be sought by the ICC. States' policies may also change over time, and previous political options may disappear.¹³⁶ Additionally, self-referrals put the SP concerned in a situation of dependence on the OTP's discretionary powers, and its actions will define the SP's attitude towards future cooperation. Reluctance may result from a dispute over post-conflict resolution methods (such as amnesty). Moreover, since the OTP is free to identify possible suspects, it is not unlikely that a person from the current government may also face prosecution, which will obviously be resisted by the SP's authorities.¹³⁷ Thus a lack of cooperation can be expected.

SPs can also be unwilling to cooperate if their admissibility challenge has been ruled against them. Complementarity, which strengthens the position of SPs by giving them a chance to conduct national prosecutions, can act to the Court's disadvantage. It "could be placed in the paradoxical situation of having to depend upon the same institutional and procedural weaknesses that were deemed incapable of supporting domestic investigations and prosecutions".¹³⁸ The stigma of being deemed 'unwilling' does not necessarily encourage the State to be less unwilling when it comes to cooperation with the Court. If it indeed attempted to shield a suspect from criminal responsibility (Art. 17(2)(a)), it will not change its mind when the assessment concerning such responsibility will be administered by the Court in front of the entire international community.

As a way of finding a solution to States' reluctance to cooperate with the Court, one can look at their behaviour in the international arena. States want to act in cooperation with other States in order to achieve the best results.¹³⁹ This suggests that they are likely to influence each other and thus may impact on their interests. Moreover, through their involvement in multilateral organisations and intergovernmental institutions, powerful States are capable of imposing their opinion on others and changing the directions of those institutions.

¹³⁴ See statistical data in Section 4.

¹³⁵ Schabas, *supra* note 73, p. 18.

¹³⁶ W. Burke-White, *Bargaining for arrest at the International Criminal Court: a response to Roper and Barria*, 21 *Leiden Journal of International Law* 477 (2008), p. 478.

¹³⁷ Ryngaert, *supra* note 13, p. 13.

¹³⁸ Rastan, *supra* note 51, p. 454.

¹³⁹ Roper, Barria, *supra* note 133, pp. 458-9.

3.3. Protection of peace and justice

In its assessment of the need to protect peace and justice, the Prosecutor may conclude that no basis for prosecution exists when it would not be “in the interests of justice, taking into account all the circumstances, including the gravity of crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”¹⁴⁰ Although AWs may have already been issued and respective requests for arrest and surrender transferred to SPs, some suggest that international criminal justice “should probably be prepared to stand down when criminal prosecution becomes an obstacle to peace”.¹⁴¹ The peace negotiations in Uganda were possible explicitly because the suspects from Lord’s Resistance Army were afraid of being subjected to the ICC’s jurisdiction.¹⁴² If the parties to a conflict are willing to talk with each other, the authorities of the State concerned will inevitably be unlikely to arrest and surrender their opponents, especially if they want to put an end to the fighting. Additionally, the SPs may also have an interest in a peaceful transition to democracy. Thus they do not intend to impose too much pressure on the non-cooperative State if such pressure would or even might deteriorate the situation.¹⁴³ The OTP will essentially lack international support if it chooses to insist on surrender in specific cases.

International tribunals may be seen as a tool to end civil wars. Seeking the surrender of suspects is a way of imposing the international community’s values over warring parties. However, the very fact of establishment of an international criminal court already promotes accountability, and in such a situation the OTP has to choose whether to insist on immediate arrests or to wait until peace is restored.¹⁴⁴ This decision raises problems with respect to the selective enforcement of AWs. Selective enforcement can be a way of ensuring that some AWs are executed rather than none. It involves a careful balancing of factors such as political desirability and effectiveness.¹⁴⁵ Of course “[t]he enforcement of warrants that are deprioritised is only reported at a later stage, when the political reality is possibly more favourable.”¹⁴⁶ Even if only a less important AW is secured, it gives a clear signal to the conflicting parties that there is no escape from justice. Such a stance is supported in the OTP Policy Paper of 2007, where it is admitted that the primary role of the ICC is to ensure “lasting respect for the enforcement of international justice.”¹⁴⁷

It seems that until a conflict has ended through peaceful negotiations there is high likelihood that the OTP will not enjoy political support from the international community, and that AWs for the highest officials will remain outstanding. Apprehending

¹⁴⁰ Art. 53(2)(c) of the ICC Statute.

¹⁴¹ Schabas, *supra* note 73, p. 21.

¹⁴² *Ibidem*.

¹⁴³ Ryngaert, *supra* note 13, p. 19.

¹⁴⁴ *Ibidem*, p. 28.

¹⁴⁵ *Ibidem*.

¹⁴⁶ *Ibidem*.

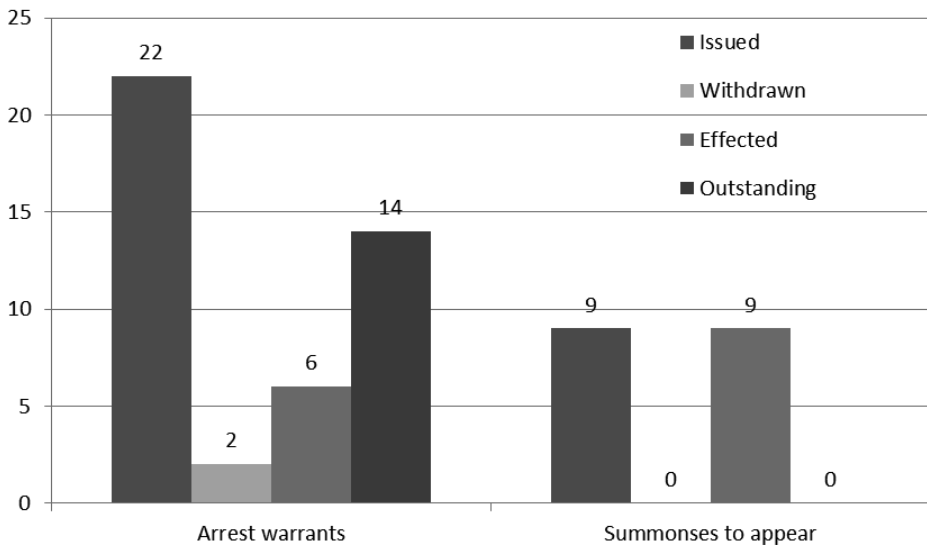
¹⁴⁷ OTP, Policy Paper on the Interests of Justice, ICC-OTP-2007, p. 7.

a suspect is easier once a conflict has ended.¹⁴⁸ Unfortunately, this also means that the ICC cannot serve as a tool for ending the conflict itself.

4. THE EFFECTIVENESS OF THE JUDICIAL PRACTICE IN THE ISSUANCE OF ARREST WARRANTS

4.1. Statistical summary of arrest warrants issued to date¹⁴⁹

The experience of issuing AWs by the PTCs has so far not been by any means consistent. It is clear however that AWs are a preferred way of getting custody of suspects. Whereas there have been only nine summonses to appear (five in the Kenya situation and three in Darfur), twenty-two AWs have been issued.¹⁵⁰ This indicates that very often it is believed that the suspects will not appear before the ICC voluntarily, or that their apprehension may cause problems. Hence the decision to issue AWs.



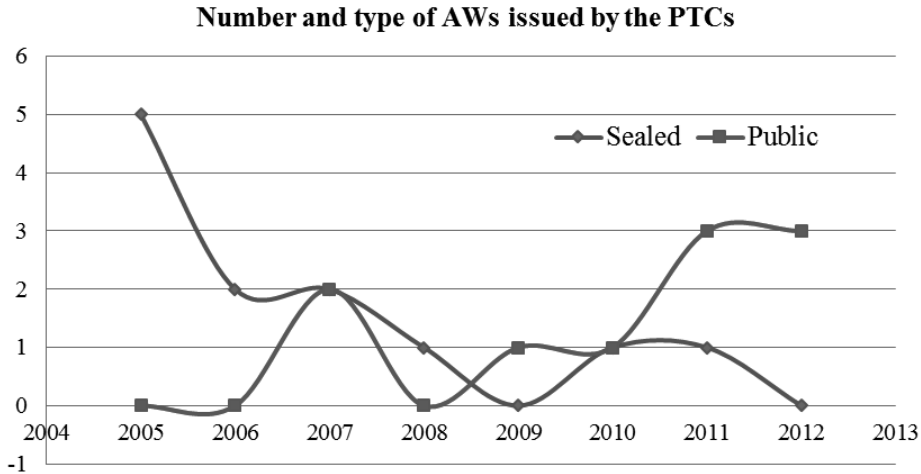
Interestingly, as reflected in Chart 1 above, the effectiveness of summonses to appear has been 100% to date, while only six AWs have resulted in successful surrender to the ICC. These constitute a 100% effectiveness rate in the CAR and Côte d'Ivoire (one AW each) and approximately a 57% success rate in the situation in the DRC (here however two AWs were issued against Bosco Ntaganda). Nevertheless, as many as fourteen AWs remain outstanding, including all cases in the situations in Uganda, Darfur and Libya.

¹⁴⁸ Roper, Barria, *supra* note 133, p. 465.

¹⁴⁹ All statistical data and charts presented herein have been compiled based on public information available on the ICC website: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed 27 January 2013).

¹⁵⁰ Two AWs were withdrawn following deaths of the suspects.

As far as the distinction between public and sealed AWs is concerned, the OTP has so far preferred the latter. Up until now, twelve sealed AWs have been issued, as opposed to ten public AWs.¹⁵¹ It should be noted however that this tendency is changing, as visible in Chart 2 below.



This may be related to the growing difficulty of the situations under ICC jurisdiction. Additionally, it may represent the OTP's prioritisation of international criminal justice values. As postulated above, issuing public AWs aims at more political effects, i.e. bringing about a regime change, rather than the rapid arrest of the suspects. Sealed warrants however are more successful in securing surrender – all of the suspects transferred to the Court had had this type of warrant issued against them. They have been effected within various periods of time, but generally less than a few months. Immediately after securing custody, these warrants were reclassified as public.

The unsealing of all AWs issued for Ugandan suspects took place approximately three months after issuance, when measures for the protection of victims were implemented.¹⁵² Arguably, the OTP was aware that apprehending suspects in this situation would not have been easy and an orchestrated action by the entire international community would be necessary to secure their arrest. The other instance of reclassification of an AW from sealed to public occurred in the case of *Ntaganda*, this time almost two years after its issuance without securing the arrest.¹⁵³ The PTC noted that the circumstances for issuing a sealed warrant changed (the main argument being that he was no longer fighting as a top commander) and decided to unseal it. Among other reasons invoked were suspicions that Ntaganda might have already been aware of the AW against him,

¹⁵¹ One should bear in mind that due to the nature of sealed AWs some may be unknown to the general public, yet issued in relation to certain suspects.

¹⁵² ICC Press Release of 14 October 2005, ICC-CPI-20051014-110.

¹⁵³ *Ntaganda*, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda of 28 April 2008, ICC-01/04-02/06-18.

hence keeping it sealed was unnecessary. Additionally, the PTC hoped for action by the international community that would facilitate and assist the DRC in arresting and surrendering him to the Court.¹⁵⁴ Another AW in this case was issued in July 2012, this time publicly.

According to the up-to-date experience of the Court, the SC referrals (i.e. situations of Sudan and Libya) have proven extremely difficult for the ICC with regards to obtaining cooperation. None of the six persons sought via AWs have been surrendered. From the ICC's point of view, they remain at large, although in the Libyan situation the suspects have been captured and are detained by national forces.¹⁵⁵ This does not however mean that they will be transferred to The Hague for trial, especially given the Libyan challenge to admissibility.

4.2. Prospects for improvement of the effectiveness of arrest warrants

If the ICC aims at increasing the rate of positive compliance with its requests and improving international cooperation, it has to take a two-fold approach. Firstly, the Court has to be very strict with respect to its own powers and should perform them rigidly. Allowing the OTP to use its competencies to the fullest whilst respecting the letter of the law is crucial. Ryngaert stresses that "a major part of the Prosecutor's policy in relation to arrest will consist in devising strategies to convince States to comply with their legal obligation to enforce arrest warrants".¹⁵⁶ Moreover, when issuing AWs the PTCs, together with the OTP, need to try to foresee what the States' objections may be and prevent these from arising by always being one step ahead. Secondly, the Court should aim at developing cooperation networks and improving the positive and legitimate image of itself in the eyes of the international community. Those two paths consist of smaller measures (as set out below) which, when taken together, should create a single consistent policy aimed at ensuring that the perpetrators of the most atrocious crimes are brought to justice.

Setting high standards with respect to the procedure at the stage of investigation and pre-trial helps the Court to avoid unnecessary delays in obtaining compliance with its requests for arrest and surrender. Complementarity problems could be addressed early, so that States do not try to challenge the admissibility of cases. In this respect it is important that the OTP has the essential background data at its disposal. Moreover, efforts should be focused also on domestic investigations. Sometimes acceptance of a State's jurisdiction and aiding them in the exercise of it might be a better option which may render the same results, i.e. bringing the perpetrators to justice. As soon as a problematic issue is highlighted, the OTP should invite SPs to start investigating, and

¹⁵⁴ *Ibidem*, paras. 4-5.

¹⁵⁵ BBC reported the capturing of Gaddafi: <http://www.bbc.co.uk/news/world-middle-east-15804299> accessed 27 August 2012, and of Al-Senussi: <http://www.bbc.co.uk/news/world-africa-17413626> accessed 27 August 2012.

¹⁵⁶ Ryngaert, *supra* note 13, p. 59.

thus open national proceedings.¹⁵⁷ If despite such actions the State remains inactive, the possibility of rendering the case admissible in front of the ICC should then be considered.

The internal policy of the Court manifests itself also in the prioritisation of some cases over others. Sometimes the ICC, although it was created for the purpose of prosecuting highly positioned individuals, should satisfy itself with arresting lower and less influential perpetrators. This is certainly the case when the officials are protected by immunities, such as in the *Bashir* case.¹⁵⁸ Trying persons who are easier to apprehend and may not be as important for the State they come from can be more beneficial overall for the Court. These trials could serve as evidence that the crimes took place and that the officials were involved in their commission. Hence once the immunity protection ceases, subsequent trials of high State officials would be easier to conduct. Additionally, the conviction of lower level perpetrators sends a direct message to the people living within targeted States that their authorities should be urged to step down quicker.¹⁵⁹

The external efforts of the ICC should be focused on obtaining cooperation from both SPs and non-Party States. In order to ensure the successful implementation of the Statute in the domestic systems of the SPs, efforts to raise the awareness of the ICC's role should be undertaken. The SPs ought to understand the need for assisting the Court, since it is a method of enforcement of the international criminal justice system which they themselves have created.¹⁶⁰ The Court must aim at having good relationship with the territorial State. This can be achieved through outreach programmes which increase the level of domestic support for the ICC.¹⁶¹ The territorial State is the one most likely to successfully execute an AW, therefore the OTP must precisely know the suspect's location. Using tracking teams is helpful both for gathering the necessary information as well as keeping checks on the compliance level of the SPs with the cooperation requests.¹⁶² Furthermore, the ICC must directly address the State concerned and adroitly use its bargaining power, depending on the particular circumstances. There are a range of incentives that the Prosecutor can choose from, both positive and negative. Offering financial help, assisting in efforts to join international organisations, and threatening intervention or imposing travel bans are a few of these.¹⁶³

Apart from that, having a deep knowledge and understanding of the regional politics in the areas under the Court's jurisdiction is vital to choosing the right arguments and methods of negotiation. The African countries are essentially interrelated, and their leaders and authorities have more influence on each other than their colleagues from different continents. Since they often support certain movements within neighbouring

¹⁵⁷ Robinson, *supra* note 64, p. 100.

¹⁵⁸ Gosnell, *supra* note 15, p. 847.

¹⁵⁹ *Ibidem*, p. 848.

¹⁶⁰ Rastan, *supra* note 51, p. 456.

¹⁶¹ Burke-White, *supra* note 136, p. 482; Ryngaert, *supra* note 13, p. 12.

¹⁶² Ryngaert, *supra* note 13, pp. 34-5.

¹⁶³ *Ibidem*, pp. 21-2.

countries, it may be beneficial for the ICC to exploit these relationships. Whilst supporting the national law-enforcement institutions, the OTP could organise inter-state police operations to act on the territory of the States concerned.¹⁶⁴ Burke-White suggests for example that in order to capture suspects from Uganda, the Court should make a deal with Sudan or the DRC, offering to delay some prosecutions against their officials. Once the Ugandan conflict is over, the ICC will have a stronger position in the SC with respect to Sudan as a non-Party State.¹⁶⁵

As a final resort in the external efforts of the ICC, other international organisations could be addressed. Not only they do have additional bargaining powers and a unique negotiating position, but also in the exercise of their mandate they are often allowed to enter the non-cooperative country and arrest the suspects sought by AWs.¹⁶⁶ The SC is not to be forgotten, as it can aid the Court in many respects when requested. Among the measures available are not only urging the States to cooperate, but also the authorisation of peacekeeping missions and mandating forces to arrest suspects.¹⁶⁷

Finally, publicising the problems that the Court is dealing with and stressing the ways in which the international community can help increases the awareness of the ICC's activities. Choosing the strongest arguments in the course of announcing and describing the crimes committed¹⁶⁸ should have a crucial impact on the States.

CONCLUSIONS

While the Rome Statute provides for certain solutions, the States have learned to exploit its weaknesses if cooperating with the ICC is not in their interests. The key role belongs to the OTP. It not only fulfils the prosecutorial duties by identifying the perpetrators and focusing the Court's attention on particular cases, but perhaps most importantly acts as a diplomatic representative of the Court in the early stages of investigations. Whereas it may be said that the OTP's role seems mainly political, its actions are controlled by the PTCs, therefore it always has to conform to the law which binds it. The Pre-Trial Chambers ensure that the law is respected and that the necessary evidence is provided. These two institutions of the Court balance each other in their functions and offer a system of checks and influences so that the goals of international criminal justice are met by both respecting legal requirements and taking appropriate political actions.

Therefore, in order to enhance the effectiveness of AWs, the ICC as an organisation should follow a two-fold approach. In its internal matters it should always obey the letter of law, whilst recognising the diplomatic functions of the OTP. Additionally, it is

¹⁶⁴ *Ibidem*, p. 9.

¹⁶⁵ Burke-White, *supra* note 136, pp. 480-1.

¹⁶⁶ Ryngaert, *supra* note 13, p. 15, 38.

¹⁶⁷ Rastan, *supra* note 51, p. 444.

¹⁶⁸ Burke-White, *supra* note 136, p. 479.

vital to assess the particular circumstances of each situation and interpret them wisely in order to prioritise certain cases. Externally, the Court ought to focus its activities on maintaining and enhancing a positive image as a legal institution, and simultaneously it should work on increasing the level of inter-state cooperation.

If the next decade of the ICC's judicial practice is to be more fruitful and successful, the suspects sought by the AWs should be captured and their trials commenced. AWs should not be left outstanding for too long, as the Court risks losing its legitimacy as an institution protecting the values of international criminal justice.

Maurizio Arcari*

LIMITS TO SECURITY COUNCIL POWERS UNDER THE UN CHARTER AND ISSUES OF CHARTER INTERPRETATION**

Abstract

This article deals with the interpretation of Security Council powers under the UN Charter, and analyses available interpretive options. The various approaches, inspired by the textual, teleological, “subsequent practice”, and “systemic” methods of interpretation, as well as the complementary means of interpretation supplied by the preparatory works of San Francisco Conference, are successively considered and their relative advantages and shortcomings comparatively assessed. The article argues that recourse to one or the other from among the available interpretive methods can be influenced in individual cases by political and judicial contingencies, and that as a whole the interpretation of Security Council powers under the Charter is an evolving process, the variations of which may depend on the changing needs of collective security and of the international legal order at large.

INTRODUCTION

It can comfortably be said that the topic of the limits to the competence and powers of UN Security Council (SC) has attained the status of *locus classicus* in international law and in the international legal literature. The reasons are conveniently summed up in the observation made by an author, who referred to “the worrisome tendency of the Security Council since the end of the cold war to over-stretch its activities and powers beyond their foreseeable, and arguably permissible, legal limits.”¹ Hence, an overview of the last two decades of collective security practice permits one

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¹ G. Abi-Saab, *The Security Council Legibus Solutus? On the Legislative Forays of the Council*, in: L. Boisson de Chazournes, M. Cohen (eds.), *International Law and the Quest for Its Implementation. Liber Amicorum Vena Gowlland-Debbas*, Brill, Leiden/Boston: 2010, p. 23.

to ascertain different instances of questionable use by the SC of its powers under the UN Charter.

Very cursorily, one may recall the assumption by the SC of quasi-judicial powers carried out through resolutions 731 (1992) and 748 (1992) in the well-known *Lockerbie* case; the controversial interventions in the field of international criminal justice brought about in resolutions 827 (1993) and 955 (1994) establishing the international criminal tribunals for Former Yugoslavia and Rwanda – later replicated with resolution 1757 (2007) on the establishment of the Special Tribunal for Lebanon; the exercise of “legislative-type” competences in the field of the fight against terrorism and the proliferation of weapons of mass destruction, carried out through resolutions 1373 (2001) and 1540 (2004) respectively; and, finally, the practice of the so-called “targeted” or “smart” sanctions affecting the rights of individuals inscribed on SC blacklists, mainly enacted through resolutions 1267 (1999), 1333 (2000) and 1390 (2002) concerning Taliban and Al-Qaida.²

It must be noted that most of such questionable cases also raised complicated legal disputes before international, regional or domestic courts. Besides the well-known proceedings initiated in 1992 before the International Court of Justice (ICJ) in the *Lockerbie* cases (later discontinued),³ and the 1995 decision in the *Tadic* case rendered by the Chamber of Appeals of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) on the legality of the establishment of the same tribunal,⁴ the new century has already seen a handful of judicial decisions, coming from both regional and domestic courts, dealing with the scope of SC powers. For the sake of brevity, one may quote the prominent judgment rendered on 3 September 2008 by the Court of Justice of the European Union in the *Kadi* case,⁵ or the judgments pronounced in 2011 and 2012 by the European Court of Human Rights in the *Al-Jedda* and *Nada* cases,⁶ all concerned with the effects of SC decisions on fundamental rights of individuals. Turning to domestic courts, one may add the landmark decisions issued by the United Kingdom Supreme (House of Lords) Court in 2007 and 2010, in the *Al-Jedda* and *Ahmed* cases

² For a recent overview of these and other cases of questionable use by the SC of its Chapter VII powers, and of the legal issues involved, see N. Krisch, *Introduction to Chapter VII: The General Framework*, in B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations. A Commentary* (3rd ed.), Oxford University Press, Oxford: 2012, pp. 1241-1243 and 1248-1255.

³ Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v UK; Libyan Arab Jamahiriya v US*), (Request for the Indication of Provisional Measures, Orders 14 April 1002), [1992] ICJ Rep, respectively pp. 3 and 114.

⁴ *Prosecutor v. Dusko Tadic* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [hereinafter “Tadic Decision”], available at <http://www.icty.org>.

⁵ Case C-402/05/P Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Judgment 3 September 2008, [2008] ECR I-06351.

⁶ *Al-Jedda v. the United Kingdom* (27021/08) Grand Chamber, ECHR Judgment 7 July 2011; *Nada v. Switzerland* (10593/08) Grand Chamber, ECHR Judgment 12 September 2012 [hereinafter “Nada Judgment”], both available at <http://www.echr.coe.int>.

respectively.⁷ And, to complete the picture, one should mention the recent decision rendered on 24 October 2012 by the Appeals Chamber of the Special Tribunal for Lebanon (STL), dealing with the question of the proper use by the SC of its Chapter VII powers in the establishment of the same tribunal.⁸

Even though twenty years have passed since the issue became prominent, the question of the limits to SC powers is far from being settled, as the above decisions demonstrate. To this purpose, it is interesting to compare the reasoning developed by the ICTFY Appeals Chamber in 1993 and by the STL Appeals Chamber in 2012, when both were confronted with the same substantive issue; namely, the legality of the establishment of the two criminal tribunals by the SC.

After having affirmed its competence to deal with the matter, the ICTFY Appeals Chamber set forth an important statement of principle. While recognizing that the SC enjoys a very wide discretion under Art. 39 of the Charter to determine the existence of a threat of the peace and to decide the measures necessary for maintaining and/or restoring peace, the Appeals Chamber pointed out:

[T]his does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the international division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives the Security Council as *legibus solutus* (unbound by law).⁹

Starting from these premises, the Appeals Chamber developed a stringent analysis of SC powers under Chapter VII of the Charter, and concluded that the establishment of the ICTFY fell squarely within such powers.¹⁰

Twenty years later, the conclusions reached by the STL Appeals Chamber on the same legal issues sound very different. First of all, this Chamber endorsed a divergent interpretation of the basic “jurisdictional issue”, and affirmed lack of authority to review the legality of resolution 1757 (2007), whereby the SC gave binding force to the terms of the treaty on the establishment of the STL, concluded between the United Nations

⁷ *R (on application of Al-Jedda) v. Secretary of State for Defence*, Opinions of the Lords of Appeal 12 December 2007, [2007] UKHL 58; *Her Majesty's Treasury v. Mohammad Jabar Ahmed and others*, United Kingdom Supreme Court Judgment 27 January 2010, [2010] UKSC 2, both available at <http://www.bailii.org>.

⁸ *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra* (STL-11-01/PT/AC/AR90.1), Decision on the Defence Appeals against the Trial Chamber's “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”, 24 October 2012 [hereinafter “Ayyash Decision”], available at <http://www.stl-tsl.org>.

⁹ *Tadic* Decision, *supra* note 4, para. 28.

¹⁰ *Ibidem*, paras. 29-36.

and the Government of Lebanon, but not ratified by the Lebanese parliament. This was so because:

Once the Security Council has established the existence of a threat to international peace and security under Article 39 of the United Nations Charter, it retains the sole and exclusive prerogative to determine which measures under Articles 41 and 42 of the Charter are required to maintain or to restore international peace and security (...). What is important is that this decision is essentially political in nature, and as such not amenable to judicial review.¹¹

However, what appears to be more striking is the argument elaborated by the STL Appeals Chamber on the underlying (and substantive) question of the standard of review applicable to SC decisions. According to this vision,

Our finding that we lack the authority to review Security Council resolution 1757 is also supported by the difficulty in establishing a meaningful standard of such review. (...) the United Nations Charter does not specify any legal criteria that the Security Council had to take into account when making this determination [of the existence of a threat to international peace and security under Art. 39 of the Charter]. (...) It would be impossible to verify the facts on which the Security Council based its decision, how it weighed those facts, and whether it did so properly.¹²

The comparison between such diverse conclusions reached in different times by two different jurisdictions on similar or comparable legal questions may serve to convey the idea that the question of the limits to SC powers is ultimately a matter of Charter interpretation. The purpose of the present contribution is to develop this basic suggestion, and to consider the alternatives that are available for the interpretation of the pertinent provisions of the UN Charter concerning the powers and competences of the SC.¹³ Having in mind that the UN Charter remains an international treaty – albeit one “having certain special characteristics”, as rightly pointed out by the ICJ¹⁴ – the following analysis will be developed by referring to the main (and most pertinent) principles of treaty interpretation codified in Art. 31 of the 1969 Vienna Convention on the Law of Treaties. In the following pages, the approaches inspired by the textual, teleological, “subsequent practice” and “systemic” methods of interpretation, as well as the supplementary means of interpretation supplied by the preparatory works of the San Francisco Conference, will be successively considered, and their main implications for a proper interpretation of SC powers under the Charter will be tentatively assessed.

¹¹ *Ayyash* Decision, *supra* note 8, para. 52.

¹² *Ibidem*, para. 51.

¹³ It must be underlined that the present survey will be limited to some of the provisions of Chapter V of UN Charter dealing in general with the functions and competences of the SC, and to the more specific provisions of Chapter VII, dealing with the binding powers reserved to this organ in the field of peace maintenance. Therefore, the provisions of Chapters VI, VIII and XII of the Charter will not be considered.

¹⁴ *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter) (Advisory Opinion 20 July 1962) [1962] ICJ Rep, p. 157.

1. THE TEXTUAL APPROACH TO THE INTERPRETATION OF SC POWERS UNDER THE CHARTER

The first key provision that comes to the forefront in a textual analysis of SC powers under the Charter is Art. 24. This Article, after having indicated the SC as the organ charged with the primary responsibility for the maintenance of international peace and security, provides in the second paragraph that

In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

In fact, the first phrase of the cited provision represents the most punctual and explicit textual reference set forth in the Charter on the limits of SC powers, insofar as it recalls that this organ is bound to respect the “Purposes and Principles of the United Nations”, as they are defined in Art. 1 and 2 of the Charter. Even if this may at first glance appear as a powerful statement, one cannot overlook the fact that the broad language of Art. 1 and 2 of the Charter, and the sweeping and abstract character of the purposes and principles enshrined therein, can hardly provide meaningful and precise limitations to the powers of SC.¹⁵ Besides that, the Purposes and Principles of the UN Charter seem also to liberate this organ from additional legal constraints.¹⁶ In this regard, it is worth mentioning that Art. 1, para.1 of the Charter, which sets forth the basic purpose of maintaining peace and security, specifies that the United Nations are bound

to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

It is easy to note that the reference to justice and international law is confined to the second part of the provision, relating to the adjustment or settlement of international disputes that might lead to a breach of the peace, and does not concern the first phrase of the paragraph, dealing with the collective measures for maintenance of the peace. The most plausible implication of this formulation would be that only action deployed by the UN and its organs in the field of the settlement of disputes has to be subjected to the principles of justice and international law, while the same cannot apply to the coercive action carried out by the SC for the maintenance or restoration of peace.¹⁷ As it is well

¹⁵ See A. Peters, *Article 25*, in: Simma et al., *supra* note 2, pp. 812-814; see also the punctual analysis provided by M. Wood, *The UN Security Council and International Law*, Hersch Lauterpacht Memorial Lectures, Second Lecture: The Security Council's Powers and their Limits (as delivered on 8th November 2006), pp. 7-12, available at http://www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php.

¹⁶ See Krisch, *supra* note 2, pp. 1256-1257.

¹⁷ See R. Wolfrum, *Article 1*, in Simma et al., *supra* note 2, pp. 113-114.

known, this conclusion is further reinforced by the *travaux préparatoires* of the UN Charter. At the San Francisco Conference, a proposal was submitted by the Egyptian delegation to move into the *chapeau* of Art. 1, para. 1 the reference to conformity with justice and international law, so as to subject to such principles the whole range of activity of the UN, including *both* the peaceful adjustment or settlement of disputes *and* the coercive action for the maintenance and restoration of peace.¹⁸ This proposal – sustained at San Francisco by some small States worried about the extensive powers conferred on SC under the draft established at Dumbarton Oaks by the four sponsoring powers – was however defeated, having failed to reach the required two-thirds majority: a strong argument for this outcome was that submitting Security Council actions to justice and international law would carry the risk of undermining the efficacy of the initiatives undertaken by that organ in the field of peace maintenance.¹⁹

Going back to Art. 24 of the Charter, the final phrase of its second paragraph also seems to provide some other possible textual limitations for SC action, as it envisages the “specific powers” granted to SC for the discharge of its responsibilities, which are specifically laid down in Chapters VI, VII, VIII and XII of the Charter. Referring to this phrase of Art. 24, the ICTFY Chamber of Appeals observed that “the Charter thus speaks the language of specific powers, not of absolute fiat”.²⁰ This conclusion can be further corroborated if one looks at the subsequent provision in the UN Charter devoted to the functions and powers of the SC. Art. 25 states that “The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” According to one possible interpretation of the final proviso “in accordance with the present Charter”, only SC decisions vested by other specific Charter provisions with binding force must be carried out by UN members, as opposed to those decisions in a broad sense which are merely recommendatory.²¹ In establishing that UN members are bound to carry out SC deliberations only when and where the Charter expressly enables the SC to decide, Art. 25 would confirm that, as a general principle, the powers of this organ are specific and definite in scope.

¹⁸ The text of the proposed Egyptian amendment to Art. 1, para. 1, read as follows: “To maintain international peace and security, *in conformity with the principles of justice and international law*; and to that end to take effective corrective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, adjustment or settlement of international disputes or situations which may lead to a breach of the peace” (emphasis added): see *United Nations Conference on International Organization* [hereinafter UNCIO], doc. 1006 I/6, 15 June 1945, vol. VI, p. 21. The rationale of this proposal is efficaciously summed up in the following excerpt taken from the original French text of the Egyptian delegate’s speech at Commission I of the San Francisco Conference (not reproduced in the abridged English version) : “il ne peut y avoir paix sans justice. La paix certes oui, mais dans la justice” (*ibidem*, p. 50).

¹⁹ See *ibidem*, pp. 34 and 25-31, especially the explanations provided by the representatives of the United Kingdom and the United States. See further on this *infra*, section 5.

²⁰ *Tadic* Decision, *supra* note 4, para. 28.

²¹ See Peters, *supra* note 15, p. 808; but for another possible, and opposite, interpretation of Art. 25 see *infra*, note 37 and the accompanying text.

However, even assuming that the UN Charter speaks the “language of specific powers”, if one looks at the articles specifically envisaging a binding effect for SC decisions – such as Chapter VII provisions dealing with measures to maintain or restore international peace and security – it is hard to escape the impression that very few clues are provided for identifying the legal limits to SC powers. A key provision in this sense is Art. 39, which lays down the preconditions for SC actions in the field of maintenance of peace and security:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

As the ICTFY Chamber of Appeals recognized in the *Tadic* decision, of the three situations justifying the resort to Chapter VII, the “act of aggression” might appear as the more amenable to legal definition, while the “threat to the peace” is more of a political concept.²² In any case, the decision not to provide a definition in the Charter of those expressions was a deliberate choice of the drafters at the San Francisco Conference, pursued in order to ensure to the SC a great measure of freedom and flexibility in the qualification of any relevant situation.²³ The result of this approach is, not only that the flexible concept of ‘threat to the peace’ has proved to be the most frequently used tool in the practice of the SC,²⁴ but also that its interpretation has become one of the thorniest issues in the legal debates.²⁵ This is exemplified by the opposite conclusions reached by the Appeals Chambers of ICTFY and of the STL on the question of assessing the legality of the determinations of a threat to the peace made by the SC in the Former Yugoslavia and Lebanon cases. While the ITCFY Appeal Chamber was ready to move away from the literal interpretation of the Charter, and attempted to justify the soundness of the concrete qualification of a ‘threat to the peace’ under other principles of legal interpretation (an argument that will be reconsidered later),²⁶ the STL Appeal Chamber seemed to confine itself to a strict evaluation of the textual elements of the Charter, reaching the extreme conclusion that the notion of ‘threat to the peace’ cannot be subjected to any standard of legal review.²⁷

²² *Tadic* Decision, *supra* note 4, para. 29.

²³ See the report of Paul-Boncour, chairman of the Committee III/3, charged with the re-drafting of Chapter VIII, Section B, of the Dumbarton Oaks proposals (later Chapter VII in the UN Charter), UNCIO, doc. 881 III/3/46, 10 June 1945, vol. XII, p. 505: “The Committee therefore decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression”. The report was adopted unanimously by Committee III of the Conference (UNCIO, doc. 943 III/5, 13 June 1945, vol. XI, pp. 12-27).

²⁴ See N. Krisch, *Article 39*, in Simma et al., *supra* note 2, p. 1278.

²⁵ For an overview of this classical question, see I. Osterdhal, *Threat to the Peace. The Interpretation by the Security Council of Article 39 of the UN Charter*, Iustus Forlag, Uppsala: 1998; and, more recently, A. Orakhelashvili, *Collective Security*, Oxford University Press, Oxford: 2011, pp. 149-175.

²⁶ See *infra*, note 46 and accompanying text.

²⁷ *Cf.*, *supra* notes 11-12 and accompanying text.

However, the conclusion that the text of the UN Charter does not provide meaningful parameters for a legal assessment of SC powers does not seem to be inescapable. On the one hand, it must not be forgotten that, especially in the early days of collective security, it was far from unusual for the members of the SC to examine the legal foundation of a proposed action in the light of the pertinent provisions of the Charter and to consider the most plausible textual interpretation thereof. One may quote the debates on the specific or general powers accruing to the SC under the text of Art. 24 of the Charter, that characterized the question of Trieste in 1947;²⁸ or the decision adopted by the SC in 1946 to establish a special sub-committee charged with the task of ascertaining whether the situation created in Spain by the government of Franco endangered international peace and security and fell under the scope of Art. 39 of the Charter.²⁹

On the other hand, the observation that “SC members regularly debate the limits of the scope of action under Art. 39, thus indicating their conviction that the concepts carry some meaning and are not completely indeterminate”³⁰ seems to hold true also in current times. In this respect, suffice it to consider the thematic debates periodically devoted by the SC to certain selected issues, such as the impact of infectious diseases or of climate changes on the maintenance of peace and security: it is during such occasions that UN members States often call into question the boundaries of the notion of threat to the peace appearing in Art. 39, its proper interpretation, and its applicability to the above-mentioned phenomena.³¹

Be that as it may, other more flexible or more liberal methods of interpretation may be available to overcome the interpretative difficulties arising from the indeterminacies of the relevant provisions of UN Charter, and as a matter of fact they are often exploited for appraising the scope of SC powers.

2. THE PRINCIPLE OF EFFECTIVENESS AND THE TELEOLOGICAL APPROACH TO THE INTERPRETATION OF SC POWERS UNDER THE CHARTER

Insofar as it is intended to enhance a purpose-oriented reading of the provisions of an international treaty and is aimed at maximizing the goals thereof, the so-called teleological method is often considered in the legal literature as the most appropriate

²⁸ See SC Official Records, 2nd year, 91st Mtg., 10 January 1947, pp. 43-61.

²⁹ See Resolution 4 (1946) of 29 April 1946, SC Official Records, 1st year, 39 Mtg., pp. 241-245, and *Report of the Sub-Committee on the Spanish Question*, UN doc. S/75, 1 June 1946.

³⁰ See Krisch, *Article 39*, *supra* note 24, p. 808.

³¹ See e.g. the summary records of the SC debate devoted to “New Challenges to international peace and security and conflict prevention”, UN doc S/PV.6668, 23 November 2011, esp. pp. 11-12, 18-19 and 23-24 for the interventions of the representatives of Colombia, South Africa and India, questioning the problematic qualification of climate change and of the HIV/AIDS disease as threats to the peace.

for the constitutive instruments of international organizations.³² At the same time, the principle of effectiveness or “*effet utile*” is an important conceptual underpinning of teleological interpretation, and there are many elements in the Charter that encourage its adoption.³³ First of all, the previously quoted Art. 1, para. 1 of the Charter pledges the Organization to take “*effective* collective measures” for the prevention and removal of threats to the peace, while Art. 24, para. 1 provides that “in order to ensure prompt and *effective* action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security”. Secondly, it must be emphasized that attempts made at the San Francisco Conference to envisage express legal limits or forms of legal control over SC actions were defeated precisely on the account that any legal straightjacket imposed on that organ would compromise the effectiveness of the UN system of collective security. This held true not only for the above-mentioned Egyptian amendment concerning the place of justice and international law in the very first article of the Charter,³⁴ but also for a Belgian proposal aimed at subjecting the decisions of the SC infringing on the legal rights of States to the judicial review of the International Court of Justice.³⁵

The paradigm of effectiveness of UN action in the field of the maintenance of international peace and security has played an important role, not only during the drafting of the Charter but also in the following practical application and judicial interpretation of this instrument. Leaving aside some well-known cases brought before the ICJ, where the principle of effectiveness made its appearance under the cover of the implied powers doctrine,³⁶ one may here recall as a pertinent example – and one more directly concerned with the topic of collective security – the 1971 Namibia Advisory

³² See generally, E.P. Hexner, *Teleological Interpretation of Basic Instruments of Public International Organizations*, in S. Engel (ed.), *Law State, and International Legal Order. Essays in Honour of Hans Kelsen*, University of Tennessee Press, Knoxville: 1964, pp. 119-138.

³³ S. Kadelbach, *Interpretation of the Charter*, in Simma et al., *supra* note 2, pp. 79-80 and 84-86.

³⁴ See *supra* note 19.

³⁵ The text of the Belgian proposal submitted to Committee III/2 of the San Francisco Conference read as follows: “Any State, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision”: UNCIO, doc. 461 III/2/16, 21 May 1945, vol. XII, p. 63. The Belgian amendment referred to Chapter VIII, Section A of the Dumbarton Oaks proposals (concerning the peaceful settlement of disputes, later Chapter VI of the UN Charter) and was motivated by the fear that a State may be obliged by a recommendation adopted by the SC under that Chapter to abandon a right granted by positive international law (*ibidem*, doc. 433 III/2/15, 19 May 1945, vol. XII, pp. 48-50). Belgium withdrew its proposals after having received assurances from the inviting powers that a recommendation made by the Council under Section A of Chapter VIII did not possess obligatory effects (*Ibidem*, doc. 498 III/2/19, 22 May 1945, pp. 65-66).

³⁶ See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion, 11 April 1949) [1949] ICJ Rep, p. 174; *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal* (Advisory Opinion, 13 July 1954) [1954] ICJ Rep, p. 47.

Opinion. In this case, the World Court suggested an extensive reading of Art. 25 of the Charter premised on the *effet utile* of this provision, and derived from it a general power of decision of the SC, going well beyond the “specific powers language” laid down in Art. 24 and Chapter VII of the Charter.³⁷ More recently, the same reasoning reappeared, albeit mixed with a constitutional-flavoured argument, in the 2003 decision of the Trial Chamber of the ICTFY in the *Milutinovic* case, whereby the principle of effectiveness of the UN system of collective security was evoked to assert the universal reach of SC decisions adopted under Chapter VII and their applicability to non-member States.³⁸

However, the most far-reaching and recent expression of the teleological interpretation of SC powers has been enacted with reference to Art. 103 of the Charter. As is well known, Art. 103 establishes the priority of UN Charter obligations over conflicting treaty obligations of Member States,³⁹ and the ICJ in its orders on provisional measures in the *Lockerbie* cases unequivocally affirmed that this rule also applies to SC decisions adopted under Chapter VII.⁴⁰ It is therefore not surprising that, in the recent case law concerning the impact of UN targeted sanctions on individual rights, Art. 103 of the Charter has been extensively evoked to guarantee the effectiveness of the anti-terrorist actions carried out by the SC under Chapter VII, and to affirm the primacy of SC decisions over conflicting conventional human rights obligations binding on States called on to implement UN sanctions.⁴¹ In this vein, it has also been suggested that the

³⁷ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council 276 (1970)* (Advisory Opinion, 21 June 1971) [1971] ICJ Rep, pp. 52-53, para. 113: “It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. (...) If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter”. But cf. the interpretation of Art. 25 made by the ICJ with that expounded above, *supra* note 21 and accompanying text.

³⁸ See *The Prosecutor v. Milan Milutinovic, Dragoljub Ojdanic, Nikola Sainovic* (IT-99-37-PT), Decision on Motion Challenging Jurisdiction, 6 May 2003, available at <http://www.icty.org>, paras. 45-63 and especially para. 48: “The principle of *institutional effectiveness* (...) also lends support to an interpretation of Chapter VII of the Charter as empowering the Security Council to adopt measures for the maintenance of international peace and security in the circumstances of this case (...). Chapter VII of the Charter *may be interpreted purposively* as empowering the Security Council to continue to deal with a situation which it has determined to be a threat to international peace and security even if the country concerned ceases to be a member of the United Nations” (emphasis added).

³⁹ For a recent assessment of this provision, see A. Paulus, J.R. Leiss, *Article 103*, in Simma et al., *supra* note 2, pp. 2110-2136.

⁴⁰ See Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v UK; Libyan Arab Jamahiriya v US*), *supra* note 3, p. 15, para. 39, and p. 126, para. 42.

⁴¹ For a judicial application in domestic case law see *Tribunal Fédéral Suisse, A. c. Département Fédéral de l'Economie* (2A.783/2006), Judgment 23 January 2008, available at <http://www.bger.ch>. For more details see M. Arcari, *Les exigences de la sécurité collective*, in J. Rideau, C. Grewe, L. Balmond, M. Arcari (dir.), *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union Européenne*, Bruylant, Bruxelles: 2010, pp. 29-31.

scope of Art. 103 of the Charter cannot be limited to conflicting treaty obligations of UN member States, but must be also extended to any conflict with obligations arising under customary international law, because otherwise the priority effect associated with SC decisions could be easily circumvented.⁴² Finally, it is worth recalling that the English courts, in the *Al-Jedda* case, have suggested that “authorizations” to use all necessary means delivered by the SC to member States must be considered on the same footing as Chapter VII binding “decisions” for the purposes of application of Art. 103 of the Charter.⁴³

It is evident, however, that the teleological interpretation of Charter provisions, aimed at maximizing the effectiveness of SC action in the field of collective security, cannot be forced beyond some basic textual limits that are present in the Charter itself. In this respect, the following observation – made by an author criticizing the tendency to overstretch the priority rule sanctioned in Art. 103 of the Charter – may be generalized and applied to the various instances of teleological interpretation of SC powers reviewed above: “[b]ut that interpretation rests on shaky ground. Logic is a tool of interpretation, not a means for creating new obligations. And the wording of Art. 103 is just the way it is.”⁴⁴

In order to provide more solid foundations for the powers of the SC and for their limits (if any), recourse to other criteria of interpretation may be desirable. The reference to elements of interpretation “external” to the text of the Charter, such as the practice of member States in the application of Charter provisions concerning collective security, may in this regard be of help.

3. THE ‘SUBSEQUENT PRACTICE’ APPROACH TO THE INTERPRETATION OF SC POWERS UNDER THE CHARTER

According to Art. 31, para. 3, letter (b), of the 1969 Vienna Convention, in the process of treaty interpretation account must be taken of “any subsequent practice in

⁴² See Krisch, *supra* note 2, p. 1262; in the same direction, R. Kolb, *Interprétation et création du droit international*, Bruylant, Bruxelles: 2006, p. 580. The argument that the priority rule of Art. 103 of the Charter applies to both conventional and customary obligations of UN member States was also advanced by the EU Council and Commission in the first phase of the Kadi case: Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Judgment 21 September 2005, II-3706, para. 156.

⁴³ See *R (on application of Al-Jedda) v. Secretary of State for Defence*, *supra* note 7, paras. 30-34 (Lord Bingham of Cornhill), para. 117 (Lord Rodger of Earlsferry) and paras. 131-135 (Lord Carswell). For a review of the underlying legal arguments, see R. Kolb, *Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?*, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 21 (2004).

⁴⁴ K. Zemanek, *The Legal Foundations of the International System. General Course of Public International Law*, Recueil des Cours de l'Académie de Droit International de La Haye, vol. 266, Martinus Nijhoff Publishers, The Hague, Boston, London: 1997, p. 232.

the application of the treaty which establishes the agreement of the parties regarding its interpretation.” In fact, the reference to “subsequent practice” can be regarded as a convenient method for the interpretation of constitutive treaties of international organizations. The inference here is that acceptance or acquiescence by the member States of an international organization of an institutional practice developed by organs of the organization in the application of the constitutive treaty may reveal an agreed-upon or “authentic” interpretation of the instrument at hand.⁴⁵ This was the path followed by the ICTFY Appeal Chamber in the *Tadic* case of 1995, when deciding on the challenge to the qualification of “threat to the peace” made by the SC to justify the invocation of Chapter VII as a legal basis for the establishment of the Tribunal. According to the Appeals Chamber, the internal conflict existing at that time in Former Yugoslavia might have amounted to a threat to the peace in accordance with the settled practice of the Security Council and in the light of “the common understanding of the United Nations membership in general.” On this point, the following passage of the *Tadic* decision is particularly telling:

Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which is classified as a ‘threat to the peace’ and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly (...). It can thus be said that there is a common understanding, manifested by the ‘subsequent practice’ of the membership of the United Nations at large, that the ‘threat to the peace’ of Article 39 may include, as one of its species, internal armed conflicts.⁴⁶

It is not surprising that “subsequent practice” or “acquiescence” are often invoked as another line of legal justification to explain actions based on a generous interpretation, if not on plain overstretching, of the SC competencies under the Charter. This has happened, for example, in the case of the so-called “legislative powers” exercised by the SC in resolutions 1373 (2001) and 1540 (2004), setting forth measures of general scope and application for the fight against terrorism and against the diffusion of weapons of mass destruction to non-State actors. According to many authors, the fact that those “legislative” resolutions were not substantially contested by UN member States, and particularly the fact that most States accepted the obligation to report on the national implementation of such measures, would reveal the general acceptance of SC practice, and eventually validate the exercise by the SC of “new” legislative powers that would otherwise be outside the reach of the coercive powers provided for in Chapter VII of the Charter.⁴⁷

⁴⁵ See generally, J. Alvarez, *International Organizations as Law-makers*, Oxford University Press, Oxford: 2005, pp. 87-92; see also N. Blokker, *Beyond ‘Dili’: On the Powers and Practice of International Organizations*, in G. Kreijen, M. Brus, J. Duursma, E. de Vos, J. Dugard (eds.), *State, Sovereignty, and International Governance*, Oxford University Press, Oxford: 2002, pp. 299-322.

⁴⁶ *Tadic* Decision, *supra* note 4, para. 30.

⁴⁷ For this conclusion see e.g. A. Marschik, *Legislative Powers of the Security Council*, in R. St John Macdonald, D.M. Johnston (eds.), *Towards World Constitutionalism*, Brill, The Hague: 2005, pp. 457-492, esp. 473 ff. For a more nuanced evaluation of SC “legislative” measures concerning terrorism, see however

However appealing the above arguments may appear, some caution is due in applying the “subsequent practice” method of interpretation to the powers of the SC. Indeed, as an author has cogently pointed out, “[t]he fact the Council has acted does not guarantee that its action is lawful or that this action will constitute legally significant ‘practice’ that contributes to the evolution of the law”,⁴⁸ and care must be taken to distinguish between an “action” (of the SC) and “practice” (of UN member States). What really matters is a consistent pattern of general reception of SC initiatives by the UN membership at large, which would reveal the “common understanding” needed to establish the agreement of the parties to a certain interpretation of the UN constitutive instrument. If the threshold for this agreement is “taken seriously”, the possibility to validate, under the cover of “subsequent practice”, the most controversial cases of the liberal use by the SC of its Chapter VII powers may become very problematic.⁴⁹ In this respect, the general measures set forth in resolutions 1373 (2001) and 1540 (2004) have remained as occasional examples and have not been replicated, and further attempts by the SC to “legislate” in the matter of international terrorism – i.e. by providing a general definition of the latter notion or by generalizing the application of blacklists and targeted sanctions to terrorists different from those associated with Taliban and Al-Qaida – have encountered a cool reception by UN member States.⁵⁰ These developments suggest that the interpretative method of “subsequent practice” needs to be handled very carefully.

One may ask whether other interpretative methods based on the consideration of factors “external” to the UN Charter may be available for addressing the issue of the scope of SC powers. In this respect, attention must be paid to Art. 31, para. 3, letter (c), of the Vienna Convention, establishing that in the interpretation of a treaty account shall be taken of “any relevant rules of international law applicable in the relations between the parties”.

A. Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17(5) European Journal of International Law 881 (2006).

⁴⁸ See Abi-Saab, *supra* note 1, p. 33.

⁴⁹ See Krisch, *supra* note 2, p. 1254.

⁵⁰ See e.g., resolution 1566 (2004), adopted unanimously on 8 October 2004 under Chapter VII of the Charter, especially para. 3, whereby the SC outlines a general definition of criminal acts “committed (...) with the purpose to provoke a state of terror in the general public (...) intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism” and calls upon States to prevent and punish such acts; and para. 9, where the SC decides to establish a working group to consider and submit recommendations “on practical measures to be imposed upon individuals, groups or entities involved or associated in terrorist activities, other than those designated by the Al Qaida/Taliban Sanctions Committee”. Some members of the Council, while participating in the consensus on the adoption of the resolution, have however underlined the compromise language of the text and have expressed dissatisfaction for the fact that their operative paragraphs have been placed under Chapter VII of the Charter: see UN doc. S/PV.5053, 8 October 2004, especially the intervention of the representative of Brazil, pp. 7-8. As far as it is possible to know, Resolution 1566 (2004) remained a dead letter and no significant traces of its implementation can be found in the subsequent practice of the SC.

4. THE 'SYSTEMIC APPROACH' TO THE INTERPRETATION OF SC POWERS UNDER THE CHARTER (AND INTERNATIONAL LAW)

It is obvious that the SC, through its decisions based on Chapter VII of the Charter, can impinge on the substantive rights of States. This of course may happen not only vis-à-vis those States that are directly targeted by the enforcement measures adopted under Arts. 41 or 42, but also with respect to other UN member States called upon to implement those measures. It is therefore frequent that the SC, in its Chapter VII resolutions providing for the imposition of economic measures, takes pains to remind States *expressis verbis* of their obligation to implement sanctions “notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into (...) before the date of the [relevant] resolution”;⁵¹ and we have already alluded to the critical role that Art. 103 of the Charter may play in such instances.⁵²

On the other hand, it is a fact that especially SC non-armed measures have considerably evolved in recent times. Once again, the paradigm of effectiveness of UN action in the field of maintenance of the peace appears to have played a considerable role in this evolution.⁵³ It is precisely with the aim to improve the impact and efficacy of its Chapter VII measures that the SC has progressively changed the targets of its non-military sanctions, shifting from States to individuals deemed directly or indirectly responsible for threatening international peace and security.⁵⁴ The transformation of traditional economic embargoes into “smart”, or “targeted” sanctions against named individuals has inevitably posed new challenges for the protection of fundamental human rights. In fact, the obligation of States to implement in their internal order the freezing measures imposed against individuals inscribed in the SC blacklists may very easily clash with obligations that States owe to those same individuals as a consequence of participation in treaties for the protection of human rights (*i.e.*, the obligation to guarantee a fair and equitable process to the individuals concerned, or the obligation not to deprive them of private property).⁵⁵ In order to resolve such conflicts, the rule of priority enshrined in Art. 103 of the Charter seems to be of little avail. This is so, first, because States may be deemed to have some – albeit weak and unarticulated

⁵¹ See for instance, resolution 670 (1990), para. 3, providing for the partial interruption of air communications with Iraq and Kuwait.

⁵² See *supra* notes 40-43 and accompanying text.

⁵³ See *e.g.*, General Assembly Resolution 51/242 of 15 September 1997, Annex II (Question of Sanctions Imposed by the United Nations), UN doc. A/RES/51/242, 26 September 1997, pp. 6-10.

⁵⁴ For an overview of the evolution of SC non-armed measures, see *generally*, N. Krisch, *Article 41*, in Simma et al., *supra* note 2, pp. 1308-1319.

⁵⁵ See *generally*, A. Ciampi, *Security Council Targeted Sanctions and Human Rights*, in B. Fassbender, *Securing Human Rights? Achievements and Challenges of UN Security Council*, Oxford University Press, Oxford: 2011, pp. 98-140.

– obligations in the field of the protection of human rights also arising under the UN Charter and general international law, which fall beyond the proper scope of Art. 103; and second, because the promotion of human rights is spelled out in Art.1, para. 3 of the Charter as one of main purposes of the UN Organization, so that UN organs must coordinate the protection of human rights with the other legitimate purpose of maintenance of the peace.⁵⁶

Significantly, domestic or regional courts called on to review the legality of SC targeted sanctions, after having initially indulged in the logic of Art. 103 of the Charter and acceded to the principle of the pre-eminence of SC decisions over conflicting human rights obligations,⁵⁷ in their most recent decisions have attempted to strike a new balance between the different values at stake.⁵⁸ The recent case law of the European Court of Human Rights (ECtHR) concerning the impact of SC resolutions on human rights may be cited as the most telling example of this judicial trend. For instance, in the *Nada* judgment of 12 September 2012, the ECtHR held Switzerland responsible for the violation of the right to private and family life of the applicant, because that State had not adequately explored and exploited “the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order”. Such an option, according to the Court, “should have allowed some alleviation of the sanction regime applicable to the applicant” and should have “avoid[ed] interference with his private and family life”, without however “circumventing the binding nature of the relevant [SC] resolutions or compliance with the sanctions provided for herein”.⁵⁹

What the above reasoning of the ECtHR suggests is that integrating human rights into the implementation of SC enforcement measures may be the best way to ensure the effectiveness of UN action in the field of peace maintenance. The fact that this perspective as suggested by the Court is limited to the domestic implementation of Chapter VII measures is due to the contingencies of the case, and is without prejudice to the possibility that the SC itself may be bound to integrate human rights requirements in its decisions aimed at the maintenance of international peace and security. In this respect, it is of significance, first of all, that the SC has in most recent years subjected the regime of targeted measures to a thoughtful revision, with the aim to render this regime more transparent, more equitable, and consistent with the principles of the rule of law;⁶⁰ and secondly, that in all recent resolutions concerning targeted sanctions

⁵⁶ See G. Thallinger, *Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council*, 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1015 (2007), pp. 1027-1029.

⁵⁷ See references *supra* note 41.

⁵⁸ See P. De Sena, C. Vitucci, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values*, 20(1) *European Journal of International Law* 193 (2009).

⁵⁹ *Nada* Judgment, *supra* note 6, para. 195.

⁶⁰ See *inter alia*, Resolution 1904 (2009), concerning the establishment of an Office of the Ombudsperson charged to receive and process the requests of de-listing submitted by persons inscribed on the SC Consolidated list concerning the Taliban and Al-Qaida, as well as Resolutions 1989 (2011) and 2082 (2012), carrying out further improvement to the procedures of listing and de-listing.

against individuals and entities associated with Al-Qaida, the SC has constantly taken pains to remind that the need to combat terrorism must be pursued “in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law (...)”.⁶¹

The developments summarily reviewed confirm that a new and promising approach to the question of the limits to SC power is underway. This approach demands that the UN Charter provisions on collective security not be read in their “splendid isolation”, but are integrated into the overall framework of international law norms, both of conventional and customary origin, that may be pertinent and applicable to UN member States and to the UN Organization itself. Such an approach is not only consistent with the prescriptions of the above cited Art. 31, para 3, letter (c), of the Vienna Convention, but also corresponds to the notion of “systemic interpretation” recently expounded by the International Law Commission as one of the most appropriate tools to coordinate the different normative layers of international law, to avoid fragmentation of the international legal system, and to guarantee its overall consistency.⁶²

All things considered, the most appealing feature of the above described “systemic approach” of interpretation is that it paves the way for the integration into the Charter law of “external” normative values – such as human rights obligations of both a conventional and customary nature – that may eventually play the role of additional legal limits to SC powers.⁶³ But even admitting that this perspective is intriguing, one cannot underestimate the legal hurdles created by the text of the Charter to such integration, at least insofar as Art. 1, para. 1, liberates the actions carried out by the UN in the field of the maintenance of international peace and security from the observance of international law.⁶⁴

5. A COMPLEMENTARY APPROACH TO THE INTERPRETATION OF SC POWERS UNDER THE *TRAVAUX PRÉPARATOIRES* OF THE CHARTER

After a survey of the main interpretative approaches to the question of the limits to SC powers, one can hardly avoid the impression that the bulk of the issue remain rather unpredictable. This may induce a last attempt to clarify the meaning and the scope of SC powers under the Charter by having recourse to the preparatory works of the latter instrument. Such an attempt may also be consistent with the prescription of Art. 32 of the Vienna Convention, providing that recourse to supplementary means of

⁶¹ See e.g., Resolution 1989 (2009), fifth preambular paragraph.

⁶² See generally, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, UN doc. A/CN.4/L.682, 13 April 2006.

⁶³ See Peters, *supra* note 15, pp. 822-825 and 833-834.

⁶⁴ See *supra* notes 17-19 and accompanying text.

interpretation may be authorized when the interpretation according to the general rule of Art. 31 “leaves the meaning ambiguous or obscure”.

The reasons which recommend downgrading the role of preparatory works in the process of treaty interpretation are well known,⁶⁵ and are particularly applicable when the interpretation of UN Charter – and especially of its provisions concerning collective security – is at stake.⁶⁶ Occasional references have been made above to the proceedings of the San Francisco Conference, in order to show that the absence of legal constraints on SC action in the text of the Charter was a deliberate choice made by the drafters.⁶⁷ It may however be of interest to point out that, while the various proposals advanced by small States at San Francisco to envisage some form of legal control over the SC were frustrated by the opposition of the great (inviting) powers, the abandonment of such proposals was not completely unconditional. On the one hand, it is true that proposals aimed at introducing some substantive legal standards (i.e., the conformity to justice and international law) or some form of judicial control (i.e., review by ICJ over SC decisions infringing on the rights of States) in the framework of the collective security system were defeated based on the reasoning that the submission of the SC to legal straightjackets would undermine the efficacy of UN action in the field of peace maintenance. But on the other hand, it must not be forgotten – and the *travaux préparatoires* of San Francisco are crystal clear on this point – that the renunciation by small States of their proposals was obtained on the basis of the strongest assurances, provided by the inviting powers, that the UN Security Council was in any case “bound to act in accordance with the principles of justice and international law”,⁶⁸ and that “no compulsion or enforcement was envisaged” in SC actions concerning the peaceful settlement of disputes,⁶⁹ and that as a whole the SC organ has to act, in the field of peace maintenance, “as a policeman” and not as a ‘jury’.⁷⁰

The question may thus be posed whether the above assurances are to be considered as mere lip service paid to appease some recalcitrant countries at the San Francisco Conference, and have lost any relevance many years after the entry into force of the Charter; or whether those same assurances conveyed some envisioned legal boundaries on the powers of the SC, which cannot be trespassed without calling into question

⁶⁵ See generally, U. Linderfalk, *Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation*, 54 Netherlands International Law Review (2007), pp., 133-154; for an alternative view on the relevance of preparatory works for treaty interpretation see J. Klabbers, *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?*, 50 Netherlands International Law Review 267 (2003).

⁶⁶ See Kadelbach, *supra* note 33, pp. 88-89.

⁶⁷ See *supra* notes 18-19, 23, 35, and accompanying text.

⁶⁸ See the statement of the delegate of the United States, UNCIO, doc. 433 III/2/15, 19 May 1945, vol. XII, p. 49.

⁶⁹ See the statement of the delegate of the United States, UNCIO, doc. 498 III/2/19, 22 May 1945, vol. XII, p. 66.

⁷⁰ See the statements of United Kingdom and United States delegates at Commission I of San Francisco, UNCIO, doc. 1006 I/6, 15 June 1945, vol. VI, pp. 25 and 29-30.

the very fundamental (and still actual) compromise lying at the heart of the system of collective security. The second alternative may perhaps help to explain why questionable instances of the exercise by the SC of functions of a quasi-judicial or quasi-legislative nature have raised in the recent past – and will prospectively continue to raise – stronger objections and protests by some relevant sectors of UN membership.⁷¹ By contrast, this can also explain the recent initiatives within the UN aimed at enhancing the legitimacy of the SC through its submission to the principles of the rule of law.⁷² In the same vein, it is not superfluous to note the somewhat sporadic but authoritative attempts made in the legal literature to reconsider the question of the legal limits to SC powers in light of the “Spirit of San Francisco”.⁷³ This seems to confirm the conclusion that, especially for the issues discussed in this article, the preparatory works may provide a complementary, rather than a merely supplementary, means for the interpretation of UN Charter.

CONCLUSION

Different alternatives are available for the interpretation of UN Charter provisions concerning the powers and the competences of the SC, each presenting both its relative shortcomings and advantages. Even if the utilization of one or other among the available methods can be influenced in individual cases by political or judicial contingencies, it is in fact possible to detect a rather consistent pattern of chronological development in the recourse to the various interpretative solutions, which follows the different historical phases of UN collective security.⁷⁴ While a textual interpretation of Charter provisions was the natural option in the early days of collective security, when the first-time application of specific articles relating to SC competence was at stake,⁷⁵ the stalemate of the UN system of collective security – and especially of Chapter VII mechanisms – that characterized the Cold War enhanced the elaboration of purpose-oriented approaches to Charter interpretation, aimed at revitalizing the role of UN

⁷¹ For a more detailed account of these contested cases, see M. Arcari, *De l'action parajudiciaire du Conseil de sécurité*, in M. Arcari, L. Balmond (s.l.d.), *La sécurité collective entre légalité et défis à la légalité*, Giuffrè, Milan: 2008, pp. 83-113.

⁷² See e.g., the statement by the President of the SC on the item “The promotion and strengthening of the rule of law in the maintenance of international peace and security”, UN doc. S/PRST/2010/11, 29 June 2010; as well as the report “The UN Security Council and the Rule of Law” produced by the Austrian initiative 2004-2008 holding the same name, UN doc. S/2008/270, 7 May 2008.

⁷³ See G. Arangio-Ruiz, *On the Security Council's “Law Making”*, 83(3) *Rivista di diritto internazionale* 609 (2000), esp. pp. 660-682. See also K. Mansson, *Reviving the ‘Spirit of San Francisco’: The Lost Proposal on Human Rights, Justice and International Law to the UN Charter*, 76 *Nordic Journal of International Law* 217 (2007).

⁷⁴ For an analysis based on the different historical phases in the evolution of the UN system of collective security and SC actions, see generally D.L. Bosco, *Five to Rule Them All. The UN Security Council and the Making of the Modern World* (Oxford University Press, Oxford: 2009).

⁷⁵ See the examples referred to *supra* notes 28-29.

organs in the field of maintenance of international peace and security.⁷⁶ By contrast, the “subsequent practice” approach appeared to be the most adequate solution to appraise the SC’s ultra-activism following the end of the Cold War and the innovative character of many SC actions in this period.⁷⁷ More recently, the growing complexities of the international system and the multiplication of impacts and interferences that SC decisions may have on the international legal order have imposed a “systemic-oriented” approach to the interpretation of the Charter provisions, aimed at reconciling, rather than opposing, the different values involved in SC actions.⁷⁸ Finally, it cannot be excluded that even recourse to the basic compromises underlying the role of the SC in the system of collective security, as reflected in the *travaux préparatoires* of the UN Charter, may contribute to setting the threshold for permissible or impermissible interpretations of the powers of that organ.

Of course, the distinctions outlined above are not water-tight, but correspond to a wide and schematic generalization, so that intermediate or overlapping situations can also be found.⁷⁹ However, it seems useful to convey the idea that the interpretation of SC powers under the Charter is an evolving process, the variations of which can be associated with, and may to a large extent depend on, the changing needs of collective security and of the international legal order at large. This being so, the preferable way to approach the problem of the limits to SC powers would be to have recourse to a contextual and coordinated consideration of all available interpretative options, instead of picking and privileging one of them.⁸⁰

Over and above the methodological issue concerning the interpretative tool that may be most desirable or advisable for dealing with the issue at hand, the review carried out above has shown that the question of the limits to SC powers is in itself a legal question, which may be framed and answered according to legal standards. Even admitting that in the field of collective security the Charter privileges the political over the juridical approach and posits very few express limitations to SC action, there is no gainsaying the fact that the question of the real scope of SC powers remains, in the first instance, a matter of proper Charter interpretation.

⁷⁶ Besides the Namibia case mentioned *supra* note 37, another prominent example in this sense is the ICJ advisory opinion relating to *Certain Expenses of the United Nations*, *supra*, note 14.

⁷⁷ See *supra* notes 47-50 and accompanying text for further references.

⁷⁸ See the relevant examples *supra* notes 55-59 and accompanying text.

⁷⁹ Relevant examples are the instances of teleological interpretation of Art. 103 of the Charter that have been advanced in recent times: see *supra* notes 42-43.

⁸⁰ It may incidentally be noted that such an approach is also in line with the suggestions provided by the International Law Commission during its work on codification of the law of treaties. The Commission, referring to the various methods of treaty interpretation mentioned in the draft article on the general rule of interpretation, pointed out that “the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation (see the commentary to draft Art. 27 adopted on second reading in 1966, later to become Art. 31 of the Vienna Convention).” 2 Yearbook of the International Law Commission (1966), pp. 219-220.

*Natividad Fernández Sola**

THE EUROPEAN UNION AS A REGIONAL ORGANIZATION WITHIN THE MEANING OF THE UN CHARTER**

Abstract

Since it assumed competences in the area of security and defence, the EU has become a complete regional organization in the sense of the Chapter VIII of the UN Charter. This article explains the current situation, following the recognition of the EU's special status by the United Nations and the entry into force of the Treaty of Lisbon. The future implementation of the mutual defence clause can improve the relevance of the European role as a security actor in the global framework of the UN and add a new task to its traditional peace-keeping, crisis management, and conflict prevention operations. In addition, the EU is an important political actor in the implementation of UN Security Council (UNSC) resolutions, especially those concerning the sanctions against individuals considered as belonging to terrorist organizations. By refusing the implementation of a UNSC resolution that fails to protect human rights, the EU can contribute to the evolution of the UN Charter legal order and be a political force to be reckoned with in the Security Council. The EU orientation, as reflected in its values, including respect for international law, can both reinforce the legitimacy of some UNSC resolutions and improve the credibility and specificity of the EU as an international actor.

INTRODUCTION

Inclusion of the EU's role as a regional organization in a discussion on the limits of the United Nations (UN) Security Council's competences is justified. Not only does the EU currently have a unique international legal personality, it also develops its own Common Security and Defence Policy (CSDP) and plays an important role as a crisis management actor in the implementation of some UN peacekeeping operations.

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This article explains the EU's status within the UN, the changes introduced by the Treaty of Lisbon (ToL), and the impact of its implementation, especially of the mutual defence and solidarity clauses. It also examines the European Union's role as peacekeeper, crisis manager and crisis prevention actor, and finishes with a reference to the problems concerning the application of UN Security Council (UNSC) resolutions by the EU. Our conclusion is constructive, as the EU orientation as reflected in its values, including its respect for international law, can both reinforce the legitimacy of some UNSC resolutions and improve the credibility and specificity of the EU as an international actor.

1. LEGAL STATUS OF THE EU BEFORE UNITED NATIONS

The EU has been an observer member at the UN since 1974, and since 2011, after some diplomatic mistakes, it has had enhanced its participation rights. This status allows it to speak among representatives of major groups or before individual states, to submit proposals and amendments, the right of reply, to raise points of order, and to circulate documents. However, the EU itself does not have voting rights, but instead is represented by its 27 Member States, two of which – France and United Kingdom – are permanent veto-holding members of the Security Council.

Even if it does not have full membership, the EU is the only non-state participant party to several dozens of UN agreements, and has been actively involved as a full participant at important UN Summits.¹

As mentioned, its observer membership is held alongside the full membership of all its 27 Member States. The Treaty of the European Union (TEU) obliges the EU members participating in the SC meetings to keep the High Representative and fellow states informed of their actions, and to defend in the SC the interests and positions of the EU (Art. 34 TEU). However, their obligation to request the High Representative to be invited to present the EU's position on a UNSC agenda item does not impact on their right to form their own foreign policy (Declaration 14).²

¹ *About the EU at the UN*, available at: http://www.eu-un.europa.eu/articles/en/article_9389_en.htm (last accessed 2 May 2013).

² Declaration concerning the common foreign and security policy (annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, Council of the European Union, 6655/1/08, REV.1)

"In addition to the specific rules and procedures referred to in paragraph 1 of Article 24 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations."

The Conference also declares that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States."

The eventuality of the EU taking up a seat on the Security Council³, even if logical from a qualitative point of view and coherent with the development of a common European Foreign Policy, is nevertheless politically sensitive among EU members. The most clear example – but not the only one – of national reluctance is the United Kingdom, which does not want to risk giving up its permanent seat on the UNSC.

No less important than its representation within the universal organization is the coordination of EU voting within the General Assembly's six main committees and other bodies and agencies, such as the Economic and Social Council or the International Atomic Energy Agency. The high level of coordination results from more than 1,000 internal EU coordination meetings held at the UN to develop a common EU stance. The result is a common European voice, including on controversial topics such as the Middle East. The EU has also spoken with one voice at all major UN conferences held since the 1990s.⁴ This remarkable success deserves to be publicized at least as much as the particular instances of incoherence and disagreements are commented on.

The financial contribution of the EU and its Member States to the UN budget also should be taken into account, as it is the leading financial contributor, providing almost 40% of the UN budget (followed by the US at 22% and Japan at 16.6%). More than 40% of the funding for UN peacekeeping missions comes for Europe, and more than 13% of peacekeeping personnel. Later we will also point out how the EU operates its own missions to support the UN.

2. CHANGES INTRODUCED BY THE TREATY OF LISBON: UNITARIAN LEGAL PERSONALITY, MUTUAL DEFENCE CLAUSE AND SOLIDARITY CLAUSE

The basic innovation introduced by the ToL is the EU's unique international legal personality. If previously the EU already enjoyed this legal prerogative,⁵ it was shared

³ The European Parliament voted on 9 May 2011 in favor of requesting their own permanent representative at the UN Security Council. This move has been met with condemnation from some EU members, who believe that allowing the Union in is a step too far.

Members of the European Parliament have voted in favor of the idea of an EU seat within the Council as part of an overhaul of the EU's common defense, security and foreign policy, European Voice newspaper reported, RT 11.5.2011, <http://rt.com/news/eu-un-security-council-representative/>. See H. Spongenberg, *EU heading for single UN seat, UN official says*, EU Observer, 3 October 2006.

⁴ Statistics concerning increase in common votes in the General Assembly, where the EU has voted unanimously 97% of times, in http://www.unric.org/html/english/pdf/Leporello_EU-VN_e.pdf. One exception arose at the end of 2011 with the blockage by the UK of EU statements to UN committees for a symbolic reason; the opposition continues even if the blockage is not general. For an academic approach see M. O. Hosli, E. Van Kampen, F. Meijerink and K. Tennis, *Voting Cohesion in the United Nations General Assembly: the Case of the European Union*, paper presented at the ECPR Fifth Pan-European Conference, 24-26 June 2012, Porto.

⁵ N. Fernández Sola, *La subjetividad internacional de la Unión Europea*, 11 Revista Derecho Comunitario Europeo 85 (2002).

with the traditional one of the European Community. Apart from the confusion among third states, the previous situation generated a diverse international representation. Before the UN, the European Community was represented by the President of the Commission⁶ and, for issues dependent on the “second pillar”, by the rotating European Council President; and the coordination between them was not always perfect.

Since the entry into force of the ToL in December 2009, the European Union as a whole has taken on the role and obligations which the European Community previously exercised. Commission and Council delegations to the UN in New York have also been merged. Following the enactment of the Lisbon Treaty, the EU proposed to,⁷ and obtained from General Assembly the same representation rights (but not voting rights) as full members.

2.1 Mutual defence clause⁸

The ToL provides another innovation, this time related to the CSDP: the inclusion of a mutual defence/mutual assistance clause. According to Art. 42.7 TEU (in the wording established by the ToL):

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation

This clause works, with respect to an attack or armed aggression from a State, in accordance with the right of self-defence recognized by Art. 51 of the UN Charter, and allows for a military response only after the attack, but not for preventive purposes. The clause implies the undoubted recognition of the EU as a regional defensive organization in the sense of Chapter VIII of the UN Charter.

However, there are two questions that the ToL does not clarify: the content of the obligations derived from this article, and the way in which the clause is to be automatically applied. It is sometimes assumed that the obligation of mutual assistance is larger than that contained in the NATO Treaty, as Member States have to give both civil and military assistance. In our opinion it is not a larger obligation, as the Washington Treaty speaks, in fact, of “necessary measures, including the use of armed force”, so theoretically other kinds of measures apart from military actions would also be possible.

⁶ The European Community inherited the EEC’s international role after the Treaty of Maastricht, and thus between 1993 and 2009 the EU was represented by the European Community at the UN.

⁷ Participation of the European Union in the work of the United Nations, Draft Resolution A/65/L.64/Rev.1, United Nations.

⁸ The following ideas come from my research: *Les clauses d’assistance mutuelle et de solidarité du traité sur l’Union européenne: contenu, délimitation et garanties politiques et juridiques*, in: *Mélanges en l’honneur du Professeur Joël Molinier*, LGDJ, Paris: 2012, pp. 203-220.

Of course, there are practical limitations to such “other measures”, as the NATO is a military organization and has not developed anything but military capabilities.

Even if some authors have considered the TEU mutual assistance clause as automatic in its application, this article argues against this interpretation, for historical and practical reasons. Historically, during the constitutional process, the mutual defence clause was considered as a flexibility clause that Member States could subscribe to or not. If we add that the use of military force is a discretionary capacity of Member States, and that some Member States declare themselves as neutral, for the sake of coherence this would infer that the clause is not of automatic application, but that each state has to decide on its own reaction to an armed attack on another Member State.

The main obligation assumed by the states pursuant to this clause is a political one. Any decision in this domain requires the unanimity of the Council and constructive abstention is open to the states. This possibility to “opt out” on a case-by-case basis reinforces our position that one Member State cannot be obliged to automatically use force as a response to an armed attack against another Member State.

Although it is difficult to imagine an application in practice, the clause can be useful for EU members not belonging to NATO and for non-European territories of European NATO members. For these reasons the European Parliament recently asked the High Representative for a rapid implementation of this clause in order to guarantee a similar level of security for all European citizens.⁹

As an obligation included in the constitutional treaty of the EU, the mutual defence clause should have some legal and political guarantees. A legal guarantee seems to us only possible if one Member State fails to adopt any kind of measure to assist a fellow state which has suffered from an armed attack, and is obligated to do so either by virtue of being a member of NATO or the EU (including civil or military assistance). On the other side, the political guarantee looks weak, as the political reaction would depend on the strength or weakness of the state being requested to provide assistance.

Several factors may create obstacles to the implementation of the clause: including institutional or structural, budgetary, and political factors. First, the need for a European Headquarter allowing for autonomous and permanent planning for operations seems clear. Second, defence budget restrictions would require major coordination between NATO and the EU of assistance offered before an armed attack. Finally, no development is possible without the will to act. European political will is essential and may promote the revision of national security and defence strategies.

2.2. Solidarity clause (art. 222 TFEU)

According to Art. 222.1 and 2 of the Treaty on the Functioning of the European Union (TFEU):

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.

⁹ European Parliament, *Report on the EU's mutual defence and solidarity clauses: political and operational dimensions*, A7-0356/2012, 30 October 2012.

The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) - prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
 - (b) - assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.
2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

Thus, with respect to a terrorist attack, EU actions can be deployed for the following purposes: prevention of a terrorist threat, protection of democratic institutions and the civilian population, and assistance on the territory of a Member State requesting the same. In order to distinguish this clause from the mutual assistance one, it seems clear that the term “terrorist attack” refers to an armed attack not from a state, but instead from a non-state actor. (For the purpose of this paper, we leave aside the issue of assistance in the case of disasters).

The content of the obligation arising from this article is assistance to the victim of a terrorist attack. This assistance can be provided by civil or military means, but it does not imply that all Member States must be engaged in collective defence. In fact, to put one state’s civil and/or military capabilities at the disposal of another state does not imply the use of force. Such a use of force would require authorization by the UNSC, and the action could be considered as a Petersberg mission, if developed outside Member States’ territory, or a mutual assistance mission, if developed inside one Member State, but not the application of the solidarity clause. Moreover, Member States oblige themselves to coordinate their activities within the Council and to keep the European Parliament informed.

The practical implementation of the solidarity clause, already used after the terrorist attack in Madrid in March 2004, requires a unanimous decision by the Council, i.e. where constructive abstention is possible for a Member State if such a decision involves the use of military assets.

We can also look at political and legal guarantees when referring to application of the solidarity clause. Legal recourse would be possible against a state that does not provide any assistance if the victim state of a terrorist attack asked for it. From a political point of view, reciprocity is the best guarantee of fulfillment of the solidarity clause. Member States can easily perceive that they too can be victims of a terrorist attack in the future, or just need cooperation at the European level to prevent it.

The solidarity clause asks for the development of EU civil protection assets. A Council decision is needed and urgently requested by the European Parliament. In fact, the European Parliament report on mutual defence and solidarity clauses¹⁰ asked for

¹⁰ *Ibidem*.

quick implementation of the solidarity clause in order to deliver a coordinated multi-sector response when needed. It considers that the solidarity clause can provide the impetus for enhancing the EU's leverage among European citizens. In order to do that, efficient coordination is required among the multiple EU-level monitoring centers.

3. EU INVOLVEMENT IN UN CRISIS MANAGEMENT OPERATIONS

Regardless of the future directions of development with respect to the mutual assistance and solidarity clauses, the EU is already playing a major role in conflict prevention and crisis management. It acts as a mediator in controversies threatening international security, such as the Iranian and North Korean nuclear programs, or in the Middle East quartet. In these situations, the EU can play a leading role as a balance, or swing vote, among other big powers, i.e. by becoming more involved in support of one party's position. It had a special impact on the US position, for example, with respect to the Iraq war in 2003. While it was frequently said that the US was the locomotive behind the normative and institutional order embodied in the UN and reshaped in the post-cold war era, its military action against Iraq did serious damage to that order.¹¹ As a result of its actions in Iraq, the US lost its credibility as mediator in the eyes of certain Middle Eastern regional powers, even if, due to its enormous military and political power, its participation in the resolution of conflicts is essential.

At present, third generation peacekeeping operations (PKO) are performed by regional organizations with or without the express authorization of the UNSC.¹² There are also joint and hybrid UN operations with regional organizations, mainly to guarantee humanitarian assistance in internal conflicts. Regional organizations have coercive capacity or strategic authorization for the use of force based on Chapter VIII of the UN Charter.

¹¹ I. Johnstone, *US-UN Relations after Iraq: The End of the World (Order) As We Know It?*, 15(4) European Journal of International Law 813 (2004).

¹² The AU's Constitutive Act is based on the premise that sovereignty is conditional and is defined in terms of a state's willingness and capacity to provide protection to its citizens; the Constitutive Act acknowledges that the state has the principal responsibility for protecting its citizens. If a state fails to live up to these commitments, the AU has a right to intervene for human protection purposes through multilateral military force, if necessary. Article 4 (h) of the Constitutive Act declares that the Union has "the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances: namely war crimes, genocide and crimes against humanity". In February 2003, the AU Heads of State and Government added an amendment to Article 4 (h) that extends the right to intervene to situations that pose "a serious threat to legitimate order to restore peace and stability in the Member State of the Union upon the recommendation of the Peace and Security Council". Article 4 (j) of the Constitutive Act also indicates that a member state has the right to request intervention from the Union for the restoration of peace and security. In addition, consistent with the protection mandate and in contrast to the OAU, the AU does not require the consent of a state to intervene in its internal affairs in situations where populations are at risk. In March 2005, the AU's Executive Council lent further credence to the AU's endorsement of *The Responsibility to Protect* principles. "The Ezulwini Consensus" constitutes the common African position on the UN reform.

See also T. Kabau, *The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions*, 4(1) Goettingen Journal of International Law 49 (2012).

With the *Artemis* operation, the EU started its autonomous (i.e. without NATO) peacekeeping and crisis management operations, coercive (with the strategic authorization for the use of force by Chapter VII of the UN Charter) and outside European space. This operation had a concrete aim: supporting another international organization, normally the UN or African Union (AU).

In this vein, *EUFOR-Althea* was a 2004 stabilization operation where the EU replaced NATO, the organization that assumed the implementation of a no-fly zone obligation decided upon by UNSC resolution 816 (1992).¹³ In July 2004, the UNSC, by resolution 1551 under Chapter VII, acknowledged the substitution of NATO by the EU. Accordingly, the EU Council adopted a decision on 12 July 2004 on the deployment of *EUFOR-Althea* in Bosnia Herzegovina, with the main aim of supporting the implementation of the Dayton peace agreement.

The operation in Darfur was the second case of EU involvement in UN peacekeeping missions. This was a hybrid operation developed by the AU and the UN in Chad (UNAMID).¹⁴ The EU supporting action to the AU Mission continued until the end of December 2007, when its mandate ended and the African Union Mission in Sudan was handed over to the joint AU/UN peacekeeping operation in Darfur (UNAMID) in accordance with UN Security Council resolution 1769 (2007). A second resolution (1778, of 25 September 2007) approved a multidimensional presence in Chad and in the Republic of Central Africa. In order to provide support to the African Union and United Nations for the political and humanitarian crisis in Darfur (Sudan), the European Council on 15 October 2007 approved Common Action 2007/677/CFSP, establishing *EUFOR Chad /RCA* with Headquarters in Mont Valerien and a tactical HQ in Abeche (Chad), employing a force of maximum 3,700 troops.

Another example of EU involvement in a UN peacekeeping operation took place in the Democratic Republic of Congo (DRC). At the request of the UNSC, and using the military operation *EUFOR – RD Congo*, the EU intended to reinforce the UN Monitoring mission and the Congolese Armed Forces. On 25 April 2006, the Security Council adopted resolution 1671 (2006), authorising the temporary deployment of a EU force to support the United Nations Mission in the Democratic Republic of Congo (MONUC) during the period encompassing the elections in the country. This military operation was conducted in full agreement with the authorities of the DRC and in close coordination with them and MONUC.

Finally, *EUNAVFOR – Atalanta* is an operation initially aimed to protect the humanitarian assistance provided by the World Food Program to Somalia. Initially,

¹³ Res. 816 (1992) authorized all member states, on a national basis or through a regional organization, to adopt all necessary measures in air space over Bosnia Herzegovina to implement the obligations of a no-fly zone. UNSC Resolution 1575/2004 was the basis for EUFOR-Althea. The Mission was prologued by UNSC resolutions 1639/2005, 1722/2006, 1785/2007, 1845/2008, 1895/2009, 1948/2010, 2019/2011 and 2074/2012, under the Chapter VII of the UN Charter.

¹⁴ The African Union/UN Hybrid operation in Darfur, referred to by its acronym UNAMID, was established on 31 July 2007 with the adoption of Security Council resolution 1769.

UNSC resolution 1816 (2008) under Chapter VII authorized states that collaborated with the Federal Transitional Government to enter into Somali territorial waters (200 miles) to combat piracy or repress, by the use of force, acts of piracy, but not to rescue people by force of arms nor use force except for self-defence. Next, UNSC resolution 1838 (2008) approved the active participation in the fight against piracy in High Sea coast off Somalia by warships and military aircraft, which implies the use of force against acts of piracy, and not only in Somalia jurisdictional waters.

As a reaction, the EU Council Decision 2008/918/CFSP approved the launch of *EUNAVFOR Operation Atalanta*.¹⁵ Its mandate includes authorization for the use of force when necessary. It has the Operational Headquarter in Northwood and a tactical Headquarter on board. Subsidiary to *Atalanta* is the training mission in Somalia (May 2010) – EUTM Somalia – to train security forces for the Federal Transitional Government (SSR operation). Recent EU missions in South Sudan (EUAVSEC South Sudan) and in Mali (EUTM Mali) develop UNSC resolutions for improving institutional building and to provide assistance, expertise, training and capacity-building support to the Malian Army and Security Forces, respectively.¹⁶

Title V of the ToL codifies EU actions in military crisis management. According to Art. 42 and 43, Petersberg Missions will guarantee peacekeeping, conflict prevention, and international security reinforcement, always in accordance with UN Charter principles.

Based on the experiences described above, we can infer the importance of the EU's role as a regional organization in close cooperation with or implementation of UNSC resolutions, acting as peacekeeper or conflict prevention and crisis management actor.

4. IMPLEMENTATION OF UNSC RESOLUTIONS. LIMITS TO SECURITY COUNCIL ACTIONS AND THE INCREASED ROLE FOR REGIONAL ORGANIZATIONS

The last question which requires analysis in order to achieve a global understanding of the EU as a regional organization refers to the implementation, at the EU level, of the UNSC resolutions as needed. The legal paradox is the EU's competence to implement coercive measures imposed by the Security Council while not being an official Member State of the UN. This situation is similar to the one which occurred under GATT after the assumption by the European Communities of exclusive trade competences.

¹⁵ Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta); previously, Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.

¹⁶ Council Decision 2012/312/CFSP of 18 June 2012 on the EU Aviation Security CSDP Mission in South Sudan (EJ L 158/2012) following UNSC Resolution 1996 (2011), adopted on 8 July 2011. Council Decision 2013/34/CFSP of 17 January 2013 on a EU Military Mission to contribute to the training of the Malian Armed Forces (EUTM Mali) following UNSC Resolution 1996 (2011), adopted on 8 July 2011.

The application of UN Security Council resolutions in the security and defence field needs a CFSP common position and the approval of a regulation on the basis of the former Art. 60, 301 and 308 of the Treaty establishing European Community in order to be effective within the Union. Today, the legal basis for the adoption of such measures is Art. 215 of the TFEU.¹⁷

We will refer here to the resolutions adopted to fight terrorism. The most important resolutions from the UN Security Council adopting measures against the Taliban and banning exports of certain goods and services to Afghanistan were resolutions 1267 (1999), 1333 (2000) and 1353 (2001).¹⁸

A judicial action for annulment of the EU rules implementing the UNSC resolutions may be commenced by an individual affected by such regulations, claiming its invalidity on the basis of non-compliance with human rights requirements. This happened when M. Kadi, affected by those measures, went before the European Court of Justice (ECJ). The *Kadi* case (2008) forced the ECJ to tackle directly the issue of the efficacy within the EU of a UNSC resolution imposing sanctions on an individual supposedly connected with terrorist groups. The first judgment, by the Tribunal of First Instance (TFI),¹⁹ declared that Security Council resolutions engaged the EU, which has to adopt all necessary measures for Member States to implement them. Its argument was based on Art. 103 of the UN Charter, according to which the Charter prevails over constitutive treaties, except for *ius cogens*. This was clearly an interpretation from the international law point of view. However, the ECJ²⁰ annulled the TFI judgment and considered that fundamental rights (in this case the right to be heard, to an effective judicial review, and to respect for property) should prevail over Security Council resolutions.

Some scholars argued that this judgment goes against UNSC authority. However, it is also possible to understand it as a motivation to the Security Council to adopt mechanisms to compensate for the lack of legal protection for individuals faced with

¹⁷ Article 301 TCE referred to the adoption of economic measures against third States in order to fulfill CFSP economic sanctions; article 60 was about Council adoption of economic sanctions; and article 308 TCE was the residual competence clause. Article 215 of the ToL states that CSDP can provide, by decision, for the interruption or reduction of economic and financial relations with third countries; the Council should then adopt the necessary measures, by qualified majority; as well if the restrictive measures are against a natural or legal person.

¹⁸ EU Council approved common position 1999/727/CFSP implementing the first UNSC resolution, and common position 2001/154/CFSP and regulation 467/2001.

¹⁹ Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005. *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*. Case T-315/01.

²⁰ Judgment of the Court (Grand Chamber) of 3 September 2008. *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*. This decision analyzes Common Position 2002/402/CFSP and Regulation (EC) No 881/2002, adopting measures against persons and entities included in a list drawn up by a body of the United Nations.

A final judgment was adopted by the General Court on 30 September 2010. *Yassin Abdullah Kadi v European Commission*, Case T-85/09.

restrictions on their fundamental rights.²¹ Otherwise, one should ask what would be the EU's legal position if, in implementing a UNSC resolution, it violates international law norms contained in the Charter and part of peremptory norms such as those protecting the fundamental human right to defence before the courts in legal procedures.

CONCLUSIONS

From the above-presented analysis we can conclude that the EU is today a regional organization in the sense of the chapter VIII of the UN Charter, and acting under Article 51 of the Charter, as it contributes to UN aims and to the implementation of its resolutions aiming at maintenance of international peace and security and, since the entry into force of the ToL has a right to collective defence/ mutual assistance. The Security Council frequently uses the EU for the enforcement action under its authority.

The EU role within the UN can be improved by the mutual defence clause introduced by the Treaty of Lisbon if, following the demand from the European Parliament, the High Representative adopts measures for the rapid implementation of the clause in order to be ready to react to any eventual request of a Member State.

As an enforcement agency, the EU is under the authority of the UNSC. However, we cannot deny the existence of legal and political controversies with respect to the legitimacy of Security Council actions on some occasions. In particular, following the 9/11 attacks the practice of the United States to use the United Nations to shape global norms and innovative approaches to peace and security, such as the self-defense action in Afghanistan and Security Council resolution 1373 on terrorism, has increased. For some states, this is seen not as an attempt to adapt existing norms and institutions to new threats, but rather to tear them down and start again from scratch. The obvious result is a damaged UN Charter-based legal order. But European – and American – interests are embedded in this order; hence the importance of its recovery.

By refusing the implementation of a UNSC resolution that fails to protect human rights, the EU can contribute to the recovery of the UN Charter legal order and be a political force to be reckoned with in the Security Council.

Today the EU is trying to elaborate the European Global Strategy in order to develop an external action perspective. This perspective has to do with power, influence, and the possibility for the EU to play a leading role in accordance with its values and interests. The EU's call to the attention of the Security Council issues concerning the content and procedures for implementing its resolutions imposing sanctions for terrorism can be a way to promote and reinforce its normative role as a leading actor distinct from the US, and one which acts in consistence and coherently with respect to European proclaimed values.

²¹ J.M. Pérez de Nanclares, *Unidad y pluralismo en la jurisprudencia del Tribunal de Justicia de la Unión Europea. Hacia un refuerzo de la autonomía del Derecho de la Unión Europea frente al Derecho internacional*, in: A.J. Rodrigo & C. García (eds.), *Unidad y pluralismo en el Derecho internacional público y en la comunidad internacional. Coloquio homenaje a O. Casanovas*, Tecnos, Barcelona: 2009, pp. 254-285.

Dagmar Richter*

JUDICIAL REVIEW OF SECURITY COUNCIL DECISIONS – A MODERN VISION OF THE ADMINISTRATION OF JUSTICE?*

Abstract

The Security Council's new activism, particularly in the field of "individualized sanctions", gives impetus to the debate on whether, and to what extent, the most powerful organ of the UN should be subject to judicial review. This article analyses and categorizes the various strategies already employed in international courts, such as, e.g., "denial of justice", incidental control, full review of implementing acts, the "as-long-as" rule, and various instruments of judicial self-restraint. The author suggests that "jurisdiction", understood as encompassing the procedural aspects of the problem, should be regarded as a "door-opener" to judicial review. As regards its substantive dimension, the existence of primary responsibilities on both sides (the Security Council and the judiciary) should be taken into consideration. The author demonstrates that the principle of loyalty and cooperation means, on the one hand, respect by the Security Council for judicial review from inside of the UN system, and on the other hand, respect for Security Council prerogatives from external courts. Taking into account the evolution of a duty of loyal cooperation between different systems within the global legal order, and in expectation that the ICJ will defend the international rule of law, we may speak of a "modern vision of the administration of justice."

INTRODUCTION

The debate on whether Security Council ("SC") decisions¹ should be reviewable by courts involves fundamental aspects of adjudication in the global perspective: who is the "ultimate warrantor of legitimacy" in security matters; should it be a primarily "political" or rather a primarily "judicial" body? Is the SC part of a constitutional system

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¹ The term "decisions" relates to binding decisions in the sense of Articles 25 and 48 of the U.N. Charter, to be carried out by the Member States of the United Nations.

of checks and balances, or rather a hierarchical collective security scheme subject to “realpolitik”?²

It is common knowledge that SC decisions cannot be challenged directly (principally), but only in a “more subtle” manner.³ At least, there is no procedure in United Nations law *aiming at* the delivery of a declaratory judgment on the legality, let alone the annulment, of SC resolutions. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice (“ICJ”) were clearly rebuffed.⁴ Even today, the Member States of the United Nations do not show much enthusiasm concerning the empowerment of international jurisprudence and the implementation of the rule of law in the global legal sphere. This reluctance is based on the general demurrers used by states with regard to all matters of national security as well as “political questions” (“*actes de gouvernement*”),⁵ matters which are typically affected by SC decisions. Whenever international jurisprudence has been established by international treaties, states have sought to insert exclusion clauses or to declare reservations in order to except matters of national security from judicial review. Additionally, the traditional concept of the prerogative of the executive in security matters, which is even more relevant in the international sphere than in the national one, has intensified that retentiveness.⁶ All of these general caveats against judicial review have been relayed, to greater and lesser degrees, to the Security Council.

Whilst the issue of second-guessing the SC did not play an important role in the early years of the United Nations, since its decisions were effectively paralyzed by the veto right of its permanent members, the relevance of SC decisions, with respect to their number, intensity and concreteness, has dramatically increased since the overcoming of the East-West conflict. Since the SC has started to establish administrative post-war structures within the states and to individualize its sanction measures by resorting to “targeted” or “smart” sanctions, the question of judicial review has become ever more urgent.⁷ What may be still acceptable in inter-state affairs can become intolerable in individual cases. Importantly, issues that are politically difficult if not impossible

² See J. E. Alvarez, *Judging the Security Council*, 90 American Journal of International Law 1 (1996), pp. 2 and 7.

³ See generally, J. Herbst, *Rechtskontrolle des Sicherheitsrates*, Peter Lang, Frankfurt: 1999; B. Lorinser, *Bindende Resolutionen des Sicherheitsrates*, Nomos Verlagsgesellschaft, Baden-Baden: 1996; B. Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrates*, Duncker & Humblot, Berlin: 1996.

⁴ *Certain Expenses of the United Nations*, ICJ Advisory Opinion of 20 July 1962, ICJ Rep. 1962, p. 168. See also Alvarez, *supra* note 2, pp. 14–15, with detailed references.

⁵ E.g., *Nixon v. United States*, U.S. Supreme Court, 13 January 1993, 506 U.S. 24 (1993).

⁶ Cf., H. Krieger, *Zur gerichtlichen Kontrollpflicht bei sicherheitspolitischen Entscheidungen im Mehrebenensystem*, 124 Deutsches Verwaltungsblatt 1469 (2009), pp. 1469–1472, with further references.

⁷ Cf., B. Fassbender, *Review Essay: Quis judicabit? The Security Council, Its Powers and Its Legal Control*, 11 European Journal of International Law 219 (2000), p. 221; A. Reinisch, *Should Judges Second-Guess the UN Security Council?*, 6 International Organizations Law Review 257 (2009), pp. 261–263; F. Magnusson, *Targeted Sanctions and Accountability of the United Nations Security Council*, 13 Austrian Review of International and European Law 23 (2008).

to judicially review between states can be more readily subjected to judicial review when they touch upon individuals. Thus, in considering the expansion of potential applications, the term “judicial review” ought to be understood broadly in order to include the plenitude of methods by which SC decisions can be challenged in various judiciaries.⁸

Two aspects ought to be distinguished. The first is whether the ICJ is precluded from dealing with a case of which the SC is actively seized. This question has been answered in the affirmative by the ICJ in the *Tehran Hostages* and *Lockerbie* cases, where the ICJ acknowledged that the simultaneous exercise of their functions, by the SC on the one hand and itself on the other, was in conformance with both the UN Charter as well as the ICJ Statute.⁹ There is no such applicable rule like Art. 12 of the UN Charter, which prohibits the General Assembly from dealing with a matter while the SC is seized with the same. Art. 103 of the UN Charter cannot be interpreted analogously, even though it may contribute to the issue. The second essential question, which remains unanswered, is whether the binding effect of SC decisions can be challenged in court if the SC exceeds the powers accorded to it by the UN Charter? And, if so, what would be the consequence of such a finding?¹⁰

It is widely acknowledged today that with regard to the procedural (Art. 27(3)) and substantive (Art. 24(2)) requirements of the UN Charter, the Security Council is not *legibus solutus* (above the law).¹¹ It is not so clear, however, what the exact range of any such legal constraints placed on it might be, how they can be demarcated, and by whom. And although the possibilities of international jurisprudence remain limited, international judicial bodies are not impotent *vis-à-vis* the Security Council. For example, although within the framework of contentious jurisdiction one state can bring before the ICJ a legal dispute only against another state, but not against the SC (Art. 34 of the ICJ Statute), such inter-states disputes may involve questions concerning the legality of a SC decision, which could then be addressed indirectly or incidentally. As concerns advisory jurisdiction, the Security Council itself, the General Assembly, or other organs of the UN or specialized agencies may request an advisory opinion on a legal question (Art. 65 ICJ Statute) which, again, could involve questions relating

⁸ A more narrow understanding is advised by A. Tzanakopoulos, *Disobeying the Security Council, – Countermeasures against Wrongful Sanctions*, Oxford University Press, Oxford: 2011, p. 103: judicial review by a court must yield a binding result; and p. 107: as a “weapon of deterrence” its regular availability must be guaranteed.

⁹ See A. Peters, in: B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations, A Commentary*, (3rd ed.), vol. I, Oxford University Press, Oxford: 2012, Article 24, pp. 776-770 (MN 26-27), with references.

¹⁰ See Reinisch, *supra* note 7, p. 259.

¹¹ Case IT-94-1-T, *Tadić*, ICTY, Appeals Chamber, Decision on the Defence Motion on Interlocutory Appeal on Jurisdiction of 2 October 1995, reprinted in I.L.M. 25 (1996), 35, para. 28. For a comprehensive view of the procedural and substantive “constitutional restraints” of the SC, see T. Giegerich, “A Fork in the Road” – *Constitutional Challenges, Chances and Lacunae of UN Reform*, 48 German Yearbook of International Law 29 (2005), pp. 59 et seq.

to the legality of a SC decision. In this procedure the issue could even be addressed directly, notwithstanding the fact that an “advisory” opinion is not binding. This is why we cannot speak of judicial review in the narrow sense, although we should note at this point that the ICJ can be confronted with the question of the legality of SC resolutions in both types of procedures outlined above.

It remains to be clarified, however, whether and to what extent the ICJ may examine the legality of SC decisions that only contribute to the outcome of a certain procedure. Though a court cannot automatically claim authority to exercise *incidental control*, with all the attendant consequences, incidental control must be considered justified if the court cannot exercise its proper functions unless the respective issue – a *preliminary question* – be answered. In principle, a judicial organ must always have competence to determine whether or not its own jurisdiction is well-founded.¹² This authority can be considered a “natural” *implicit or inherent competence* emanating from the implied powers of the court.¹³ The crucial question then will be whether the ICJ may, in an egregious case, deny an illegal SC decision applicability, or even validity.

Still another issue relates to the appropriate standard of judicial control applicable in such cases, particularly if it comes to an examination of the legality of SC decisions. Is there anything like a political question doctrine in international jurisprudence? The latter cannot be answered without taking into account the specific functions of the organs and the nature of the international organization(s) concerned. Whilst the SC bears “primary responsibility for the maintenance of international peace and security” (Art. 24(1) of the UN Charter), the ICJ shall be the “principal judicial organ of the United Nations” (Art. 92 of the UN Charter). Both spheres can overlap if a judicial finding touches upon the maintenance of international peace and security as interpreted by the SC. In such a case the relationship between both organs within the UN system is at stake. The matter becomes even more interesting if a judicial organ outside of the UN, e.g., the European Court of Justice, finds itself in a position to decide whether a SC decision underlying a certain European act conforms to the exigencies of international law.

¹² E.g., Art. 19(1) of the Rome Statute of the International Criminal Court. The ICTY speaks of “*competence-competence*” in this context: ICTY Appeals Chamber in *Tadić*, *supra* note 11 (and 30), para. 18. See also S. Zappalà, *Reviewing Security Council Measures in the Light of International Human Rights Principles*, in: B. Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council*, Oxford University Press, Oxford: 2011, p. 177, note 18.

¹³ Cf., Tzanakopoulos, *supra* note 8, 96: Internal review (by one organ over another within the same legal order) of compliance with a superior law (e.g., constitutional law) has been, since the U.S. Supreme Court Judgment in *Marbury v. Madison* (5 U.S. 137 [1803]), an inherent power of the Court. For the opposite position (that explicit authorization is needed), see Tzanakopoulos, p. 102, together with references. According to Alvarez (*supra* note 2), pp. 4 et seq., the *Marbury* analogy is misleading. The same author (at p. 34) mentions an “evolutionary potential inherent in the creation of an interpretative body in a constitutive charter”.

1. JUDICIAL PRACTICE WITHIN THE U.N. AND RELATED SYSTEMS

1.1. Practice of the ICJ

1.1.1. Advisory Opinions

1.1.1.1. No Procedure – No Review: *Certain Expenses of the United Nations* (1962)

The ICJ, in its Advisory Opinion of 1962 on *Certain Expenses of the United Nations*, addressed for the very first time the issue of examining the legality of SC decisions. In this early opinion it argued mainly by using a comparison between the international and the national legal orders. In contrast to the legal systems of many states, the UN system was considered to lack a (specific) procedure which could have allowed for the determination of the validity of acts of the organs within the structure of the UN. The ICJ concluded that “each organ must, in the first place at least, determine its own jurisdiction.”¹⁴

The ICJ, by mainly resorting to the lack of a procedure, can be criticized for having chosen a very formalistic procedural approach, thereby ignoring the potential range and substance of Art. 96(1) of the UN Charter. It could have argued instead that the validity of an act of an organ of the UN can be a “legal question” and, consequently, must be considered and decided – at least in the form of an advisory statement. Even less convincing is the Court’s conclusion, according to which any organ, “in the first place at least” must delineate own jurisdiction. What would be the consequence if one organ of the UN would extend its own jurisdiction at the expense of another organ? And since it mentioned the “in the first place at least”, what would the ICJ have suggested to apply in the second place, and under what circumstances would the ‘second place option’ be considered? As subsequent practice demonstrates, the pure doctrine of *Certain Expenses* was not upheld for long.

1.1.1.2. A Roadmap to Incidental Control: *Namibia* (1971)

A more courageous position was taken by the ICJ in its Advisory Opinion of 1971 relating to the *Legal Consequences of the Continued Presence of South Africa in Namibia*. The relevance of this case follows from the fact that the General Assembly, as well as the Security Council, had adopted several Resolutions declaring the continued presence of South Africa in Namibia illegal, and instructing it to withdraw. Consequently, the question came up whether these resolutions were in conformity with the UN Charter. It was contended in the proceedings that the ICJ should not assume the power of judicial review of an action taken by other principal organs of the UN without a specific request to that effect, nor should it act as a court of appeal from their decisions.

¹⁴ *Certain Expenses of the United Nations*, International Court of Justice, Advisory Opinion of 20 July 1962, ICJ Rep. 1962, p. 151 (at p. 168).

The ICJ came to the conclusion that it would “consider these objections before determining any legal consequences arising from the resolutions.”¹⁵ Hence, it considered the validity of a SC resolution as a *preliminary question*, opening the door to incidental review. What is more, the ICJ finalized its deliberations on validity with a remarkable statement on the binding character of SC resolutions, concluding that, as the respective decisions of the Security Council were “adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25”, they were “consequently binding on all States Members of the United Nations.”¹⁶ What we see here is a combination of all pertinent norms and principles in order to make the binding effect of SC decisions dependent on the fulfillment of certain substantial requirements. The ICJ delivered an undisputed main message (SC decisions are “binding”) in order to place, by adopting the method of conjoining norms, certain conditions on it, namely the duty to observe the purposes and principles of the U.N. Charter (Art. 1 and 2 of the UN Charter), and to respect Art. 24 of the UN Charter delimitating the functions and powers of the Security Council. As these conditions were considered to be fulfilled in the case before the court, the strategy of the ICJ did not cause too much controversy or excitement.

Art. 25 of the UN Charter, relating to the binding character of decisions of the SC, plays the most important role in this context: so long as the SC acts in conformity with the material and formal rules mentioned above, its decision shall be binding on all States Members of the UN. However, the same passage can be deemed to establish that, *vice versa*, SC decisions shall not be binding if they violate “the purposes and principles of the Charter”, or exceed the powers accorded to the SC by Arts. 24 and 25. In other words, the ICJ has attributed to itself the *final say on the binding character* of SC resolutions, which can be considered as a *light version of annulment*. While the principles of the Charter represent the material or substantive side of the ICJ’s standard of incidental review, Art. 24 relates to the competences of the SC, i.e. whether the SC has acted *ultra vires*. Both standards are interlinked with each other, as Art. 24 itself refers to the “Purposes and Principles of the United Nations” which the *Travaux Préparatoires* considered the “sole reserve” to the wide freedom of judgment that should be left to the SC.¹⁷ It should be noted, however, that taking into account the broadness of the purposes and principles of the UN, substantive constraints on the Chapter VII

¹⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia – Notwithstanding Security Council Resolution 276* (1970), ICJ, Advisory Opinion of 21 June 1971, Rep. 1971, p. 16, para. 89: “Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.”

¹⁶ *Ibidem*, para. 115.

¹⁷ Case IT-94-1-T *Tadić*, ICTY, Trial Chamber, Defence Motion on Jurisdiction, Decision of 10 August 1995, para. 7 (with reference).

powers of the Security Council cannot be considered very realistic. It is not surprising that until the present time the ICJ has never defied the SC in this way in any of its judgments or opinions.

Interestingly, the ICJ, in its Advisory Opinion on *Namibia*, did not refer to the concept of judicial self-restraint. Instead it mentioned that the SC was acting in the exercise “of what it deemed to be its primary responsibility,”¹⁸ and concluded that the reference in Art. 24(2) of the UN Charter to specific powers of the SC under certain Chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1.¹⁹ As the latter vests in the Security Council “primary responsibility for the maintenance of international peace and security”, it is hard to imagine any action of the SC that would not, under any circumstances, contribute to the maintenance of international peace and security. This applies all the more as the Charter itself is based on the conception that peace and security are dependent on a multitude of factors including, *inter alia*, good governance, economic wealth, and human rights.

1.1.1.3. General Assembly v. Security Council: *Kosovo* (2010)

The “Namibia Principles” were confirmed by the ICJ in its Advisory Opinion on the *Declaration of Independence with Respect of Kosovo* in 2010.²⁰ The request by the General Assembly for an Advisory Opinion in this case created the risk of the ICJ ruling upon SC Resolution 1244 (1999). In this resolution the SC had instructed the parties to the conflict to engage in “a political process” that, only in the final stage of settlement, could result in the transfer of authority to Kosovo. Kosovo, however, declared its independence immediately.

The ICJ, in its Advisory Opinion, not only confirmed its own competence “to consider the interpretation and legal effects of such decisions,”²¹ but also strengthened the General Assembly’s capacity to challenge decisions of the SC via a request for an advisory opinion. As the ICJ put it:

Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.²²

This statement addresses the institutional side of the incidental control mechanism, because it is the General Assembly that, in the first instance, may have an interest in challenging decisions of the Security Council, even though this may be conceived as a

¹⁸ ICJ in *Namibia*, *supra* note 15, para. 109.

¹⁹ *Ibidem*, para. 110.

²⁰ *Unilateral Declaration of Independence in Respect of Kosovo*, ICJ, Advisory Opinion of 22 July 2010, Rep. 2010, p. 403.

²¹ *Ibidem*, para. 46.

²² *Ibidem*, para. 47.

“vote of no confidence.”²³ As the General Assembly represents the whole community of states, the ICJ, in its *Namibia* Advisory Opinion, revalued the principle of equality of states *vis-à-vis* the privileged position of those members sitting in the Security Council.

1.1.2. Contentious Procedure: A Missed Opportunity in *Lockerbie* (1992)

Decisions of the SC can also be challenged in contentious cases submitted to the Court by one state against another. As the ICJ later clarified, it considers the interpretation and legal effects of such decisions both in the exercise of its advisory jurisdiction, and in the exercise of its contentious jurisdiction.²⁴ However, as early as in the *Lockerbie* Case the question came up whether the Provisional Measures requested of the Court by Libya could undermine the essential messages of SC resolution 748 (1992). Libya at that time objected to such concerns, arguing that “the risk of contradiction between the resolution and the provisional measures (...) does not render the Libyan request inadmissible, since there is in law no competition or hierarchy between the Court and the Security Council, each exercising its own competence.”²⁵ This argumentation reminds us very much of the statement of the ICJ in *Certain Expenses*, according to which “each organ must, in the first place at least, determine its own jurisdiction.”²⁶ It can be doubted, however, whether the issue as framed actually related to “hierarchy”, or instead to the inter-organizational duties of different organs in the same international organization, including the concept of judicial self-restraint. Unfortunately, there was no need for the Court to definitively determine the legal effects of Security Council resolution 748 (1992).²⁷ It should be noted that even in the event the ICJ would ever deny a SC decision binding effect, its own judgment would be binding only on the parties of the contentious case.

1.2. Practice of International Criminal Tribunals

The issue whether, and to what extent, a judicial organ may examine SC decisions has also been taken up by courts other than the ICJ. With respect to International Criminal Tribunals the issue arises in a different light, because such courts have been established mostly by SC decision. Accordingly, any procedure undertaken by such a court can raise the fundamental question of the legality of the establishment of the Tribunal, which in turn leads to a situation whereby an international body created by the SC (the Tribunal) has to examine the decision of the SC relating to its own creation.

²³ Fassbender, *supra* note 7, p. 223.

²⁴ ICJ in *Kosovo*, *supra* note 20, (and 1.1.1.3 herein), para. 46.

²⁵ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.)*, ICJ, Request for the indication of Provisional Measures, Order of 14 April 1992, Rep. 1992, pp. 50 et seq., para. 39.

²⁶ ICJ, *supra* note 14 (with reference).

²⁷ ICJ, *supra* note 25, para. 43. Shahabuddeen, J., sep. op., Rep. 1992, p. 142, formulated the relevant questions concerning potential limits to the Council's power.

This appears to be problematic, because an International Criminal Tribunal, in contrast to the ICJ, is not specifically entrusted with the function of a “principal judicial organ of the United Nations” (Art. 92 of the UN Charter). On the other hand, it has to be admitted that Criminal Tribunals are commonly explicitly charged to examine their “jurisdiction”.²⁸ If a SC decision establishing a particular Tribunal ought to be set aside because of a serious violation of the applicable law, then the Tribunal lacks jurisdiction. It is, however, not very likely that any International Criminal Tribunal would end its own existence by making such a “suicidal finding”. The most relevant cases were delivered by the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the Special Tribunal for Lebanon (“STL”), though the International Criminal Court may also be affected.²⁹

1.2.1. Subjecting the Security Council to its “Constitutional Framework”: The ICTY in *Tadić* (1995)

The ICTY had to deal with the issue in the *Tadić* case, when the Defence argued that the establishment of the International Tribunal by SC resolutions 808 (1993) and 827 (1993) violated international law.

In its Decision on the Defence Motion on Jurisdiction of 1995, the ICTY Appeals Chamber made it clear that it regarded the issue as one of “*primary jurisdiction*” and not of “*incidental jurisdiction*”³⁰. On the other hand, it spoke of the “pivotal role” of the SC, which exercises a “very wide discretion” under Art. 39 when determining the existence of a breach of or a threat to the peace.³¹ This wide discretion of the SC was then considered by the Appeals Chamber in the context of the system as a whole. Inasmuch as the UN Organization was established by a treaty, which serves as a “*constitutional framework*”, the SC itself should be “subjected to certain constitutional limitations”, however broad its powers under the constitution might be. Its powers could not go beyond the limits on the jurisdiction of the Organization at large, nor compromise the internal division of power within the UN. Concerning the applicable standard of interpretation, the Appeals Chamber, having regard to Article 39 of the UN Charter, distinguished between an “act of aggression”, which it considered “more amenable to a legal determination”, and a “threat to the peace”, which it considered to be “more of a political concept”. The Appeals Chamber made it very clear however that any determination that there exists a threat to the peace must remain within the limits of the Purposes and Principles of the Charter.

The decision of the Appeals Chamber of the ICTY is one of the most expressive examples of the advancement of constitutionalism in international law. Whereas the Trial Chamber had very anxiously refused to conduct any judicial review in the

²⁸ *Supra* note 12.

²⁹ See generally, J. Pichon, *Internationaler Strafgerichtshof und Sicherheitsrat der Vereinten Nationen*, Springer-Verlag, Berlin Heidelberg: 2011.

³⁰ ICTY in *Tadić*, *supra* note 11, para. 21.

³¹ *Ibidem*, para. 28.

context of Art. 39 of the UN Charter, the Appeals Chamber dispelled its doubts by referring to the constitutional character of the Charter and to “a modern vision of the administration of justice.”³² This approach has found followers in other International Criminal Tribunals,³³ but it has also evoked critiques, e.g., in the Special Tribunal for Lebanon (STL).

1.2.2. Denying Justice: The Special Tribunal for Lebanon in *Ayyash* (2012)

In marked contrast to the *Tadić* decision of the ICTY, the STL, in its *Ayyash* decision, (2012)³⁴ came to the conclusion that “the Security Council’s determination as to the existence of a threat to international peace and security is not subject to judicial review”, and that the same applies “to the Security Council’s decision regarding the measures it employs once it has found that such threat exists.”³⁵ The Appeals Chamber in the *Ayyash* case based its holding mainly on the argument that the Statute of the Tribunal does not provide an explicit source empowering the STL to review a SC decision, but it also resorted to the distinct role and nature of the STL, which had been established by the SC as an independent institution outside of the UN system. While it explicitly acknowledged the competence of the ICJ to pronounce itself incidentally on the legality of SC decisions, it denied itself the same competence by holding that the authority of the STL “must necessarily be much more limited than that of the ICJ.”³⁶ In order to underpin this conclusion, the STL Appeals Chamber warned of the consequences of the opposite view: If the STL were entrusted with the power to potentially invalidate its own legal basis (SC Resolution 1757 [2007]), this power could ultimately result in the discontinuance of all proceedings in front of the Tribunal and undermine the fundamental decision of the SC on the establishment of a Special Tribunal.³⁷ The Appeals Chamber also referred to the difficulty of establishing any meaningful standard of review with regard to the prerequisites for a finding of what precisely constitutes a breach of the peace or a threat to the peace (Art. 39 of the UN Charter). As there exists a “plethora of complex legal, political, and other considerations”, such a decision must be left to the wide margin of discretion of the SC.³⁸

³² *Ibidem*, para. 6

³³ Case SCSL-2004-15-AR72(E) *Kallon et al.*, *Special Court for Sierra Leone*, Decision on Constitutionality and Lack of Jurisdiction of 13 March 2004, para. 37; see also Case ICTR-96-15-T *Kanyabashi*, *International Criminal Tribunal for Rwanda*, Decision of the Defence Motion on Jurisdiction of 18 June 1997, paras. 19-22. See also Virginia Morris, *Prosecutor v. Kanyabashi – Decision on Jurisdiction*, in: 92 American Journal of International Law 66 (1998).

³⁴ Case STL-11-01/PT/AC/AR90.1 *Salim Jamil Ayyash et al.*, STL Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal” of 24 October 2012.

³⁵ *Ibidem*, para. 35.

³⁶ *Ibidem*, paras. 36, 39.

³⁷ *Ibidem*, para. 42.

³⁸ *Ibidem*, para. 51.

This denial of review by the STL has been criticized by some authors as being motivated less by the law than by timidity and fear.³⁹ Indeed, one may question whether the lack of a specific procedure or explicit empowerment,⁴⁰ or the wide margin of appreciation granted to the SC's decisions, constitute arguments which preclude all forms of judicial review, including incidental control.⁴¹ As Judge Baragwanath put it, the Tribunal is the creation of the Security Council, but not its mere creature.⁴² The same applies to the difficulty of establishing a meaningful standard of scrutiny in a highly political matter. Such a difficulty cannot constitute the basis for a total denial of justice, but calls for an adequate standard of scrutiny while at the same time respecting the principle of judicial self-restraint. As the STL explicitly distanced itself from the *Tadić* decision of the ITCY,⁴³ the *Ayyash* case leaves us with the question whether we are confronted with an isolated finding, or with a general trend towards a more deferential attitude vis-à-vis the SC.

1.3. Practice of the Human Rights Committee: *Sayadi and Vinck* (2008)

Focus on the legal limits of Security Council actions has become increasingly important since, following the political changes of 1989/90, a re-activated Security Council started to exercise global legislative functions, and in the exercise of such functions imposed *individualized sanctions* pursuant to Art. 41 of the UN Charter. A large number of the cases relevant to the issue of judicial review of SC decisions pertain to the obligation of member States to implement these measures, i.e. to freeze the assets or restrict the movement of specific individuals and organizations suspected of terrorist activities, whose names are put on a list annexed to a pertinent SC resolution.⁴⁴ In this context a series of decisions of Human Rights Treaty Bodies, as well as of domestic and regional courts, including the Courts of the European Union (the ECJ and the CFI)⁴⁵ have contributed to the discussion.

In the case of *Sayadi and Vinck v. Belgium*,⁴⁶ the UN Human Rights Committee (HRC) was charged with the examination of national implementation of the sanctions

³⁹ See e.g. J. E. Alvarez, *Tadić Revisited*, – *The Ayyash Decisions of the Special Tribunal for Lebanon*, 11 Journal of International Criminal Justice (2013, forthcoming).

⁴⁰ In this sense, the STL's reasoning was in accord with that of the ICJ in *Certain Expenses of the United Nations* (Section 1.1.1.1 herein).

⁴¹ See also Judge David Baragwanath, Separate Opinion to the Ayyash Decision of the STL, *supra* note 34, para. 47: "A criminal court does not require explicit authority in order to engage in a judicial review of conduct which, if unlawful, will provide a defence. The power to do so is inherent in the judicial office and in the court or tribunal seized of a case: ..."

⁴² Judge Baragwanath, Separate Opinion, *supra* note 34, para. 48.

⁴³ STL, *supra* note 34, para. 41.

⁴⁴ E.g., SC Res. 1267 of 15 October 1999; SC Res. 1452 of 20 December 2002.

⁴⁵ *Infra* 2.

⁴⁶ Communication 1472/2006 *Nabil Sayadi and Patricia Vinck v. Belgium*, HRC 22 October 2008, CCPR/C/94/D/1472/2006. For a description of the legal proceedings against the Belgian state in Belgium, see Magnusson, *supra* note 10, p. 57.

regime established by SC Resolution 1267 (1999). It rightly denied the relevance of Art. 46 of the Covenant on Civil and Political Rights (CCPR), which states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. As the HRC clarified, the case was not about the interpretation of the UN Charter, but rather about the compatibility with the Covenant of *national* measures taken by the State party in its implementation of the SC resolution.⁴⁷ On this basis, the HRC considered itself a “guarantor of the rights protected by the Covenant”, with a duty to consider to what extent the obligations imposed on State parties by SC resolutions may justify the infringement of the rights guaranteed by the Covenant.⁴⁸ Even though the obligation to comply with SC decisions adopted under Chapter VII of the Charter may constitute a “restriction” covered by the Covenant, Belgium had violated the Covenant, because the suspects’ names were transmitted to the Sanctions Committee prematurely, without waiting for the outcome of the criminal investigation in Belgium and even before they had been heard.⁴⁹ As the suspects turned out to be innocent, Belgium was found to be responsible for the presence of their names on the Sanctions Committee’s anti-terror list. Although it had no competence to remove their names from the list, it had a duty to endeavor to have these names removed, to provide them with compensation, and to make public the requests for their removal.⁵⁰

Though this view may appear to be rigorous, it should not be so considered. The HRC focused exclusively on State action that had not been demanded by the SC. Belgium alone was found to be blameworthy for not having complied with the requirements of due diligence to be applied with respect to its discretionary power. As in these circumstances the SC decision neither directly nor indirectly becomes a target of judicial review, the problem of cases like this lies ahead of a potential conflict between the judiciary and the SC.

2. CHALLENGING THE SECURITY COUNCIL FROM OUTSIDE OF THE SYSTEM: UN TARGETED SANCTIONS IN EUROPEAN COURTS

Targeted Sanctions imposed by the SC have increasingly become a challenge in the relationship between the European Union and the United Nations, as well as to the traditional habits of the SC. As the European Union has competence to implement the relevant SC resolutions with respect to freezing the assets of suspected terrorists,⁵¹ the then-EC legislature felt obliged to incorporate the relevant Chapter VII resolutions

⁴⁷ *Ibidem*, para. 10.3.

⁴⁸ *Ibidem*, para. 10.6.

⁴⁹ *Ibidem*, paras. 10.7 et seq.

⁵⁰ *Ibidem*, para. 12.

⁵¹ At the time of the judgment: Art. 60, 301, 308 EC Treaty; today: Art. 75, 215, 352 TFEU.

of the SC into Community law. It was here that the problem arose again. When plaintiffs, such as, e.g., *Kadi, Yusuf and the Barakaat International Foundation*,⁵² *SEGI*,⁵³ *Möllendorf*⁵⁴ or the *Organisation des Modjahedines*⁵⁵ asserted that their fundamental rights, namely their rights to property, free movement, defense, and effective judicial remedy were violated by an EC (EU) act of implementation, the question arose whether they in effect were challenging the legality of the underlying SC resolution. It should be noted that the judgments considered herein below represent judicial practice delivered *outside of* the UN system, and stand as well for the practice of *domestic courts*⁵⁶ ruling on implementing measures within the framework of their respective constitutional orders.

2.1. A “Limited Revolt” by EU Jurisprudence in *Kadi et al.*

2.1.1. The *Ius Cogens* Doctrine of the Court of First Instance (*Kadi* 2005)

In 2005 the European Union Court of First Instance (“CFI”)⁵⁷ came to the conclusion that, having special regard to Article 103 of the UN Charter, it had no authority to call into question, even indirectly, the lawfulness of resolutions of the Security Council.⁵⁸ However, it considered itself empowered to review, indirectly and exceptionally, the lawfulness of the resolutions in question with regard to *ius cogens*, which the CFI considered as a body of rules that constitute the “international public order”.⁵⁹ Though it was overruled by the ECJ (Grand Chamber) judgment of

⁵² *Infra* 2.1.

⁵³ Case C-355/04 P *SEGI et al. v. Council, Spain and U.K.*, ECJ (GC) 27 February 2007; *SEGI et al. v. 15 States of the European Union* (6422/02), ECHR 23 May 2002, Rep. 2002-V, available at <www.echr.coe.int>: Mere listing “may be embarrassing, but the link is much too tenuous to justify application of the Convention.”

⁵⁴ Case C-117/06 *Gerda Möllendorf and Christiane Möllendorf-Niehuus*, ECJ 11 October 2007, ECR I-8361.

⁵⁵ Case T-228/02 *Organisation des Mojahedines du peuple d'Iran v. Council*, CFI 12 December 2006, ECR II-4665.

⁵⁶ For a comprehensive overview of the disparate practice of national courts, see E. de Wet, A. Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 German Yearbook of International Law 166 (2002), pp. 166 et seq. For more on the practice of the U.K., particularly in the *Al Jedda* case, see Reinisch, *supra* note 7, pp. 281-283; also Magnusson, *supra* note 7, pp. 55-56. According to the House of Lords, Regina (on the application of *Al-Jedda*) v. *Secretary of State for Defence* (12 December 2007), UKHL 58, para. 39, the U.K. may implement SC resolutions, but must ensure that the detainees's rights under the European Convention on Human Rights are not infringed to a greater extent than is inherent in such detention. For the prevalence of core constitutional law principles, see Reinisch, *supra* note 7, p. 286 (with references to U.S., German and Italian law). For the U.S. practice, see Reinisch, *supra* note 7, pp. 269-271. For the Dutch Court Practice, e.g., in the case *Milošević v. the Netherlands*, see J. Pichon, *supra* note 29, p. 3319, note 993. For the Swiss Practice see *supra* note 61.

⁵⁷ Since 1 December 2009: “General Court”.

⁵⁸ Joined Cases T-315/01 *Yassin Abdullah Kadi v. Council and Commission*, and T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission*, CFI 21 September 2005.

⁵⁹ CFI in: *Kadi* 2005, *supra* note 58, para. 226.

2008,⁶⁰ the *ius cogens* doctrine represents a first layer of judicial practice and can still be considered influential as one of the possible approaches to dealing with SC decisions in courts.⁶¹ At first sight it seems reasonable to review a SC decision only exceptionally, if the alleged violation is intolerable, such as in the case of a violation of a peremptory norm. It also seems reasonable to relate that exceptional review to the violation of those norms of international law which are considered applicable to SC actions. However, the *ius cogens* standard is a make-or-break-standard, too narrow to produce any likelihood of judicial review, as can be inferred from the same *Kadi* decision in which the CFI postulated its use. Another objection relates to the fact that the *ius cogens* doctrine could not be based plausibly on any legal ground.⁶² The CFI's bare note concerning the international *ordre public* cannot settle the doubts.

2.1.2. The “So-long-as Formula” of the European Court of Justice (*Kadi* 2008)

The ECJ, in its Appeals Decision, started the relevant part of its deliberations with the statement that the EU (then the EC) is based on the rule of law.⁶³ It noted that an international agreement could not affect the allocation of powers fixed by the Treaties, that the European legal system enjoyed *autonomy from the U.N. system*, that within the European system exclusive jurisdiction was conferred to the European Court, and that such jurisdiction formed part of the very foundations of the Community.⁶⁴ From this starting point the ECJ proceeded to the more crucial parts of its judgment, alleging that it would apply its review of legality exclusively to the EU act intended to give effect to the SC resolution, and not to the latter as such.⁶⁵ It was not for the European judicature to review the lawfulness of a SC resolution, even if that review were limited to an examination of the compatibility of a particular resolution with *ius cogens*.⁶⁶

Considering the EU's “autonomous” system of sanctions, the ECJ found that measures incompatible with respect for human rights were not acceptable in the Community,⁶⁷ because obligations imposed by an international agreement like the UN Charter could not have the effect of prejudicing the “constitutional principles” of the European Treaties.⁶⁸ While the ECJ was not, to say the least, unaware of the need for respecting the main responsibility of the SC for the maintenance of peace and security, it denied the SC a “generalised immunity” from jurisdiction within the

⁶⁰ *Infra* 2.1.2.

⁶¹ *E.g.*, the Swiss Federal Court (Bundesgericht) adopted the CFI's *ius cogens* doctrine in 2007: BG, Case No. 1A 45/2007, Judgment of 14 November 2007 – *Youssef Nada v. SECO*, BGE 133 II 450.

⁶² See also Magnusson, *supra* note 7, p. 68.

⁶³ ECJ, Case Nos. C-402/05 P and C-415/05 P, Judgment of 3 September 2008 – *Kadi et al. v. Council of the EU et al.*, para. 281.

⁶⁴ ECJ in *Kadi* 2008, *supra* note 63, para. 282.

⁶⁵ *Ibidem*, para. 286.

⁶⁶ *Ibidem*.

⁶⁷ *Ibidem*, para. 284.

⁶⁸ *Ibidem*, para. 287.

internal legal order of the Community.⁶⁹ Instead, it pleaded for a quality-oriented form of judicial self-restraint by using the “so-long-as formula,”⁷⁰ to wit: *So long as*, under the UN system of sanctions, the individuals or entities concerned had an acceptable opportunity to be heard through the means of an administrative review forming part of the United Nations legal system, the European Court must not intervene in any way whatsoever.⁷¹ As the UN system did not comply with these requirements, the ECJ felt obliged to ensure “in principle the full review”, including review of an EU regulation which was designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the UN Charter.⁷²

What we see here is a “limited revolt”. The ECJ showed disobedience in its result, by partly annulling an EU regulation which was enacted to give effect to the resolutions adopted by the Security Council under Chapter VII of the UN Charter. The same applies to the somewhat obscure formulation “in principle the full review”.⁷³ On the other hand, the ECJ explicitly refrained from reviewing the SC as such by the standards of international law. With this strategy it eliminated the much criticized need to identify the *ius cogens* character of the relevant human rights guarantees as it followed from the CFI judgment.⁷⁴ However, in doing so the Court instead ran the risk of being criticized for not employing international law, but rather sticking to a pure European (regional) law perspective.⁷⁵ It seems artificial to review an EU regulation designed to give effect

⁶⁹ *Ibidem*, para. 321.

⁷⁰ For the introduction of this concept into the judiciary see with respect to the review of European law: *Internationale Handelsgesellschaft* (“*Solange I*”), Federal Constitutional Court (Germany), Judgment of 29 May 1974, Common Market Law Reports 2 (1974), 540; *Wünsche Handelsgesellschaft* (“*Solange II*”), Judgment of 22 October 1986, 3 Common Market Law Review 225 (1987).

⁷¹ ECJ in *Kadi* 2008, *supra* note 63, para. 319.

⁷² *Ibidem*, para. 326.

⁷³ An explanation is given, e.g., by Advocate General Bot in the new *Kadi* case, *infra* 2.1.3 (with note 82) in para. 59: “The Court’s use of the expression, ‘in principle [a] full review’, is therefore intended to emphasise the fact that the judicial review extends to all EU acts, whether or not they are adopted pursuant to a rule of international law, and that the review concerns both the external lawfulness of those acts and their internal lawfulness in the light of fundamental rights protected by EU law.” And, *ibidem*, para. 61: “The true position is that, (...) the Court expressed clearly and concisely the idea that its review, however broad it is, is full only in principle and that there are therefore possible exceptions. If there is an area in which an exception is appropriate, it is, (...) in the area of the fight against terrorism, which includes prevention, seen from the perspective of global coordination.”

⁷⁴ Reinisch, *supra* note 7, p. 275.

⁷⁵ See e.g., P. Palchetti, *Judicial Review of the International Validity of UN Security Council Resolutions by the European Court of Justice*, in: E. Cannizzaro, P. Palchetti, R. A. Wessel (eds.), *International Law as Law of the European Union*, Martinus Nijhoff Publishers, Leiden:2012, pp. 383-386: “hardly understandable why, in the presence of an internal act which implements the Security Council resolution, judicial review should be conducted only in the light of domestic standards” (*ibidem*, p. 385). Palchetti also speaks of “avoidance behavior” by the ECJ (p. 386). According to F. Francioni, *The Right of Access to Justice to Challenge the Security Council’s Targeted Sanctions: After-Thoughts on Kadi*, in: U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford: 2011, p. 920: the legal parameter employed by the ECJ “remains exclusively a European Union law parameter”, rather than the

to a SC decision without touching upon the latter. By such a restricted standard, EU courts will be deprived of the possibility to participate in the process of developing international law standards within the UN.⁷⁶ Even though the ECJ explained that the Charter of the United Nations neither imposed the choice of a particular model for implementation, nor prohibited “any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms,”⁷⁷ it did not really address the problem of the EU member states, being also U.N. member states, running the risk of non-compliance with Art. 25 of the UN Charter as a possible result of its judgment.⁷⁸

2.1.3. *Kadi* (2010, 2013 et seq.) – A Never-ending Story?

The “so-long-as formula” was willingly adopted by the General Court in the new *Kadi* case that was brought before it shortly after a new Regulation had been enacted. In 2010 the General Court annulled Commission Regulation (EC) No. 1190/2008 of 28 November 2008 insofar as the measure concerned Mr. Kadi.⁷⁹ Based on the judgment of the Court of Justice in *Kadi* (2008), it took the position that its review – “in principle [a] full review” – should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings were based.⁸⁰ According to the General Court “the principle of a full and rigorous judicial review” of such measures was all the more justified as they had a marked and long-lasting effect on the fundamental rights of the persons concerned.⁸¹

The Appeals Proceedings are still pending and are likely to result in a Judgment of the Grand Chamber of the ECJ which will finally determine the appropriate standard(s) of judicial review. As *Advocate General Bot*, in his Opinion of March 2013, has proposed to the Grand Chamber, the objective of combating terrorism and the optimum protection of the fundamental rights of listed persons *must be balanced, in the spirit of cooperation* between the European Union and the United Nations, as demanded by Article 220(1) TFEU.⁸² Considering the listings to be “part of a political process which goes beyond any individual case” and acknowledging certain improvements in the procedure before

international human rights standards under which the Security Council (...) should be held accountable.” The vindication of human rights thus would be made for the benefit of “a cosy regional club of European States rather than for the promotion of human rights and the rule of law worldwide” (*ibidem*, p. 922). Krieger, *supra* note 5, p. 1473, criticizes the fact that the legal conflict was solved unilaterally, to the detriment of international law. She also points to the “regionalization” of the UN by EU jurisprudence (*ibidem*, p. 1475).

⁷⁶ Palchetti, *supra* note 75, p. 390.

⁷⁷ ECJ in *Kadi* 2008, *supra* note 63, paras. 298-299.

⁷⁸ But *cf.*, ECJ in *Kadi* 2008, *supra* note 63, paras. 32-33, where the Court consents that “the European [Union] must respect international law in the exercise of its powers.”

⁷⁹ See Case T-85/09 *Kadi et al. v. Council of the EU et al.*, General Court, Judgment of 30 September 2010, para. 127: “That must remain the case, at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails.”

⁸⁰ General Court in *Kadi* 2010, *supra* note 79, paras. 132-135.

⁸¹ *Ibidem*, para. 151.

⁸² Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v. Yassin Abdullah Kadi*, Opinion of Advocate General Bot (ECJ) of 19 March 2013, para. 76.

the Sanctions Committee, *AG Bot* called for moderation in the carrying out of judicial review by the EU judicature, advising the Court not to substitute its own assessment for that of the competent political authorities.⁸³ Taking note of the fact that both organizations share the same values concerning respect for fundamental rights, he argued that an effective global fight against terrorism required confidence and collaboration between the European Union and the United Nations, rather than mistrust.⁸⁴

Eventually, *AG Bot* pleaded for a distinction between two different standards of review. Whilst the EU judicature should carry out a strict review of the way in which the implementation procedure was conducted by the Commission (“external” or procedural lawfulness), the review of the internal (substantive) lawfulness of the contested EU act should be limited to manifest errors of assessment. In other words, the EU judicature must rigorously review whether the EU Regulation was adopted employing a procedure which respected the rights of the defense, but must not call into question the merits of the listing effected by the U.N. Sanctions Committee, except in cases where the implementation procedure within the European Union has highlighted a flagrant error in the factual finding made, in the legal classification of the facts, or in the assessment of the proportionality of the measure.⁸⁵ Advocate General Bot explained that proposed differentiation by arguing that it was for the Sanctions Committee to evaluate the appropriateness of a listing and to obtain, from the States concerned, the information or evidence justifying inclusion on the list, whilst the EU institutions were not intended to have that information or evidence.⁸⁶

The recent developments demonstrate that the debate is reaching an ever more sophisticated level. However, it may be doubted whether the novel approach presented by Advocate General Bot in 2013 would really be helpful. If the Sanctions Committee may freely resort to secret service information submitted by any dubious state, and such information is not available to the EU institutions, there exists no possibility at all for the suspect to reveal any error, – not even “flagrant error”.

2.2. Selected Practice of the European Court of Human Rights

2.2.1. So long again: The *Bosphorus* Judgment (2005)

The *Bosphorus* case was considered by the ECJ as well as by the European Court of Human Rights (ECtHR). The ECJ was asked for an interpretation of an EC regulation which, by implementing a freezing order of the SC, had led to the impoundment of two aircraft in Ireland. Though its Judgment⁸⁷ did not address the legality of the SC resolution in question, some authors argue that by finding the measures to be proportionate the

⁸³ *Ibidem*, paras. 80-81.

⁸⁴ *Ibidem*, para. 85.

⁸⁵ *Ibidem*, paras. 90, 98, 105-107, 110.

⁸⁶ *Ibidem*, paras. 105, 107.

⁸⁷ Case C-84/85 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister of Transport, Energy and Communication, Ireland and the Attorney General* [1996], ECR I-3953.

ECJ implicitly affirmed the legality of the UN sanctions.⁸⁸ This, however, is far from certain. After the impoundment had been re-effected by the Irish authorities subsequent to the ECJ judgment, the *Bosphorus* enterprise lodged a complaint with the European Court of Human Rights (ECtHR).

In its *Bosphorus* Judgment,⁸⁹ the ECtHR confirmed the rule according to which a Contracting Party transferring sovereign power to an International Organization cannot by such means escape from its obligations under the European Convention on Human Rights (ECHR). Thus, in principle, the ECHR signatory states cannot escape by claiming that they were obliged by Art. 25 of the UN Charter to carry out a SC decision. However, a State Party is considered liable under the ECHR only with respect to treaty commitments entered into *subsequent* to the entry into force of the Convention.⁹⁰ This means that judicial review within the framework of the ECHR will be to no avail if, as is usually the case, a state acceded to the UN Charter prior to its accession to the European Convention on Human Rights.

The most relevant part of the *Bosphorus* Judgment relates to the notorious “so-long-as formula”. In the Court’s view, State action taken in compliance with legal obligations emanating from external sources such as, e.g., the UN Charter, is justified *as long as* the respective International Organization is considered to protect fundamental rights, both as regards the substantive guarantees offered and the procedural mechanisms controlling their observance, in a manner which can be considered to be “*at least equivalent*” to that for which the Convention provides. By “equivalent” the Court means “comparable”, as any requirement that the International Organization’s protection be “identical” could run counter to the interests of international cooperation. Nevertheless, any such finding of equivalence would be susceptible to review in the light of any relevant changes in fundamental rights protection. If equivalent protection is considered to be provided by the International Organization, the *presumption* will be that a State has not violated the requirements of the ECHR when it does no more than implement the legal obligations flowing from its membership in that particular organization.⁹¹ This presumption can be rebutted only if, in the circumstances of a particular case, the protection of Convention rights is “manifestly deficient”. Only in such a case would the interest of international cooperation be outweighed by the Convention’s role as a “constitutional instrument of European public order” in the field of human rights.⁹²

Although the guarantees offered by the UN sanctions mechanism were far from “equivalent” to those for which the Convention provides, the ECHR did not find any violation. The explanation for this result lies in the fact that the Court narrowed its perspective to the EC (EU). Though it admitted that the Regulation (EC) against which

⁸⁸ E.g., Reinisch, *supra* note 7, p. 281.

⁸⁹ *Bosphorus Hava Yollari Turizmve Ticaret Anonim Şirketi v. Ireland* (45036/98) Grand Chamber, ECHR 30 June 2005, Rep. 2005-VI.

⁹⁰ *Ibidem*, para. 154.

⁹¹ *Ibidem*, para. 155.

⁹² *Ibidem*, para. 156.

the complaint was lodged originated in a SC resolution adopted under Chapter VII of the UN Charter, and also that the latter was “pertinent to the interpretation of the regulation”, it came to the conclusion that the SC resolution could not have constituted a legal basis for the impoundment of the aircraft, because it did not form a part of Irish domestic law.⁹³ Consequently, the equivalence test was applied exclusively to the guarantees provided by the then-EC law – which not surprisingly passed the test.

Thus, in the end, there is a delicate interoperation of two International Organizations, with one of them serving as the reference Organization (the EC/EU), which sufficiently conforms to the rule of law, and the other representing the real actor in the background (UN), to which no such test is applied. The Court did not address the question of whether the UN resolution had left any margin for the appreciation of individual rights to the EC (acting in place of the European UN Member States), nor did it review the EC regulation with regard to its protection of human rights. Instead, we are faced with an approach which formalistically focuses on the last part of a multi-stage process of the implementation of a SC decision. While according to this conception the SC decision itself is screened out, the human rights reputation of the EC (EU) serves as a “whitewash machine”.

2.2.2. Escaping the Problem: The *Nada* Judgment (2012)

Nada v. Switzerland also relates to the UN Sanctions Committee’s listing practice. However, the facts of this case were unique, insofar as Mr. Nada (the Applicant), had been trapped in an Italian exclave on Swiss territory as a consequence of the Sanctions regime, whilst Switzerland was neither the Applicant’s State of citizenship nor his State of residence. As distinguished from Ireland in the *Bosphorus* case, Switzerland became a member state of the UN only *after* having acceded to the European Convention on Human Rights. Accordingly, its liability under the Convention for acts implementing SC decisions was not limited by *a priori* commitments.⁹⁴ In this situation, the ECtHR resorted to a finding of a lack of effort undertaken taken by Switzerland in order to release Mr. Nada from his distress. Even though the UN Sanctions Committee was entitled to grant exemptions in specific cases, Switzerland had not attempted to take all possible measures (e.g., encourage Italy to approach the Sanctions Committee) to adapt the sanctions regime to the applicant’s individual situation in order to harmonize diverging obligations. It was thus found to have violated the Convention.⁹⁵

By so deciding, the ECtHR has established an “obligation to endeavor” (*Bemühenspflicht*) as a minimum obligation under the Convention in cases where binding decisions of the SC must be carried out. If a State Party to the Convention fails to even bring forward its human rights concerns about a particular SC decision, or to seek such relief as it may possibly obtain, there is no need for any judicial review of the legality of

⁹³ *Ibidem*, para. 145.

⁹⁴ See Section 2.2.1 herein.

⁹⁵ *Nada v. Switzerland*, ECHR (No. 10593/8) Grand Chamber, ECHR 12 September 2012, available at <www.echr.coe.int>, paras. 193-198.

that (background) decision, i.e. the SC decision. As the ECtHR put it, such a failure absolves the Court of the need to determine the question of the hierarchy between the Convention and the UN Charter.⁹⁶ This is reminiscent of the argumentation of the HRC in the *Sayadi* case.⁹⁷ If the UN system shows any flexibility with respect to human rights concerns, the states must take the opportunities offered. In such constellations the ECtHR, as well as the HRC, seem to shift the problem from the judicial to the diplomatic sphere, i.e. from adjudication to negotiation. The ECtHR did not refer to anything like discretion, or even “free choice”, being left to the UN Member States when implementing a SC decision. Nor did it resort to the strategy of releasing the states from any responsibility when acting on behalf of an International Organization, as it did on the grounds of a very strict authority and control test in *Behrami and Saramati* (2007) in favor of the NATO states.⁹⁸ After all, it cannot be in error to claim an obligation to endeavor.

3. FINDINGS AND PERCEPTIONS

3.1. Internal and External Judicial Review

As Court Practice has shown, there are various forms of direct and indirect scrutiny, and there also exists a category of cases where a state or another entity has not appropriately determined the margin of appreciation to be applied when implementing a SC decision. In the latter instance, courts tend to use shortcomings in the exercise of discretion by the UN Member States as a basis for avoiding review of problematic issues.

Two major forms of judicial review should be distinguished from each other. Where the ECJ annuls EU secondary law or where a domestic court annuls domestic law that was enacted in order to implement a SC decision, judicial review remains internal (*internal review*). In those cases the system possesses the instruments “to repair the damage”. It can require or provide for a new act of implementation, and by so doing ensure its compliance with both internal laws and its obligations under the UN Charter.⁹⁹ If, in contrast, the SC decision itself is subjected to judicial review by external institutions (*external review*), the risks inherent in any *decentralized judicial review* may attach and, as a consequence, the obligatory character of the obligations under Art. 25 of the UN Charter, as well as the authority of the SC, will be affected.¹⁰⁰ This is what is referred to as the “fragmentation” of international law.¹⁰¹

⁹⁶ *Ibidem*, para. 197.

⁹⁷ See Section 1.3 herein.

⁹⁸ *Behrami and Behrami v. France*, and *Saramati v. France et al.* (71412/01 and 78166/01) Grand Chamber, ECHR 2 May 2007 (Decision on Admissibility), available at <www.echr.coe.int>.

⁹⁹ See Reinisch, *supra* note 7, p. 284.

¹⁰⁰ Cf., *ibidem*, p. 284.

¹⁰¹ E.g., International Law Commission, Report of the Study Group on *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (finalized by M. Koskenniemi), U.N. Doc. A/CN.4/L.682 of 13 April 2006.

The notions of “internal” or “external” review should not be confused with “principal” or “incidental” control/review, as the former terms concern the object of review, whilst the latter relate to the mode of review. Nonetheless, they can overlap. Even if the review is being narrowed down to internal law (internal review), it may indirectly affect the underlying SC decision. From the UN perspective there is only one point that matters, that being whether the Member States will effectively implement a certain SC decision, regardless of the means of implementation or standards and forms of judicial review they may employ. Depriving implementing measures of their validity means that – at least for a certain period of time – the particular UN resolution will not be effectively carried out and, accordingly, international responsibility will be invoked.¹⁰² In addition, the issue of the immunity rights of the United Nations¹⁰³ must be considered. It is worth considering whether, e.g., a mere declaratory statement on the illegality of a SC decision can amount to a violation of such rights. The answer to this question should depend on the effects which such a statement might have.

From the EU and domestic perspectives the crucial point is whether EU or domestic courts consider themselves competent to review, in any respect, either directly or indirectly, *the SC decision as such*, or whether they hedge around it by focusing on the implementing act (external review).¹⁰⁴ There is a clear tendency in external jurisdiction to limit the judicial focus to the implementing act, so that the object of review remains totally within the framework of the domestic legal order and its pertinent hierarchy of norms. From the internal standpoint, as being represented particularly by the ECJ, judicial review is not only justified but even required, because the act of implementation being reviewed is considered to be part of the European *constitutional* order. This refers to the “*constitutional hegemony*” of the fundamental law, on the basis of which the reviewing organ operates.¹⁰⁵ Determining the legality or validity of an act of an International Organization thus appears to be analogous to a constitutional review in States¹⁰⁶ which, at least implicitly, was recognized by the ICJ in *Certain Expenses*, by the ICTY in *Tadić*, and also by the ECJ in *Kadi*.¹⁰⁷ The respective courts presume to fulfill their duty as guarantors of the fundamental principles of their own legal order, including above all the protection of human rights. However, the problem remains that even the strictest focus on domestic law cannot prevent a decision based thereon from having repercussions on the underlying SC decision. This is why the principles of loyalty and cooperation between the different systems and their organs have to be taken into consideration.¹⁰⁸

¹⁰² Cf., *ibidem*, p. 285.

¹⁰³ See Art. 105 of the UN Charter, together with the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, 21 UNTS 1418.

¹⁰⁴ In this instance Tzanakopoulos, *supra* note 8, p. 110, suggests employing the term “auto-determination” rather than “judicial review”.

¹⁰⁵ *Ibidem*, pp. 99, 102.

¹⁰⁶ Peters, *supra* note 9, Article 24, MN 28.

¹⁰⁷ See Sections 1.1.1, 1.2.1 and 2.1.2. herein.

¹⁰⁸ *Infra* 3.5.

3.2. The Fine Line between Reform Pressure and International Responsibility

Judicial review also creates the risk of saddling the UN Member States with international responsibility for not effectively implementing SC decisions (Art. 25 of the UN Charter). However, “disobedient states” should not fear becoming the target of any sanctions. To the contrary, the UN system seems to retreat whenever serious human rights concerns have been ascertained by international or national courts. For example, subsequent to the delivery of the views of the Human Rights Committee in the *Sayadi* case, the complainants’ names were removed from the list pursuant to a decision of the Sanctions Committee.¹⁰⁹ Even in the general perspective, considerable improvements in the UN sanctions mechanism can be observed.¹¹⁰ Pursuant to SC Resolution 1526 (2004) an *Analytical Support and Sanction Monitoring Team* has been appointed, which scrupulously monitors to what extent the UN Sanctions regime is being challenged in the courts.¹¹¹ The refusal of national and international courts to apply SC resolutions believed to violate human rights thus appears to build up the pressure necessary to make sure that the SC and its members will seriously take human rights concerns into account.¹¹² There is also a “social review”¹¹³ of SC measures, preventing them from insisting in the implementation of decisions that are found to be intolerable from the human rights perspective, all the more so as the UN lacks any enforcement mechanism of its own. Last not least, the so-called “EC narrative” should be taken into account. Taking into account that the former EC was successfully forced by national courts to include human rights into its legal system, it seems likely that a similar process may be replayed in the UN.¹¹⁴ This experience indicates that a strategy of dosages of well-founded disobedience by domestic courts forces, in the first instance, the judiciary of an International Organization to expand its human rights jurisprudence, and subsequently causes the legislature of that Organization to amend its human rights system accordingly.

¹⁰⁹ HRC in *Sayadi and Vinck*, *supra* note 46, para. 92. It is true that the problem in this case laid with the state and not with the U.N. Even so, it is remarkable that the UN responded to the outcome of the procedure.

¹¹⁰ E.g. S.C. Res. 1822 (2008), 1904 (2009), 1989 (2011) and 2083 (2012). In particular, S.C. Res. 1822 (2012), para. 24, where the SC “Requests that Member States and relevant international organizations and bodies encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson”. This can be understood as an offer of cooperation by the SC to the Member States in order to prevent decentralized judicial review in external courts. See also N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press, Oxford: 2010, pp. 154-160.

¹¹¹ See the most recent, Thirteenth Report of the Analytical Support and Sanction Monitoring Team: U.N. Doc. S/2012/968 (31 December 2012). For earlier Reports, see Magnusson, *supra* note 7, p. 54 with note 71.

¹¹² Reinisch, *supra* note 7, p. 288, speaks of “beneficial spill-over effects”.

¹¹³ Zappalà, *supra* note 12, p. 178.

¹¹⁴ Cf., Reinisch, *supra* note 7, p. 289.

3.3. Art. 103 of the UN Charter – An Overestimated Conflict Norm

The problem of “second-guessing” the Security Council is often considered a normative conflict in instances where compliance with UN Security Council resolutions would collide with the fundamental values (particularly human rights) of another legal order. As the International Law Commission (ILC) has pointed out, a strong presumption against normative conflict, also extending to adjudication, already existed in international law.¹¹⁵ Indeed, Art. 103 of the UN Charter establishes a hierarchy between Charter obligations and other obligations of the Member States.¹¹⁶ However, it does not say either that the *Charter* prevails or that a *SC decision* prevails,¹¹⁷ but rather refers to *obligations under the Charter* which must prevail. Though it is widely recognized that Art. 103 covers not only the rights and obligations in the Charter itself but also obligations imposed on binding decisions by the United Nations bodies (e.g., Art. 25 of the UN Charter),¹¹⁸ it does not deal with the problem which arises if such decisions are presumed to be illegal. In other words, Art. 103 of the UN Charter is not intended to preclude national courts from reviewing the correct applicability of SC decisions against those very principles of the UN Charter which the SC itself is bound to respect (Art. 24(2) of the UN Charter).¹¹⁹ Thus, one should not speak of a conflict of norms but rather the issue of *quis iudicabit* – which eventually may lead to a *conflict of systems*.

3.4. The Procedural Dimension: “Jurisdiction” As a Door-opener to Judicial Review

Judicial review, especially with respect to SC decisions, contains both a procedural and a substantive dimension. The procedural side concerns the “jurisdiction” of the court. If, e.g., the validity or legality of a SC decision is a preliminary question to a main question over which the court undoubtedly has jurisdiction, it must also have jurisdiction with regard to the preliminary question, at least in the form of incidental review.¹²⁰ If a court is even established by a SC decision, it utterly lacks jurisdiction if that decision turns out to be invalid because of a violation of superior law, i.e. UN primary law, comprising Charter law and the applicable principles of international law. As international courts are entitled or even explicitly obliged¹²¹ to examine whether they have jurisdiction in a case, the validity or legality of the respective SC Resolution can constitute a precondition for the existence of jurisdiction. This is why the ICTY

¹¹⁵ International Law Commission, *supra* note 101, para. 37.

¹¹⁶ E.g., Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*, ICJ 26 November 1984, ICJ Reports, 1984, 392, para. 107.

¹¹⁷ But cf. CFI in *Kadi 2005*, *supra* 2.1.1 herein.

¹¹⁸ International Law Commission, *supra* note 101, para. 331.

¹¹⁹ See Francioni, *supra* note 75, p. 918. *Contra* Krisch, *supra* note 110, p.163.

¹²⁰ See ICJ *Advisory Opinion in Namibia*, *supra* 1.1.1.2 herein (with reference); see also the Introduction to this article.

¹²¹ E.g., Art. 19 (1) of the Rome Statute of the International Criminal Court.

Appeals Chamber speaks of a “*primary jurisdiction*” in this context.¹²² It is true that the SC did not establish the Yugoslav Tribunal to buttress its own legitimacy, even though it created such bodies as a more impartial alternative to its own politicized processes.¹²³ But a mere expectation on the part of the Council does not militate against the court’s jurisdiction. The question of what standard of review must be applied once jurisdiction is affirmed is a separate issue.

3.5. The Substantive Dimension: Primary Responsibilities on Both Sides and Adequate Standard of Review

Whenever a court reviews a SC decision, the primary responsibility of the SC for the maintenance of peace and security (Art. 24(1) of the UN Charter) can be affected. On the other hand however, courts also have a primary responsibility – for the maintenance of the *rule of law*¹²⁴ within their respective legal systems. This applies in particular to the ICJ (Art. 92 of the UN Charter), but as well to the ECJ and domestic supreme courts.

In consideration of the essential message of Art. 92 of the UN Charter a distinction should be made between the ICJ and all other courts. Since its *Namibia* Advisory Opinion (1971), the ICJ feels itself authorized to examine whether the SC, as a precondition of the binding character of its decision, has complied with its obligations under Article 24(2) of the UN Charter. If it should ever use this authority to its fullest extent, it ought to take into consideration that it owes loyalty to the SC. The *principle of mutual loyalty* between the UN and their Member States¹²⁵ not only applies to the relationship between the UN and their members, but also requires a “constructive dialogue”¹²⁶ between the SC and the ICJ when exercising their competences independently. In the exercise of their competences, both organs must respect the legitimate interest of the other, and not impede each other in their action.¹²⁷

If, in contrast, a court reviewing a SC decision belongs to a foreign (external) system such as, e.g., the ECJ, it owes loyalty in the first instance to its own organization and its members and organs. A domestic court (including EU courts) accordingly puts its focus on the fulfillment of the exigencies of domestic law. This applies all the more if the object of judicial review is not the SC decision itself, but only the implementing act, notwithstanding the fact that even then repercussions to the SC decision will be likely.

¹²² ICTY Appeals Chamber in *Tadić*, *supra* note 30, para. 21.

¹²³ See Alvarez, *supra* note 3, p. 11.

¹²⁴ See UN General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, Doc. A/RES/67/1 of 30 November 2012; and generally S. Chesterman, *An International Rule of Law?*, 56 *American Journal of Comparative Law* 331 (2008), pp. 331 et seq.

¹²⁵ See K. Doehring, *Unlawful Resolutions of the Security Council and their legal Consequences*, 1 *Max Planck Yearbook of United Nations Law* 91 (1997), pp. 105 et seq.

¹²⁶ Palchetti, *supra* note 75, p. 392.

¹²⁷ See Fassbender, *supra* note 7, p. 223.

Depending on the perspective taken, i.e. UN law or domestic law, judicial review may lead to different outcomes.¹²⁸ Here again, a *duty of loyalty and cooperation* is required in order to prevent damage to the applicable law of both systems. Although the EU is not itself a member of the UN, and while the UN cannot claim any rights from the EU treaties, there are some indications of the existence of a duty of loyalty *vis-à-vis* the UN in European law. As can be inferred from Arts. 3(5), 21(1), and 21(2)(c) of the TEU, and particularly from Art. 220 of the TFEU, support for the aims and principles of the UN, above all the maintenance of peace and security, as well as cooperation of the EU with the UN, are declared to be (constitutional) principles of the EU itself.¹²⁹ The European Court of Human Rights has also long recognized “the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organizations” as a principle enshrined in the ECHR system.¹³⁰ Accordingly, many Constitutions of the world pledge allegiance to the United Nations and its fundamental Charter, which correlates to the duty of the UN Member States to assist the UN in any action it takes (Art. 2(5) of the UN Charter). Where such a duty of loyalty arises, there already exists some kind of community flowing from the *global interdependence of the UN and various types of infra-orders*, e.g., legal orders of a subject-specific International Organization or of a regional or state system. As these orders become more homogeneous, they extenuate the need for hegemony or ultimate authority as exercised by the traditional SC in a disparate world order.¹³¹

However, the problem cannot be solved by recognizing the existence of an abstract principle of loyalty *vis-à-vis* the UN in any of the (sub-)systems concerned. The decisive question rather is how such loyalty must be exercised and what limitations may result from it. It goes without saying that the SC, when deciding on the existence of a threat to international peace and security (Art. 39 of the UN Charter), and also on the measures necessary to combat or eradicate that threat, must enjoy a *very wide margin of appreciation*. However it remains difficult to demarcate this appreciation, as it appears impracticable and not convincing to distinguish between the “more political” and the “more legal” aspects of a SC decision,¹³² or to distinguish between fact finding and the assessment of facts by the SC, and other questions left to judicial review.¹³³ Having particular regard to the issue of targeted sanctions, it has also been proposed to resort to a combination of both interests by balancing the need for international cooperation with the defense of human rights.¹³⁴ However, with the exception of the ICJ, there are no courts competent to balance and weigh all the interests in the field of worldwide

¹²⁸ Cf., Reinisch, *supra* note 7, p. 268.

¹²⁹ See also General Advocate Bot in *Kadi 2013*, *supra* note 82, para. 73.

¹³⁰ ECHR in *Bosphorus*, *supra* note 89, para. 150 (with further references).

¹³¹ Cf., Krisch, *supra* note 110, p. 153, 157. The same author speaks of an “enmeshment of laws” (*ibidem*, at 160 et seq.).

¹³² ICTY Appeals Chamber in *Tadić*, *supra* 1.2.1 herein.

¹³³ AG Bot in *Kadi 2013*, *supra* 2.1.3 herein.

¹³⁴ Reinisch, *supra* note 7, p. 287.

security, all the more so as this form of judicial review must be considered to be the most flexible of all. The power of weighing and balancing could serve as a pretext for undermining the proper functioning of mechanisms established by the SC, such as, in particular, the functioning of International Criminal Tribunals.

Instead, a limited standard¹³⁵ of review is needed in order to adapt the intensity of judicial review to the goal of maintaining the proper functioning of all organs and systems concerned. This standard must ensure the execution of jurisdiction of the courts on the one hand, and respect for the primary responsibility held by the Security Council for the maintenance of international peace and security on the other. It must, in principle, prevent all courts from substituting the SC's political assessment with their own.¹³⁶ *Judicial review from outside of the U.N. system, moreover, must be limited to the "hard legal facts", i.e. to whether the SC had competence (Art. 27(3) of the UN Charter) and whether or not it manifestly violated the principles it is bound to respect (Art. 24(2) of the UN Charter).* These include universal human rights to the fullest extent, given that the latter are manifestly violated. There is no justification whatsoever for limiting the obligations of the SC under Art. 24(2) of the UN Charter to peremptory norms.

On the other hand, it must taken into account that judicial self-restraint, particularly in cases of individualized sanctions, seems required only when there exists an adequate level of procedural and substantive guarantees in the relevant system itself, i.e. the UN. This applies all the more because unilateral disobedience by the states, which might result in cases of a flagrant lack of such guarantees, may weaken the SC's authority much more than any adjudication could ever do.¹³⁷ It is also well-known that due to the limited legitimacy of the Security Council, judicial blind spots within the UN system would be less acceptable than on the national plane. At this stage of deliberation the application of the "so-long-as formula" comes into the play. The human rights deficit has to be compensated for on the national or regional level *so long as and insofar as* the new form of actions by the SC (individualized sanctions) do not correspond with extended procedural or institutional measures of legal control.¹³⁸

Judicial review from inside of the U.N. system, i.e. by the ICJ, should be assessed differently. The loyal ICJ pays tribute to the specific role of the other organs of the UN, e.g., by granting the SC's decisions a very wide margin of appreciation when it comes to the maintenance of peace and security. However, there is no rule preventing the ICJ from weighing the SC's interests against human rights interests, given that it has jurisdiction. From a quality-oriented point of view the mere threat of a subsequent

¹³⁵ For more on the varieties in methods, see Alvarez, *supra* note 2, pp. 26-27: e.g., applying a test of manifest irregularity or abuse of power, demarcating areas of "political discretion", focusing on "fundamental norms", applying distinct levels of scrutiny.

¹³⁶ For a more far-reaching version of the argument of non-substitution, see General Advocate Bot in *Kadi 2013*, *supra* note 82, para. 71.

¹³⁷ Cf., Alvarez, *supra* note 2, pp. 12-13.

¹³⁸ Cf., M. Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte*, 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 41 (2006), pp. 61-62, 70-71.

judicial review will cause the SC to strengthen the persuasiveness and legitimacy of its decisions. It has rightly been observed that if the ICJ were to declare a SC decision *ultra vires*, such a decision would fundamentally change the UN system and could even politicize the ICJ.¹³⁹ The basis for such change, however, is the presumption that, having regard to the power and manifold means of the SC, *peace and security can always be maintained in at least one way among many that will not manifestly violate human rights*. In this sense the Security Council of the future will be capable of adapting itself to a “modern vision of the administration of justice.”¹⁴⁰

¹³⁹ Alvarez, *supra* note 2, pp. 36-37.

¹⁴⁰ ICTY in *Tadić*, *supra* note 32.

*Pavel Šturma**

DOES THE RULE OF LAW ALSO APPLY TO THE SECURITY COUNCIL? LIMITING ITS POWERS BY WAY OF RESPONSIBILITY AND ACCOUNTABILITY**

Abstract

Both States and international organizations are subjects of international law. They possess an international legal personality, which also implies international responsibility in case of breach of their obligations. This contribution presents the argument that also the UN Security Council is not legibus solutus, therefore its acts may entail the responsibility of the Organization. A problem remains in the implementation of such responsibility.

1. INTRODUCTION

Both States and international organizations are subjects of international law. They possess an international legal personality, although it is not necessarily identical in its scope and nature.¹ In cases of breach of international law (i.e. internationally wrongful acts), the question of their responsibility arises. Who is responsible in such cases: an international organization, its Member State(s), both of them, or neither?

No doubt, the UN Security Council is an important actor, if not the most important institutional actor (i.e. different from States) in contemporary international relations. However, when it comes to control of the legality of acts adopted by the Security Council and/or its responsibility therefore, the situation seems to be problematic.

Is the assumption correct that the binding nature of the resolutions of the Security Council (Art. 25 of the Charter of the United Nations (Charter or UN Charter)) and the priority of obligations under the Charter over other international agreements (Art.

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¹ Reparation of Damage Suffered in the Service of the Organization, Advisory Opinion, ICJ Reports 1949, 174, at 178.

103)² excludes any kind of control over the Security Council's acts? And how does this attitude honor the commitment to the rule of law confirmed in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels of 24 September 2012?³ Undoubtedly, norms governing the responsibility of both States and international organizations are essential to the rule of law.

The present contribution does not intend to question the powers of the Security Council to adopt both individual and normative acts under the UN Charter. Clearly, Art. 25 and Chapter VII provide a legal basis for resolutions, including specific obligations related to the protection of peace and security in particular cases. Resolutions of the Security Council that provide for general rules, not necessarily linked to a specific situation in a given country presenting a threat to international peace, are more complicated but still seem justified. They include not only the resolutions that established the Statutes for ad hoc International Criminal Tribunals for the former Yugoslavia [res. 827 (1993)] and for Rwanda [res. 955 (1994)] as well as the Statute of the Special Tribunal for Lebanon [res. 1757 (2007)], but also resolutions that lack a link to any specific situation at all. The most famous examples of these are resolutions 1267 (1999) and 1373 (2001), dealing with targeted sanctions against persons and entities suspected of supporting and financing of terrorism, and resolution 1882 (2009) on the use of children in armed conflicts.

Instead of focusing on the Security Council's powers, this contribution aims at discussing possible legal consequences, namely responsibility, for internationally wrongful acts of the Council. It also includes the issue of judicial (or other) review of acts adopted by the Security Council. In other words, the contribution does not deal with the problem from the point of view of primary norms (powers and their limits), but rather from the point of view of secondary norms (responsibility or accountability).

This seems to be even more important in view of the 2012 Declaration on the Rule of Law, as this declaration, while establishing the applicability of the rule of law to the United Nations and its principal organs, deals only in vague terms with the possible accountability of the Security Council: "Recognizing the role under the Charter of effective collective measures in maintaining and restoring international peace and security, we encourage the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are

² Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*), Order of 14 April 1992, ICJ Reports 1992, 16, para. 39.

³ UN GA Resolution A/RES/67/1 (30.11.2012): "2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law."

maintained and further developed.”⁴ The key element here is the requirement of fair and clear procedures, although their nature may be different for the Security Council, as a political body, than for international judicial bodies.

Therefore it seems appropriate to shed more light on some issues with respect to the responsibility of international organizations in relation to resolutions adopted by the Security Council and implemented by States. This will be the first part of my contribution. The second part will focus on possible review procedures available to States and/or individuals.

2. INTERNATIONAL RESPONSIBILITY OF THE UN FOR ACTS OF THE SECURITY COUNCIL

Responsibility is a key concept of any legal order, including the system of international law. Both States and international organizations are able to commit an internationally wrongful act.

Unlike the rules on the responsibility of States for internationally wrongful acts, codified already in 2001, the International Law Commission adopted the Articles on the Responsibility of International Organizations in the second and final reading only at its 63rd session in June 2011.⁵ The recently adopted 67 articles (with commentaries) present a welcome attempt to codify and progressively develop general rules on the responsibility of international organizations and the responsibility of a State for an internationally wrongful act committed in connection with the conduct of an international organization (Art. 1).

According to Art. 4, an internationally wrongful act of an international organization occurs when conduct is attributable to that organization under international law and constitutes a breach of an international obligation of that organization.

The Security Council is not an international organization in itself, but only an organ of the United Nations Organization. Thus the conduct of the Security Council as an organ may be attributed to the United Nations Organization (Art. 6).

In spite of its very strong position (i.e. powers), the Security Council is not *legibus solutus* (unbound by law), but is bound by international obligations. These obligations arise first of all from the UN Charter. The special provision on the conflict of norms (Art. 103), provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” However, this does not affect obligations *erga omnes* arising from the customary norms of international law⁶ having a *jus cogens*

⁴ UN GA Resolution A/RES/67/1 (30.11.2012), para. 29.

⁵ See Report of the International Law Commission, Sixty-third session, GAOR, Sixty-sixth session, Suppl. No. 10 (A/66/10), 53-68.

⁶ Cf. J.-M. Thouvenin, *Article 103*, in: J.-P. Cot, A. Pellet, M. Forteau, *La Charte des Nations Unies. Commentaire article par article* (3e éd.), vol. II, Economica, Paris: 2005, 2140-2142.

nature, binding on all subjects of international law, including the bodies of the United Nations.⁷

Consequently, international responsibility may incur only exceptionally, in the event of an act of the Security Council would constitute either a violation of the Charter itself or a violation of a preemptory norm of general international law.

The first category also covers possible violations committed by the Security Council acting *ultra vires*. According to the ILC's Articles on Responsibility of International Organizations, the conduct of an organ of an international organization shall be considered an act of that organization under international law if the organ acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ (Art. 8).

One of the most complex problems is drawing a line between the responsibility of an international organization and its Member States.⁸ On the one hand, Chapter IV of Part two of the Articles (2011) deals with the responsibility of an international organization in connection with the act of a State or another international organization. It covers several cases, such as aid or assistance in the commission of an internationally wrongful act (Art. 14), direction and control exercised over the commission of an internationally wrongful act (Art. 15), and coercion of a State or another international organization (Art. 16). All these provisions correspond to Articles 16 to 18 of Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA, 2001).⁹

On the other hand, Part five of the Articles on the responsibility of international organizations was adopted at the end of the work of the ILC. It deals with the responsibility of a State in connection with an act of an international organization. As was expressed in the commentary, the present articles are intended to fill a gap that was deliberately left uncovered in the Articles on the responsibility of States for internationally wrongful acts.¹⁰

From the point of view of responsibility for the Security Council's acts, the most interesting provisions are in Art. 17 (Decisions, authorizations and recommendations addressed to Member States and international organizations). The purpose of this Article is to ensure that an international organization cannot avoid its responsibility in cases where a Member State breaches an international obligation on the basis of a binding or recommendatory act of the organization. This rather bridges the gap between State responsibility and the responsibility of international organizations.¹¹

⁷ In this sense *cf.* the decision of the Court of First Instance, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 21 September 2005, T-315/01, para. 226.

⁸ In the recent literature see e.g., *Symposium on Responsibility of International Organizations and of (Member) States*, 7(1) International Organizations Law Review 9 (2010), pp. 9 et seq.

⁹ Yearbook of International Law Commission, 2001, Vol. II, Part 2, 26.

¹⁰ Report of the International Law Commission, 2009, Sixty-first session, GAOR, Sixty-fourth session, Suppl. No. 10 (A/64/10), p. 158.

¹¹ *Cf.* N. Blokker, *Abuse of the Members: Questions concerning Draft Article of the Draft Articles on Responsibility of International Organizations*, 7(1) International Organizations Law Review 35 (2010), p. 39.

According to Art. 17, para. 1 of the 2011 articles, “an international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization”.¹² It does not condition the establishment of international responsibility of an organization on whether or not the act in question is internationally wrongful for the Member State to which the decision, authorization or recommendation is directed (Art. 17, para. 3). In cases where an international organization adopts merely an authorization or recommendation, it would incur responsibility only if the State commits the act in question because of that authorization or recommendation (Art. 17, para. 2), or put differently, because the State relied on that authorization or recommendation.

It is possible to conclude, therefore, that the responsibility of the United Nations Organization may be established even on the basis of certain, however rare, acts of the Security Council. The UN incurs responsibility not only in cases where such Security Council acts were implemented by its subsidiary bodies, but also in cases of binding decisions or authorizations implemented by the Member States.

3. IMPLEMENTATION OF INTERNATIONAL RESPONSIBILITY AND/OR OTHER REMEDIES

Although certain acts of the Security Council may give rise to the responsibility of the United Nations Organization in principle, it remains to see what procedural means, if any, are available for holding it accountable. This seems to be the main problem, if not the key obstacle, in any quest for accountability of the Security Council.

First of all, the International Court of Justice (ICJ), as the principal judicial organ of the United Nations, does not seem to be well suited for a judicial review of the Security Council's acts, or for deciding a dispute concerning the responsibility of the United Nations Organization. Of course, these are two different procedures in theory, but neither of them is available in practice.

As to the review of the “constitutionality” of the Security Council's acts, the ICJ does not have any direct competence to review, nor *a fortiori* to declare as null acts of one principle organ of the UN challenged by another principle organ, Member States, or individuals. However, one cannot exclude the possibility of an incidental review exercised by the Court in the framework of its contentious or advisory jurisdiction. It may happen, and indeed does happen in the course of the resolution of a dispute between States or in the case of an advisory opinion requested by the General Assembly.¹³

¹² Cf., Report of the International Law Commission, 2011, Sixty-third session, GAOR, Sixty-sixth session, Suppl. No. 10 (A/66/10), pp. 107-108.

¹³ Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion of 21 June 1971, ICJ Reports 1971, 16: “Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. (...)”

Up to now, the ICJ has shown restraint in situations where the Security Council was exercising its functions under the Charter.

When it comes to the issue of the responsibility of the United Nations Organization, it cannot be invoked before the ICJ, as only States may be parties in cases before it. Regarding its advisory jurisdiction, the ICJ may give an advisory opinion on any legal question at the request of whatever body may be authorized by the Charter.¹⁴ Indeed, the Court could give its opinion on the question of the responsibility of the UN, which is clearly a legal question. However even in the case where the General Assembly or the Security Council adopts a resolution with such a request, which is difficult to achieve, the advisory opinion, if given by the Court, will not have the binding force of a judgment.

If the States have a only very limited standing in advisory proceedings before the ICJ initiated by one of the principal UN bodies (mostly written statements), individuals have no standing at all, even if they are directly concerned.

This seems to be one of the most important shortcomings of the legal order of the United Nations, in particular in the context of promoting the rule of law at the national and international levels. It concerns, albeit not only, in particular human rights protection in cases of targeted sanctions introduced by resolutions of the Security Council.

Of course, the establishment of the Office of Ombudsperson (Ms. Kimberly Prost) and of certain procedures for appeal thereto by persons affected by the Security Council sanctions is an important step forward. Nevertheless, this is not a kind of judicial review. The Security Council or the United Nations at large should establish their own efficient mechanism of review, giving full protection of human rights to the extent compatible with the counter-terrorism objectives.¹⁵

However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.” (para. 89) For more details *cf.* D. Richter, *Judicial Review of Security Council Decisions – A Modern Vision of the Administration of Justice?*, this volume, pp. 271-297.

¹⁴ Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports, 2010, para. 47: “There is, therefore, nothing incompatible with the integrity of the judicial function in the Court undertaking such a task. The question is, rather, whether it should decline to undertake that task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory Opinion on Certain Expenses of the United Nations, however, the Court responded to the question posed by the General Assembly, even though this necessarily required it to interpret a number of Security Council resolutions (...) Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, rest on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.”

¹⁵ The recently adopted Security Council res. 2083 (2012) seems to be a step to this direction. The Security Council, in para. 19, “*Decides* to extend the mandate of the Office of the Ombudsperson, established by resolution 1904 (2009), as reflected in the procedures outlined in annex II of this resolution, for a period of thirty months from the date of adoption of this resolution, *decides* that the Ombudsperson shall continue to receive requests from individuals, groups, undertakings or entities seeking to be removed from

If such a mechanism proves to be deficient, the regional courts (such as the Court of Justice of the EU or the European Court of Human Rights), and perhaps even national courts, are and will be able to intervene in order to protect human rights. However, this scenario involves some serious problems. Firstly, as is clearly shown in the *Kadi* case, with different judgments of the Court of First Instance and the European Court of Justice,¹⁶ this may be welcome from the point of view of human rights protection but not from the perspective of the coherency of international law. Instead, this approach opens the way for the increasing fragmentation of international law.¹⁷

Secondly, the intervention and protection by regional courts cures only the symptoms, and not the causes of such infringements. They are not able to decide on the question of responsibility (and financial liability) of the UN as the only universal organization. And they can hardly contribute to the accountability of the Security Council for its acts, and thus to the promotion of the rule of law at the international level. Much work still has to be done.

the Al-Qaida Sanctions List in an independent and impartial manner and shall neither seek nor receive instructions from any government, and *decides* that the Ombudsperson shall present to the Committee observations and a recommendation on the delisting of those individuals, groups, undertakings or entities that have requested removal from the Al-Qaida Sanction List through the Office of the Ombudsperson, either a recommendation to retain the listing or a recommendation that the Committee consider delisting". Annex II sets up the procedure and time limits for both the Ombudsperson and the Committee in the main stages (Information gathering, Dialogue with the petitioner, and Committee discussion). However, there is no rule on compensation for the petitioner in case of his/her delisting.

¹⁶ ECJ, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, Joint Cases C-402/05 P and C-415/05 P, 3 September 2008.

¹⁷ Cf. P. Šturma, V. Bílková, *Targeted Anti-Terrorist Sanctions and Their Implications for International Law Normative and Institutional Coherency*, in: A. Constantinides, N. Zaikos (eds.), *The Diversity of International Law*, Brill, Leiden/Boston: 2009, pp. 215-237.

*Andreas Zimmermann**

THE SECURITY COUNCIL AND THE OBLIGATION TO PREVENT GENOCIDE AND WAR CRIMES**

Abstract

This article addresses the question of the obligations of both, the Security Council as such, as well as of its individual members (including the five permanent members), when faced with genocide or in situations where violations of the Geneva Conventions are being committed, given that the contracting parties of the Genocide Convention are under a positive obligation to prevent genocide and are under an obligation to secure respect for the provisions of the Geneva Conventions.

INTRODUCTION

Thank you, Mr. Chairman, very much for giving me the floor and thank you for bringing me over to Warsaw and thanks to the Polish Academy of Sciences and the Polish Branch of the ILA for bringing us together to this what is really a round table indeed.

I will focus on obligations of the Security Council as such, but also those of individual States on the Security Council, when acting within the framework of Chapter VII in particular, to prevent the commission of certain serious violations of international law. More specifically, I will focus on two sets of treaty-based obligations, namely on obligations arising under the Genocide Convention and obligations under the four Geneva Conventions, and will then try to analyse what these obligations involve for the practice of the Security Council. Moreover, I will also focus on “internal” obligations of the Security Council and its members arising under the UN Charter itself.

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1. STATES AND THE OBLIGATION TO PREVENT GENOCIDE

As it is well-known, under Article 1 of the Genocide Convention all contracting parties are under an obligation not only *not to commit* genocide themselves, but are also under a positive obligation *to prevent* genocide committed by others. One ought to also recall that in 2007, the International Court of Justice, in the case brought by Bosnia Herzegovina against Serbia, confirmed that obligation and stated that this constitutes a due diligence obligation.¹ The Court stated more specifically that there exists:

a State's obligation to prevent and the corresponding duty to act, [which] arise[s] at the instant that the State learns of, or should normally have learnt of, the existence of a serious risk that genocide will be committed.²

By the same token, that duty also entails a duty to employ "all the means likely to have a deterrent effect on those suspected of preparing genocide."³

In order to further conceptualize this obligation, the Court came up with some factors as to which States have to act and in what manner, depending on the respective distance to the situation.⁴ What is more, the Court also found that, as circumstances permit, they are under a legal obligation to act, and, in particular, the Court was strict in confirming that there need not be a territorial link between the crimes to be committed but that third States, too, are subject to such a duty to prevent genocide.⁵

2. THIRD STATES AND THE COMMISSION OF WAR CRIMES

When it comes to war crimes, one has to recall common Article 1 of the four Geneva Conventions⁶ which reads: "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" [*à faire respecter la présente Convention en toutes circonstances*].

In analysing this provision, the International Committee of the Red Cross (ICRC) Commentary on Article 1 states that "the other parties must try to bring them to respect the Convention" (*les autres parties doivent-elles chercher à la ramener au respect de la*

¹ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Rep 2007, pp. 43 et seq. (p. 222, para. 430).

² *Ibidem*, p. 221, para. 431.

³ *Ibidem*.

⁴ *Ibidem*, p. 221, para. 430.

⁵ *Ibidem*, p. 107, para. 153 f; ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment of 11 July 1996, ICJ Rep. 1996 pp. 595 et seq. (p. 616, para. 31).

⁶ Cf., B. Kessler, *The Duty to "Ensure Respect" Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts*, 44 German Yearbook of International Law 498 (2001).

Convention.⁷ And again it was the ICJ, in its Advisory Opinion of 2004 on the Israeli wall in the occupied Palestinian territories,⁸ which found that all contracting parties “are under an obligation to ensure that the requirements of the instruments in question are complied with.”⁹ As a matter of fact, in fulfilling this duty the contracting parties of the four Geneva Conventions met on at least two occasions to bring about Israel to abide by its obligations under the fourth Geneva Convention.¹⁰ And that obligation, under common Art. 1, not only relates to grave breaches of the four Geneva Conventions but, as the Court put it, “to the requirements of the instruments in question”, and thus also applies to possible violations of common Art. 3, that is to war crimes committed in non-international armed conflicts.¹¹

Thus, at least when genocide is being committed or when there is a real risk of genocide being committed, or where serious violations of the Geneva Conventions, including violations of common Art. 3, are being carried out, third parties are under an obligation to act. Yet, if these are the substantive obligations of States, the question arises what these obligations might involve for both the Security Council as such as well as for States contracting parties of the Genocide Convention and the four Geneva Conventions being members of the Security Council at the relevant time.

3. OBLIGATIONS TO PREVENT GENOCIDE AND WAR CRIMES AND THE SECURITY COUNCIL

The first question one has to very briefly consider is whether acts of genocide or violations of the four Geneva Conventions amount to a situation which falls within the meaning of Art. 39 of the UN Charter.¹² As is well-known, the subsequent practice of the Security Council has confirmed ever since 1990 – and one might argue that this is

⁷ J. Pictet (ed.), *ICRC Commentary, Convention I, Art. 1/ CICR commentaires, Les Convention de Genève du 12 août 1949: Commentaire* (2nd ed.), 2006, Convention I, Art. 1, p. 26.

⁸ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion of the 9 July 2004, ICJ Reports 2004 pp. 136 et seq.; cf., A. Imsei, *Critical reflections on the international humanitarian law aspects of the ICJ wall advisory opinion*, 99 American Journal of International Law 102 (2005), pp. 114 et seq.; D. Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 American Journal of International Law 88 (2005).

⁹ *Ibidem*, p. 199, para. 158.

¹⁰ Conference of High Contracting Parties to the Fourth Geneva Convention of 1949, on 15 July 1999 and on 5 December 2001, declaration of 5 December 2001 in International Review of the Red Cross No. 847, pp. 661-695 (Implementation of the Fourth Geneva Convention in the occupied Palestinian territories: history of a multilateral process (1997-2001); UNGA A/ES-10/L.7 (2001) B; UNGA Res. 97 (58) (9 December 2003), UN Doc A/RES/58/97.

¹¹ ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, ICJ Rep 1986, pp. 14 et seq. p. 114, para. 219 f.; Kessler, *supra* note 6, pp. 498, 507 et seq.

¹² N. Krisch, in: B. Simma et al. (eds.), *The Charter of the United Nations. A Commentary* (3rd ed.), Oxford University Press, Oxford: 2012, vol. 1, Art. 39, marginal note 25.

by now even noncontroversial or at least almost noncontroversial – that those kinds of violations of international law do amount to, and may be characterized by the Security Council as, triggering the right of the Council to act under Chapter VII.¹³

Thus, violations of the Genocide Convention or war crimes trigger the primary responsibility of the Security Council under Art. 24 of the Charter and the ensuing duties laid down in paragraphs 1 and 2 of Art. 24.¹⁴ Indeed, Art. 24 of the Charter may be interpreted in a way to really imply certain duties. Art. 24 para. 2 refers to the discharge of duties by the Security Council when it states: “[i]n discharging these duties (...)”, and “duties” certainly imply that there are certain obligations on the part of the Council. Similarly, the French text of Art. 24 is even less ambiguous in that it refers to the fulfilment of the duties and then states that “*qu’en s’acquittant des devoirs que lui impose cette responsabilité, des devoirs que lui impose*” – thus “duties” are imposed upon the Council in the French text of Art. 24. And, again in Art. 24 para. 2, the Council has to act in the “*accomplissement de ces devoirs*”, i.e. in the fulfillment of these duties. Moreover, under Art. 24 para. 2, the Council “*shall act* (...)”. In that regard it is also interesting to note that the wording of the respective Dumbarton Oaks proposal had only referred to the fact that the Council “should act”, and that this wording was later changed to “shall act”.¹⁵

Accordingly, already under the wording of Art. 24 there are obligations inherent in the Charter to act. Similarly, if one considers the whole approach of the Uniting-for-Peace-resolution of the General Assembly,¹⁶ it might be safe to assume that it implies that the Security Council has certain duties, and it is only if those duties are not being fulfilled by the Security Council that the secondary responsibility of the General Assembly comes into play, which again implies certain duties incumbent upon the Security Council.¹⁷

Similarly, if we take it for granted that indeed member States have obligations under the Genocide Convention and under the four Geneva Conventions to act and if, furthermore, they transfer responsibility to the Security Council in that such violations

¹³ Cf., e.g. UNSC Res 688 (5 April 1991), UN Doc S/Res/688, operative para. 1; Res 794 (3 December 1992), UN Doc S/Res/794, operative para. 10; Res 1296 (19 April 2000), UN Doc S/Res/1296, operative para. 5; Res 1314 (11 August 2000), UN Doc S/Res/1314, operative para. 9; UNSC Res 1674 (28 April 2006), UN Doc S/Res/1674, operative para. 26; and most recently UNSC 1970 (26 February 2011), UN Doc S/Res/1970, operative para. 2 (a).

¹⁴ A. Peters in: Simma, *supra* note 12, vol. 1, Art. 24, marginal note 15.

¹⁵ Dumbarton Oaks Proposals for the Establishment of a General International Organization of 7 October 1944 in US Dept. of State, Dumbarton Oaks Documents on International Organization, Chapter IV, Section B, 5.

¹⁶ UNGA Res. 377 (V) (3. November 1950), UN Doc A/Res/377 (V) operative para. 1.

¹⁷ *Ibidem*; cf. Ch. Tomuschat, *Uniting for peace*, 76 *Friedenswarte* 289 (2001); J. Andrássy, *Uniting for Peace*, 50 *American Journal of International Law* 563 (1956); D. Zaum, *The Security Council, the General Assembly, and war: the uniting for peace resolution*, in: V. Lowe et al. (eds.), *The United Nations Security Council and war: the evolution of thought and practice since 1945*, Oxford University Press, Oxford: 2008, pp. 154 et seq.

of the Genocide Convention and of the Geneva Conventions do amount to threats to peace or breaches of peace, and if States have transferred their responsibility, we cannot assume that States wanted to transfer their obligations to abide by the Genocide Convention and the Geneva Conventions respectively to the Security Council, and not at the same time also oblige the Security Council to act on their behalf, because they would by that token violate the aforementioned obligations. Therefore, that again implies that by transferring obligations or transferring powers to the Security Council, States implicitly also transfer at the same time their obligations that come with it.

Moreover, as already mentioned, under Art. 24 of the Charter, the Security Council shall act in accordance with the purposes and principles of the United Nations, and obviously human rights protection constitutes one of the major purposes and principles of the organization. If one thus shares the general view that under Art. 24 of the Charter the Security Council has certain duties and obligations, at least when it comes to genocide and war crimes triggering Arts. 24 and 39, one might ask how to operationalize these obligations.

Obviously, the Security Council has a wide margin of appreciation when acting under Chapter VII, since Arts. 39, 40, and 42 refer to deciding “what measures shall be taken”.¹⁸ Obviously, therefore, the Security Council is merely under an obligation of conduct and that is indeed what the Court stated in its genocide judgment, namely that “the obligation to prevent genocide is only an obligation of conduct”¹⁹ – yet at least it does constitute a (legal) obligation of conduct. We might now compare this holding with the jurisprudence of the European Court of Human Rights in *Ilascu*,²⁰ where a certain territory was not under the *de facto* control of the respective contracting party. Nevertheless, the Court found that the contracting party still had positive obligations to try its best to prevent violation of Arts. 2 and 3 of the European Convention on Human Rights occurring in that territory.²¹ If one were to transfer that idea, taking into account that both the right to life and the prohibition of torture under Arts. 2 and 3 of the European Convention, like the prohibition of genocide and war crimes, form part of *ius cogens*, we may also transfer the holding in *Ilascu*, namely that the Security Council is at least under an obligation to make a *bona fide* attempt to cope with the obligations arising under both Art. 1 of the Genocide Convention and common Art. 1 of the Geneva Conventions.²²

This approach is confirmed by the holding of the ICJ in its Wall opinion, where the Court, albeit quite cautiously, stated that “the Security Council, should consider

¹⁸ Art. 39 of the UN Charter.

¹⁹ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 1.

²⁰ European Court of Human Rights, *Case of Ilascu and Others v. Moldova and Russia*, Judgment of 8 July 2004, Application no. 48787/99 ECHR 2004-VII pp. 179 et seq.

²¹ *Ibidem*, p. 77, paras. 331, 333.

²² A. Zimmermann, *The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?*, in: U. Fastenrath et al. (eds.), *From bilateralism to community interest: Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford: 2011, p. 645.

what further action is required to bring to an end the [underlying] illegal situation”.²³ It thus seems that the Court in the Wall opinion similarly took the position that, at least somewhat, the Security Council is under an obligation to cope with such violations of international law, notwithstanding its discretion how to act.²⁴

That brings us to our next question, namely, what are the obligations of individual member States of the Security Council when voting in the Council?

4. OBLIGATIONS TO PREVENT GENOCIDE AND WAR CRIMES AND MEMBERS OF THE SECURITY COUNCIL

First, it is important to note that all members of the Security Council, including the five permanent members, are contracting parties of both the Genocide Convention and the Geneva Conventions. Thus, all States deliberating within the framework of the Security Council are bound by the Genocide Convention and the Geneva Conventions and, therefore, the question arises what are their obligations when they exercise their voting rights in the Council generally, and, more specifically, when they vote in favour of a given draft resolution, when they abstain, or when they, as permanent members, eventually exercise their veto? One may recall that in *Behrami* and *Saramati*, it was the European Court of Human Rights²⁵ which found that individual contracting parties of the European Convention on Human Rights are not bound by their obligations arising under the Convention when voting in the Security Council.²⁶ One might wonder, though, whether indeed that approach is first, convincing, and second whether it is also relevant in the case at hand.

First, it might be argued that this result reached by the European Court of Human Rights is not convincing because the Court gave no reason why a State contracting party of the European Convention on Human Rights should be fully dispensed of its obligations under the Convention within the framework of an international organization and its organs such as the United Nations and the Security Council. Yet, second, even if one were to follow *arguendo* the approach taken by the European Court of Human Rights, it would only apply to (positive) obligations arising under a regional instrument

²³ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, *supra* note 8, pp. 135 et seq. (n. 40) (p. 200, para. 160).

²⁴ K. Ipsen, *Völkerrecht* (5th ed.), C. H. Beck, Munich: 2004, p. 118.

²⁵ European Court of Human Rights, Decision as to the Admissibility of Application no. 71412/01 (*Agim Behrami and Bekir Behrami against France*) and Application no. 78166/01 (*Ruzhdi Saramati against France, Germany and Norway*), 2 May 2007; cf., M. Milanovic & T. Papić, *As bad as it gets*, 58 International and Comparative Law Quarterly 267 (2009); P. Klein, *Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme*, 53 Annuaire français de droit international 43 (2007); Ph. Lagrange, *Responsabilité des Etats pour actes accomplis en application du Chapitre VII de la Charte des Nations Unis*, 112 Revue Générale de Droit International Public 85 (2008).

²⁶ ECtHR, *Agim Behrami and Bekir Behrami against France* (decision as to the admissibility), n. 88, para. 149.

such as the European Convention on Human Rights, since it is safe to assume that the underlying idea of the European Court of Human Rights in *Behrami* was that it cannot be that European members of the Security Council would carry with them in their backpack their obligations arising under the European Convention on Human Rights when voting in the Security Council, while other members of the Security Council from other regions of the world would then carry with them their respective obligations stemming from other treaties. Yet, when it comes to the Genocide Convention and the Geneva Conventions, the legal situation is fundamentally different given that all member States on the Security Council, to still use the previous picture, carry the very same backpack with them since they are all bound by the Genocide Convention and the Geneva Conventions. Accordingly, the assumed danger that European State members of the Security Council would raise in the deliberations limitations arising under the European Convention on Human Rights, and African States those arising under the African Charter on Human and People's Rights, and so forth, simply does not arise in the case at hand. Therefore, even if one were to assume, as a matter of principle, the *Behrami* and *Saramati* holding to be a correct one, it would not, at least when it comes to the Genocide Convention and the Geneva Conventions, hold true.

Accordingly, States voting in the Security Council have to take into account their obligations under international law as they arise under the Genocide Convention and the four Geneva Conventions. It is also important to realize that the issue of Art. 103 of the Charter of the United Nations simply does not arise at this stage because Art. 103 of the Charter only comes into play once obligations under the Charter have arisen. This is however not yet the case where the Security Council is still deciding on whether to adopt measures (and if so which ones) under Chapter VII. As long as no such measure has yet been adopted, there are no obligations whatsoever arising under the Charter yet. Accordingly, Art. 103 of the Charter is a non-issue at this stage.²⁷ There is, therefore, no reason to assume that individual members of the Security Council are not bound by their obligations under the Genocide Convention and under the four Geneva Conventions to prevent genocide and to ensure respect for the Geneva Conventions when voting in the Council.

One might then wonder what this could mean in the actual practice of the Security Council. It probably does not mean that all States have to vote in favour of any given draft resolution, since every member of the Security Council has some discretion whether in a given situation a certain measure would indeed prevent genocide and would indeed ensure respect for the Geneva Conventions. But at the very least, member States of the Security Council, whether permanent or non-permanent members, are under the obligation to take their obligations under the Genocide Convention and under the Geneva Conventions into account, and they cannot rely on political grounds to veto or vote against a draft resolution simply for other reasons, unless they were willing to violate their positive obligations under the Genocide Convention and the four Geneva

²⁷ A. Paulus & J. R. Leiss, in: Simma, *supra* note 12, vol. 2, Art. 103 marginal note 38.

Conventions as described above. In particular, where a regional organization is willing to act under Chapter VIII, Security Council members would, as a matter of principle at least, not be enabled, legally speaking, to veto a resolution which eventually would authorize a regional organization to take enforcement measures under Chapter VIII.²⁸

These positive treaty-based obligations would, however, as has been shown, be limited to situations of genocide and war crimes. It would not cover situations where ‘only’ crimes against humanity are in the process of being committed. If one were to transpose that to the situation in Syria, we have to note that the situation at a certain point in time reached the threshold of a non-international conflict, and it is probably safe to assume that significant violations of common Art. 3 have been committed, or are in the process of being committed. In such a scenario a “blanket veto policy”, vetoing *any* possible action by the Security Council under Chapter VII, would indeed run counter to the obligations arising at least under the four Geneva Conventions.

CONCLUDING OBSERVATIONS

Within the context of the conflict in Syria, the Russian foreign minister Lavrov has been quoted as stating that “the Council in Syria is acting as it was supposed to act when the Charter was drafted in 1945”, thereby referring to the voting system within the Security Council as drafted in 1945, including the veto of the permanent members. Yet, while he was right that the voting system in the Security Council has not changed since 1945, substantive international law has significantly changed ever since the Genocide Convention was adopted in 1948 and the Geneva Conventions were adopted in 1949, and what is more Russia, just like all other members of the Security Council, has since then also acceded to these instruments with the ensuing positive obligations to prevent genocide and to ensure respect for the Geneva Conventions. So while it might thus be true that the Security Council is acting as it was supposed to act in 1945 when it comes to procedure and voting, its members have in the past years not always acted in the way they must act under current modern international law.

²⁸ Cf., generally, Z. Deen-Racsmany, *A Redistribution of Authority between the UN and Regional Organizations in the Field of the Maintenance of Peace and Security?*, 13 *Leiden Journal of International Law* 297 (2000).

POLISH PRACTICE IN INTERNATIONAL LAW

*Oktawian Kuc**

KRSTIĆ CASE CONTINUED

Decision of the Circuit Court in Warsaw of 6 December 2012
(Ref. no. VIII Kop 222/12)¹

THE DECISION:

The Circuit Court in Warsaw, pursuant to Articles 609 § 1, 611 § 4, 611a § 1 and § 6 of the Polish Code of the Criminal Proceedings and to Article 2.4 of the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) signed in The Hague on 18 September 2008, on the basis of a motion filed by the Minister of Justice has affirmed the legal permissibility of taking over the ICTY Judgment of 19 April 2004 regarding Radislav Krstić, which imposed a 35 year prison sentence, in order to enforce it. Additionally, the Court ordered a preventive measure in the form of preliminary detention for 2 months from the day of taking custody of the convict by the relevant authorities on the territory of the Republic of Poland.

FACTUAL BACKGROUND:

The massacre in Srebrenica is probably the most shocking example of atrocities on civilians, which occurred during the wars following the disintegration of the former

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¹ Case not reported, on file with author.

Yugoslavia. Although it was designated by the UN Security Council as a “safe area”, Srebrenica was seized by Bosnian Serb forces in July 1995 with the aim of separating Muslim women, children and the elderly from the remaining male population. As a result of the plan, approximately 8,000 Bosnian Muslims from the enclave were rounded up, executed and buried in mass graves. Later, in order to conceal the evidence of the crimes committed, many bodies were excavated and reburied in remote locations.

The Drina Corps, commanded by Radislav Krstić from July 1995, were present in the area and involved in the implementation of the plan concerning the Muslim population. Krstić's troops were responsible for bombarding Srebrenica; obtaining means of transportation, including the buses later used for the transportation of Bosnian Muslims to the execution sites; monitoring the evacuation of women and children from the area; and attacking the Bosnian Muslim column trying to reunite with the Muslim-controlled territory. Additionally, the Drina Corps' assets and personnel were engaged in facilitating the executions and mass burials at Orahovac, Nežuk, Kozluk, Branjevo Farm and the Pilica Cultural Centre.

In an indictment of 2 November 1998, amended on 22 November 1999, the ICTY Prosecutor charged Radislav Krstić with genocide, crimes against humanity in form of extermination, murder, persecutions, deportations and inhuman acts, as well with violation of the laws or customs of war in form of murder. All alleged acts were committed by Krstić in his capacity as the Commander of the Drina Corps of the Bosnian Serb Army between July and November 1995 in connection with the siege and fall of Srebrenica. He was detained by SFOR troops on 2 December 1998 in Bosnia and Herzegovina, and later transferred to the ICTY detention facility.

Radislav Krstić was the first person to be found guilty of genocide by the ICTY, as the Trial Chamber I, presided over by Judge Almiro Rodrigues, rendered its Judgment on 2 August 2001. During the trial, it was established beyond a reasonable doubt that the convict ordered the procurement of the buses and oversaw the transport, assigned additional troops from his command to participate in the Branjevo Farm massacre, monitored subordinated officers directly engaged in killings, had knowledge of the plan to execute the entire remaining Bosnian Muslim male population from the Srebrenica enclave, and was aware of his soldiers' involvement in the exterminations and mistreatments. Additionally, Krstić was convicted for persecution, crimes against humanity, and murder as a war crime. Consequently he was sentenced to 46 years in prison.

Both the Prosecution and the Defense appealed. Although the Appeal Chamber, presided over by Judge Theodor Meron, conceded that genocide had occurred in Srebrenica as determined by the court of first instance, it reduced Krstić's responsibility for genocide from that of direct participation to only aiding and abetting. The Chamber highlighted that no direct evidence establishing the participation of the Drina Corps in the executions was presented. Only the involvement of their personnel and assets in assisting the killings could be proven. It was however determined that Krstić was fully aware of the plan to commit genocide conceived by the Bosnian Serb Army Main Staff in Srebrenica and did not prevent the use of soldiers and resources of the troops under

his command to carry it out. Without adequate proof of the convict's genocidal intent, the Appeal Chamber held he could only be responsible as an aider and abettor. The Trial Chamber's verdict in relation to murder (as a war crime) and persecution (a crime against humanity) was affirmed, but the Appeal Chamber did not share the legal reasoning for excluding the possibility of cumulative convictions, and found Krstić guilty of aiding and abetting the extermination and persecutions (crimes against humanity) and aiding and abetting murder (a war crime). The sentence imposed in the first instance was adjusted accordingly and reduced to 35 years of imprisonment.

On 20 December 2004, the convict was transferred to the United Kingdom to serve his sentence as determined by the Appeal Chamber. During his stay in Wakefield prison, in May 2010 three Muslim inmates attacked him and slit his throat open. Although Krstić survived the assault with serious injuries, the Government of the United Kingdom could not ensure his safety. Thus, he was transferred to the ICTY Detention Unit in order to await the determination of a new location for enforcement of his sentence.

Following preliminary correspondence, the ICTY Registrar, using diplomatic channels, requested on 10 July 2012 the taking over of the enforcement of the remainder of Krstić's sentence on the territory of the Republic of Poland. Thus the Minister of Justice of Poland, on 31 August 2012, filed a motion in the Circuit Court in Warsaw for issuance of a decision concerning the legal permissibility of the takeover. After receiving the court's decision, the Minister of Justice decided on 4 January 2013 to agree to take over the enforcement of the sentence imposed on Radislav Krstić and informed the ICTY accordingly. As of 13 March 2013, the final decision concerning the actual transfer of Krstić is still pending.

REASONING OF THE WARSAW COURT:

Before reaching its decision, the Court was confronted with two main legal issues. The first matter which had to be examined was whether all the prerequisites mandatory under international law binding Poland in relation to the enforcement of ICTY judgments were fulfilled. Secondly, all the conditions laid down by Polish law to enforce foreign judgments had to be fulfilled to the Court's satisfaction.

According to Article 27 of the ICTY Statute adopted by the UN Security Council,² the imprisonment of convicts shall take place in one of the States that indicates their willingness to accept such persons and shall be carried out in accordance with the applicable law of that State, but subject to the supervision of the ICTY. Poland has expressed its interest in assisting the Tribunal in this regard and this cooperation

² *Updated Statute of the International Criminal Tribunal of the former Yugoslavia*, September 2009, adopted on 25 May 1993 by Resolution 827 and amended by Resolutions 1166, 1329, 1411, 1431, 1481, 1597, 1660, 1837 and 1877, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (15 January 2013).

was formalized. The appropriate arrangement, entitled the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia (hereinafter the “Agreement”),³ was concluded on 18 September 2008 in The Hague. The President of Poland later ratified it⁴ on 9 July 2009, with the consent of the Polish Parliament.⁵ This procedure has significant legal consequences, as pursuant to Article 91.2 of the Constitution of the Republic of Poland “an international agreement ratified upon prior consent granted by statute shall have precedence over statutes, if such an agreement cannot be reconciled with the provisions of such statutes.”⁶

The Agreement sets both the basic legal framework for the procedure relating to cooperation in matters concerning the enforcement of the ICTY sentences as well as the conditions of such enforcement. Generally, all powers of decision remain with the Tribunal. Without the affirmative decision of the ICTY President, undertaken in consultation with the judges, a convict can neither be pardoned, released early, moved to a half-open or an open prison, nor can his sentence be commuted, even if such possibilities were available under Polish law and all the required prerequisites were fulfilled or satisfied. Additionally, the Polish authorities are bound by the duration of the sentence imposed by the Tribunal. Pursuant to Article 3.2 of the Agreement, enforcement is possible even, if a convicted person is neither a Polish national nor permanent resident, and even without his consents to serve the sentence on Polish soil.

The first matter – satisfaction of international legal requirements, did not pose any significant obstacles for the Warsaw Court. The request to the Government of the Republic of Poland to enforce the sentence was issued by the ICTY Registry and approved by the ICTY President, as required by Article 2.1 of the Agreement. All relevant accompanying documents were attached, including:

- 1) the certified copy of the final and valid judgment of the International Criminal Tribunal for the former Yugoslavia of 19 April 2004;
- 2) specification indicating how much of the sentence had already been served, including information on pre-trial detention; and
- 3) a medical report and other data relevant to the enforcement of the sentence.

³ In Polish: *Umowa między Rządem Rzeczypospolitej Polskiej a Organizacją Narodów Zjednoczonych o wykonywaniu wyroków Międzynarodowego Trybunału Karnego dla byłej Jugosławii*, 18 September 2008, Dz. U. 2009, No. 137, item 1123.

⁴ *Government Statement of 3 August 2009 concerning the binding force of the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, concluded in The Hague on 18 September 2008*, Dz. U. 2009, Nr 137, item 1124.

⁵ *Act of 2 April 2009 on ratification of the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, concluded in The Hague on 18 September 2008*, Dz. U. 2009, Nr 79, poz. 661.

⁶ *Konstytucja Rzeczypospolitej Polskiej* (The Constitution of the Republic of Poland), 2 April 1997, Dz. U. 1997, No. 78, item 483, as amended.

In relation to point 2, as of 12 December 2012 Radislav Krstić had already served 5,156 days (14+ years) from the day of his arrest. He was kept in the UN Detention Unit until his transfer to a prison in the United Kingdom, and on 15 December 2011 was again in the UN Detention Unit. As far as medical information provided is concerned, despite the fatal attack in 2010, no contraindications exist preventing the further enforcement of the convict's sentence, although the Court took note of the scant nature of the medical documentation.

In addition to the need to conform to international regulations, the Polish authorities and courts are also bound by Polish law governing the matter of enforcement of foreign judgments. This is also affirmed by the Agreement itself, which stipulates in Article 2.4 that "the competent national authorities of the requested State shall promptly decide upon the request of the Registrar, in accordance with national law".

Polish rules pertaining to the enforcement of foreign judgments are primarily included in the Code of Criminal Proceedings (hereinafter the "Code").⁷ Although the Code provides a complex legal framework for cooperation with the International Criminal Court,⁸ there is a lack of special rules pertaining to *ad hoc* international criminal tribunals. Only Article 615 § 1 of the Code states that "[with respect] to relations with international criminal tribunals and their organs functioning on the basis of international agreements to which the Republic of Poland is a party, or established by the international organizations formed by international agreements ratified by the Republic of Poland, the provisions of this Part⁹ shall be applied accordingly." Furthermore, Article 615 § 2 sets forth the principle of the subsidiarity of Polish statutory norms in relation to international obligations,¹⁰ which has been affirmed by the Polish Supreme Court.¹¹ This article is of a key importance in the Krstić case, as it provides the Court with the competence to: firstly, not take into account those national provisions that are in direct conflict with the Agreement concluded with the United Nations through the ICTY; and secondly, to refer accordingly to those rules of municipal law regulating judicial

⁷ *Kodeks postępowania karnego* (Code of Criminal Proceedings), 6 June 1997, Dz. U. 1997, No. 89, item 555, as amended.

⁸ Articles 611g to 611s.

⁹ The Code is divided into fifteen Parts, and each Part consists of Chapters. Part XIII is titled "Proceedings in criminal cases in international relations." This is the Part to which the cited article refers.

¹⁰ "The provisions of this Part shall not be applicable, if an international agreement to which the Republic of Poland is a party, or a legal act governing the functioning of an international criminal tribunal resolves the matter differently."

¹¹ *Postanowienie Sądu Najwyższego* (Decision of the Supreme Court), dated 8 June 2009, IV KK 461/08: "the regulated in the Code of Criminal Proceedings a system of cooperation in criminal cases in international relations (...) is subsidiary with respect to international agreements. Application of municipal provisions is not fully excluded, but concerns a narrow scope of cases, being situations when an international agreement does not regulate a key issue for the cooperation. If lacunae exist and the regulations included in an international agreement are not complete, the Polish court is obliged to apply those provisions of national law which deal with the issue. Whereas with certainty an international agreement can exclude the application of municipal law in its entirety, if a given type of cooperation is regulated in a comprehensive manner."

cooperation with foreign authorities, but not necessarily literally with international criminal tribunals, in criminal cases, including the enforcement of criminal judgments. From this perspective, it is rather puzzling, why the Circuit Court in Warsaw did not indicate Article 615 as a main and predominant basis of its decision, but rather specified concrete articles of the Code that can only be applicable by the virtue of Article 615 and in relation to it.

Both on the basis of the above-mentioned subsidiary rule and relevant provisions of the Agreement, Polish statutory rules inscribed in the Code governing the jurisdiction and venue of a court (Art. 611 § 4), the role of the Minister of Justice as a moving party before municipal courts (Art. 609 § 1), the obligatory defense of a convict if he/she is not available to appear before the court (Art. 611a § 1), and the permissibility to order preventive measures (Art. 611a § 6) shall be especially applied by Polish courts confronted with a request concerning the enforcement of ICTY judgments. Furthermore, the Polish courts shall scrutinize, whether the conditions set forth in Article 611b § 1, excluding the permissibility of enforcement of foreign judgments in Poland, are relevant in a particular case. As explained above, some of those conditions may be countermanded by the Agreement.

These conditions set forth in Polish legislation are rather substantive in nature. As the Court stressed: “[p]rovision of Art. 611b § 1 points 1-6 of the Code of Criminal Proceedings defines the prerequisites, which exclude the permissibility of taking over the execution of a foreign judgment in Poland. They are mandatory and therefore a court shall issue a ruling on the impermissibility of taking over the execution of a judgment if they occur”. Pursuant to the article mentioned, a judgment shall not be taken over to be executed in Poland, if: 1) it is neither final, legally valid, nor enforceable; 2) a convict does not agree to be transferred for the execution of incarceration;¹² 3) a judgment’s execution could infringe the sovereignty, security or legal order of the Republic of Poland; 4) its execution would be contrary to Polish law; 5) the act indicated in a request does not constitute a criminal act under Polish law; 6) an act does not fulfill all elements of an offence or a statute declares that an act is not an offence or a perpetrator has not committed the alleged crime or cannot be punished; or 7) any statute of limitations is applicable.

The finality of the Krstić judgment is self-evident. Moreover, it is actually being enforced as the convict has already served part of his sentence. As far as the consent of the offender is concerned, this condition is explicitly excluded on the basis of the subsidiarity of Polish law in relation to international agreements regulating cooperation in criminal matters, as “[p]ursuant to Art. 3.2 of the Agreement, the enforcement of judgments rendered by the Court is possible also in situations when a person convicted is not a Polish citizen, has not had a place of permanent residence on the territory of

¹² In relation to convicts penalized by a criminal fine or forfeiture of property and not being a permanent resident of Poland, the taking over of a judgment is possible, only if his or her property is located on territory of Poland.

the Republic of Poland, or does not consent to the enforcement of a judgment in Poland.”

The Court dedicated the majority of its opinion to the third and fourth conditions for exclusion. It stated at the beginning that “[t]he execution of the ICTY judgment of 19 April 2004 neither violates the sovereignty, security, nor the legal order of the Republic of Poland, nor is it contrary to Polish law” and provided a well-balanced reasoning focusing not only on the specific circumstances of the case, but also including a more general examination of current international relations, initially concentrating on the most fundamental issue, i.e. sovereignty. In particular it stated that: “Sovereignty means State independence, manifesting itself in the possession of a legal personality constituting the highest authority over a defined territory. A sovereign State is therefore a subject of international law in international relations. State authorities can undertake any actions they deem most beneficial for the State’s interests. The notion of sovereignty has remained the foundation of the international law, but its scope has been reshaped. The justice system is a strictly protected instrument of the authority exercised, because it is a fundamental executor of the citizens’ law, guardian of social order, and its proper functioning is a pillar of social confidence in the government. Nevertheless, even in this sphere international cooperation is perceived to be necessary in order to achieve greater efficacy and justice. In order to reconcile the two contradictory rights: first – to protect sovereignty, and second – to increase effectiveness, the principle of complementarity has been introduced, namely a mutual complement of municipal and international jurisdictions.

International Criminal Tribunals have grown out of the need to fulfill the idea of justice in the international arena in cases exceeding the particular, individual interests of a single State, thus where the World community has acknowledged that not only has its sense of security been violated, but also certain values and goods underlying its existence. International Tribunals compel civilized conduct in the uncivilized conditions posed by wars. The need to deliver justice with the use of instruments offered by the criminal law (both substantive and procedural) – despite all the imperfections connected with the accomplishment of this goal – has appeared to be so strong that it has been expressed in the form of a categorical imperative: ‘there is no peace without justice’.

It needs also to be highlighted that the Tribunal’s judgments are characterized by a preventive impact on potential perpetrators. This is a universal and irrefutable basis of the entire justice system. The consequent truth is that it is not the degree of penalty but its inevitability that is the main factor deterring criminal conduct. Lack of jurisdiction would be a consent to, or encouragement of, illegal conduct. It reinforces the principle that the impunity of one crime leads to another crime. Everyone must be aware that killing thousands of people shall not go unpunished, especially in the name of a perverted ideology.

The Tribunal – in the light of international politics – is an effective instrument in conflict and dispute resolution, because it can permanently eliminate chaos and provocateurs from political life. It is a means of intervention in the internal matters of a State, but resting on firm legal and moral foundations.

The establishment of the International Criminal Tribunal for the former Yugoslavia has not only been a homage paid to the victims of the bloody conflict, but above all a victory of justice over political opportunism. The international community, by its act of creating the Tribunal, wished to pay a moral debt to the victims remaining anonymous to it, rather than to their families, in whose memories they live unrevengeed. The natural, human reaction is to demand retribution for the wrong and to punish those responsible. This means that the justice delivered can satisfy public consciences and restore confidence in the law. (...)

The limit on the exercise of a sovereign power – not indicating a State's weakness, but on the contrary, its strength – is *inter alia* its respect for norms assumed as a result of signing different types of international legal obligations”.

Therefore, on the basis of the essential principle of *pacta sunt servanda*, derived from reason and morality as well from the UN Charter (Art. 2.2) and the Vienna Convention on the Law of Treaties (Art. 26), the Agreement concluded to foster cooperation between Poland and ICTY was deemed not to infringe on Poland's sovereignty.

The Court dealt with the issue of security by indicating that the same kind of agreements had been concluded by a majority of the European countries, including those that used to be integral parts of the former Yugoslavia. Moreover, “[t]he jurisprudence accepts that the phrase – the possibility of violating the legal order of the Republic of Poland – should be understood to encompass a situation, when a judgment that is to be taken over for execution has been rendered in breach of material procedural safeguards or norms constituting the essence of the legal order of Poland or shaping defined legal institutions, e.g. breach of evidentiary rules or the right of defense. The documentation attached by the International Criminal Tribunal for the former Yugoslavia proves that the process of Radislav Krstić was conducted in a fair manner, on the basis of legally binding acts, in accordance with standards determined by the European Court of Human Rights.”

As to the compatibility with Polish criminal law of those criminal offences for which Krstić had been prosecuted and sentenced, “[p]rovision of Art. 19 § 1 of the Criminal Code¹³ stipulates that a court shall sentence for incitement or aiding within the limits provided for perpetration. According to Polish law, the acts indicated in the request may be categorized as crimes against peace, against humanity and war crimes defined in Chapter XVI of the Criminal Code, and additionally the statute of limitations does not apply to crimes against peace, against humanity, and war crimes (Art. 105 § 1 of the Polish Criminal Code)”. The crime of genocide is included in Article 118 of the Polish Criminal Code and resembles its conventional equivalent, but extends its protection to political groups and defined philosophies of life, besides national, ethnic, racial and religious groups.

For these reasons, and taking into account that no legal hindrance to taking over the judgment in Krstić case for execution existed, the Court held as described at the outset.

¹³ *Kodeks karny* (Criminal Code), 6 June 1997, Dz. U. 1997, No. 88, item 553, as amended.

CONCLUSIONS

The Krstić case undoubtedly has a symbolic meaning. It sanctioned the opinion that the crime of genocide is not a remote and rather historical event, which is unlikely to occur at the end of 20th century, but rather remains a real threat and significant danger to national, ethnic, racial and religious groups throughout the World. The consciousness of Europe, which believed that after World War II and the Holocaust the “Old Continent” was free from such monstrosities as genocide, was shocked by the designation of the Srebrenica massacre as a clear case of the crime of genocide.

This case also has a special meaning for Poland. The Republic of Poland was the first country of the World to issue convictions for the crime of genocide,¹⁴ even before the entrance into force of the Genocide Convention,¹⁵ which was drafted and lobbied for by a Pole – Professor Raphael Lemkin.¹⁶ After more than 60 years, a Polish court was asked again to assist in the suppression of this “odious scourge”. Moreover, the case also has a precedential value in the Polish legal regime, as a Polish court for the first time has been confronted with a request from an international criminal tribunal and officially pronounced in favor of international judicial cooperation. This decision shall be looked upon for normative guidance in future cases, particularly those relating to the International Criminal Court cooperation regime.

¹⁴ The term “genocide” was used in the judgments rendered by the Supreme National Tribunal of Poland, which tried Nazi perpetrators: *Poland v. Greiser*, (1948) 13 LRTWC 70, [1946] 13 ILR 387; *Poland v. Goeth*, (1946) 7 LRTWC 1, [1946] 13 ILR 268 (“the wholesale extermination of Jews and also of Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations”) and *Poland v. Hoess*, (1948) 7 LRTWC 11.

¹⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

¹⁶ The term “genocide” appeared originally in R. Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation – Analysis of Government Proposals for Redress*, Carnegie Endowment for International Peace, Washington, D.C.: 1944; although Lemkin’s concept can easily be tracked back to a paper he presented at the 5th Conference for the Unification of Penal Law in Madrid in 1933. On the involvement of Lemkin in passing the Convention, see J. Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Palgrave Macmillan, New York: 2008.

AMICUS CURIAE BRIEFS IN *JANOWIEC AND OTHERS V. RUSSIA*

On 16 April 2012 the European Court of Human Rights rendered its judgment in the case of *Janowiec and Others v. Russia* (nos. 55508/07 and 29520/09). The case related to the Katyn massacre, perpetrated in 1940 by the Soviet Union based on a decision of the Politburo of the Soviet Communist Party, the highest State organ at that time. All told 21,857 Polish citizens were murdered, almost 70 per cent of them being prisoners of war. Only in 1990 did the Soviet Union authorities acknowledge Soviet responsibility for the massacre (after claiming for years the Germans were the perpetrators). Shortly thereafter a domestic criminal investigation was commenced, and eventually discontinued in September 2004. The results of the investigation are not known to the public because the final decision, and 35 volumes of the case file (out of a total of 183), still remain confidential, allegedly to safeguard “the crucial security interests of the Russian state”.

Following the termination of their Katyn investigation, the Russian authorities rejected requests for rehabilitation of the Katyn victims (filed by close relatives of the victims) due to the fact that the investigation had not definitively established what may have happened to the Polish prisoners in the spring of 1940.

The applicants in the *Janowiec* case alleged violation of three provisions of the European Convention on Human Rights (ECHR):

- a) right to life in its procedural dimension, i.e. the State’s obligation to investigate (Article 2);
- b) prohibition of inhuman and degrading treatment, based on the way the Russian authorities had reacted to the requests for rehabilitation and other motions lodged by the applicants (Article 3);
- c) obligation of co-operation with the Court, since the Russian authorities had refused to provide the Court with a copy of the decision to discontinue the Russian investigation into the Katyn massacre (Article 38).

In its judgment a chamber of seven judges found that violations of Articles 3 and 38 had taken place. At the same time, when addressing the complaint formulated under Article 2, the Court has for the first time relied on the formula that its temporal competence to hear allegations referring to the procedural obligation to conduct an effective investigation can be founded on “the need to ensure the effective protection of the guarantees and the underlying values of the Convention” (this formula is part of the famous test established by the Grand Chamber in its *Šilih v. Slovenia* judgment, 9 April 2009 (no. 71463/01). Although the Court characterised the Katyn massacre as a mass

scale imprescriptible crime under international law (war crime), and in consequence as an act contrary to the underlying values of the Convention, it deemed itself not competent to hear the case *ratione temporis*. The Court held that to become competent there must be additional new and important material emerging after the date of Russia's ratification of the ECHR.

The ruling that the complaint based on Article 2 was inadmissible was decided by a narrow majority of four votes to three. The minority criticised the Court for its narrow approach to the formula that refers to the Convention's core values.

The European Convention on Human Rights allows each party to request that a case decided by a chamber to be referred to the Grand Chamber of 17 judges. But the requesting party must demonstrate to a panel of five judges that the case is exceptional and raises a serious issue of general importance (Article 43).

The request for referral was lodged in June 2012, and the panel accepted it on 24 October 2012. In November and December 2012 six renowned non-governmental organizations asked the Court for permission to intervene in the case as third parties. The Court agreed, and they presented their written submissions in January 2013.

The hearing before the Grand Chamber was held on 13 February 2013. The final judgment is expected later this year or in the beginning of 2014.

This documentation block consists of:

- a) request for referral;
- b) *amicus curiae* brief by Amnesty International (London);
- c) joint *amicus curiae* brief by Human Rights Centre "Memorial" (Moscow), European Human Rights Advocacy Centre (London) and Essex Transitional Justice Network, School of Law, University of Essex, UK
- d) *amicus curiae* brief by Open Society Justice Initiative (New York);
- e) *amicus curiae* brief by Public International Law & Policy Group (the Hague).

*Ireneusz C. Kamiński**

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BOOK REVIEWS

Chiara Giorgetti (ed.), *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (series: *International Law in Practice*, Vol. 4),
Martinus Nijhoff Publishers, Leiden-Boston, 2012, pp. xxxii + 612

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Chiara Giorgetti, the editor (and co-author) of *The Rules, Practice and Jurisprudence of International Courts and Tribunals*, describes the aim of the book as “to present the main adjudicatory bodies in a way that is both accessible and comprehensive.” Indeed, the proliferation and growing complexity of international dispute settlement mechanisms on one hand, and the role they play in the international legal order on the other, make this task particularly actual and relevant.

The book consists of nineteen chapters, written by a team of several authors, composed of both distinguished academics and experienced practitioners. It examines the main courts, tribunals, and other judicial bodies operating today on the international plane. The starting point of this examination is identification of the characteristics that define an international court or tribunal. Even though they appear to be a heterogeneous group (with no common rules on jurisdiction or procedure) they share at least five features: they enjoy the power to issue decisions legally binding upon the parties to a dispute; they are constituted by instruments governed by international law; they apply international law to resolve disputes; their members (exercising judicial functions) are independent and act in their own personal capacities; and other members of their staff are also independent international agents. Bodies fulfilling these criteria are featured in the book as “international courts and tribunals”. This demonstrates the authors’ functional-structural approach to defining an international court. It is not necessary that the words “court” or “tribunal” are used in the institutions’ official name (e.g. UN Compensation Commission – Ch. XVII).

The structure of the particular chapters reflects a deliberate, systemic concept of the book. As a rule, each chapter explores a different court or tribunal. The exceptions, where several institutions are described together in a single chapter, concern administrative tribunals of international organizations (Ch. VI), hybrid/internationalised criminal tribunals (Ch. X), and bodies established by regional economic integration agreements (Ch. XVI). To the extent possible, the chapters follow a similar scheme. They start

with a general overview of the institution (including, where relevant, its history or a more detailed explanation of its origins), then examine its jurisdiction and procedures. This is followed by a review of the jurisprudence of the court/tribunal, which is done either by reference to the most significant problems emerging in the case-law (we may call this a substantial approach) or by reference to the most significant cases, or by a combination of these two methods. Each chapter closes with conclusions. This schematic construction well serves the aim of accessibility and clarity of the contents and facilitates comparisons between different adjudicatory bodies.

The chapters are grouped under six sub-headings according to the subject matter jurisdiction of the courts and tribunals concerned. The first sub-heading, *Courts and Tribunals of General Jurisdiction*, include chapters devoted to the International Court of Justice (Ch. I) as well as to the Permanent Court of Arbitration (PCA) (Ch. II). It may seem surprising to find these two quite conceptually different institutions joined together, the ICJ being the very definition of an international court of law, while the PCA constitutes a merely institutional framework to promote and facilitate the use of arbitration as a dispute resolution method. They both, however, are the only *fora* with truly general jurisdiction, namely the power to hear any legal dispute that the parties bring before them.

The second sub-heading, *Courts and Tribunals of Specialized Jurisdiction* covers an even more varied group of institutions, such as the International Centre for Settlement of Investment Disputes (Ch. III), the International Tribunal for the Law of the Sea (Ch. IV), the World Trade Organization system (Ch. V) and administrative tribunals of international organizations (Ch. VI). As the remaining sub-titles bring together bodies that enjoy jurisdiction over similar subject matters, it must be admitted that this second sub-heading simply features institutions that would not fit in elsewhere in the book. Their only common characteristic is that their jurisdiction is not general. This fact, however, does not in any way decrease the quality and importance of the analyses concerning each of them.

As noted above, the remaining groups are distinguished in more foreseeable way. The third sub-heading provides the reader with a presentation of *Specialized Courts: International Criminal Courts and Tribunals*, including International Criminal Court (Ch. VII), the International Criminal Tribunals for the Former Yugoslavia (Ch. VIII) and for Rwanda (Ch. IX) respectively, as well as an overview of hybrid and internationalized tribunals (Ch. X), with the Special Court for Sierra Leone, Cambodian Extraordinary Chambers or Special Tribunal for Lebanon among them. However, reference to the latter group of institutions may be questionable, taking into consideration their legal status and function. It seems that the prevailing reason for their inclusion was again subject matter jurisdiction: violations of international criminal law.

Under the fourth sub-heading, *Specialized Courts: Human Rights*, we find chapters concerning the European Court of Human Rights (Ch. XI), the Inter-American Court and Commission of Human Rights (Ch. XII), and the African human rights system (Ch. XIII).

This section is followed by chapters presenting *Specialized Courts: Regional Economic and Political Integration Agreements* (fifth sub-heading), including the European Union Courts (Ch. XIV), the NAFTA Court (Ch. XV) and an overview of other judicial bodies established by regional agreements (Ch. XVI, featuring the Andean Community, Mercosur, COMESA, and CAFTA-DR).

The final chapters, contained under the sixth sub-heading, refer to *International Ad-Hoc Tribunals and Claim Commissions*, and explore the UN Compensation Commission (Ch. XVII), the Iran-US Claims Tribunal (Ch. XVIII) and the Claims Resolution Tribunal (Ch. XIX).

The efforts of Ch. Giorgetti and her co-authors deserve great appreciation. The number of the institutions examined by them is impressive. Of course one can always argue that this or that one could have been more elaborated, requires deeper analysis etc. But in fact, each of the presented bodies in of themselves could be a separate monograph, and most of them are the subjects of more than one. The special value of this book lies precisely in the fact that it gathers the presentation of the main international courts and tribunals into one volume, giving a coherent picture of the system international adjudication. Thanks to its disciplined, systemic structure (for which the editor deserves special credit), it facilitates the possibility to compare the institutions presented and draw analogies and trace differences between them. It can serve as either an academic textbook or a practitioner's manual. Despite its broad scope, this book offers much more than a simple overview of international judicial institutions and the rules that govern them. As it also provides an analysis of the most significant examples of their practice, it constitutes a comprehensive study on the subject of international courts and tribunals and the role that they and their jurisprudence play in the development of international law.

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**Brusil Miranda Metou, *Le rôle du juge dans le contentieux international*,
Bruylant, Bruxelles, 2012, pp. 626**

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The role of judges in the international legal order has been one of the fundamental issues in academic research on international law ever since the idea emerged that differences between states could be resolved by an impartial, independent judicial body vested with the competence to render a decision binding upon the parties. Brusil Miranda Metou, in her book *Le rôle du juge dans le contentieux international* makes a very interesting contribution to the international discourse on this issue, from the point of view of African-francophone doctrine.

Metou analyses the role of the international judge through the prism of the work of the International Court of Justice as the archetypical model, the “Sèvres standard” of a permanent international court. Her starting point (*Chapitre introductif*) is a reflection on the development of adjudicatory methods for the resolution of international disputes, and how they have been perceived by the potential parties to such disputes (i.e. states), which ranges from defiance to revived interest in having their differences resolved by judges. She identifies the reasons for such development within the framework of the gradual institutionalisation of the international community, the promotion of the rule of law, and the idea of attaining and maintaining peace through law and justice. These factors have resulted in a transformation of the role of the judge. The particular aspects of this transformation are developed in following chapters of her book.

According to Metou, the main characteristic of the role of the international judge, which determines the mode of his/her exercise of their judicial function, is ambivalence, which should not be understood in pejorative way. Accordingly, she examines the various aspects of the problem in reference to this main feature.

This is reflected in the book’s structure. The analysis is divided into two core parts. The first (*Partie 1*) examines the “ambivalent role” of the judge in the adjustment of the contentious procedure and concentrates on three sets of problems. The first, the management of the course of the proceedings (*Titre 1*), includes both flexible and strict verification of the Court’s competence to adjudicate the case with respect to its different sources of jurisdiction, (*Chapitre 1*) as well as the way in which judges conduct the proceedings (*Chapitre 2*). The latter covers, e.g., the internal organisation of the work of the Court in the case, contacts with the parties, and organisation of the stages of the proceedings with their participation.

Secondly, the first part of the book also focuses on the prompt and meticulous direction of possible incidental proceedings (*Titre 2*) concerning: provisional measures (*Chapitre 1*), examination of preliminary exceptions submitted by the parties (*Chapitre 2*), and the treatment of reciprocal actions and requests for third party intervention (*Chapitre 3*).

Thirdly, the author also discusses, in the first part of the book, the problems surrounding discretionary and restricted determination of the object of the dispute (*Titre 3*). These include the statement of facts and evaluation of proof by the judges (*Chapitre 1*) and examination of the parties' argumentation from the perspective of the legal questions involved in the dispute (*Chapitre 2*).

In consequence, the first part of this book provides the reader with the valuable insight into the operative aspects of the ICJ's work. Metou's detailed (maybe at some points too detailed) analysis of what judges do and why at every step of every stage of every kind of proceeding shows how they balance, in their management of the case, the dual, sometimes contradictory and sometimes complementary, values or aims of the contentious procedure which are supposed to ensure the proper administration of justice. The only doubt that may arise in respect of this part of the book is largely of a structural nature and concerns the examination of the issue of preliminary exceptions in *Titre 2*, which focuses on incidental proceedings. Taking into account the substantial coherence of the analysis it might have been more sensible to discuss this issue together with the problem of competence in *Titre 1*. This remark however in no way diminishes the value of this study.

The second part of the book (*Partie 2*) is devoted to the substantial aspects of the role of the ICJ judge, concerning determination of the applicable law and possible solutions to the dispute. In this respect the author first presents the modes of examination of the applicability of the rules invoked by the parties (*Titre 1*). She discusses how judges determine the validity (binding force) of rules and norms belonging to different sources of law and the opposability of these rules and norms to the parties (*Chapitre 1*). This is followed by reflection on the problems concerning the search for proper application of the identified rules to the case under consideration (*Chapitre 2*), which includes qualification of the facts of the case in light of applicable norms, the interpretation of the applicable law, determination of the content of unwritten norms, and finally recourse to decision *ex aequo et bono*.

In *Titre 2* of the second part of her study, Metou concentrates on the subtle strengthening of the law, especially that accompanying a given case as a result of judicial activity in the course of the dispute resolution process. She points out the impact that the judges make on the consolidation and coherence of the international legal order through their elaboration of the means of detection of objective law (peremptory norms, general principles of law), through the development of regimes governing various sources of law and explanations of the interrelationships, and sometimes interferences, between them (*Chapitre 1*). On the other hand, she also shows how they influence the regime of inter-state relations (*Chapitre 2*), with respect to, e.g. state sovereignty, by determination of the scope of the principle of non-intervention or clarification of the conditions for legality of the use of force. Later, the author examines judicial participation in the development of new domains of international law, focusing on the law of international organisations, human rights, and environmental law (*Chapitre 3*).

Finally, the questions surrounding the diverse aspects of adoption of judicial decisions are elaborated (*Titre 3*). This refers primarily to the efforts to come to a balanced result in the decision, giving precedence to solutions negotiated by the parties at any stage of the proceedings and referring to different factors, also of non-legal nature, in framing the content of the judgment (*Chapitre 1*). Apart from that, the process of elaboration of the judicial decision is also examined (*Chapitre 2*), with special focus on the implementation of judicial and jurisprudential politics in the grounds and context of the decision.

Metou's general conclusion is that it is impossible to restrict the work of international judges by application of pre-defined models and roles. Their role is determined by many factors: the general aim to find a balanced and acceptable solution to the dispute, the circumstances of each case, the particularities of the applicable norms, the social and political expectations or needs, etc. Therefore, international judges act in an ambivalent mode, on one hand preserving judicial integrity while on the other adapting, sometimes in a very creative way, the applicable law to the circumstances of the case.

This elaborate, in-depth study by Brusil Miranda Metou on the role of international judges deserves great credit. Of course she does not answer all the questions concerning this issue. In fact, her views may give rise to some new ones. But this is precisely where the true value of academic discussion lies. And thanks to her Benedictine work we all can benefit from having a better idea of what goes on in the minds of international judges.

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Polish Review of International and European Law

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POLREVIEL: A PROMISING NEW EDITORIAL PROJECT

The idea of creating a new English language journal presenting the research of Polish authors in the field of international and European law has been brewing for many years. Some international law topics, which are particularly relevant in the Polish context, remain unappreciated in foreign scholarship. This in turn makes a publication on any such issue difficult.

For a long time, the only English language title available on the market was the Polish Yearbook of International Law (PYIL), published by the Institute of Law Studies of the Polish Academy of Sciences since 1966. Although the editorial mission of PYIL consists of promoting research and publication of authors from Central and Eastern Europe, including Poland, there was a feeling among Polish international and European law scholars that they lacked a journal that would allow for quick reactions to current developments in their fields. As a yearbook, PYIL is published on an annual basis and by definition cannot immediately respond to all the emerging issues in international and European law. As a consequence, the texts that appear in PYIL are of a different nature. They normally look at various legal developments from a broader perspective and with some temporal distance. Moreover the Yearbook, due to its size and frequency, has also a limited publishing capacity and is only able to include 10-12 articles per volume (with about 50% of texts usually coming from Polish authors). In addition, many Polish scholars have also called for a greater academic integration (which deteriorated after the changes that took place at the end of 1980s and beginning of 1990s). The creation of a new English language journal may be therefore seen as a step in this direction.¹

The above reasons have led to the establishment of the Polish Review of International and European Law (PolRevIEL). The journal was launched in 2012 by prof. Cezary Mik (the current Editor-in-Chief) from Cardinal Wyszyński University. Prof. Mik was successful in compiling an excellent board of editors, with professors of international and European law representing all major Polish universities. This group also includes two prominent Polish scholars affiliated with foreign institutions – Prof. Malgorzata Fitzmaurice from Queen Mary University of London, and Prof. Emeritus Maria Frankowska from the *Southern Illinois University* School of Law. The composition of the board is a good omen for the future, both in terms of the professional backgrounds of its members and the diversity of academic interests represented.

¹ Another recent interesting initiative is the creation, by a group of younger scholars, of an international law blog modelled on Opinioluris.org or Worldtradelaw.net. The blog, for the time being, is published only in Polish and it is available at: <http://przegladpm.blogspot.com/>.

The journal is published on quarterly basis² and each issue contains four or five full-length articles. The academic scope of PolRevIEL is defined very broadly and includes various fields of international law, both public and private, as well as European Union law. As indicated by the Editorial Board in the inaugural issue, the journal is interested not only in traditional problems of general international law, but also in “non-European regional international law, international organizations law, so-called self-contained regimes law, and even legal problems lying on the borderline between international law and states’ legal orders.”³

The materials published in the journal can be divided into four broad categories. The most elaborate texts appear in the “Studies section” (usually one or two contributions per issue). The aim of this section is to provide readers with theoretically grounded, in-depth analysis of selected problems of international and European law, not necessarily connected with the current developments in the field. The second section “Articles” – which in fact constitutes the largest part of PolRevIEL – includes texts which are shorter and less detailed. Unlike the Studies, their objective is to provide a quick reaction to current developments in international and European law. This section definitively fills the gap that has existed in Polish academic writing. It supplements not only the Studies section of PolRevIEL, but also texts that are published in PYIL. PolRevIEL also includes two traditional sections: case comments, which analyse the recent international and European jurisprudence (according to the guidelines for authors such jurisprudence must have been issued within the previous twelve months from the moment of submission) and reviews of current publications.

The inaugural issue of PolRevIEL was published in April 2012. It includes a joint study⁴ by one of the leading Polish scholars in the theory of law (S. Sykuna, J. Zajadlo), which deconstructs the concept of “hard cases”⁵ and subsequently analyses it in the context of humanitarian interventions. Other texts in the inaugural issue include articles by prof. A. Wisniewski (*On the Theory of the Margin of Appreciation Doctrine*) and prof. D. Pyc (*Ballast Water Management in the Baltic Sea Region*), both from Gdansk University; dr. P. Szwedo from Jagiellonian University (*Global Water Trade and the Canadian Export Regulations – Reconciling the Legal Quagmire with the Principle of Subsidiarity*); M. Stec (*Trading Human Rights for Public Security*); and prof. M. Tomaszewska and

² Although, it should be noted that the subsequent numbers of PolRevIEL were published as double-issues and with considerable delay. However, according to the plans of the Editorial Board, the future issues should be on time.

³ Inaugural issue of PolRevIEL (2012), p. 7.

⁴ *The Theory of Hard Cases and Humanitarian Intervention*, Inaugural issue of PolRevIEL (2012), pp. 11-60

⁵ The concept defined in the Polish legal doctrine in the following way: “a hard case, in its most general presentation, occurs when a judge does not have at his disposal an explicit norm made by certain authority, but also may arise in cases involving decision-making problems resulting from the lack of consent among lawyers” (B. Wojciechowski, *Rozstrzyganie tzw. trudnych przypadków poprzez odwołanie się do odpowiedzialności moralnej* (Deciding so-called hard cases by reference to moral responsibility), LXX Studia Prawno-Ekonomiczne, (2004), p. 11.

dr. S. Majkowska-Szulc, again from Gdansk University (*The Effectiveness of the European Law in Poland. The Example of Labour Law*). This is accompanied by two case comments (by prof. J. Gilas and dr. A. Grzelak) and two book reviews (both devoted to the same book: *Theory and Philosophy of International Law. Selected Problems*, by R. Kwiecień).

Issues 1 and 2 of PolRevIEL were published together in January 2013 as a single volume. The central text of this double-issue is a comprehensive study by P. Mostowik and M. Niedzwiedz from Jagiellonian University, who analyse the developments of EU competences in the field of judicial cooperation in civil matters (i.e. from lack of competence to exclusive competence). The overall assessment of this process by the authors is positive, and they conclude that it “creates the opportunity to create simultaneously efficient activities for the unification of private international law, led by the European Union not only via EU regulations but also through international agreements.”⁶ The Articles Section of the journal includes the first part of the collection of revised papers presented at the Symposium on Maritime Piracy in International Law, which was held in Warsaw in May 2011. These texts include: A. Tarwacka (*Piracy in Roman Law and the Beginnings of International Criminal Law*); M. Satora (*Piracy from the Middle Ages to the 19th Century*), and Z. Rudnicki (*Attempts to Codify the International Law of Piracy within the Framework of the League of Nations*).

The most recent issue (no. 3-4) was published in April 2013. It does not feature any study but instead includes three longer articles by: B. Gronowska (*Finality of judgment in the context of the revision provided for by the Rules of the European Court of Human Rights*); A. Rozalska (*Intra-EU BITs – are they really still necessary? The Best Award of the Year 2012 and Professor Emmanuel Gaillard Say “Yes”*); and P. Mostowik (*Should We Stay or Should We Go in. Advantages of Enhanced Cooperation Aimed toward Unification of Conflict of Laws Rules in Divorce and Separation Matters*), as well as the second portion of papers from the Symposium on maritime piracy (K. Marciniak, *International Law on Piracy and Some Current Challenges Related to Its Definitions from the international law perspective*, and L. Lukaszuk, *Combating maritime piracy within the Asia and Pacific region. Selected issues*).

PolRevIEL is currently printed only in hard copy version, but the Editorial Board is planning to make journal available on-line in the most important electronic legal databases, including HeinOnline, Westlaw and LexisNexis. This should allow both for broader dissemination of the ideas presented in the journal as well as wider recognition of its existence.

Details concerning the submission procedure and review process are available at the PolRevIEL webpage: <http://priel.uksw.edu.pl/node/2>. The journal accepts submissions on a rolling basis, with specific deadlines for each particular issue: issue 1 – before

⁶ *International Conventions Concluded by the European Union after the ECJ “Lugano II Opinion” of 2006. An Alternative or Complementary to EU Regulations Path to Unification of Private International Law?* 1(1-2) PolRevIEL 9 (2012), p. 48.

31 March; issue 2 – before 30 June; issue 3, before 30 September; issue 4 – before 1 November. The PolRevIEL's webpage also provides information on subscription options to the journal.

As the Editorial Board of PYIL, we welcome this newly launched endeavour in the field of international and European law and wish it every success in the future. Considering the composition of PolRevIEL's Editorial Board and the content of the first three issues, it seems likely that the journal will become an important publication for anyone interested in Polish scholarship in the fields covered. As mentioned, we do not see PolRevIEL as a competitor (even so, it would be a healthy type of competition), but rather as a supplementary and alternative forum for the discussion of international and European law from a Polish perspective.

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Bartłomiej Nowak, *Gas market liberalization and energy security. Legal and institutional aspects*. Wolters Kluwer Polska – Lex, 2012, pp. 272

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Liberalization of the European (as well as Polish) gas market and the problem of energy security are hot topics in the current political debate. The progressive (albeit very slow) de-monopolization of domestic gas markets in the EU countries, the shale gas revolution, Russia's fight to maintain its dominant position in the supply sector (particularly in the CEE region) as well as the shift from solid fuels to gas and various renewable energy sources are characteristic features of the process that is currently shaping the gas sector. Despite those developments, the existing scientific literature analyzing the legal aspects of current processes is limited, at least in terms of the Polish scholarship. This seems to be surprising, especially considering the number of theoretical and practical issues that call for scientific enquiry. The importance of such enquiry also lies in the fact that energy, in the current stage of economic development, has become a necessity for the well-being and proper functioning of entire economic systems. Any interruptions in energy supplies, even if only temporary, carry with them serious financial and social costs to all sectors of the economy. The monograph by Bartłomiej Nowak is one of those few positions that attempts to analyze the various legal problems that have emerged over recent years and to propose feasible regulatory solutions that could address existing market shortcomings.

Nowak observes, as a starting point of his analysis, that the current growth of gas consumption in Poland, together with a continuing dependency on foreign upstream suppliers, creates an urgent need to enquire how these supplies should be secured. Very different views on the virtues of energy security and liberalization of the energy market, including its feasibility and desirability, are expressed in both the political and academic debate. Nowak takes the approach that liberalization fosters innovative solutions. He assumes that the market should be opened for competition by increasing number of sellers (and suppliers), albeit under the supervision of independent national regulators and unbundled from mother companies system operators. System operators should, in Nowak's opinion, grant access to the energy infrastructure on non-discriminatory conditions, based on the assumption that free access to infrastructure is one of the principal elements in improving the level of competition and thereby also the security of supply in the energy market. However, as Nowak argues, it is also crucial to satisfy several premises in the entire process, without which the effects of liberalization may be insufficient to improve energy security. In particular, he identifies three necessary conditions: (i) the creation of adequate legal regulations for the functioning of the gas market, including those directly concerning energy security; (ii) the creation of effective bodies to monitor how these legal regulations and rules of competition in the gas market are adhered to, including, above all, an agency for energy regulation and independent

Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Hart Publishing, 2012

ISBN 978-1849460637

Among the publishing success stories of 2012 one should undoubtedly mention Ernst-Ulrich Petersmann's *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, issued by Hart Publishing. The book invites readers to critically reassess assumptions concerning structural features, not necessarily inherent, of international economic law (hereinafter "IEL"). The author, currently Professor Emeritus at the European University Institute, provides 540 pages of dense reasoning arguing for a restructuring of IEL, aimed at strengthening judicial protection of "cosmopolitan" human rights against market and governmental failures, along two principal axes. First, efficiency of collective action to provide global public goods¹ requires a "paradigm change" (p. 44) from the Westphalian model of inter-state relations (rivalry) to multilevel governance. Second, the transition from a "Westphalian international law of coexistence" to the "post-war law of cooperation" (p. 113) requires the establishment of "cosmopolitan" foundations of constitutional pluralism.

While the former postulate alone might not contribute much to the debate on the necessity of reform of international economic relations, presenting the latter separately would likely discourage practitioners of trade and finance and be viewed as another utopian quest for a vague notion of justice. And yet the author's credentials – his vast experience in international commerce, including in the Foreign Trade Department of the German Federal Ministry of Economics and Division of Legal Affairs in the GATT/WTO – and his realistic, consistent argumentation compel even the most cynical reader to reconsider the legitimacy deficit of IEL as inseparable from common action problems, and not merely as "another chapter" of the reform agenda.

Although it was not Prof. Petersmann's intention to provide a systemic overview of economic law (p. 38), his major postulates are formulated following a meticulous historical and comparative analysis of the evolution of IEL. He argues that the incomplete transition from legal norms focused on the individual pursuit of wealth – which in the normal course of dealings may lead to establishment of a monopoly or oligopoly, detrimental to the entire society – to a system establishing checks and balances aimed at eliminating political and entrepreneurial abuses (pp. 35-36), constitutes one of the recurring themes of the early 21st century.

¹ In economics, public goods are defined as non-excludable and non-rival in consumption. For instance, the amount of knowledge does not diminish due to an increased number of users. The same is true for national security, or New Year's fireworks.

Back in 2011 President Obama, in remarks at Osawatomie High School (Kansas), claimed that “a country succeeds when everyone gets a fair shot, when everyone does their fair share, when everyone plays by the same rules”.² What sparked comment and criticism overseas, although it did not capture much attention in Europe, was his questioning of the American dream of meritocracy, which allegedly justifies social inequalities.³ The polarised reactions to the truism that individual fortune is influenced by one’s social environment reflect the same dynamics that both push and harness the evolution of IEL.

In the Medieval times a humble artist, careful not to commit the cardinal sin of pride, remained anonymous. Liberalism and the notion of self-realisation restored subjectivity to the creator, and the French revolution paved the way for anthropocentrism. Only recently has the social nature of a human being been rediscovered. This social aspect of human life, fully embraced in the collective human rights of the third generation, has not been equally acknowledged in other legal fields (just to list one example: the current controversy surrounding the just balance between protection of Intellectual Property Rights and Internet freedom in the Anti-Counterfeiting Trade Agreement, ACTA). Also, in public international law one can distinguish between the individualistic approach (be it the British commitment to hegemony or French support for multilateralism) and the “communitarian” way of thinking about the international community in terms of common values and goals.⁴ The latter approach to the constitutionalisation of international law has been particularly advocated by German scholars.

The same split between an individual and his social environment can be observed in economic relations (law). John Lock, John Stuart Mill and Adam Smith laid the grounds for the *homo economicus*, whose pursuit of self-interest contributes to the prosperity of the entire nation. This does not mean, however, that market powers should remain unrestrained: “Adam Smith’s invisible hand (...) is invisible, at least in part, because it is not there”⁵. Prevention of market failures, restraints on rent-seeking and market abuses, and thus the creation of equal opportunities for all individuals is indispensable not only to tap the human potential for economic growth, but also for the well-being of democracy. A political system that deprives too many of the chance to participate in a nation’s success is unsustainable in the long term.⁶

Professor Petersmann also remains attached to the German “free but regulated” tradition of “communitarian” IEL, having called for its constitutionalisation for many years now.⁷

² The White House, *Remarks by the President on the Economy in Osawatomie, Kansas*, December 06, 2011, available at <http://1.usa.gov/Yd0Bfb> (accessed 21 February 2013).

³ I. Sawhill, S. Winship, K. Searle Grannis, *Pathways to the Middle Class: Balancing Personal and Public Responsibilities*, Brookings, Social Genome Project Research, No. 47, 20 September 2012.

⁴ A. von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 *Harvard International Law Journal* 223 (2006).

⁵ J. Stiglitz, *There is no invisible hand*, *The Guardian*, 20 December 2002.

⁶ F. Fukuyama, *The End of History and the Last Man*, Free Press, New York: 2006 (reprint edition).

⁷ Petersmann’s writings include numerous publications on the constitutionalisation of IEL; available at the European University Institute’s website, <http://bit.ly/12RcihA> (21 February 2013).

Although IEL should constitute a tool for improving general welfare, Petersmann argues that international economic regulation largely failed to secure global public goods such as human rights or the rule of law. The principal reason for the consistent failure to revise obsolete international regulations, chiselled in the Westphalian-State model, despite ever more rapid changes in the globalised economic environment, is the lack of universal, pluralistic theories of justice which would allow all the parties concerned to agree on the technicalities of system restructuring. As a result, the laws in force face an increasing crisis of legitimacy, whereas renewal initiatives stumble on democratic dissent.

As the Westphalian conceptual framework does not entirely fit the contemporary international community,⁸ Prof. Petersmann calls for a new theory of justice for IEL, which would allow for the establishment of “judicially enforceable, cosmopolitan rights of citizens” including equal market freedom, non-discriminatory conditions of competition, and judicial protection of constitutional rights and transnational rule of law for the benefit of citizens. Referring to Dworkin’s writings, the author reiterates that law and governance must be justified not only on utilitarian grounds but also in terms of morality and justice, which in turn should be included in, according to Hart’s classification, secondary “rules of recognition.” “The relationship between theories of justice and IEL must be clarified by interpreting IEL in the light of the human rights obligations and diverse constitutional obligations (...) with due regard to economic and social rights of the poor” (p. 23). The legitimacy, and thus sustainability, of such renewed IEL would largely depend upon the efficiency of the constitutional and judicial protection mechanisms in place to protect basic values. In this respect the book draws much inspiration in Kantian legal and constitutional theories. Most importantly, however, the *International Economic Law in the 21st Century* adopts Rawls’s approach to the principles of justice, including each person’s right to “the most extensive basic liberty compatible with a similar liberty for others” and positive discrimination in favour of the socially disadvantaged.

Obviously one could question the book’s diagnosis of IEL’s weaknesses, which are explained by the scarcity of legal instruments, rather than attributed to the consolidation of interests of principal economic operators versus dispersed consumers. Arguably, if the latter was not the case, the equilibrium of IEL could be changed even within the current legal framework. In this context, the attainment of a global “participatory, deliberative and constitutionally accountable democracy” may appear unlikely, or even potentially dysfunctional if actually realised. Undoubtedly, however, a reform effort based on common convictions rather than on political compromise behind closed doors is more likely to gain public support. A universally shared, pluralistic theory of justice treating,

⁸ See notably, A.-M. Slaughter, *A New World Order*, Princeton University Press, Princeton: 2005. Prof. Petersmann notes that while the Westphalian narration still dominates the UN discourse, IEL lawyers tend to perceive economic laws from five different, often uncoordinated perspectives: public international law, global administrative law, conflicts law, multilevel constitutional regulation, or multilevel economic regulation of the economy (p. 78).

in line with Petersmann's arguments, the rule of law and economic cooperation as common goods, might transform the "prisoner's dilemma" of international exchange into a "cooperative game" (that is without a dominant strategy of betrayal). Thus "the 'animal spirits' and rational egoism of individuals need to be restrained by stronger constitutional and institutional protection of 'public reason', based on cosmopolitan freedoms and other 'principles of justice'" (p. 6). The enforcement mechanisms of IEL could then be harnessed for the realisation of human rights goals (p. 10).

These normative issues, sketched in the Introduction to the book, are explored in depth in the first of eight substantive chapters and followed by conclusions. Chapter I contains suggestions on how IEL should be restructured in order to secure attainment (protection) of global aggregate public goods, including a mutually beneficial trading system, energy security, or financial and environmental systems preventing climate change. Accordingly, the introduction of constitutional protection of human rights and references to fundamental values should, as has happened domestically in Western democracies, subjugate the pursuit of self-interest (also at the State level) to the common good and overcome collective action problems.⁹ After indicating the regulatory shortcomings of contemporary IEL (p. 50), Prof. Petersmann calls for replacing "Westphalian" economic law with a "cosmopolitan" regulation. This would permit filling in the gaps in: jurisdiction, governance, incentives, participation, and the rule of law (pp. 58-59). From the perspective of sustainability of the global economic order, however, only a reform in constitutional spirit would allow for overcoming the two "paradoxes of freedom": the economic and political paradoxes of liberty.

Chapter II deepens the analysis of governance and economic failures in international economic law, both of which stem from the "paradoxes of freedom". It contains crucial definitions, for IEL, of "constitution", "constitutionalism" and "constitutionalisation". It is the global constitutional approach, including a system of checks and balances, that allegedly can pave the way for overcoming the world's jurisdictional fragmentation, which is one of the root causes of the collective action problem. The chapter draws particular attention to the experience of European integration, showing how multilevel governance and focus on the protection of individuals, thus empowering voters (consumers), enhances the common welfare more than a narrowly-perceived economic cooperation. The European example also shows how a pluralistic justice theory, respectful of national constitutional traditions, could contribute to the establishment of a "cosmopolitan" IEL.

Based upon the first two chapters – showing that collective action problems require the constitutionalisation of IEL – Chapter III tends to prove that international relations theories, including realism or institutionalism, do not provide a solution to the problem of efficiency of international law. In line with the Kantian theory of constitutional

⁹ In economics the "collective action problem" describes a situation in which a particular action would be beneficial to all persons concerned, however no one is willing to bear the costs of such conduct. One example of such situation is the so-called tragedy of the commons.

protection of (equal) liberties and Rawl's theory of constitutional protection of public reason, it is argued that the failures of the global economic system, including the crisis of 2008, largely depend on "constitutional ignorance" of economic theories and regulation. A citizen-oriented law, i.e. "civilised and constitutionalised" political and economic markets (p. 191), would limit conflicts of interests among individuals exercising both private and public authority, thus improving economic efficiency more than regulatory or administrative corrective interventions directly on the market. This argument contributes to one of the major premises of the book – that the current "top-down" Westphalian intergovernmental cooperation should be replaced with "bottom-up" governance.

Ways of extending the protection of human rights from the national to international level are described in Chapter IV. Just as the European Court of Human Rights (ECtHR) emphasises the importance of collective enforcement of human rights, so too should equal freedoms, non-discrimination, and the rule of law be protected in IEL through an institutional web of multilevel guarantees. Considerable attention is devoted to empirical evidence, including EU failures to protect general welfare in line with WTO laws, the UN Global Compact for corporate social responsibility, and the WTO's incapacity to protect certain freedoms, such as non-discriminatory market conditions, working to the benefit of consumers. The proposed multilayer approach also leaves space for diversification of protection levels depending on the specific problem area. At the same time however, the various "local" approaches and legal protection should remain globally consistent. Case studies analysed in this part of the book constitute the basis for formulating legal strategies for overcoming the world's jurisdictional fragmentation.

After calling for the integration of various theories of international law providing for collective public goods (chapters I and II) and arguing for the civilisation and constitutionalisation of IEL (chapters III and IV), the fifth chapter of the book focuses on the pluralistic aspect of the IEL reform agenda. Since the multilevel protection of human rights and constitutional values assumes operation within different jurisdictional spheres, the resulting transnational justice ought to enable adaptation of the underlying principles of justice to the peculiarities of each forum. The challenge of competing notions of IEL is again discussed in this context. Also, the issue of regulatory and judicial transnational consistency re-emerges: its relevance is reflected in the need for self-governments' reliance on the transnational rule of law. Prof. Petersmann demonstrates how trade and investment laws – through the "judicialisation" process – already contribute towards the strengthening of legal security, creating a common denominator for the cooperating states. The very meaning of the principles of justice, subject to the "overlapping consensus", is scrutinised in Chapter VI. The importance of the justice theory, which would permit the fundamental transformation of IEL, is elevated, as the global compromise should cover not only procedural norms but also certain substantive provisions. While discussing various theories of justice, another important element is also introduced: "reasonable disagreement." Emphasis is placed on notions of constitutional, distributive, and corrective justice.

The author's GATT/WTO experiences are fully exposed in Chapter VII, which draws the readers' attention to the logical conclusion that the disaggregation of the State in the globalised world of governance not only renders the Westphalian, atomised model of intergovernmental relations (partly) obsolete, but also compels ever more important international organisations to adapt to the ever changing legal environment. The declaration that "global interdependence transforms national constitutions into 'partial constitutions' that cannot unilaterally protect human rights in transnational relations" (p. 373) may give persons attached to the more conservative notion of state cause for concern.

All the above-mentioned threats are synthesised in Chapter VIII, explaining why multilevel protection of "individual cosmopolitan rights" is necessary for the constitutionalisation of IEL, which in turn should serve the purpose of protecting "public reason", thus resolving the paradox of freedom. The goal of protection of (individual) freedom is attained to some extent through limitation on the exercise thereof (at least collectively), as in the long term unrestrained freedom would prove self-destructive for the entire system. The constitutional protection of rights, on the one hand limiting private and public abuses of power, and on the other compensating for Westphalian-State limitations, secures the provision of global public goods, beneficial to each and everyone. Accordingly we complete the journey "From 'Constitutional Nationalism' to Multilevel Judicial Protection of Cosmopolitan Rights in IEL."

The author's detailed exposition allows him to answer, in his Conclusions (pp. 487-514), fifteen fundamental question posed at the beginning of the book (pp. 38-40). While the answers to some appear obvious given the initial assumption of the book (#2, does the IEL need to be justified by theories of justice?), or by its very structure (#4 what are the roots of the current financial, environmental and poverty crises?), others require a strategic analysis of the future global economic order (#9, what is the legitimate role of the judiciary in interpreting IEL and "public interest regulation"?), or even compel the reader to critically reassess the existing legal environment (#14, can parliamentary democracy remain effective without stronger protection of deliberative, participatory, and cosmopolitan democracy?).

In the end readers may be left with some mixed feelings. In terms of subject matter, even though the narration is maintained in a realistic tone and based upon empirical evidence, the ratio between arguments referring to the notion of justice and those focusing on social and economic patterns of human behaviour render the final message closer to theoretical postulates than practical solutions. This, however, is obviously a subjective perception. On the more technical plane, Prof. Petersmann's adherence to German jurisprudence is not limited to his subject-matter dedication to the communitarian vision of international law. He also appears to reject the Anglo-Saxon model of an easy-to-read narration. Despite the risk of being perceived as an untrained reader, I must admit that numerous parts of the book are not an easy read. The very first page, which introduces the topic through reference to structural changes of economy, risks of regionalism, legitimacy shortcomings in IEL regulatory attempts, and the inaptness

of the Westphalian model requires considerable concentration to follow the path of the author's reasoning. Although this is not necessarily a drawback, it should be stated that this is a book which requires the reader's exclusive attention. Also the "spiral structure" of the book hinders a quick orientation to its contents: the same themes remerge throughout the book in various configurations, which often makes it difficult to assess upfront to which thread of reasoning a particular passage relates. Having said that, each chapter definitely moves the reasoning process forward however, even if it is not always immediately evident in which direction. Indirectly this is reflected in the summaries of preceding chapters that appear at the beginning of subsequent: some topics that were described previously as already covered re-appear later on, either enlarged to include a new chapter or to re-emerge in subsequent parts. Given this complex structure and the often demanding language, the numerous tables included, the outlines of chapters, and the very precise index in the book provide important assistance.

This book will both broaden practitioners' perspectives on their discipline and provide many scholars with a fresh perspective, one which combines profound theoretical studies with a practical approach. Although the reader should be forewarned that it is a demanding read, it deserves every recommendation.

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James Crawford, Martti Koskenniemi (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, 2012, pp. 480

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A GOOD COMPANION

In 2012 the prestigious publishing house Cambridge University Press issued “The Cambridge Companion to International Law,” edited by the eminent academics, professors of the international law James Crawford and Martti Koskenniemi.

During last three decades we have witnessed an impressive and extensive development of international law. Deep changes have taken place in almost all directions: the establishment of *ad hoc* criminal tribunals and the International Criminal Court; the creation of the World Trade Organization; expansion and development of the powers of the Security Council; the intensive efforts of the international community to fight terrorism; and the prevention of violations of the human rights, development of the doctrine responsibility to protect, etc. At the same time new trends have appeared in the forms of globalization, fragmentation, and also constitutionalisation. Despite all the changes, we have also observed, and can still observe, heinous violations of human rights all over the world, accompanied by inaction on the part of the international community when it actually should act. The world is changing constantly and rapidly, and this creates constant challenges for international law, from genocide in Africa to the rise of the Arab spring, use of torture on suspected terrorists, or Jewish construction of settlements to nuclear tests in North Korea.

The authors of The Cambridge Companion to International Law (hereinafter sometimes “Companion”) have noted all the changes, as well as the intersections of law and politics and law and philosophy, and “by preparing [a] volume that goes beyond a mere repackaging of existing materials have aimed at a politically and historically informed account of the role of international law in the world.” This review is a short analysis of whether they attained their stated aims.

The “Companion” is composed of four parts, which total 18 chapters, together with a Preface, Introduction, Guide to electronic sources of international law, International law chronology, Select guide to further reading, and Index.

The first part is designated “The context of international law.” In it the authors present the variety of contexts faced by international law. “[T]o know something about these contexts” - the editors write in the introduction - “is a first step in coming to know international law”. Gerry Simpson, in his paper “International law in diplomatic history,” addresses one of the contexts, specifically diplomacy, which cannot exist without international law and is, on the one hand, a tool of the international law, and on the other its product. In fact his contribution is a short history of international law in the context of diplomacy, and a useful but modest guide to that history. Another

author in this part of the book, M. Koskenniemi (also editor) describes a different context in his paper, entitled “International law in the world of ideas.” He presents the history of international law through philosophical and political debates. Koskenniemi’s contribution is a brief description, leaving the reader with many questions unanswered. Frédéric Mégret, in his paper “International law as law” also relies on the help of “historic glasses” to focus on the question of the “law-like” nature of international law, underlying that this debate is an ongoing and evolving one. Mégret presents selected aspects of international law from different angles and perspectives. Taking note of the decline of sovereigns and the waning of states, the author focuses on the role of the state in the changing perspective of international law and international relations, tending to show that the restoration of “classical” international law (classical order, classic subjects of international law, its classic powers) is highly unlikely, but reminds us that the global perspective, ongoing debates, and differing views do not provide us with only one appropriate idea of the status of the state and the role and nature of international law.

The second part of the Companion is titled “International law and the state”, and presents the fundamental notions of international law such as state, sovereignty, or jurisdiction. Karen Knop, in her paper entitled “Statehood: territory, people, government” focuses on the notion of the state and interrelated questions. While employing the classic formula “territory-people-government”, Knop progresses to a more complex view, taking into account non-state actors, nationality, exercise of jurisdiction beyond state borders, and even international administration. The context of the powers of a state in determining its jurisdiction is later developed in the paper of Bruno Simma and Andreas Müller in a paper entitled “Exercise and limits of jurisdiction.”

One of the papers included in this part of the book focuses directly on the question of sovereignty. James Crawford (also an editor), in “Sovereignty as a legal value” discusses the notion of sovereignty in the context of its protection, scope of its obligation, and sovereignty within the state and amongst states, noting that on the one hand “statehood is now a protected status under international law, and to this extent sovereignty once achieved is entrenched”, while on the other hand Crawford notes the arguments of the naysayers of sovereignty and those predicting its twilight, and he underscores the possibility to exercise sovereignty by a state and at the same time the protection of interests vis-à-vis other sovereignties.

The third part of Companion is titled “Techniques and arenas”. It focuses, *inter alia*, on the different fora for exercising international law. Benedict Kingsbury contributes to this part with an excellent presentation entitled “International courts: uneven judicialisation in global order”, in which he categorizes the basic types of international courts, the different role courts can play as producers of the legal knowledge or as institutions to make legal commitments credible. Kingsbury also presents an analysis of states’ tendencies to join international treaties establishing courts and tribunals in the context of states’ populations and economies. This special perspective seems to be continued in a paper by Jan Klabbers entitled “International institutions,” focusing

more broadly on the growth of international organizations and the institutionalization of international law as such.

Last but not least the paper of Sarah Nouwen, placed in the fourth part of the Companion titled "Projects of international law" is worthy of mention. In Nouwen's contribution, entitled "Justifying justice," attention is given to one of the international courts, namely the International Criminal Court, based on the author's experience gathered during her journeys to Africa. Nouwen confronts people's expectations with the reality of the ICC, its policies, and its execution, providing us with a thoughtful perspective of international criminal justice in the context of actual situations.

The Cambridge Companion to International Law is not a comprehensive analysis of any field of the international law. In fact, every presentation may leave the reader with a feeling of need for further analysis, however this is also one of the book's strengths. It is fantastic at raising awareness, and could be dubbed "surprising explorations and adventures in international law."

In summary, "The Cambridge Companion to International Law" is an excellent introduction to international law, revealing to students, helpful to academics, and of interest to anyone interested in what international law is, and what it is not. From my point of view as an academic what is lacking in the book is a wider perspective of national legal orders. The state is still the most important subject of the international law. The entire system of the European Union, of international criminal justice, or the international systems protecting human rights etc. are all based on cooperation with states. The better that cooperation is, the more effective is international law. Without development of this sphere, the Companion remains, with a few exceptions, a largely theoretical work. While it is good so far as it goes, it requires further and deeper analysis of the complex fields of international law.

In conclusion however, it must be acknowledged that the book is full of different ideas and the presentation of various approaches by excellent scholars, so the last thing that comes to my mind is: "it's good to have such a Companion."

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