

SPIILJ

State Practice and International Law Journal

1 / 2014

Volume 1 Issue 1 pp. 1 - 182 Spring 2014

Editors

Professor Benedict Chigara, London, UK (Chair)

Professor J. Patrick Kelly, Delaware, USA

Professor Annika Rudman, Stellenbosch, RSA

About SPIILJ

"The foremost companion for judges, diplomats, legal practitioners, academics and students on all aspects of public and private international law, SPIILJ documents, analyses and evaluates State practice for compliance with international legal standards, and reviews the status of customary international law under the light of emergent, continuing and long-standing State practice."

State Practice and International Law Journal

Editors:

Professor Ben Chigara, Professor of Law, Brunel University, London, UK
Professor J. Patrick Kelly, Professor of Law, Widener Law, Delaware, USA
Professor Annika Rudman, Professor of Law, Stellenbosch University, RSA

Email: SPILJ@brunel.ac.uk

Editorial Assistant:

Dr. Rossana Deplano, Lecturer in Law, Brunel University, London, UK

Book Review Editor:

Dr. Khanyisela Moyo, Lecturer, Transitional Justice Institute, Ulster University, UK

International Advisory Board:

Justice Sir, Christopher Greenwood, Judge of the International Court of Justice, The Hague
Justice Abdul G. Koroma, Judge of the International Court of Justice, The Hague
Justice Daniel David Ntanda Nsereko, Appeals Chamber, International Criminal Court
Justice Tafsir Malick Ndiaye, International Tribunal for the Law of the Sea, Hamburg, Germany
Professor David Freestone, Formerly of the World Bank, The George Washington University, USA
Professor Mary Footer, Professor of International Economic Law, Nottingham University, UK
Professor Muthucumaraswamy Sornarajah, Professor of Law, National University of Singapore
Professor Christoff Heinz, Professor of Human Rights, Faculty of Law, University of Pretoria, RSA
Professor Malcolm Evans, Professor of Law, Faculty of Law, Bristol University, UK
Professor Tiya Maluwa, Director, Penn State School of International Affairs, Pennsylvania, USA
Professor Michelo Hansungule, International Commission of Jurists & University of Pretoria, RSA
Professor Nigel White, Professor of International Law, Law School, Nottingham University, UK
Professor Thilo Marauhn, Professor of International Law, University of Giessen, Germany
Professor Abimbola Olowofoyeku, Professor of Public Law, Brunel University, London, UK
Professor Evance Kalula, IAPO, University of Cape Town, Republic of South Africa
Dr. Edwini Kessie, Council and Trade Negotiations Committee Division, WTO, Switzerland

Editorial Board:

Professor Dino Kritsiotis, Professor of Law, Law School, Nottingham University, UK
Professor Manisuli Ssenyonjo, Professor of International Law & Human Rights, Brunel University
Professor Neil Boister, Professor of Law, Faculty of Law, Christchurch, New Zealand
Professor Lindsay Moir, Professor of Law, Hull University, UK
Professor Richard Frimpong Oppong, Professor of Law, Thompson Rivers University, Canada
Professor Johanna Gibson, Professor of Intellectual Property Law, Queen Mary, London, UK
Professor Susan Breau, Professor of Law, University of Reading, UK
Professor Ademola Abass, Professor of Law, United Nations University, Belgium
Professor Robert Cryer, Professor of Law, Birmingham Law School, Birmingham University, UK
Professor Frans Vil Joen, Professor of Human Rights, Faculty of Law, University of Pretoria, RSA
Professor Duncan French, Professor of Law, Lincoln Law School, University of Lincoln, UK
Professor Max Guderzo, Professor of History, University of Florence, Italy
Professor A.V. Jose, Fellow - Centre for Development Studies, Trivandrum, Kerala, India
Professor Tomoya Obokata, Professor of International Law and Human Rights, Keele University, UK
Dr. Yenkong Hodu, Senior Lecturer, Law School, Manchester University, UK
Dr. Sven Simon, Assistant Professor, Faculty of Law, University of Giessen, Germany

State Practice & International Law Journal (SPILJ)

Volume 1 Number 1 Spring 2014

ARTICLES:

- ‘State Practice as Metaphor: A Reconciliation Approach’
J. PATRICK KELLY 1
- ‘Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya’s Serving Senior State Officials’
MANISULI SSENKONJO 17
- ‘State Practice, Customary Humanitarian Law and Civilian Casualties of Armed Conflict’
SUSAN BREAU 45
- ‘Transferring sentenced persons (offenders) to the United Kingdom: Highlighting some of the human rights issues courts have had to deal with’
JAMIL DDAMULIRA MUJUZI 73
- ‘State Practice and the Making and (Re)Making of International Law: The Case of the Legal Rules Relating to Marine Biodiversity in Areas Beyond National Jurisdiction’
DIRE TLADI 97
- ‘Emergent State Practice on the creation and practice of Standards on Corporate Social Responsibility’
OLUFEMI AMAO 117
- ‘Building a Taxonomy of UN Security Council Decisions: a Biased Compliance with the UN Charter Obligations?’
ROSSANA DEPLANO 139

DIGEST OF INTERNATIONAL LAW:

- ‘Has Recent State Practice transformed the Law on the Use of Force?’
SVEN SIMON 161

BOOK REVIEWS:

- Jeremy Waldron, *The Rule of Law and the Measure of Property* (Chidebe M. Nwankwo) 171
- Levitt, J.I., *Illegal Peace in Africa: An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta* (Aimee Asante) 175
- Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* (O.C. Olubokun) 181

'State Practice as Metaphor: A Reconciliation Approach'¹

J Patrick Kelly*

This issue announces a new peer-reviewed truly international law journal devoted to the idea of greater legitimacy and more democratic processes in international law making. Why is such a journal needed at this time? First, international law and legal institutions increasingly matter. The UN Security Council has redefined and expanded its authority to include humanitarian interventions and has exercised what can only be called legislative power.² The World Trade Organization, the successor to the General Agreement on Tariffs and Trade, has become a sophisticated and nuanced regulatory regime with the authority to regulate trade and intellectual property as well as to effectively adjudicate the legality of domestic legislation. With these developments there is a burgeoning of scholarship raising difficult issues of the authority and legitimacy of many international legal norms and of the international institutions that are increasingly producing them.³ From a historical perspective, several authors, most prominently Antony Anghie, have questioned the use and misuse of legal categories to justify colonial expansion⁴ and the continuation of unequal relationships into the post-colonial era.⁵ Implicitly such analysis raises the rather thorny issue of the legitimacy of many customary international law norms that were created in this era and its aftermath. Another group of writers are raising concerns about the more recent development of norms by international institutions⁶ and international adjudicative bodies.⁷

Second, the launch of this new law review comes at a fortuitous time in the evolution of political and economic power. Globalization and its attendant spread of economic development have led to the rise of a significant middle class from Brazil to China to South Africa. Rates of economic growth in emerging nations far exceed growth rates in the developed world. From 2000-2010, for example, developing countries grew on average of 6.8% per year whereas high income countries averaged an increase of only 1.8% per year over the same period.⁸ These widely

* Professor Emeritus – Widener. J.D. Harvard University Law School. I am grateful to SPILJ's independent reviewers for their comments on an earlier draft of this article.

¹ In homage to Nelson Mandela who passed away on December 5, 2013. He showed the world the power of reconciliation by blending two societies after an abusive and divided past leading his country toward a more just society. The development of international law is beginning to exhibit a similar trajectory. Many international norms were articulated and imposed based on unequal power relations with little attention to the interests, needs or wishes of less powerful states and societies. We are entering an era where changes in economic power and the need for global solutions to problems may encourage a reconciliation with this past.

² See Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?' (2004) 28 Fordham International Law Journal 542.

³ Jean I. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (CUP 2012).

⁴ Anghie, for example, has argued that much of modern international law and legal structures were forged from the colonial encounter with Non-European civilizations with these cultures as the objects of reform. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 36-38.

⁵ See for example, James Thuo Gathi, *War, Commerce and International Law* (OUP 2010).

⁶ José E. Alvarez, 'Contemporary International Law: An "Empire of Law" or the "Law of Empire"?' (2009) 24 American University International Law Review 811.

⁷ On the legitimacy problems of unilateral standards and 'evolutionary' interpretation in adjudication, see J. Patrick Kelly, 'The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Roles of States in WTO Governance' (2005) 38 Cornell Journal of International Law 459.

⁸ This increased the developing countries share of world income from 18% in 2000 to 30% in 2010. See World Bank, 'Changes in Country Classifications', available at <<http://data.worldbank.org/news/2010-GNI-income>>

different growth rates will necessarily over time lead to a relative change in economic and political power increasing the pressure for the enhanced democratic legitimacy of international institutions that still reflect the balance of power at the end of World War II.⁹

With capital, technology and even labor now moving rapidly around the globe, nations beyond the US, Japan and Western Europe have enhanced voices in international forums and markets.¹⁰ The G-7, the informal group of highly industrialized states that meets to coordinate world economic and financial policy, has been effectively supplanted by the G-20, the group of finance ministers and central bank governors from the world's largest economies that include a broader group of emerging market countries including China, India, South Africa, Saudi Arabia, Indonesia and Brazil.¹¹ In order to effectively manage the growing world economy, particularly in a time of crisis, all major economies of the world must be included.¹² These changes in economic power are and will inevitably affect the norms and processes of international law and their perceived legitimacy.

Why state practice? State practice as metaphor is a broader idea than the empirical role of state practice in the formation of custom. State practice as used in this journal is a metaphor for all the methods and processes to increase the democratic legitimacy of international norms including not only the practices of states, but also other forms of representation by which citizens express their views. Increasingly norms are articulated and influenced by non-governmental organizations, private standard setting groups, quasi-public entities such as the Inter-Parliamentary Union and transgovernmental organizations such as the Basle Committee on Banking Supervision. With the advent of the internet, Facebook and Twitter empower crowd sourcing, instant organization and new methods of norm articulation that have the capacity to transform domestic and global political processes.

State practice as metaphor at a minimum encompasses state participation, input and influence in lawmaking whether in the CIL process, multilateral treaty making or ongoing norm articulation in treaty regimes. State practice by governments with all their flaws is the means by which governments, as representatives of their people, contribute to and accept legal norms. Voting and electoral politics may generally be the best barometers of democratic legitimacy, but they are not sufficient to assure democratic legitimacy. National governments can control and manipulate the voting process, be violent and illiberal as Fareed Zakaria reminds us.¹³ While many governments are less than democratic, they remain the primary means of broad-based representation to legitimize international law. NGOs and civil society are playing an increasing and important role in informing and influencing norm formation.¹⁴ However, many of these organizations as advocates and representatives of a particular point of view are narrowly focused and, as hierarchical institutions, may not be particularly representative either of their own

classifications> accessed 21 February 2014. (This increased the developing countries share of world income from 18% in 2000 to 30% in 2010).

⁹ Fareed Zakaria, *The Post-American World* (Norton 2009) 40-48. (His point is not the demise or even absolute decline of the United States and the West, but rather of a gradual erosion of relative economic power).

¹⁰ At the IMF, for example, the votes of the western powers have declined with their relative decrease in contributions and the votes of Japan, China, and Saudi Arabia among other countries have increased as their contributions to the Fund have escalated.

¹¹ G-20, 'About G-20', available at <https://www.g20.org/about_G20> accessed 21 February 2014.

¹² Michael Spence, *The Next Convergence: The Future of Economic Growth in a Multispeed World* (Farrar, Straus and Giroux 2011) 43-45.

¹³ Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (Norton 2004).

¹⁴ Former UN Secretary-General Kofi Annan called this NGO revolution, "the new global people-power." UNSG 'Partnership with Civil Society Necessity in Addressing Global Agenda' (29 February 2000) Press Release SG/SM/7318. See also, Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004)

membership or the societies from which they came.¹⁵ Transgovernmental organizations may be seen as both a form of representation and as exclusive clubs with limited representation. Yet each of these forms of representation whether by governments, NGOs or otherwise has a role to play in the movement toward more democratically legitimate lawmaking.

What does it mean to say international institutions or norms are legitimate or illegitimate? Legitimacy is an inherently subjective concept that can be evaluated from different perspectives. In the international domain several forms of legitimacy resonate: formal or legal legitimacy, social legitimacy and normative legitimacy particularly the critique from democratic legitimacy. Formal legitimacy or legality is a modern touchstone for minimal legitimacy.¹⁶ Formal legitimacy requires that legal norms and decisions be approved through prior defined legal processes accepted as valid.¹⁷ In the international sphere the primary “right processes” are treaties formed by the express consent of participating states such as the United Nations Charter and customary international law (CIL) as defined by both state practice and *opinio juris*, i.e., the general acceptance of norms as legally required.¹⁸

Social legitimacy is the degree to which members of a society, accept the legitimacy of a decision. Did, for example, the international community accept as legitimate NATO’s actions in Kosovo even though the Security Council never expressly authorized NATO’s military intervention as legally required under the Charter? The Security Council did subsequently vote 12-3 to reject a resolution condemning the bombing campaign and later welcomed the political settlement that followed. These actions suggest general approval by the majority of the members of the Security Council even though a veto of an authorizing resolution would have been highly likely. Such a conflict between the views of a majority of the Security Council members and the use or threatened veto by a permanent member has been characterized as “illegal but legitimate.”¹⁹ The third type of legitimacy, normative legitimacy, requires a substantive point of view. Is a decision consistent with a widely held political or other philosophy such as democratic theory? Democratic legitimacy is of particular concern in the international sphere because decisions of international institutions are far removed from democratic accountability by the voters of each member nation.

United Nations Security Council resolutions and decisions under Chapter VII, for example, are legally binding and thus formally legitimate because states signed and ratified the Charter. The Charter specifically grants to the Council the authority to make decisions that are binding on member states and states have the corresponding obligation to comply. This clearly defined delegation of authority satisfies formal or legal legitimacy. Yet after nearly seventy years of

¹⁵ Ken Anderson and David Reiff, ‘Global Civil Society: A Skeptical View’ in Helmut Anheier, Marles Galsius and Mary Kaldor (eds), *Civil Society* (SAGE 2005); Kenneth Anderson, ‘What NGO Accountability Means - And Does Not Mean’ (2009) 103 *American Journal of International Law* 1.

¹⁶ Max Weber developed the theory of formal legitimacy asserting that legality or formal correctness would incline the citizenry toward compliance. Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (Edward Shils and Max Rheinstein trans, Simon and Shuster 1954) 8-9.

¹⁷ Legitimacy is the property of a rule or institution that exerts a compliance pull because the community believes that the rule or institution came into being or operates in accordance with generally accepted principles of “right process.” Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 24.

¹⁸ Thomas Franck described CIL and treaties as the secondary rules of right process in the international legal system using Hart. Hart’s distinction between primary rules of substantive law and secondary rules of accepted processes to make law. Franck developed four criteria: determinacy, symbolic validation, coherence and adherence to determine the legitimacy of a process. Franck, *ibid* 206-7. For the view that CIL does not meet Franck’s criteria of right process, see J Patrick Kelly, ‘The Twilight of Customary International Law’ (2000) 40 *Virginia Journal of International Law* 449, 457.

¹⁹ See Ruth Wedgwood, ‘NATO’s Campaign in Kosovo’ (1999) 93 *American Journal of International Law* 828. For a critical view of Kosovo as the selective use of humanitarian intervention, see Christine Chinkin, ‘Kosovo: A “Good” or “Bad” War?’ (1999) 93 *American Journal of International Law* 841.

significant changes in the number and composition of states as well economic and political power, many states question whether the Security Council, with only fifteen members, five of whom are permanent, is sufficiently representative to be considered democratically legitimate.²⁰ Similarly, with the five permanent members having the right to veto decisions that each perceives as contrary to its interests, specific decisions may be inconsistent with the consensus of the international community rendering the social legitimacy of such decisions suspect.

While the goals of this journal include providing clarity about norm formation and promoting greater legitimacy and democratic processes in law making, we must also build on the past. Despite concerns about the legitimacy of many past norms and continuing domination of some treaty regimes by a few states²¹ several of these institutions have, at least, in the post-World War II era, helped create, in general, a more peaceful, ordered world.²² Nations have cooperated to create institutions that have, by and large, fostered economic development and generated greater wealth and income throughout the globe. But international norm development is stunted, the legitimacy of many past norms and processes remain questionable, and international legal structures reflect a bygone era. The world faces significant long term problems such as the spread of nuclear weapons and cross-border violence, climate change, preventable disease, the loss of biodiversity and endemic poverty. Solutions to these problems require the participation and commitment of a wider group of nations not just a few. In a more complex, flatter world economic and political power must be shared in order to solve cross-border problems.

If there is to be greater democratic legitimacy in law making, we must examine the past as part of our journey toward reconciliation. Below I describe several major areas of norm development that are of problematic legitimacy that will command attention in these pages. First, I discuss the troubled history of CIL development in which few nations participated and Eurocentric norms were created or universalized in order to justify the colonial enterprise and later unequal relations. Second, I examine the recent attempts to develop customary international environmental law and principles through declarative law in non-binding instruments without the benefit of consent or consensus. This methodology challenges fundamental notions of state sovereignty and wise policy formation. Third, I examine international treaty regimes that hold out the promise of a more inclusive lawmaking process and greater legitimacy, yet are nevertheless plagued by unilateral power plays and judicial norm creation removed from state consent or consensus.

I. Customary International Law - The Historical Component

A reflective view of the history of international law reveals major concerns about the legitimacy of many norms that are considered to be customary international law (CIL). From a modern perspective state practice and *opinio juris*, the elements of CIL, are the means by which nations express their normative preferences in a decentralized system. State practice is the empirical

²⁰ See for example, High Level Panel on Threats, Challenges and Changes, 'A More Secure World: Our Shared Responsibility' (2 December 2004) A/59/565.

²¹ Alvarez (n 6).

²² The package of international institutions established after World War II has created a deliberative process to discuss and on occasion act on threats to international peace and security that by a large have helped solve these problems or at least reduce the incidence and spread of violence. International economic institutions, particularly the GATT and its successor the World Trade Organization, have helped create the conditions for the spread of economic development, the reduction of poverty in many countries and the containment of economic problems. For a discussion of the long march to reduced violence in the modern world, see Stephen Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Penguin Books 2012).

element in CIL formation providing evidence of customary norms. The states involved in an action or practice may justify their action by reference to a norm or disagree about the appropriate norm. Under CIL theory it is the general acceptance of states as the international community or *opinio juris* that determines and legitimizes a norm.²³ Thus it is the reaction of the states as a whole, not just of parties involved alone, that tells us how to interpret state practice.²⁴ Yet contrary to modern legal theory only a few nations historically participated in state practice and the interests and preferences of the less powerful nations and peoples were generally ignored in the literature discussing the meaning of the incidents of state practice.²⁵

Many international legal norms were not developed by what we consider today as right process, i.e., formed by treaties as express consent or by CIL as the product of state practice and *opinio juris*. If customary international law is an inductive, decentralized method of law making formed by consistent state practice and the general acceptance of norms, then few norms developed prior to World War II met either of these requirements. Rather CIL development from the Middle Ages through much of the 20th century might be characterized as dominated by the exercise of military and economic power and justified by western legal maxims using a deductive methodology.²⁶

In order to understand the early formation of what are called CIL norms, we must look beyond the modern formal requirement of state practice and general acceptance to the wider political and economic context. From this wider lens state practice and the general acceptance of states played only a limited role in norm development. Rather a deductive form of natural law based on general legal maxims drawn from European cultures was used to support the extension of military and economic power into the nations and territories of Latin America, Africa and Asia.²⁷ Even many norms that were labeled as CIL had their roots in an assumed universal law and remained deductive despite the label of custom.

Many international rules and doctrine developed as a means to regularize and justify both peaceful and violent encounters between European and Non-European cultures.²⁸ Ileana Porras among others has modified this view by demonstrating that the competition and even violent encounters among European nations for trade and territory were similarly generative of

²³ At least since the 19th century with the rise of positivism and the secular state, customary rules arise from the common consent or consensus of states. See Lassa Oppenheim, *International Law*, vol 1 (Peace) (Longmans 1905) §§ 11-12.

²⁴ See Brian Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 105-07. For a contrary view, see Anthony A D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971).

²⁵ For a discussion of the discrepancies between modern CIL legal theory and the actual development of CIL norms see, Kelly (n 18).

²⁶ For an example of deductive reasoning to justify norms, see Clyde Eagleton, *The Responsibility of States in International Law* (NYU Press 1928). There is a wide literature on colonialism and its aftermath as well as a modern conservative literature on international law as dominated by power and self-interest. Anghie clarifies that the founders of international law were preoccupied with justifying colonial relations. Anghie (n 4) 13-15. For a discussion of how legal categories were used to justify conquest, see Robert A Williams, Jr, *The American Indian In Western Legal Thought: The Discourses of Conquest* (OUP 1992). For a critique of the legalistic approach to the use of force and an exposition of international law as power, see Michael J Glennon, *Limits of War, Prerogatives of Power* (Palgrave 2001).

²⁷ Eagleton (n 26) provides an accessible window into the deductive world in an era of positivism.

²⁸ Anghie demonstrates that at a minimum many CIL norms particularly of state responsibility developed from the need to justify colonial expansion and the protection of property from the actions of Non-European civilizations. He further explains that in the prior natural law era similar doctrine were used to justify conquest and the forced taking of property. Anghie (n 4) 17-31. While some have challenged the breadth of his claim of the centrality of colonialism as the forge of international law, nearly all critics recognize that European international law to the extent it existed was universalized to justify colonial expansion and relations.

international legal norms.²⁹ From the 16th through the 19th centuries what might be termed ‘state practice’ often consisted of one state imposing its will on another state or territory based on the use or threat of unequal military power.³⁰ The 16th century natural law Spanish jurists, such as Suarez and Vitoria, through the transitional humanist Grotius to positivists Vattel and Oppenheim all developed analogous doctrine to justify conquest and the taking of property as reparations. The views of the natural law Spanish jurists and clerics, Vitoria and Suarez, had resonance because they coincided with the interests of the emerging colonial powers and justified the Spanish conquest of the Indies. The roots of the law of state responsibility may be seen in their writings. Vitoria recognized that Indians had jurisdiction over territory and a sense of property, but they were also subject to universal *ius gentium* norms a violation of which might justify punitive actions.³¹ Vitoria derived from natural reason a right of nation states to hospitality and to sojourn in foreign countries from which he deduced a right to travel and to trade.³² For Vitoria it was a violation of *ius gentium* to treat foreigners inhospitably and violations of these universal natural rights would justify reparations, occupation and even conquest.³³

Grotius similarly used a deductive approach to emphasize and extended the right to trade by claiming that the doctrine of the providential function of commerce is the source of the sacrosanct law of hospitality.³⁴ For Grotius as for Vitoria a society that excluded or inhibited commerce violated the right to commerce and provided just cause for war or reparations. The absurdity of this line of reasoning was that violence and conquest were justified because trade promoted peace and harmony. Both Vitoria in the 16th century and Grotius in the 17th century used assumed universal principles and deduction to justify the European conquest of new worlds. For Grotius positive law in the form of state practice and treaties between states may reveal law, but such behavior still must be judged by assumed natural principles.

With the dawning of the positivist era in the 19th century non-European states and territories were excluded from participation in international society by denying these states sovereignty and therefore the rights and protections of international law.³⁵ Oppenheim explains this strategy in simple syllogistic terms without irony³⁶ The Law of Nations is the product of the Christian Nations of Europe. Membership in the Family of Nations and its laws is only available to ‘civilized’ states. International law does not protect or give rights to states outside the circle of ‘civilized’ states. Those states outside the circle and those in *terra nullus*, land not controlled by a state, may be subjected or occupied. Whether using natural law principles or in a positivist era of state practice, international law constructs had the effect of justifying the use of power against the less powerful including the use of violence and the taking of property and territory.

Coextensive with the rise of the positivist theory that law emanated from the acts of states there grew a practice of some governments of military reprisals for torts or other actions against their subjects particularly against merchants trading in foreign lands. During the subsequent centuries this was rationalized as each state having a right to protect person and property of its citizens

²⁹ Ileana Porras, ‘Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ *De Jure Praedae*—the Law of Prize and Booty or “How to Distinguish Merchants From Pirates” (2006) 31 Brooklyn Journal of International Law 741.

³⁰ For a description of this process, see Gathii (n 5) 145-190.

³¹ Annabel Brett, ‘Francisco de Vitoria (1480-1546) and Francisco Suárez (1548-1617)’ Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012).

³² Franciscus De Vitoria, *De Indis et De Iure Belli Reflectiones* (Ernest Nys ed, John Paley Bate trans), reprinted in James Brown Scott (ed), *Classics of International Law* (Carnegie Institution 1995) 151-52.

³³ *ibid* 151-55.

³⁴ Porras (n 29) 773.

³⁵ Anghie describes this process of excluding those considered uncivilized from the protections of international law (n 4) 52-65.

³⁶ Oppenheim (n 21) §§ 26, 27, 29 and 211.

abroad and each state having a corresponding duty to provide foreigners with the minimum standards of treatment under international law.³⁷ As diplomatic practice became more sophisticated reprisals were not justified unless there had been a prior peaceful attempt to obtain reparations for violations of rights under international law.³⁸ The right to travel and the sanctity of one's property were now justified in more positivist terms as the right of diplomatic protection that was expanded to protect businessman and their capital. Both natural law theorists and positivist theorists declared norms to justify war on the one hand and the expansion of trade and investment, not as an exchange among equals, but rather as the extension of state power through the forcible opening of markets and protection of investment.³⁹

International tribunals, treatise writers and states used natural law arguments to support weak customary law arguments because state practice was scant and acceptance if present was often coerced.⁴⁰ When international law is viewed in this wider political economy context, the technical requirements of CIL pale before the underlying necessity of justifying conquest and regularizing the opening of markets. Much of the law of state responsibility, for example, was the means to protect western property and business interests when abroad rather than the even-handed application of principle. The historical development of what is called the international minimum standard of compensation, for example, may be conceptualized as either a colonial and post-colonial enterprise based on coercive use of power or as an attempt to extend western property concepts to others even against their will, if necessary, based on universal principles that encourage economic development. Whichever narrative one chooses it is apparent that there was not, in fact, general acceptance of such principles by the overwhelming majority of nations.

In the 19th century several nations of Europe and the United States used military intervention or, the threat thereof, to settle expropriation disputes or collect debts owed to their citizens as bondholders.⁴¹ Several early disputes were terminated by coerced capitulation treaties requiring the capital-importing nations to protect foreign investors. Latin American nations strenuously objected to these tactics and responded with two interrelated initiatives – the Calvo doctrine and the Drago doctrine to emphasize their continuing disagreement with the international minimum standard and the use of military means to collect debt.⁴² Latin American states added what were known as Calvo provisions to their domestic statutes and constitutions and inserted Calvo clauses in concession contracts requiring that foreign investors pursue remedies under their domestic law on the basis of equal treatment with nationals of that country rather than resort to any international minimum standard or armed intervention.⁴³ From a modern lens it is clear that Latin American nations did not accept either the full compensation norm or the “right” to use force to collect a debt.

³⁷ Oppenheim explains that aliens abroad while subject to local rules remain nevertheless under the protection of their home state. Lassa Oppenheim, *International Law* (2nd ed, Longmans 1912) §§ 319-20.

³⁸ See Naulilaa Incident, reported in (1949) 2 United Nations Reports of International Arbitral Awards 1011.

³⁹ For a critique of the use of legality and force to protect investment during the age of imperialism, see Gathii (n 5) 145-190.

⁴⁰ Eagleton describes the study of the responsibility of states in international law as an examination of the theory upon which reparation may be demanded by one state of another, and of the processes by which it may be obtained. He utilizes primarily naturalistic maxims citing earlier publicists and only rarely refers to the actions of states. Eagleton (n 26) 3.

⁴¹ See eg, Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press 1985) 37-64 (describing the use of armed intervention and other strategies to impose the American and British view of an international minimum standard regardless of national laws or contractual clauses).

⁴² See the discussion in Gathii (n 5) 145-58.

⁴³ Hersch Lauterpacht, *Oppenheim's International Law* (8th ed, Longmans 1955) 52-54 (disputing the view that there exists a separate American international law) and 344-45 (disputing the validity of attempts by Central and South American countries to insert clauses, called "Calvo clauses," in contracts with nationals of foreign states to renounce the protection of international standards).

As in the earlier natural law era, publicists in the positivist era of the 19th and early 20th centuries constructed the law of state responsibility by referencing general natural law principles and natural law thinkers rather than the practices of states. Oppenheim while stating that it is a universally recognized customary rule that every state has the right of protection over its citizens abroad, justified this rule by citing other publicists who, he said, deduced this right from the “fundamental” right of self-preservation.⁴⁴ Much of state responsibility law was based on natural law principles and expanded by deductive reasoning. Later arbitrations and court opinions simply referred to publicists and other arbitrations using deductive reasoning in an act of self-creation. These norms said to be customary were not built on state practice or general acceptance.

Today parts of this struggle seems antiquated. Developing countries now compete for foreign investment including investment from newly emerging nations such as Brazil, South Africa and South Korea by signing bilateral investment treaties (BITs) and passing domestic laws to satisfy investors.⁴⁵ Some level of protection for foreign investors has become standard public policy in nearly all nations that participate in the world economy. Foreign investment that contributes to export driven trade has become a major force in reducing poverty.⁴⁶ Yet any attempt to codify, as international law, the standard of full compensation for expropriation or even of the wider body of the law of state responsibility remains a significant challenge.⁴⁷

Past incidents of expropriation or even the broader category of state responsibility known as denial of justice do not reveal what we would term CIL today. Rather than evidencing general acceptance of norms whether implied or tacit, these incidents clarify the ongoing disagreement about the appropriate norm and lingering rancor from more powerful nations imposing their will upon other nations whether by force or by arbitration. If such incidents and arbitrations help define and create legal principles, then neither common consent nor specific consent is required.

The long encounter between the nations of Europe and non-Europeans states and peoples distorted natural law ideas and later the concept of custom in order to justify the exercise of power. Processes for creating law or resolving disputes that were viewed as legitimate by powerful states in one era may raise significant issues of the legitimacy of norms in another. The legacy of this era is troubling and creates significant problems for CIL theory. Which of these early norms in treaties is generally accepted today and who says? As described above the law of state responsibility arose not from state practice, but rather from court and arbitration proceedings citing publicists who had deduced norms from naturalistic maxims and references to other courts and arbitration proceedings. These are subsidiary means for ascertaining norms under the statute of the International Court of Justice. Why should secondary and derivative sources be deemed more important than actual state practice and the normative attitude of states? Should you reexamine what constituted state practice in this era? Does regularized behavior in the form of domination create a required standard of behavior? The Calvo Clauses in

⁴⁴ Oppenheim (n 37) § 319.

⁴⁵ Zachary Elkins, Andrew T Guzman and Beth Simmons, ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000’, available in the Social Science Research Network Electronic Paper Collection: <<http://ssrn.com/abstract=1001169>> accessed 21 February 2014.

⁴⁶ Recent globalization of the world economy has led to the largest increase in economic growth in human history and relief from poverty for more than one billion people, see Lawrence Chandy and Geoffrey Gertz, *Poverty in Numbers: The Changing State of Global Poverty from 2005 to 2015* (Brookings 2011).

⁴⁷ The International Law Commission began its study for the codification of the law of state responsibility in 1956. This project lasted through the lives of several special rapporteurs and at least thirty-two reports. In 2001 the ILC adopted the “Articles on State Responsibility.” These articles have not become a treaty nor were they drafted or adopted by states. Many governments have objected that several articles do not reflect either state practice or opinio juris. See eg, ‘Symposium: The I.L.C.’s State Responsibility Articles’ (2002) 96 American Journal of International Law 773; ‘Symposium: Assessing the Work of the International Law Commission on State Responsibility’ (2002) 13 European Journal of International Law 1053.

contracts and in state constitutions prohibiting the payment of full compensation were not seen as practice, but as illegal attempts to avoid international legal requirements.⁴⁸ Yet international concessions contracts specifying international arbitration are respected. The underlying narrative of an international minimum standard was contained in treaties and diplomatic correspondence, but only the position of one side seemed to have relevance in the literature. What is termed state practice if closely examined may not reveal either an underlying communal belief, but rather disagreement on the norm itself.

II. The Challenge of International Environmental Law

Modern uses of CIL theory reveal a similar tendency to ignore state practice and the general acceptance by states of the norm as a legal obligation. These are the very elements necessary to legitimate a norm as law and to be deemed “right process.” International environmental law (IEL), for example, may be seen as the stalking horse for the legitimacy conundrums of modern international law and international institutions. Human beings have spread to all corners of the globe destroying habitat, cutting down forests and reducing biodiversity. Our global climate is changing; glaciers are melting; and our oceans are overfished. The burning of fuel, the dumping of sewage in the seas and the thinning of the ozone layer all cause external harm to other states and the global commons. These problems cannot be solved domestically and require international solutions. On the one hand, these problems need to be addressed soon and may require decision making processes without the specific consent of each state in order to reach acceptable solutions in the near term.⁴⁹ On the other hand, CIL not based on the general consent of the full international community and treaty regimes dominated by a few nations pose severe challenges to democratic legitimacy and to wise policy formation.

Environmental advocates, rightly concerned that the international processes of governance are slow and cumbersome, have tried several approaches to generate norms and solve problems. One approach that has proved only minimally successful has been to create CIL norms by combining non-binding declarations or resolutions with arbitration decisions or the repetition of general vague norms or principles in both binding and non-binding international instruments. This is sometimes called declarative law because it is said to create law with minimal or no actual state practice. This theory argues that unanimous or near unanimous declarations of the United Nations General Assembly or other international fora constitute a consensus on legal norms providing evidence of *opinio juris*.

We will look at two such norms or principles: the transboundary harm norm and the principle of sustainable development, to see the difficulties they pose for democratic legitimacy. The international transboundary harm norm, as an environmental norm, was first articulated in the *Trial Smelters Arbitration*.⁵⁰ The arbitrator found no international tribunal cases on point nor state practice and instead used United States domestic law cases between the constituent states of the United States as analogous to the international system. He supported this approach with a quote from the naturalistic legal maxims of Professor Eagleton in his 1928 treatise on state responsibility, “States owe at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction.” While this norm is later contained in the non-binding

⁴⁸ Both Eagleton and Oppenheim agree on this point. See Eagleton (n 26); Oppenheim (n 37).

⁴⁹ Dan Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge For International Environmental Law’ (1999) 93 *American Journal of International Law* 596.

⁵⁰ *Trial Smelters Arbitration* (United States v Canada), (1941) 3 *United Nations Reports of International Arbitral Awards* 1905.

Stockholm and Rio Declarations, it is done so in a context that it must be balanced with sovereign right to exploit resources and determine one's own environmental rights.⁵¹ This putative norm suffers from two essential problems as CIL. There is virtually no subsequent state practice and there is little evidence of general acceptance of it as a legal obligation. The Stockholm and Rio Declarations are non-binding, aspirational instruments. Even as an ethical or aspirational norm, the transboundary harm norm is combined with other balancing considerations and the locus of decision making appears to be with the nation balancing the policies. While the International Court of Justice later referred to it in *obiter dicta* as a general obligation of states in the Nuclear Weapons Advisory Opinion,⁵² its pedigree is suspect.

Nevertheless, the transboundary harm norm may be essential to a well-functioning international legal system. How do we assign responsibility for the spillover of nuclear fallout or toxic materials flowing across borders? What level of harm is required? Is a state strictly liable for harm or is negligence required? Norms are needed to assign responsibility and peacefully resolve disputes based on principle rather than power or whim. Should the norm's doubtful pedigree, even if born in an arbitration that wrongly assumed international law was the same as US domestic law, be ignored? Will treaty regimes and other mechanisms develop more precise standards for allocating costs and responsibility? The Montreal Protocol, for example, precisely defines the chemicals that are regulated and has evolved to ban the production, consumption, import and export of these chemicals by member states with some exceptions. While the transboundary harm norm has never met the requirements of CIL, as an ethical principle it has become the starting point for discussions about suitable settlements of transboundary pollution disputes.

Similarly, sustainable development is an important organizing principle for wise public policy. At times it has been termed a principle of CIL and other times as a general principle of law, yet it poses similar difficulties of both legal and democratic legitimacy as a binding legal norm. While sustainable development does have considerable resonance as policy prescription, it is a concept so vague and indeterminate that it cannot be an effective legal norm used to decide concrete disputes. It inherently requires a balancing of economic development with a variety of environmental and social considerations that require legislative judgment rather than law application. Should the balance be different in less developed countries with greater food and health needs and fewer resources to meet them? The ICJ in *Gabcikovo-Nagymaros Project* case effectively used sustainable development as a policy prescription and then referred the dispute back to the parties to consider it in determining for themselves how to balance the competing considerations.⁵³ If such norms are to have legitimacy the preferable locus of decision making should be with either the country or countries balancing these competing policies or be delegated to an international regulatory institution with the legal authority to develop and apply concrete standards.

⁵¹ The Rio Declaration formulation in Principle 2 is:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

⁵² *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996
<www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95> accessed 21 February 2014 [29].

⁵³ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) ICJ General List 92, 7.

Norms announced by judges or advocates placing great weight on the repetition of non-binding resolutions or abstract aspirational norms within binding treaties do not create effective legal norms. The Trail Smelters plant continues to pour sulfur dioxide into the air spilling over into Washington State. Most importantly, general, abstract norms do not solve serious concrete problems. Such general norms do help allocate ethical responsibility and point toward solutions. Perhaps a more fruitful, long run approach would be to develop standards in defined areas through treaty regimes with prior agreed standards and procedures to cabin delegated authority within defined parameters. Indeed international regulation is the only practical way of assuring an adequate level of protection and applying this standard to all in a uniform manner. Yet international regulation, as discussed below, has its own set of problems.

III. International Treaty Regimes and Regulatory Mechanisms

International treaty regimes such as the World Trade Organization, the Ozone Layer treaty with its various protocols, and UNCLOS hold out the promise of greater participation and legitimacy in norm development. Treaty regimes ratified by the vast majority of states are becoming a form of sector-specific legislatures based on state consent. All nations arguably can participate in these treaty regimes and provide input on the appropriate norms and standards. All states may have their interests heard and have at least the opportunity to negotiate and ultimately influence the development of international rules and standards. If nations are fully engaged, their interests heard and considered, then such states are more likely to be committed to these norms and comply. Treaty regimes typically create ongoing institutions and mechanisms for regular meetings, often called the conference of the parties, to discuss any new scientific evidence, compliance issues and possible amendments or protocols to the foundational agreement.⁵⁴ Similarly, the adjudicatory or dispute settlement mechanisms of treaty regimes promise neutral decision making based on the rule of law rather than relative power.

Despite the considerable promise of this form of international governance and several significant successes, there are major concerns in the formation and implementation of treaty regimes that raise difficult legitimacy issues for future issues of this journal. First, because treaty regimes are essentially engaged in a legislative-like process removed from democratic accountability to voters, there should be greater transparency, participation and effective influence over the rules and agreements that will bind states. Few nations, for example, participated in the crucial drafting negotiations that created the WTO and its agreements and remain excluded from effective participation in negotiations.⁵⁵ When negotiations were stalled on whether to include an agreement on intellectual property, threats of powerful states were used to coerce less developed countries to accept the TRIPS agreement or face sanctions that could exclude them from major markets. From a normative perspective one could argue that TRIPS may be in the long term self-interest of developing countries because it would promote economic development and the spread of technological innovation. Even if this were true, it ignores that the very real possibility that developing countries may have been able to obtain further concessions such as a reduction in agricultural subsidies and tariffs that would lift barriers to developed country markets and promote economic development.

⁵⁴ This approach is often called the managerial model of international standard making and compliance, see Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995)

⁵⁵ See James Thuo Gathii, 'Process and Substance in WTO Reform' (2005) 56 Rutgers Law Review 1; Richard H Steinberg, 'In the Shadow of Law or Power?: Consensus Based Bargaining and Outcomes in the GATT/WTO' (2002) 56 International Organization 339.

One can anticipate even more serious problems of democratic legitimacy in the coming decades. Even in consent-based treaty regimes there will be issues of imminent harm where non-consensual decision making should be considered.⁵⁶ Major international environmental problems such as climate change pose significant danger to the health and security of all in the not distant future. This danger is particularly acute in developing countries with fewer resources to adjust to reduced rainfall, desertification and reduced agricultural production. Getting the agreement of all nations to costly strategies such as a carbon tax on all consumption or strict standards for single source emissions may appear difficult if not impossible in the short run. Yet the costs of consuming less carbon and mitigating past emissions must be allocated.⁵⁷ Who should decide these difficult issues and by what processes?

There are a variety of innovative solutions that may be promising, but each poses serious challenges to democratic legitimacy and consent-based international governance. The Montreal Protocol, for example, permits a qualified majority to adjust (tighten) the standard on a particular chemical substance once it has been subject to control.⁵⁸ This procedure permits a majority to legislate a mandatory standard even without the consent of an affected state. Such a procedure may make sense in narrow areas where the fundamental standard has already been determined by specific consent and refinements are primarily based on an assessment of changing scientific knowledge. Climate change, as a far more serious problem, may pose more difficult dilemmas for intentional governance. Would a prior agreement to a process of qualified majority voting be acceptable if the majority imposed costly regulation like a carbon tax or emission standards? A qualified majority for legislative decisions is utilized by the European Union. Yet this qualified majority process and the rather teleological interpretations adopted by the European Court of Justice have caused serious concerns of a “democracy deficit” in the European Union even for a collection of societies with similar histories and values.⁵⁹

The second legitimacy concern is that well-meaning dispute settlement bodies may develop creative interpretation strategies to promote assumed values in a manner that undermine contractual norms in agreements. This raises concerns both from the perspective of formal legitimacy because the authority to expand an agreement may not have been delegated and from democratic legitimacy because decisions and accountability are far removed from the electorate in each state. The Shrimp/Sea Turtle litigation⁶⁰ at the WTO highlights the issue of the extent to which treaty regime dispute settlement bodies have or should have the authority to expand agreements beyond the norms originally negotiated. In its Shrimp/Sea Turtle opinion the Appellate Body (AB) to its credit acknowledged that it was expanding the original meaning of the conservation exception by acknowledging that it was using an “evolutionary” interpretive methodology rather than one that was faithful to the original meaning in the agreement.⁶¹ It expanded the conservation exception in article XX (g) to include living resources even though all living creatures were already protected under the article XX (b) exception for human, animal and plant life or health.⁶² The crucial difference was that the article XX (b) exception required that the measure be “necessary,” that is, there is no reasonable alternative means of achieving the same policy end that is more consistent with GATT obligations. The term “necessary” had been

⁵⁶ Bodansky (n 49) 607-610.

⁵⁷ Eduardo Porter, ‘Rethinking How to Split the Costs of Carbon’ *NY Times* (New York, 25 December 2013) B1.

⁵⁸ Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3 art. 2(9).

⁵⁹ See Joseph HH Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403, updated and expanded in Joseph HH Weiler, *The Constitution of Europe* (CUP 1999) 80-86.

⁶⁰ WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (Oct. 12, 1998) AB-1998-4, WT/DS58/AB/R.

⁶¹ *ibid* paras. 129-30

⁶² Article 3.2 of the Dispute Settlement Understanding provides, “...Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations of the covered agreements.”

used as a gatekeeper to prohibit measures with an ostensible public purpose, but designed or implemented in a manner to protect a domestic industry contrary to member states right of access. This creative interpretation effectively took away the Thailand shrimp industry's right of access to the United States market without a corresponding concession.⁶³

A second controversial aspect of this decision was that by upholding the United States standard for catching of shrimp, the AB effectively permitted the unilateral setting of international standards by one nation with the market power to force compliance. In this case the standard was developed by the US Congress after lobbying by the domestic shrimp industry and domestic environmental groups. Thailand voters and the concerns of the Thai shrimp industry were not represented. To what extent should unilateral international standard setting be permitted when it inherently takes away the ability of other nations to participate in and influence the development of standards with which they must comply or lose their market access?⁶⁴ There are compelling arguments that multilateral standard setting is slow and cumbersome. But it is equally true that unilateral standard setting decreases the democratic legitimacy of that standard, can create rebound trade problems for the nation imposing the standard and is likely to benefit one nation's industry more than that of other nations even when non-discriminatory.⁶⁵

These interpretative concerns will be highlighted when and if a viable, concrete climate change treaty is negotiated. If, as is likely, not all nations will be party to such an agreement, could the treaty require, for example, that all member states impose a border carbon tax on goods from countries that do not impose a carbon tax on their own manufacturers? A treaty without the participation of nearly all countries would be ineffective and create free rider problems of those attempting to reap the benefits without bearing the costs. Such a tax appears most defensible as a consumption tax that will be borne by the importing countries consumers who are creating the demand for carbon consuming goods. But would not such a tax take away the right of access to markets under the WTO rules and impose a tax on nations that have not agreed to bear this cost? These legitimacy and process concerns will be difficult issues not only for the negotiation of a viable climate change convention, but also for the wise interpretation of the WTO Agreements by the Appellate Body and for the structure of international law.

IV. CONCLUSION

The international legal framework is changing rapidly developing new forms of international institutions and crafting solutions to new problems. The evolving distribution of economic and political power seems inconsistent with past forms of law making and institutional structures. The legitimacy of many CIL norms found in standard treaties remains suspect, but, if applied in a fair manner, many such norms may be useful in helping to resolve international disputes. Less

⁶³ While provisionally accepting the measure as qualified under the article XX (g) exception, the Appellate Body found that the implementation of the measure was contrary to the anti-discrimination provisions in the preamble to article XX (g). The United States made the necessary changes to their procedures and the Appellate Body upheld the measure in *Shrimp/Sea Turtle II*. WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (Oct. 22, 2001) WT/DS58/AB/RW.

⁶⁴ Several scholars have argued that unilateral standards can play a positive role in stimulating multilateral agreements and arrangements, see Richard W Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What Can We Learn From the Tuna-Dolphin Conflict' (1999) 12 *Georgetown International Law Review* 1.

⁶⁵ Developing countries adamantly opposed trade linkage with both environmental and labor issues in the Doha trade negotiations because they understood that unilateral trade sanctions would restrict imports from the South. Gregory C Shaffer, 'The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters' (2001) 25 *Harvard Environmental Law Review* 1.

powerful nations have, by and large, been receivers of CIL norms rather than participants in its processes and the struggle for clarification and compromise will continue. It is unclear to what extent CIL norms formed in an era of natural law and assumed universal maxims have been generally accepted. This makes many legal advisors and treatise writers uncomfortable because it places norms in jeopardy. Highly general legal maxims were used in service to European interests in conquering and appropriating commodities and property. These maxims may or may not be universal. The way forward may be to develop more pluralist versions of international legal principles to move beyond the ethnocentric history of their development and imposition. Some rules may need to be negotiated and reformulated to make them more representative of the interests of a larger group of nations. In many areas where there had been disagreement about the appropriate CIL norm such as the territorial sea, the treaty negotiation process permitted nations to make tradeoffs among norms and eventually compromise. The result of the UNCLOS negotiations was that nations could agree on new common standards that each nation was willing to accept, even if these standards were the first preference of only a few nations.⁶⁶

Much of the history of international law has been an act of self-creation removed from the general acceptance of states. In this era of rapid change if judges and arbitrators continue to be important articulators of new norms, which judges and arbitrators of which countries or cultures will be chosen and by what processes? Will treaty regimes ultimately become administrative agencies with delegated authority to articulate norms through legislative rulemaking or by adjudication and be further removed from democratic processes? Will the dispute settlement bodies of treaty regimes merely engage in interstitial interpretation of norms or will they broadly create norms through adjudication?⁶⁷ How should international institutions be designed to make them more legitimate? The mission of this journal will be to provide a platform with a fresh perspective to address these difficult issues and dilemmas facing our rapidly changing international legal environment.

⁶⁶ For a discussion of tradeoffs that enabled a new consensus on various norms and standards in the United Nations Convention on the Law of the Sea (UNCLOS III), see Robert L. Friedheim, *Negotiating the New Ocean Regime* (University of South Carolina Press 1993).

⁶⁷ Joel Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333.

‘Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya’s Serving Senior State Officials’

Manisuli Ssenyonjo*

Abstract

This article examines the impact of the investigations and prosecutions by the International Criminal Court (ICC) of Kenya’s serving senior State officials, namely Uhuru Muigai Kenyatta (President of Kenya) and William Samoei Ruto (Vice President of Kenya). The focus is limited to the impact the investigations and prosecutions have had, at the time of writing in December 2013, on the following four aspects only. First, the article considers the impact investigations and prosecutions have had on domestic legal proceedings in Kenya. Second, it discusses the impact of the investigations and prosecutions on the ICC Prosecutor’s approach to investigations. Third, it analyses the impact of the investigations and prosecutions on the jurisprudence on trial *in absentia* and amendments to the ICC Rules of Procedure and Evidence. Finally, it examines the impact the investigations and prosecutions have had on cooperation with the ICC by Kenya and the African Union.

1. Introduction

The situation in the Republic of Kenya (Kenya) was the first instance in which the International Criminal Court (ICC) Prosecutor investigated a situation *proprio motu* (on the Prosecutor’s own initiative) in accordance with the provisions of Article 15 of the Rome Statute of the International Criminal Court (Rome Statute).¹ Kenya signed the Rome Statute on 11 August 1999, ratified it on 15 March 2005 and domesticated its provisions by enacting the International Crimes Act of 2008.² After the results of Kenya’s presidential elections of 27 December 2007 were announced, unprecedented ethnically driven violence, some planned and organised, some spontaneous, erupted in most of Kenya, ‘often with the involvement of politicians and business leaders.’³ The violence tore through Kenya in December 2007 and January 2008. The elections saw incumbent president and leader of the Party of National Unity (PNU), Mwai Kibaki, in competition against the leader of the Orange Democratic Movement (ODM), Raila Odinga. The result which emerged, in favour of Mwai Kibaki, came after lengthy delays and widespread accusations of vote rigging. In the mass violence which ensued within two months very serious crimes were reportedly committed:

*Professor of International Law and Human Rights; Director Centre for International & Public Law (CIPL), Brunel University, London. Email: manisuli.ssenyonjo@brunel.ac.uk. The author is grateful to SPILJ’s anonymous referees for comments received on earlier drafts of this article.

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

² International Crimes Act (2008), available at <www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf> accessed 30 December 2013. The Act came into force on 1 January 2009.

³ See Report of the Commission of Inquiry into Post-election Violence (2008) vii-viii, available at <www.communication.go.ke/documents/CIPEV_FINAL_REPORT.pdf> accessed 30 December 2013.

According to Kenyan authorities, 1,220 persons were killed. Hundreds of rapes were documented. Many more, probably thousands, were unreported. 350,000 persons were forcibly displaced, 3600 persons were injured. These alleged crimes were part of a widespread and systematic attack against the civilian population. They ... are crimes against humanity.⁴

An independent Commission of Inquiry (also known as Waki Commission, after its President, Justice Philip Waki) found the root causes of violence included: the use of violence by politicians to gain power following the legalisation of multi-party democracy in 1991; an entrenched culture of impunity; the concentration of power around the Presidency; the feeling among certain ethnic communities of historical marginalisation arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services; and poverty and unemployed youth.⁵ The Commission recommended that a hybrid special tribunal for Kenya be created with 'the mandate to prosecute crimes committed as a result of post-election violence',⁶ or if not, the names of alleged perpetrators be sent to the ICC prosecutor to conduct further investigations.⁷

One 'major setback' to the implementation of the Commission's recommendations was the fact that Kenyan lawmakers rejected twice a proposed bill to establish a special tribunal for Kenya.⁸ Therefore, Kofi Annan, the Chairman of the AU Panel of Eminent African Personalities (which included Mrs Graca Machel, Mr Benjamin Mkapa and Dr Joachim Chissano), who mediated an agreement to end the crisis, transmitted to the ICC Prosecutor on 9 July 2009 the sealed envelope (with the names of high-level people allegedly responsible for the violence) and supporting materials previously entrusted to him by the Waki Commission.⁹

On 26 November 2009, after more than a year without any action by the Kenyan government, the Prosecutor for the first time in the history of the ICC applied to the Pre-Trial Chamber for authorisation to initiate an investigation in Kenya, in accordance with Article 15 of the Rome Statute.¹⁰ He claimed that there was a reasonable basis to believe that crimes against humanity had occurred on the territory of Kenya in relation to the 2007/2008 post-election violence.¹¹ On 31 March 2010, Pre-Trial Chamber II granted (by 2:1) the Prosecutor's request to open an investigation *proprio motu* of the situation in Kenya after finding that there was a reasonable basis pursuant to Article 15(4) of the Rome Statute to proceed with an investigation of alleged crimes

⁴ See ICC, Office of the Prosecutor, press conference by the Prosecutor of the International Criminal Court, Luis Moreno Ocampo (26 November 2009), available at <www.icc-cpi.int/NR/rdonlyres/AC13413D-D097-4527-B0AE-60CF6DBB1B68/281313/LMOINTROstatement26112009_2_2.pdf> accessed 30 December 2013.

⁵ Report of the Commission of Inquiry into Post-election Violence (n 3) 22-36.

⁶ *ibid* ix.

⁷ *ibid* 18, 472-475.

⁸ See Panel of Eminent African Personalities, 'HE Kofi Annan on the Defeat of the Constitution of Kenya Amendment Bill in Parliament' (13 February 2009), available at <www.pambazuka.org/en/category/wgender/54295/print> accessed 30 December 2013.

⁹ ICC, 'ICC Prosecutor Receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya' (9 July 2009) Press Release No ICC-OTP-20090709-PR436, available at <www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr436>

accessed 30 December 2013.

¹⁰ See ICC, Request for Authorisation of an Investigation Pursuant to Article 15, Doc No ICC-01/09-3 (26 November 2009), available at <www.icc-cpi.int/iccdocs/doc/doc785972.pdf> accessed 30 December 2013.

¹¹ *ibid*. The crimes alleged to have been committed were: murder (art 7(l)(a)); deportation or forcible transfer (art 7(l)(d)); rape (art 7(l)(g)); persecution (art 7(l)(h)); and other inhumane acts (art 7(l)(k)).

against humanity on the territory of Kenya from 1 June 2005 until 26 November 2009.¹² Judge Hans-Peter Kaul dissented on the basis that:

there is no reasonable basis to believe that crimes, such as murder, rape and other serious crimes, were committed in an 'attack against any civilian population' 'pursuant to or in furtherance of a State or organizational policy to commit such attack', as required by Article 7(2)(a) of the Statute.¹³

It is vital to note that Kenya was not 'targeted' for the ICC investigations and prosecutions of some leaders. The ICC Prosecutor commenced investigations and later prosecutions following the failure of national authorities to investigate and prosecute. As Kofi Annan observed:

it was the Kenyan government's own failure to provide justice to the victims and their survivors that paved the way to the I.C.C., a court of last resort. These trials also do not reflect the court's unfair targeting of Africa, as has been alleged. Instead they are the first steps toward a sustainable peace that Kenyans want, deeply, and can only be assured of if their leaders are not above the law.¹⁴

Following summonses to appear issued on 8 March 2011, six Kenyan citizens voluntarily appeared before Pre-Trial Chamber II on 7 and 8 April 2011. After a confirmation of charges hearing, Pre-Trial Chamber II confirmed (by 2:1) charges against William Samoei Ruto (Former Minister of Higher Education, Science and Technology of Kenya) and Joshua Arap Sang (Head of operations at Kass FM in Nairobi, Kenya) and committed them for trial.¹⁵ It also confirmed charges against Francis Kirimi Muthaura (Former Head of the Public Service and Secretary to the Cabinet of Kenya and Member of Parliament of the Republic of Kenya) and Uhuru Muigai Kenyatta (then Deputy Prime Minister and former Minister for Finance of Kenya) and committed them for trial.¹⁶ Two suspects, Uhuru Kenyatta and William Ruto, were candidates in Kenya's March 2013 Presidential election having been nominated by their respective political parties namely the National Alliance Party (TNA) and the United Republican Party (URP). Kenya's Supreme Court confirmed that Kenyatta and Ruto were validly elected respectively as President and Deputy President of Kenya¹⁷ for a term of five years,¹⁸ and both are entitled to stand for another term of five years.¹⁹

The article considers the impact of the investigation and prosecution by the International Criminal Court (ICC) of Kenya's serving senior State officials namely Uhuru Muigai Kenyatta

¹² See ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Doc No ICC-01/09 (31 March 2010), available at <www.icc-cpi.int/iccdocs/doc/doc854287.pdf> accessed 30 December 2013.

¹³ Dissenting Opinion of Judge Hans-Peter Kaul, *ibid* para 4. For a comment see Charles C Jalloh, 'Situation in the Republic of Kenya. No. ICC-01-09-19, Decision on the Authorisation of an Investigation' (2011) 105(3) *American Journal of International Law* 540-547.

¹⁴ Kofi Annan, 'Justice for Kenya' *The New York Times* (New York, 9 September 2013), available at <www.nytimes.com/2013/09/09/opinion/justice-for-kenya.html?emc=eta&_r=0> accessed 30 December 2013.

¹⁵ *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, No ICC-01/09-01/11(23 January 2012), available at <www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> accessed 30 December 2013.

¹⁶ *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, No ICC-01/09-02/11 (23 January 2012), available at <www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> accessed 30 December 2013.

¹⁷ See Supreme Court of Kenya, *Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others*, Petitions 5,4 & 3 of 2013 [2013] eKLR (Judgment of 30 March 2013).

¹⁸ See Constitution of Kenya art 136(2)(a).

¹⁹ *ibid* arts 142(2) and 148(8).

(President of Kenya) and William Ruto (Vice President of Kenya). It observes that the ICC investigations and prosecutions in Kenya have had significant impact on domestic legal proceedings in Kenya (section 2); impact on the prosecution's approach to investigations (section 3); impact on jurisprudential developments concerning trial *in absentia* and amendments to the ICC Rules of Procedure and Evidence (section 4); and impact on Kenya and African Union cooperation with the ICC (section 5).

2. Impact on Domestic Legal Proceedings in Kenya

The ICC investigations against Kenyatta and Ruto formed a basis for instituting some domestic legal proceedings in Kenya. In particular, legal proceedings were instituted before the High Court of Kenya by individuals and non-governmental organisations (NGOs) seeking a declaration that Kenyatta and Ruto were not qualified to run for the Presidency and Deputy Presidency, respectively, due to pending ICC charges.²⁰ Some individuals and NGOs argued that as a result of the ICC charges, Kenyatta and Ruto did not meet the constitutional requirements established by Kenya's 2010 Constitution, which calls for public officials to have 'personal integrity'.²¹ It was also argued that for the two accused persons to hold public or State office would be a recipe for anarchy and perpetuate the culture of impunity.

The High Court of Kenya, relying on Article 163(3) of the Constitution,²² held that 'the High Court has no jurisdiction to deal with any question relating to the election of the President',²³ and that '[t]his is an issue which is within the exclusive jurisdiction of the Supreme Court'.²⁴ The Court accepted that by virtue of the principle of complementarity under Article 1 of the Rome Statute, the ICC and the Kenyan courts cannot simultaneously adjudicate over the same matter.²⁵

The Court referred to the Rome Statute explicitly suggesting an approach that amounts to the treaty provisions being considered as 'self-executing' or directly applicable in the courts. According to the Kenyan High Court, upon confirmation of the ICC charges against both Kenyatta and Ruto, 'only the ICC could bar them and it cannot, because the Rome Statute has no such provision'.²⁶ While the Court did not examine the status of the Rome Statute as an international treaty ratified by Kenya, the Court's approach leaves three possibilities. First the Rome Statute may be accorded a status above all national law in Kenya, including the constitution. Second, the status of the Rome Statute may be equal to that of the constitution, but

²⁰ See *See International Centre for Policy and Conflict and 5 Others v The Hon. Attorney-General and 4 Others*, Petition No 552 of 2012 (15 February 2013) as consolidated with Petition No 554 of 2012, 573 of 2012 and 579 of 2012, [2013] eKLR, available at <http://kenyalaw.org/CaseSearch/view_preview1.php?link=11903065891756192934559> accessed 30 December 2013.

²¹ Constitution of Kenya 2010, art 73(2)(a). Art 10(2)(c) of the Constitution states that the national values and principles of governance include: 'good governance, integrity, transparency and accountability.'

²² *ibid.* Article 163(3)(a) provides: 'The Supreme Court shall have exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President...'

²³ See unanimous judgment by a panel of 5 High Court judges *Amraphael Mbogholi Msagha, Luka Kimaru, Hellen Omondi, Pauline Nyamweya, and George Kanyi Kimondo* Petition No 552 of 2012, para 86. The Court cited the advisory opinion of Kenya's Supreme Court *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Advisory Opinion, Application No 2 of 2012 [2012] eKLR [100-102], available at <www.judiciary.go.ke/portal/assets/files/one-third-rule/Majority%20Decision-One%20Third%20Rule.pdf> accessed 30 December 2013.

²⁴ *ibid.*, Petition No 552 of 2012, para 92.

²⁵ *ibid.* para 152 and 168(a).

²⁶ *ibid.* para 152.

superior to all ordinary national laws. Third, the Rome Statute may have a position in the legal hierarchy equal to that of ordinary national laws in Kenya.

Questions relating to the domestic application of the Rome Statute must be considered in the light of three principles of international law. The first, as reflected in Article 27 of the Vienna Convention on the Law of Treaties of 1969,²⁷ is that '[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. In other words, States should modify the domestic legal order as necessary in order to give effect to their Rome Statute treaty obligations.

The second principle is reflected in Article 8 of the Universal Declaration of Human Rights,²⁸ according to which '[E]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him [or her] by the constitution or by law'. The principal perpetrators of the post-electoral violence in Kenya violated fundamental rights of victims. The victims are entitled to an effective remedy to put an end to impunity of perpetrators of these crimes and thus to contribute to the prevention of such crimes. Perpetrators must be held to account. The victims of the violence deserve no less. In this regard UN human rights treaty monitoring bodies have called on Kenya 'to ensure that all victims of the post 2007 elections violence are effectively compensated and that the perpetrators of the violence are properly prosecuted'.²⁹

Unfortunately, as at the time of writing, no serious efforts had been made by the Kenyan authorities to effectively and impartially investigate, prosecute and punish high-level figures allegedly responsible for planning, instigating and funding the 2007-2008 post-electoral violence in Kenya. Consequently, most of the perpetrators of sexual and gender-based violence, including rape and gang rapes, remain at large and unpunished.³⁰ The Government's commitment to accountability for crimes and to address grave human rights abuses which occurred during the post-election violence remains unsatisfactory.³¹

The Court further stated that despite the serious nature of the charges facing Kenyatta and Ruto at the ICC, the accused are to be presumed innocent until the contrary is proved³² and that the end result of the ICC trial (a conviction) cannot be presumed.³³ While it may be stated that the judges were clearly reluctant to interject themselves into high-level politics, which are ethnically-tinged and often explosive, it is also clear that the accused persons are presumed innocent under

²⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1969) 8 ILM 679 (VCLT).

²⁸ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR) art 8.

²⁹ See eg UN Committee on the Elimination of Racial Discrimination, 'Concluding Observations: Kenya' (2 December 2011) UN Doc CERD/C/KEN/CO/1-4 para 15.

³⁰ See UN Committee on the Elimination of Discrimination against Women, 'Concluding Observations: Kenya' (5 April 2011) UN Doc CEDAW/C/KEN/CO/7 para 25; UN Committee against Torture on the Second Periodic Report of Kenya, 'Concluding Observations' (5-31 May 2013) para 18, available at <www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KEN.CO.R.2-AUV_rev.1_en.doc> accessed 30 December 2013.

³¹ See HRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Christof Heyns' (26 April 2011) UN Doc A/HRC/17/28/Add.4 para 58 stating that in Kenya: 'Impunity for killings has become entrenched. There is an obvious reluctance on the part of Government for meaningful mechanisms to ensure accountability for killings which occurred during the post-election violence and killings at Mount Elgon. Extrajudicial killings by the police remain pervasive, the excessive use of force by the police continues unaddressed; most of the killings are not investigated and prosecuted. Intimidation of human rights defenders, especially those working in the area of extrajudicial executions, remains unaddressed.'

³² The Constitution of Kenya (2010) art 50(2)(a) reads: 'Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.'

³³ *ibid* para 154.

the Rome Statute and other universal and regional human rights instruments until proved guilty.³⁴ The findings of the High Court were thus justified. Indeed at the time of writing the trial of Kenyatta had not commenced. The impact of the High Court's decision was to reinforce the need to avoid a preconceived idea (or prejudging) that the accused had committed the offences charged before conviction or proof beyond reasonable doubt. In short, the Court established that the Rome Statute is directly applicable in the courts. It also confirmed that pending charges before the ICC do not constitute a valid ground for limiting the exercise of one's right to political participation in Kenya including the right to stand as a candidate for Presidential elections.

It is important to note that while reliance on the Rome Statute in the High Court was a welcome initiative, the Statute has not been used to institute cases against most perpetrators of post-electoral violence. The ICC prosecution does not exonerate the Government from pursuing domestic mechanisms to investigate, prosecute and, on conviction, appropriately punish the remaining large number of perpetrators (not subject to ICC investigations) and address other concerns such as adequate reparation for victims.

2. Impact on the Prosecution's Approach to Investigations and Withdrawal of Witnesses

The prosecutions of Kenyan cases have demonstrated that the Prosecutor has not prepared cases in accordance with the evidentiary threshold required for confirmation of charges. This has established the need for a more thorough investigation prior to confirmation. Indeed, the Prosecutor conceded that the evidence against Muthaura (after charges against him had been confirmed), might not establish 'substantial grounds' as a matter of law. This concession was made when defence for Muthaura filed a motion asking the ICC Trial Chamber to refer the case back to the Pre-Trial Chamber so that it can reassess the confirmation of charges in light of the evidence disclosed to the Defence. The Prosecutor stated:

The witness whose statement is at issue was essential on the issue of Mr Muthaura's criminal responsibility and, in fact, was the only direct witness against him. Hence, the confirmation decision, if stripped of references to the witness' evidence, might not establish substantial grounds as a matter of law. The Prosecution also acknowledges that its disclosure error limited the Defence's ability to challenge the critical witness' testimony, which appears to have been the principal evidence relied upon by the Pre-Trial Chamber in its decision to confirm the charges against Mr Muthaura. In the particular circumstances of Mr Muthaura's case, and given that he has elected to waive his Article 67(1)(c) right to go to trial without undue delay, the Prosecution does not oppose new confirmation proceedings with respect to him, should the Trial Chamber determine that there is a legal basis for such relief.³⁵

³⁴ Art 66(1) of the Rome Statute states: 'Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.' See also UDHR (n 28) art 11(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 7(2); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(2); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; and Arab Charter on Human Rights (2005) 12 IHRR 893 art 16.

³⁵ See *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber, No ICC-01/09-02/11 (25 February 2013) para 9.

The Majority found that at least 24 of the Prosecution's 31 fact witnesses were interviewed for the first time after the Confirmation Hearing.³⁶ In addition, the Majority found that a large quantity of documentary evidence appears to have been collected post confirmation and to have been disclosed at a late stage.³⁷ Under these circumstances, the Majority expressed the view that:

[T]he Prosecution should have conducted a more thorough investigation prior to confirmation in accordance with its statutory obligations under Article 54(l)(a) of the Statute. In addition, the timing, manner and volume of disclosure of new evidence, failed to fully respect the accused's rights under Articles 54(1)(c) and 67(1)(a),(b) and (c) as well as Article 67(2) of the Statute.³⁸

However, rather than transferring the case back to the ICC pre-Trial Chamber, e.g., Chamber considered that in the circumstances of the present case the most appropriate remedy for the prejudice caused to the accused consists of providing the Defence with further time to conduct its investigations and to fully prepare for trial in light of the new evidence.³⁹ Thus, judges appear to have micromanaged the conduct of investigations by the Office of the Prosecutor (OTP). This partly highlighted the need to develop a new approach to investigations that will aim at having 'in-depth, open-ended investigations while maintaining focus' and to ensure that 'cases at the confirmation hearing ... are as trial-ready as possible' while at the same time recognising that in some cases the OTP will have to continue to investigate even after the hearing and up to trial.⁴⁰ In such cases, however, the OTP will only proceed 'if there are sufficient prospects to further collect evidence to be trial-ready within a reasonable timeframe'.⁴¹ This new approach should ensure that the OTP brings only strong cases without overly restricting its ability to continue to gather information as it becomes available.

Could an accused person make public comments on a case pending before the ICC Trial Chamber e.g. by criticising the Prosecution case? It is interesting to note that Ruto criticised the Prosecution's case by making public statements in the media about his case before ICC Trial Chamber V(A).⁴² For example, he reportedly stated in October 2013 that:

It's abundantly clear to us and that's why we have filed several applications that this case as it runs should be terminated. The prosecution has failed miserably in its responsibility to discharge the mandate assigned to them under the Rome Statute.⁴³

Following these public statements, Judge Chile Eboe-Osuji in Trial Chamber V(A) warned Ruto not to publicly 'comment on this case pending before the Court' noting that:

³⁶ See *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, No ICC-01/09-02/11-728 (26 April 2013) para 122.

³⁷ *ibid*

³⁸ *ibid* para 123.

³⁹ *ibid* para 125.

⁴⁰ ICC Office of The Prosecutor (OTP), 'Strategic Plan June 2012 – 2015' (11 October 2013), available at <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf> accessed 30 December 2013.

⁴¹ *ibid*

⁴² See eg 'CNN's Zain Verjee Talks with Kenya's Deputy President, William Ruto, about his ICC Trial and Westgate Terror Attack', available at <www.kenyamoja.com/featured/william-ruto-interview-on-cnn/> accessed 30 December 2013.

⁴³ Felix Olick, 'Deputy President William Ruto Criticises Case a Stone-throw Away from ICC Trial Chamber' 16 October 2013, available at <www.standardmedia.co.ke/mobile/?articleID=2000095655&story_title=ruto-criticises-case-a-stone-throw-away-from-icc-trial-chamber> accessed 30 December 2013.

It has been brought to our attention that the defendant, Mr Ruto, had granted an interview to a news outlet, in of course of which he made comments on the matters pending before the court. This is a matter that had arisen in the past and the Chamber cautioned that Mr Ruto is to refrain from making comments to the press on the case pending before this Chamber. It has happened again, and counsel for Mr Ruto explained that it was a mistake, and he, on behalf of Mr Ruto, apologised without any reservation and he has undertaken, that is Mr Khan, to work out an arrangement by which there would be no further comments on the case pending before this Court, comments by Mr Ruto. For now, the Chamber will accept the apology as well as the undertaking of counsel. The Chamber will not issue any sanction on this occasion, but the Chamber will repeat its earlier warning that Mr Ruto is not to comment on this case pending before the Court. We expect that this warning will be respected, and we expect that the counsel will live up to his undertaking to do all that he can to ensure that this doesn't happen again. That is the ruling of the Chamber.⁴⁴

While mounting an organized campaign to influence judicial proceedings may be seen as a general principle governing (international) criminal trials, commenting on the ongoing proceedings in a non-prejudicial manner does not appear to be a general principle. Do ICC judges have authority under the Rome Statute to silence an accused person if s/he continues to criticise, or comment on, the Prosecution's case publicly? Unlike in the case of the Prosecution and defence counsel, the accused is not bound by the Code of Professional Conduct.⁴⁵ But even if the accused were bound, criticising the strengths of the Prosecution's evidence in on-going proceedings, in the manner in which Ruto did or in any objective manner, is 'not prejudicial to the ongoing proceedings and do[es] not bring the Court into disrepute'.⁴⁶ In addition, there are no explicit provisions in the Rome Statute or the Rules of Procedure and Evidence prohibiting an accused person from commenting publicly on his or her case pending before the ICC. Article 70 dealing with the 'offences against the administration of justice'⁴⁷ and Article 71 on 'sanctions for misconduct before the Court'⁴⁸ do not prohibit public comments like the one made by Ruto. Thus, in the absence of any provision prohibiting an accused from commenting on his or her

⁴⁴ See Transcript Case No ICC-01/09-01/11 (25 October 2013) 25, paras 7-24, available at <www.icc-cpi.int/iccdocs/doc/doc1697027.pdf> accessed 30 December 2013.

⁴⁵ Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, art 24(1) provides: 'Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.'

⁴⁶ *ibid*

⁴⁷ Rome Statute (n 1) art 70(1) provides:

The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- (e) Retaliating against an official of the Court on account of duties performed by that or another official;
- (f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

⁴⁸ Rome Statute (n 1) art 71(1) reads:

The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

pending case before the ICC, it would appear that an accused person can comment on his or her case pending before the ICC without any sanctions.

One significant challenge faced by the Prosecutor has been the withdrawal of key witnesses. For example, on 19 December 2013, the Prosecutor admitted the weaknesses in the evidence against Uhuru Muigai Kenyatta, withdrew one witness and filed an application with the judges requesting an adjournment of the provisional trial date for three months in the case of the *Prosecutor v Uhuru Muigai Kenyatta*.⁴⁹ The purpose of the adjournment was to enable the Prosecutor 'to undertake additional investigative steps' to determine whether a case can be presented to the Chamber that establishes Kenyatta's guilt 'beyond reasonable doubt' for the crimes committed during the 2007- 2008 post-election violence.⁵⁰ In a statement the Prosecutor explained that:

In the last two months, one of the Prosecution's key witnesses in the case against Mr. Kenyatta has indicated that he is no longer willing to testify. More recently, on 4 December 2013, a key second witness in the case confessed to giving false evidence regarding a critical event in the Prosecution's case. This witness has now been withdrawn from the Prosecution witness list. Having carefully considered my evidence and the impact of the two withdrawals, I have come to the conclusion that currently the case against Mr. Kenyatta does not satisfy the high evidentiary standards required at trial. I therefore need time to complete efforts to obtain additional evidence, and to consider whether such evidence will enable my Office to fully meet the evidentiary threshold required at trial.⁵¹

Given the investigative challenges, climate of fear and hostility that the investigation and trial of Kenyatta and Ruto have engendered in Kenya including corruptly or attempting to corruptly influencing ICC witnesses,⁵² reliable new evidence to establish the guilt of Kenyatta and Ruto beyond reasonable doubt, six years after the crimes were committed, will be hard to come by.

3. Jurisprudential Developments on Trial *in Absentia* and Amendments to Rules of Procedure and Evidence

Cases arising out of the situation in Kenya have clarified the scope of the accused's right and duty under the Rome Statute to be present during the trial. Article 67(1)(d) of the Rome Statute protects the rights of the accused including the right to be 'present at the trial'. This is made subject to Article 63(2), which permits trial to proceed if the accused's presence 'continues to disrupt the trial'. Article 63 of the Rome Statute, entitled 'Trial in the presence of the accused', establishes a duty on the accused to attend trial by providing that:

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the

⁴⁹ Notification of the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date, ICC-01/09-02/11, 19 December 2013 <www.icc-cpi.int/iccdocs/doc/doc1703998.pdf> accessed 30 December 2013.

⁵⁰ *ibid* para 3. Rome Statute (n 1) art 66(3) provides: 'In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.'

⁵¹ See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following an Application Seeking an Adjournment of the Provisional Trial Date, 19 December 2013 (on file with author).

⁵² See eg *The Prosecutor v Walter Osapiribarasa*, Warrant of arrest for Walter Osapiri Barasa, No ICC-01/09-01/13 (2 August 2013); Human Rights Watch, 'Kenya: Rights Defenders Under Attack: Ensure Tolerance for Free Speech, Activism', 4 October 2013, available at <www.hrw.org/news/2013/10/04/kenya-rights-defenders-under-attack> accessed 30 December 2013.

trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives.

Articles 67(1)(d) and 63(1) are generally understood to prohibit *in absentia* proceedings. This is in line with the right of the accused 'to be tried in his [or her] presence', as set out explicitly in Article 14(3)(d) of the International Covenant on Civil and Political Rights.⁵³ The ICC Appeals Chamber in *Ruto* case explained that the principal reason to prohibit *in absentia* trials is to protect the rights of the accused given that the accused is the subject of the criminal proceedings (not merely an observer) and, as such, an active participant therein.⁵⁴ The accused's presence enables him or her to follow the evidence against him/her and to react to it; and the accused's presence generally has a positive impact on the morale and participation of victims and witnesses and promotes public confidence in the administration of justice.⁵⁵ In addition the accused's presence allows 'the judges to have the opportunity to observe all parties, including the accused, as the evidence is presented'.⁵⁶ The only explicit exception to the accused's continuous presence, as set out in Article 63(2), is the continuous disruptive behaviour of the accused since this is clearly not in the interests of the fair and proper administration of justice. Therefore, disruptive behaviour may be considered as an 'implicit waiver' of the accused's right to be present.⁵⁷

The Kenyatta and Ruto cases helped to address the question of whether there are exceptions to the continuous presence of the accused at the trial (that would be in the interest of the proper administration of justice) to the seemingly strict formulation in Article 63(1) other than the disruption of the trial by the accused, as provided for in Article 63(2). For example making reasonable accommodation to the accused to discharge demanding State functions, the accused's illness, the accused's intentional boycott of the proceedings, the accused's informed agreement to be tried *in absentia*, deliberately absconding from the accused's own trial in circumstances that are precisely calculated to frustrate the trial and the course of justice, and where the accused is excused in order to work on matters related to the defence.

In the context of the ICC Kenyan cases, a question arose as to whether the presence of the Kenya President and Vice President would be required during the trial or they could be excused for purposes of accommodating discharge of State duties. The answer depends on the interpretation of Articles 67(1)(d) and 63 of the Rome Statute. Two Trial Chamber decisions, considered below, addressed this issue in June and October 2013.

3.1 Ruto's Request for Excusal from Continuous Presence at Trial

First, on 18 June 2013, the ICC Trial Chamber V(A), by a Majority, Judge Herrera Carbuccion dissenting, granted the request of William Samoei Ruto for permission not to be continuously present in Court during his trial, with the exception of specified hearings,⁵⁸ in order to enable

⁵³ ICCPR (n 34).

⁵⁴ See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', No ICC-01/09-01/11 OA 5 (25 October 2013) para 49.

⁵⁵ *ibid*

⁵⁶ Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Usacka, *ibid*, para 9, available at <www.icc-cpi.int/iccdocs/doc/doc1669856.pdf> accessed 30 December 2013.

⁵⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (n 54) para 51.

⁵⁸ See Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ICC-01/09-01/11-777 (18 June 2013), available at <www.icc-cpi.int/iccdocs/doc/doc1605793.pdf> accessed 30 December 2013.

The Chamber directed that:

(1) Mr Ruto must be physically present in the courtroom for the following hearings:

him to perform his functions, as Deputy President of Kenya, while remaining personally subject to the jurisdiction of the Court for purposes of the inquiry into his individual criminal responsibility in respect of the crimes over which the Court has jurisdiction.⁵⁹ The Chamber recognised that Ruto's position as Deputy President of Kenya involved 'important functions of an extraordinary dimension'.⁶⁰ In this regard, Trial Chamber V(A) stressed that Ruto's excusal was 'purely a matter of accommodation of the demanding functions of his office as Deputy Head of State of Kenya, and not merely the gratification of the dignity of his own occupation of that office'.⁶¹ According to the Trial Chamber the presence of the accused at the trial is the 'default position' or general rule but subject to 'reasonable exceptions' on a case-by-case basis. In the words of the Trial Chamber:

From the perspective of the imperatives of judicial control, the presence of the accused as a question of his duty establishes the default position. But reading the Statute as a whole and taking into account, in its interpretation and application, the general body of international law, of which the Statute forms apart, there remains a residue of discretion in the Trial Chamber to permit reasonable exceptions to that default position. This is to be done on a case-by-case basis. And it requires the balancing of all the interests concerned. Hence, the Chamber's grant of the Defence's request for Mr Ruto's excusal from continuous presence during the trial is an exception to the general rule. The general rule remains that Mr Ruto must be present in the courtroom during the trial.⁶²

The Prosecutor appealed this decision, and the Appeals Chamber suspended the above Chamber decision until the substance of the appeal was determined.⁶³ This decision did not consider the reality that there might be some circumstances warranting a trial to proceed in absence of the accused. Indeed, the terrorist attack on the Nairobi shopping mall in September 2013 confirmed this.⁶⁴ The Trial Chamber excused Ruto from attending the trial and allowed him to return to Kenya (for a week) to attend to his demanding State functions without any Prosecution objection. The Trial Chamber adjourned the proceedings after finding that 'it ha[d] no discretion to continue the trial in Mr Ruto's absence as a function of the Appeals Chamber's suspensive

-
- i. the entirety of the opening statements of all parties and participants,
 - ii. the entirety of the dosing statements of all parties and participants,
 - iii. when victims present their views and concerns in person,
 - iv. the entirety of the delivery of judgment in the case,
 - v. the entirety of the sentencing hearings (if applicable),
 - vi. the entirety of the sentencing (if applicable),
 - vii. the entirety of the victim impact hearings (if applicable),
 - viii. the entirety of the reparation hearings (if applicable), and
 - ix. any other attendance directed by the Chamber.

(2) The absence resulting from excusal from continuous presence at the trial at other times must always be seen to be directed towards performance of Mr Ruto's duties of state.

⁵⁹ *ibid* para 104.

⁶⁰ *ibid* para 49.

⁶¹ *ibid* para 71.

⁶² *ibid* para 104. For a similar reasoning see Kenyatta Excusal Decision (n 74) para 124.

⁶³ *The Prosecutor v William Samoeiruto and Joshua Arap Sang*, Decision on the Request for Suspensive Effect, No ICC.01/09-01/11OA5 (20 August 2013), available at <www.icc-cpi.int/iccdocs/doc/doc1634623.pdf> accessed 30 December 2013.

⁶⁴ See UNSC Press Statement (21 September 2013) UN Doc SC/11129 AFR/2695; Jeffrey Gettleman and Nicholas Kulish, 'Gunmen Kill Dozens in Terror Attack at Kenyan Mall', *The New York Times* (New York, 21 September 2013), available at <www.nytimes.com/2013/09/22/world/africa/nairobi-mall-shooting.html> accessed 30 December 2013.

effect decision'.⁶⁵ Significantly, five [East] African States (United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda), jointly filed before the Appeals Chamber *amicus curiae* submissions opposing the Prosecution's appeal.⁶⁶

The logic of the Appeals Chamber's decision, as confirmed by a later unanimous decision,⁶⁷ involved accepting the notion that the defendant's presence must generally be required throughout the proceedings unless there are exceptional circumstances to be considered on a 'case-by-case basis'.⁶⁸

On 25 October 2013, the Appeals Chamber held that the fact that under Article 63 'a continuously disruptive accused person may be 'excused' from the courtroom against his will supports the conclusion that an excusal may be permissible if the accused voluntarily waives his or her right to be present'.⁶⁹ The Appeals Chamber observed:

The discretion that the Trial Chamber enjoys under article 63 (1) of the Statute is limited and must be exercised with caution. The following limitations exist: (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.⁷⁰

It is interesting to note that the Appeals Chamber did not provide any recognised source of law (in the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence, applicable treaties, principles of international law, previous decisions, and general principles of law derived from the national laws of legal systems of the world)⁷¹ for the above limitations on the exercise of judges' discretion under Article 63(1). It concluded, rather unconvincingly, that the Trial Chamber in the Ruto excusal decision interpreted the scope of its discretion 'too broadly' and

⁶⁵ *The Prosecutor v William Samoeiruto and Joshua Arap Sang*, Decision on Mr Ruto's Request for Reconsideration of the 'Decision on the Request for Suspensive Effect', No ICC-01/09-01/11 OA 5 (27 September 2013) para 4, available at <www.icc-cpi.int/iccdocs/doc/doc1651427.pdf> 30 December 2013.

⁶⁶ See *The Prosecutor v William Samoeiruto and Joshua Arap Sang*, Joint Amicus curiae Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the 'Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial', No ICC-01/09-01/11-948 (17 September 2013), available at <www.icc-cpi.int/iccdocs/doc/doc1645647.pdf> accessed 30 December 2013; and Prosecution Response, No ICC-01/09-01/11(20 September 2013), available at <www.icc-cpi.int/iccdocs/doc/doc1648596.pdf> accessed 30 December 2013.

⁶⁷ See generally *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (n 54).

⁶⁸ *ibid* para 62.

⁶⁹ *ibid* para 51.

⁷⁰ *ibid* paras 2 and 62. Judge Anita Usacka and Judge Erkki Kourula observed that 'the introduction through creative interpretation of further unwritten exceptions to the requirement that the accused be present, subject to a number of ill-defined conditions, goes against the express will of the drafters and the explicit provisions of the Statute.' See Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Usacka, No ICC-01/09-01/11-1066-Anx, available at <www.icc-cpi.int/iccdocs/doc/doc1669856.pdf> accessed 30 December 2013.

⁷¹ Rome Statute (n 1) Article 21.

thereby 'exceeded the limits of its discretionary power'⁷² when it decided to excuse Mr Ruto from substantially all of his trial. The Appeals Chamber noted in particular that:

[T]he Trial Chamber provided Mr Ruto with what amounts to a blanket excusal before the trial had even commenced, effectively making his absence the general rule and his presence an exception. Furthermore, the Trial Chamber excused Mr Ruto without first exploring whether there were any alternative options. Finally, the Trial Chamber did not exercise its discretion to excuse Mr Ruto on a case-by-case basis, at specific instances of the proceedings, and for a duration limited to that which was strictly necessary.⁷³

The above approach to Article 63(1) means that there is a disagreement among judges in the Trial Chamber and in the Appeals Chamber about the exercise of judicial discretion. Should the Appeals Chamber interfere with the exercise of the Trial Chamber judges' discretion if such discretion has not been exercised in an abusive manner or for improper motives? In absence of the abuse of discretion, it is not necessary to interfere with the exercise of judicial discretion by the Trial Chamber. The Appeals Chamber's criteria set out above effectively means that Kenya's leaders (Kenyatta and Ruto) will generally have to be continuously present at the trial. This makes it very difficult for both leaders to cooperate fully with the Court while at the same time discharging their constitutional obligations. This will deepen tensions between the ICC and most African leaders who accuse it of unfairly targeting African leaders.

3.2 Kenyatta's Request for Conditional Excusal from Continuous Presence at Trial

Secondly, on 18 October 2013 the Majority in Trial Chamber V(B) conditionally granted the Defence request of the Chamber to excuse Kenyan President, Uhuru Kenyatta, from continuous presence at trial, 'in order to permit him to discharge his functions of state as the executive President of Kenya' while his ICC trial proceeds.⁷⁴ The conditional excusal was granted in the terms similar to those stated in the *Ruto* case 'strictly for purposes of accommodating the discharge of his duties as the President of Kenya'.⁷⁵ The Trial Chamber stressed that the conditional excusal granted to Mr Kenyatta was purely a matter of 'reasonable accommodation of the demanding functions of his office as the President of Kenya, and not merely the gratification of the dignity of his own occupation of that office'.⁷⁶

Thus the *Ruto* and *Kenyatta* Trial Chamber decisions confirmed that the ICC Trial Chamber can grant conditional excusal of the accused from continuous presence during the trial in particular to accommodate the discharge of the demanding functions of the office of the President and Vice President or where any accused demonstrates, 'for example, skills of exceptional rarity or significant public service responsibilities the immediate application of which may compete with the requirements of the general rule of presence at trial'.⁷⁷ While the Appeals Chamber confirmed the reading of Article 63 as permitting absence from trial, it stressed that this 'must' be taken on a case-by-case basis, at specific instances of the proceedings.⁷⁸

⁷² *ibid* para 63.

⁷³ *ibid*

⁷⁴ *The Prosecutor v Uhuru Muigai Kenyatta*, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial [Kenyatta Excusal Decision], No ICC-01/09-02/11 (18 October 2013), available at <www.icc-cpi.int/iccdocs/doc/doc1667182.pdf> accessed 30 December 2013. Judge Ozaki appended a dissenting opinion, and Judge Eboe-Osuji appended a separate concurring opinion.

⁷⁵ *ibid* para 5.

⁷⁶ *ibid* para 6.

⁷⁷ *ibid* 115.

⁷⁸ ICC-01/09-01/11 OA 5 (n 67) paras 2, 62 and 63.

On 26 November 2013, ICC Trial Chamber V(b) reconsidered its previous decision excusing Kenyatta from continuous presence at trial, in light of the legal clarifications provided by the Appeals Chamber in its *Ruto* judgment of 25 October 2013 on the matter.⁷⁹ Trial Chamber V(b) held, by majority, Judge Eboe-Osuji dissenting, that as a general rule, Kenyatta must be present at trial. Any future requests to be excused from attending parts of the trial will be considered on a case-by-case basis.

3.3 2013 Amendments to Rules of Procedure and Evidence Concerning Accused's Presence at the Trial

The Rules of Procedure and Evidence are included in Article 21(1)(a) of the Rome Statute among the three legal instruments that the ICC 'shall apply [i]n the first place'. In November 2013, the ICC Assembly of States Parties (ASP) adopted three key amendments to the Rules of Procedure and Evidence (RPE) - Rule 134 *bis*, *ter*, and *quater* – designed to minimise the obligation of accused to be physically present at trial.⁸⁰ It is argued below that the amendments are inconsistent with the provisions of the Rome Statute. This is despite the explicit requirement of Article 51(4) of the Rome Statute that: 'The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute.'

3.3.1 Accused's Presence Through the Use of Video Technology

Rule 134*bis* provides for Presence through the use of video technology:

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

Although presence through use of video technology is consistent with the various reasons the Appeals Chamber advanced in *Ruto* case⁸¹ for requiring the accused to be present at trial, it conflicts with Article 63(1) of the Rome Statute. Article 63(1), which provides that '[t]he accused shall be present during the trial' contemplates physical presence, not virtual presence. Article 63(2) elaborates on the presence requirement in Article 63(1) by permitting the Trial Chamber to remove the accused and make provision for him or her to observe trial 'through the use of communications technology'. This is only permitted '[i]f the accused, being present before the Court, continues to disrupt the trial' — a clear indication that the drafters of Article 63(1)

⁷⁹ See *The Prosecutor v Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, No ICC-01/09-02/11 (26 November 2013), available at <www.icc-cpi.int/iccdocs/doc/doc1689002.pdf> accessed 30 December 2013.

⁸⁰ ICC Assembly of States Parties Res ICC-ASP/12/Res.7, 27 November 2013 (adopted by consensus).

⁸¹ ICC-01/09-01/11 OA 5 (n 67) para 49:

At the outset, the Appeals Chamber notes that article 63 (1) of the Statute establishes that the accused shall be present during the trial, reflecting the central role of the accused person in proceedings and the wider significance of the presence of the accused for the administration of justice. The accused person is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein. It is important for the accused person to have the opportunity to follow the testimony of witnesses testifying against him or her so that he or she is in a position to react to any contradictions between his or her recollection of events and the account of the witness. It is also through the process of confronting the accused with the evidence against him or her that the fullest and most comprehensive record of the relevant events may be formed. Furthermore, the continuous absence of an accused from his or her own trial would have a detrimental impact on the morale and participation of victims and witnesses. More broadly, the presence of the accused during the trial plays an important role in promoting public confidence in the administration of justice.

intended physical presence when they drafted the Article, not presence through the use of video technology.

3.3.2 Accused's Presence through Counsel

Rule 134ter deals with presence of the accused through counsel:

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
2. The Trial Chamber shall only grant the request if it is satisfied that:
 - (a) exceptional circumstances exist to justify such an absence;
 - (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
 - (c) the accused has explicitly waived his or her right to be present at the trial; and
 - (d) the rights of the accused will be fully ensured in his or her absence.
3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

The above Rule clearly conflicts with the accused's presence requirement of Article 63(1) and is inconsistent with all of the rationales for requiring presence articulated by the Appeals Chamber in Ruto — particularly the need for the accused to follow witness testimony and the impact of presence on the morale of victims and witnesses.

3.3.3 Accused's Excusal from Presence at Trial due to Extraordinary Public Duties

Rule 134quater provides for 'Excusal from presence at trial due to extraordinary public duties':

1. An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.
2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.

Following the amended Rules, the defence for Ruto requested the Trial Chamber, pursuant to Article 63(1) of the Rome Statute and Rule 134quater of the RPE, to excuse Ruto from physical presence at his trial due to his 'extraordinary obligations at the highest national level as Deputy

President of Kenya'.⁸² The Prosecutor opposed the request for three reasons. First, on the basis that it is contrary to the plain text of Rule 134*quater*, which does not authorise 'blanket excusals'. Second, it advances a reading of Rule 134*quater* that is inconsistent with the Rome Statute. Third, it fails to make the necessary factual showing in particular that it fails to demonstrate that there are particular 'extraordinary public duties at the highest national level' that Ruto is mandated to fulfil.⁸³ Although the Prosecutor advanced a strong case for not granting blanket excusal to Ruto, on 15 January 2014, ICC Trial Chamber V(a) made an oral ruling (read by ICC Presiding Judge Chile Eboe-Osuij) excusing Ruto from continuous presence at trial, on the following conditions: a waiver must be filed as indicated in the new rule (134*quater*) and that Ruto will need to be present at the following hearings:

1. when victims present their views and concerns in person;
2. for the entirety of the delivery of the judgment in the case;
3. for the entirety of the sentencing hearing, if applicable;
4. for the entirety of the sentencing, if applicable;
5. for the entirety of the victim impact hearings, if applicable;
6. for the entirety of the reparation hearings, if applicable;
7. for the first five days of hearing starting after a judicial recess as set out in regulation 19 *bis* of the regulations of the Court;
8. and for any other attendance directed by the Chamber either/ or other request of a party or participant as decided by the Chamber.⁸⁴

Rule 134*quater*, as applied in *Ruto* excusal ruling above, suggests that an accused with 'extraordinary public duties at the highest national level' e.g. a (deputy) head of State should be treated differently (by being excused from physical presence from all or most of trial) than an accused with ordinary public duties or without such duties at all. While it may be argued that where an accused on a summons to appear is able to demonstrate extraordinary public duties at the highest national level, s/he would always satisfy the 'exceptional circumstances' requirement, it cannot be denied that Rule 134*quater* is based on the accused's status (high official position) and not based on exceptional circumstances. An accused who is not mandated to fulfil extraordinary public duties at the highest national level cannot rely on Rule 134*quater* despite the existence of exceptional circumstances. This means that such an accused without extraordinary public duties at the highest national level will be subjected to adverse distinction or treated less favourably than another person with extraordinary public duties at the highest national level in a similar situation for a reason related to a prohibited ground of discrimination - high official position/status. This is not consistent with the Appeals Chamber decision which left open the possibility of *any* accused being temporarily excused from trial not on the basis of status but on 'exceptional circumstances'.⁸⁵

⁸² *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial, ICC-01/09-01/11 (16 December 2013), available at <www.icc-cpi.int/iccdocs/doc/doc1699798.pdf> accessed 30 December 2013.

⁸³ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for Excusal from Attendance at Trial for William Samoei Ruto, ICC-01/09-01/11 (8 January 2014), available at <www.icc-cpi.int/iccdocs/doc/doc1707860.pdf> accessed 17 January 2014.

⁸⁴ See ICC, 'Trial in the Ruto and Sang Case: Relevant Information and Materials', available at <www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/Pages/ruto-sang.aspx> (accessed 17 January 2014).

⁸⁵ ICC-01/09-01/11 OA 5 (n 67) para 62.

The provision of privileges for some accused persons (on the basis of extraordinary public duties) over others (without such duties) is contrary to Article 27(1) of the Rome Statute, which provides that the Rome Statute 'shall apply *equally* to all persons without any distinction based on official capacity'. It would also be inconsistent Article 21(3) of the Rome Statute which provides that the 'application and interpretation of law' must be consistent with 'internationally recognised human rights' and be without 'any adverse distinction' on several grounds including 'other status'. This includes the prohibition of adverse distinction based on high official position. Besides, distinctions based on high official position are inconsistent with one of the founding principles of the Rome Statute, as stated in the Rome Statute preamble, namely 'to put an end to impunity for the perpetrators of these crimes [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes' regardless of whether or not the perpetrators have extraordinary public duties.

Could amendments to the Rules of Procedure and Evidence by the Assembly of State Parties overrule the Appeal Chamber's interpretation of Article 63(1) of the Rome Statute? As noted above, Article 51(4) of the Rome Statute requires the Rules of Procedure and Evidence and any amendments thereto must be consistent with the Rome Statute. Article 51(5) adds that: 'In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'. The amendments considered above, in particular Rule 134*quater*, appear to be inconsistent with Article 63(1) of the Rome Statute as interpreted by the Appeals Chamber. While the Assembly of States Parties has the authority under Article 121 of the Rome Statute to amend the Statute and the Rules of Procedure and Evidence, it has no authority to interpret the Rome Statute and the Rules. It could however overrule the Appeals Chamber by amending directly the Rome Statute provisions - Article 63(1) and Article 27.

4. Non-Cooperation with the ICC by Kenya and the African Union

The major negative impact arising out of the ICC investigations and prosecutions in Kenya has been non-cooperation with the ICC on the part of Kenya and the African Union (AU). While more than 60 per cent (34 of 53) of the AU member States were States parties to the Rome Statute (as at the time of writing in 2013),⁸⁶ the AU had not fully supported the ICC investigations and prosecutions in Africa involving serving African leaders including those in Kenya. As part of its opposition to the ICC investigations and prosecutions of African leaders, the AU's focus for some time was to expand the jurisdiction of the African Court of Justice and Human and Peoples' Rights (African Court) to include the competence to prosecute individuals for international crimes.⁸⁷ As Max du Plessis observed:

⁸⁶ The AU State parties to the Rome Statute by 2013, with dates of ratification, were: 1. Senegal, 02 February 1999; 2. Ghana, 20 December 1999; 3. Mali, 16 August 2000; 4. Lesotho, 06 September 2000; 5. Botswana, 08 September 2000; 6. Sierra Leone, 15 September 2000; 7. Gabon, 20 September 2000; 8. South Africa, 27 November 2000; 9. Nigeria, 27 September 2001; 10. Central African Republic, 03 October 2001; 11. Benin, 22 January 2002; 12. Mauritius, 05 March 2002; 13. Democratic Republic of the Congo, 11 April 2002; 14. Niger, 11 April 2002; 15. Uganda, 14 June 2002; 16. Namibia, 25 June 2002; 17. Gambia, 28 June 2002; 18. United Republic of Tanzania, 20 August 2002; 19. Malawi, 19 September 2002; 20. Djibouti, 05 November 2002; 21. Zambia, 13 November 2002; 22. Guinea, 14 July 2003; 23. Burkina Faso, 16 April 2004; 24. Congo, 03 May 2004; 25. Burundi, 21 September 2004; 26. Liberia, 22 September 2004; 27. Kenya, 15 March 2005; 28. Comoros, 01 November 2006; 29. Chad, 01 January 2007; 30. Madagascar, 14 March 2008; 31. Seychelles, 10 August 2010; 32. Tunisia, 24 June 2011; 33. Cape Verde, 10 October 2011; 34. Côte d'Ivoire, 15 February 2013.

⁸⁷ See e.g. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7, 15 May 2012, art 28A, which provides:

1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder: 1. Genocide, 2. Crimes Against Humanity, 3. War Crimes, 4. The Crime of Unconstitutional Change of Government, 5. Piracy, 6. Terrorism, 7. Mercenarism, 8. Corruption, 9.

A fair argument might be made that the AU's decision to embark upon the expansion of the African Court's jurisdiction is to throw sand in the ICC's gearbox, place speed-bumps in the path of African states parties to the ICC and send confusing signals to those African states thinking of ratifying the Rome Statute.⁸⁸

Instead of fully cooperating with the ICC, Kenya adopted the approach taken by the AU Assembly, the highest decision making body of the continental organisation, with respect to President Al Bashir of Sudan and former Libyan leader Gaddafi of Libya by requesting the UN Security Council to defer the ICC investigations and prosecutions in Kenya under Article 16 of the Rome Statute.⁸⁹ In this regard the AU Assembly adopted a decision during its January 2011 summit stating that the AU:

SUPPORTS AND ENDORSES Kenya's request for a deferral of the ICC investigations and prosecutions in relation to the 2008 post- election violence under Article 16 of the Rome Statute to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity, and in this regard REQUESTS the UN Security Council to accede to this request in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence; and REQUESTS the African members of the UN Security Council to place the matter on the agenda of the Council.⁹⁰

A new request for a deferral to the UN Security Council under Article 16 of the Rome Statute was made in October 2013 in the aftermath of the terrorist attacks (from 21 to 24 September 2013) of the Nairobi Westgate shopping mall, in which the AU and Kenya requested the Council to defer the ICC investigations and prosecutions in Kenya:

1. In view of the threat to the peace, breach of the peace or act of aggression likely to arise in the light of the prevailing and continuing terrorist threat existing in the Horn of Africa and East Africa;
2. In order to prevent an aggravation of the situation with regard to the peace and security of Kenya and its neighbouring countries;
3. In order to provide time during the term of the deferral, for Kenya, in consultation with the Court and Assembly of States Parties to the Rome Statute, to consider how best to respond to the threat to international peace and security in the context of the Kenyan situation.⁹¹

Money Laundering, 10. Trafficking in Persons, 11. Trafficking in Drugs, 12. Trafficking in Hazardous Wastes, 13. Illicit Exploitation of Natural Resources, 14. The Crime of Aggression.

2. The Assembly may extend upon the consensus of States Parties the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law.

3. The crimes within the Jurisdiction of the Court shall not be subject to any statute of limitations.

⁸⁸ Max Du Plessis, 'A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', 27 August 2012, available at <www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/#more-5481> accessed 30 December 2013.

⁸⁹ See Letter dated 23 March 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council (29 March 2011) UN Doc S/2011/201, available at <www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kenya%20S%202011%20201.pdf> accessed 30 December 2013.

⁹⁰ Assembly/AU/ Dec.334(XVI) para 6. See also Assembly/AU/Dec.419 (xix) para 4.

⁹¹ See Identical Letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council (22 October 2013) UN_Doc

In its letter of request dated 12 October 2013, the AU stated that a deferral of the trials under Article 16 of the Rome Statute will provide the President of Kenya and his Deputy ‘...with the time required for the enhancement of the effort aimed at combating terrorism and other forms of insecurity in the country and the region.’⁹² The resolution for a deferral of the ICC investigations and prosecutions in Kenya failed in November 2013 to get the required nine votes, making it the first UN Security Council resolution in decades to fail without a veto from one of the permanent members. Seven Council members (Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo) voted in favour, to none against, with eight (Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom, and United States) abstentions.⁹³ Commenting on the vote, the representative of Rwanda, Eugène-Richard Gasana, stated:

[The] vote undermined the principle of sovereign equal[ity] and confirmed the long-held view that international mechanisms were manipulated to serve select interests,... Article 16 had never been meant to be used by an African State; it appeared to be a tool used by Western Powers to “protect their own”. Some had not even signed up to the Rome Statute because they wished to protect their own nationals.⁹⁴

It is important to note that Article 16 of the Rome Statute applies to a ‘deferral of investigation or prosecution’ by providing that:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

A Security Council deferral under Article 16 can only be made under Chapter VII of the UN Charter, which empowers the Security Council to take measures to ‘maintain or restore international peace and security’ if it has determined ‘the existence of any threat to the peace, breach of peace or act of aggression’. Are ICC investigations and prosecutions in Kenya (or anywhere else) a threat to international peace and security so as to necessitate invoking the Security Council’s deferral powers under Article 16? Certainly not. Indeed such investigations and prosecutions aim at ensuring individual criminal responsibility and accountability for specific crimes, instead of entrenched impunity. This contributes to the maintenance of international peace and security. Thus it is not surprising that, so far, the UN Security Council has not adopted a resolution under Chapter VII of the UN Charter to defer any ICC investigation or prosecution. Besides, the reasons advanced for a deferral are unsatisfactory. Kenya can still deal with any ‘national and regional security affairs’, ‘combat terrorism and other forms of insecurity’ as well as investigate and prosecute other cases without a deferral from the Security Council.

S/2013/624, available at <www.un.org/ga/search/view_doc.asp?symbol=S/2013/624> accessed 30 December 2013.

⁹² *ibid.* See also Amnesty International, ‘African Union’s Request for the United Nations Security Council to Defer the trials of President Uhuru Kenyatta and Deputy President William Ruto’ AI index: AFR 32/010/2013 (30 October 2013).

⁹³ See UNSC Draft Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining, SC/11176 (15 November 2013), available at <www.un.org/News/Press/docs/2013/sc11176.doc.htm> accessed 30 December 2013.

⁹⁴ *ibid.*

National prosecutions are not a reason for a deferral under Article 16 but can be raised in admissibility challenges under Articles 17 and 19. This can be done 'prior to or at the commencement of the trial'⁹⁵ or exceptionally later if this is based on double jeopardy.⁹⁶ But Kenya's admissibility challenge⁹⁷ has been unsuccessful because Kenya failed to show that the 'same suspects' (for whom summons to appear were issued by the ICC) were the subject of investigation by Kenya for 'substantially the same conduct'. Indeed, Kenyan authorities have generally been unwilling or unable to effectively prosecute post-election violence.⁹⁸

In addition, there is no evidence that the ICC prosecutions would be a threat to international peace and security. Instead ICC investigations and prosecutions would contribute to determining individual criminal responsibility, promote accountability and long lasting peace in Kenya. It would be very rare for the UN Security Council to invoke Article 16 of the Rome Statute since: 'A deferral of an ICC investigation risks legitimizing political interference with the work of a judicial institution and could set a dangerous precedent for accused in other situations'.⁹⁹ Article 16 was not intended to be used as a shield to protect senior State officials from individual criminal responsibility. In the Kenyan context a deferral would further 'delay justice and reparations for victims of the 2007-2008 election violence; amount to the political interference in the ICC's management of its cases; and expand the use of Article 16 to situations where it was never intended to be used'.¹⁰⁰

One must observe that Kenya's request was not made at the beginning of the investigations but only made after some serving senior State officials were summoned as suspects. If such officials were not part of the investigations and prosecutions, it is unlikely that Kenya and the AU would have made a request for a deferral. Indeed, neither Côte d'Ivoire nor the AU has made a request for a deferral of the situation in Côte d'Ivoire because as of February 2014 no warrant of arrest had been issued against a serving senior State official in Côte d'Ivoire but only against the former President of Côte d'Ivoire, Laurent Gbagbo and two members of his 'inner circle' - Simone Gbagbo and Charles Blé Goudé.¹⁰¹ If a warrant was to be issued against the current President of Côte d'Ivoire, a request for a deferral would be expected.

After failing to obtain a deferral, Kenya resorted to the East African Court of Justice (EACJ).¹⁰² The EACJ's mandate until the date of writing (in 2013) was to 'ensure the adherence to law in the interpretation and application of and compliance with this [East African Community]

⁹⁵ Rome Statute (n 1) art 19(4).

⁹⁶ *ibid* art 17(1)(c).

⁹⁷ See Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, No ICC-01/09-01/11 and ICC-01/09-02/11 (31 March 2011), available at <www.icc-cpi.int/iccdocs/doc/doc1050005.pdf> accessed 30 December 2013.

⁹⁸ See generally Human Rights Watch, "Turning Pebbles": *Evading Accountability for Post-Election Violence in Kenya* (2011), available at <www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf> accessed 30 December 2013.

⁹⁹ See Human Rights Watch, 'Gabon/Nigeria/South Africa: Reconsider Support for Deferral of ICC Kenya Investigation', 1 March 2011, available at <www.hrw.org/news/2011/03/02/gabonnigeriasouth-africa-reconsider-support-deferral-icc-kenya-investigation> accessed 30 December 2013.

¹⁰⁰ See Amnesty International (n 92).

¹⁰¹ See *The Prosecutor v Laurent Koudou Gbagbo*, public redacted version of Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, No ICC-02/11-01/11 (30 November 2011), available at <www.icc-cpi.int/iccdocs/doc/doc1291604.pdf> accessed 30 December 2013; *The Prosecutor v Simone Gbagbo*, Warrant of Arrest for Simone Gbagbo, No ICC-02/11-01/12 (29 February 2012), available at <www.icc-cpi.int/iccdocs/doc/doc1344439.pdf> accessed 30 December 2013; *The Prosecutor v Charles Blé Goudé*, Warrant of Arrest For Charles Blé Goudé, No ICC-02/11-02/11 (21 December 2011), available at <www.icc-cpi.int/iccdocs/doc/doc1292069.pdf> accessed 30 December 2013.

¹⁰² The Court's website is available at <www.eacj.org/> accessed 30 December 2013.

Treaty¹⁰³. However, on 26 April 2012, the East African Legislative Assembly, during its fifth session held in the Kenyan capital Nairobi, adopted a resolution:

seeking the EAC Council of Ministers to implore the International Criminal Court to transfer the case of the accused four Kenyans facing trial in respect of the aftermath of the 2007 Kenya general elections to the East African Court of Justice and to reinforce the treaty provisions.¹⁰⁴

The resolution noted that the indictment of the four accused persons, including Kenyatta and Ruto, by the ICC ‘may alone not and will not resolve the underlying issues that led to the said violence that grasped the entire nation of Kenya’.¹⁰⁵ It also claimed that ‘a sizeable number of the people of Kenya (including the resolution of Kenya National Assembly to that effect) as well as the governments of the Partner States of EAC and the African Union were not in favour that this matter should be referred to the ICC but rather be dealt with locally in order to promote reconciliation’.¹⁰⁶ However, the resolution did not claim that crimes within the jurisdiction of the ICC were not committed in Kenya. Equally, it did not claim that individuals subject to the ICC prosecutions in Kenya were innocent. Indeed, criminal prosecution of international crimes does not depend on whether or not prosecutions are not supported by a sizeable number of the people.

Following this resolution, the tenth extraordinary session of the East Africa Community Heads of State Summit, held on 28 April, 2012 in Arusha, Tanzania, welcomed the resolution to extend the mandate of the EACJ to include, among others, crimes against humanity. It ‘directed the council of ministers to consider this matter by end of May 2012 and report to an Extraordinary Summit to be convened immediately thereafter’.¹⁰⁷ This approach has been influenced by the AU which at the time of writing was considering empowering the African Court of Justice and Human Rights with the jurisdiction to prosecute international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes such as, terrorism, piracy, and corruption.¹⁰⁸ Although granting the EACJ with criminal jurisdiction to prosecute international crimes is intended partly to ‘save’ Kenyan State officials from the ICC prosecution, it is unlikely that the EACJ would have retrospective criminal jurisdiction. In any case, it is up to the ICC to decide whether or not to transfer cases to another court.

Many Kenyan politicians have branded the ICC a ‘neo-colonialist’ institution that only targets Africans, prompting the debate on a possible withdrawal from the Rome Statute of the ICC. As a matter of law, States are permitted to withdraw from the Rome Statute by written notification to the UN Secretary General but the withdrawal takes effect ‘one year after the date of receipt of the notification, unless the notification specifies a later date’.¹⁰⁹ Consequently, on 5 September

¹⁰³ See Treaty for the Establishment of the East African Community (As Amended on 14th December, 2006 and 20th August, 2007) art 23(1), available at <www.eacj.org/docs/Treaty-as%20amended.pdf> accessed 30 December 2013.

¹⁰⁴ See East African Legislative Assembly, Resolution Seeking to Try Kenya 2007 General Elections Aftermath Accused Persons at EACJ, Not ICC, esp para 4, available at <www.eala.org/key-documents/doc_details/266-resolution-seeking-to-try-kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.html> accessed 30 December 2013.

¹⁰⁵ *ibid*, Preamble para 11.

¹⁰⁶ *ibid*, Preamble para 12.

¹⁰⁷ See Communiqué of the 10th Extraordinary Summit of EAC Heads of State, 28 April 2012, para 20, available at <<http://en.igihe.com/news/communique-of-the-10th-extraordinary-summit-of.html>> accessed 30 December 2013.

¹⁰⁸ See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (n 87).

¹⁰⁹ Rome Statute (n 1) art 127(1).

2013, despite some opposition,¹¹⁰ Kenya's parliament voted to quit the ICC jurisdiction.¹¹¹ The motion 'to suspend any links, cooperation and assistance' to the Court was overwhelmingly approved by Kenya's National Assembly.¹¹² The motion reads:

THAT, aware that the Republic of Kenya promulgated a new Constitution on 27th August, 2010 which has fundamental changes in the circumstances relating to the governance of the Republic; aware that the Republic conducted its general elections on the 4th of March 2013 at which the President and Deputy President were lawfully elected in accordance with the Constitution of Kenya; further aware of a resolution of the National Assembly in the Tenth Parliament to repeal the International Crimes Act and to suspend any links, cooperation and assistance to the International Criminal Court ; this House resolves to introduce a Bill within the next thirty days to repeal the International Crimes Act (No 16 of 2008) and that the Government urgently undertakes measures to immediately withdraw from the Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17th July, 1998.¹¹³

Thus, Kenya became the first State to take such a step towards withdrawing from the Rome Statute after ratification. The US and Israel are the only other States to withdraw their signature from the Rome Statute but this was done before ratification in 2002.¹¹⁴ While Kenya's withdrawal, should Kenya choose to notify the UN Secretary General, has no impact on criminal investigations and prosecutions against Kenya's President and Vice President,¹¹⁵ it is not without important effects if it ever takes place.

Firstly, Kenya's withdrawal could preclude the ICC from investigating and prosecuting any future crimes committed after the withdrawal comes into effect. Cases could then only be brought before the Court if the government decides to accept ICC jurisdiction on an *ad hoc* basis or the UN Security Council makes a referral.

Secondly, it has set a precedent for other African States opposed to the ICC to consider withdrawing, or threaten to withdraw from the Court's jurisdiction in the future. Thirdly, a withdrawal would strip the Kenyan people and victims of one of the most important judicial institutions to prosecute international crimes (genocide, war crimes, crimes against humanity, aggression) and potentially allow such crimes to be committed by State officials with impunity in the future.

Fourthly, the repeal of Kenya's International Crimes Act, which gives domestic effect to the Rome Statute, would remove an important legal basis for the domestic prosecution of

¹¹⁰ MPs from the opposition Coalition for Reforms and Democracy (Cord), led by former Kenyan Prime Minister Raila Odinga, walked out of the debate, calling the motion 'capricious' and 'ill-considered'.

¹¹¹ See Thomas Escritt and James Macharia, 'Kenya Votes to Quit ICC, Days before Deputy President's Trial' Reuters (New York, 5 September 2013), available at <www.reuters.com/article/2013/09/05/us-kenya-icc-prosecutor-idUSBRE9840QI20130905> accessed 30 December 2013.

¹¹² See 'Kenya parliament votes to withdraw from ICC' (5 September 2013), available at <www.aljazeera.com/news/africa/2013/09/201395151027359326.html> accessed 30 December 2013.

¹¹³ On file with author.

¹¹⁴ The US withdrew its signature on 6 May 2002 while Israel withdrew on 28 August 2002. John Bolton, the US Under Secretary of State for Arms Control and International Security, sent a letter to Kofi Annan, the Secretary-General of the United Nations, stating that 'the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.' See UN Treaty Collection at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#11> accessed 17 January 2014.

¹¹⁵ Rome Statute (n 1) art 127(2).

international crimes in Kenya. As Human Rights Watch observed: 'Any further action toward repeal would be a worrying sign that Kenya lacks the political will for domestic trials'.¹¹⁶

Finally, although Kenya's obligations under the Rome Statute regarding those who are already being prosecuted continue even after the withdrawal, it will be more difficult to get Kenya to cooperate. Reports of attempting to corruptly influence current, former or potential ICC Prosecution witnesses with a view to having them withdraw from their status or recanting their statements as witnesses, in contravention of Article 70(1)(c) of the Rome Statute,¹¹⁷ are in fact a form of non-cooperation.¹¹⁸ Kenya's non-cooperation was explicitly supported by the AU in its extraordinary session of 12 October 2013 which decided:

That to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office;

That the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office;

That President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC.¹¹⁹

The decisions above indicate that the AU member States including Kenya should not cooperate with the ICC in the trials of Kenya's serving leaders given that the AU decided that 'African States should comply with African Union Decisions on ICC'.¹²⁰ However, it is essential to note that non-cooperation with the ICC by State parties to the Rome Statute is contrary to the express obligation of State parties under Article 86 of the Rome Statute to 'cooperate fully with the Court in its investigation and prosecution of crimes' within the ICC's jurisdiction in accordance with the provisions of the Rome Statute. Indeed by virtue of Article 27 of the Rome Statute, all African States party to the Rome Statute have individually and voluntarily accepted the jurisdiction of the ICC to prosecute heads of State and/or Government (of State parties to the Rome Statute) including those currently serving.

It is important to note that the above AU decisions do not constitute a request or an application to the Court for a deferral of the Kenyan situation to Kenya's national jurisdiction in accordance with the Court's legal framework. The decisions have not been brought before the relevant ICC Chamber in accordance with the applicable legal procedures. Accordingly, they cannot be considered by the Court until a competent application is brought formally before the relevant

¹¹⁶ Human Rights Watch, *Perceptions and Realities: Kenya and the International Criminal Court*, October 2013, available at

www.hrw.org/sites/default/files/related_material/Perceptions%20and%20Realities_Kenya%20and%20the%20International%20Criminal%20Court_Oct2013_0.pdf accessed 30 December 2013.

¹¹⁷ Art 70(1)(c) of the Rome Statute vests the Court with jurisdiction over the offence of 'corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of Evidence.'

¹¹⁸ See Warrant of arrest for Walter Osapiri Barasa, ICC-01/09-01/13 (2 August 2013), available at <www.icc-cpi.int/iccdocs/doc/doc1650592.pdf> accessed 30 December 2013.

¹¹⁹ See AU, Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013) para 10(i), (ii), (xi).

¹²⁰ See Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Doc. Assembly/AU/13(xxii), (30-31 January 2014), para 12(i).

Chamber by any party or participant to the proceedings. If the AU wishes to bring its decisions to the Trial Chamber, it can request for leave 'to submit, in writing or orally, any observation on any issue' before the Chamber if this is desirable for the proper determination of the case.¹²¹

In addition, the above decisions are contrary to Kenya's international and domestic legal obligations. At an international level, it is obvious that the Rome Statute is legally binding on Kenya as a State Party to the Statute. Article 27 of the Rome Statute explicitly provides that 'official capacity as a Head of State or Government... shall in no case exempt a person from criminal responsibility' and that immunities shall not bar the Court from exercising its jurisdiction over such a person.¹²² As held by the ICC Trial Chamber V(A):

The central principle captured in Article 27 then is that the official position of the accused does not shield him against the jurisdiction of the Court for purposes of inquiring into his or her own individual criminal responsibility for crimes proscribed in the Statute. Indeed, the struggle against impunity for crimes that shock the conscience of humanity, being the *raison d'être* of the ICC, is a hopelessly lost cause without that cardinal principle of modern international criminal law.¹²³

International instruments adopted after the Second World War (e.g. the Charter of the International Military Tribunal,¹²⁴ Statute of the International Tribunal for the Former Yugoslavia (ICTY Statute),¹²⁵ Statute of the International Tribunal for Rwanda (ICTR Statute),¹²⁶ and Statute of the Special Court for Sierra Leone¹²⁷) had similar provisions. At a domestic level, the Constitution of Kenya (Revised edition, 2010) provides in Article 2(5) that: 'The general rules of international law shall form part of the law of Kenya' and further in Article 2(6) that 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'. Clearly, the Rome Statute - including Article 27, as a treaty ratified by Kenya, forms part of Kenya's domestic law.¹²⁸ In the words of Kenya's Chief Justice in 2012:

The ICC is not a foreign court. It is international, but it is also mobile. It is a Kenyan Court. It is part of our legal system. We ratified the Rome Statute, domesticated it and proceeded

¹²¹ ICC, Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, part II.A, Rule 103.

¹²² See also Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial (n 58) paras 66-70, 91-92.

¹²³ *ibid* para 69.

¹²⁴ Charter of the International Military Tribunal (adopted 8 August 1945) 82 UNTS 280, art 7 provided as follows: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.' See also Judgment of the International Military Tribunal at Nuremberg, 30 September 1946, 464-465, available at <<http://avalon.law.yale.edu/imt/09-30-46.asp>> accessed 17 January 2014.

¹²⁵ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted 25 May 1993) UN Doc S/25704 36, annex and S/25704/Add.1, art 7(2) provides: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

¹²⁶ UNSC Res 955 (6 November 1994) UN Doc S/RES/955. Art 6(2) of the ICTR Statute contains an identical provision to the one cited above in Article 7(2) of the ICTY Statute (n 123).

¹²⁷ The Statute is available at <www.sc-sl.org/LinkClick.aspx?fileticket=uCln1MJeEw%3D&> accessed 30 December 2013. Art 6(2) contains an identical provision to the one cited above in Article 7(2) of the ICTY Statute (n 125).

¹²⁸ See Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, ICC-01/09-02/11-713, 8 April 2013, para 35, available at <www.icc-cpi.int/iccdocs/doc/doc1577522.pdf> accessed 30 December 2013.

to anchor it in Article 2 of our Constitution.¹²⁹

It follows, therefore, that Kenya's Head of State or Government is not exempted from individual criminal responsibility before the ICC. Indeed, Kenyatta, just like Ruto, is being tried before the ICC in his individual capacity for allegations of crimes made against him personally i.e. in his personal capacity and not in his capacity as President or Vice President.¹³⁰ The Constitution of Kenya confirms that the President has no immunity from the ICC by providing in Article 143(4) that: 'The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity'.

5. Conclusion

This article has considered the impact of ICC investigations and prosecutions against Kenya's serving most senior State officials, namely, sitting President and Deputy President of Kenya - Kenyatta and Ruto respectively. It has highlighted the impact of the ICC investigations and prosecutions on the following: Kenya's domestic legal proceedings; the ICC Prosecutor's approach to investigations; the jurisprudence on trial *in absentia* and amendments to the ICC Rules of Procedure and Evidence; as well as Kenya and the African Union's relationship with the ICC, especially regarding their willingness to cooperate with the international tribunal.

All in all, the ongoing ICC investigations and prosecutions of Kenyatta and Ruto have had less impact on domestic legal proceedings in Kenya. There has been a delay in effectively and impartially investigating the 2007-2008 post-election violence by Kenyan authorities, with the result that perpetrators continue to be at large. Due partly to the lack of political will, systematic violations of human rights and disregard for the rule of law have continued to be widespread in Kenya, despite the numerous institutional and legislative reforms including the enactment of a new constitution in 2010 and the reform of the judiciary.¹³¹

Not all instances of alleged crimes against humanity (murder, deportation or forcible transfer, rape, persecution and other inhumane acts) committed in Kenya can find redress through the ICC system. Therefore, it is necessary to strengthen domestic institutions in Kenya to ensure impartial and effective investigation, without further delay, of all allegations of excessive use of force, torture and extra-judicial killings by State officials including those in the police and the military during the post-election violence, that perpetrators are prosecuted and, on conviction, appropriately punished. All victims should have access to obtaining adequate redress.

While the AU has stressed that the trial of Kenyatta and Ruto during their term of office 'could undermine the sovereignty, stability, and peace' in Kenya and in other member States as well as 'reconciliation and reconstruction and the normal functioning of constitutional institutions',¹³²

¹²⁹ Willy Mutunga, 'Judiciary Unveils Plan to Establish International Crimes Division, Remarks by Chief Justice Willy Mutunga at the Wayamo Meeting on the International Justice System' (Nairobi, 26 November 2012), available at

<www.judiciary.go.ke/portal/assets/files/Reports/WAYAMO%20MEETING%20ON%20THE%20INTERNATIONAL%20JUSTICE%20SYSTEM.pdf> accessed 30 December 2013.

¹³⁰ Kenyatta Excusal Decision (n 74) para 57; Ruto Decision (n 78) para 28.

¹³¹ See Truth, Justice and Reconciliation Commission (TJRC) Kenya, *Report of the Truth, Justice and Reconciliation Commission*, vol I (2013), para 113, available at <www.kenya-today.com/facing-justice/the-final-report-of-the-truth-justice-and-reconciliation-commission-of-kenya> accessed 17 January 2014.

¹³² AU Decision (n 119) para 5.

the prosecutions have demonstrated a clear need for effective national or regional mechanisms to prosecute international crimes without any distinction based on official capacity as a sitting or former Head of State or Government. If Kenyatta and Ruto had been subjected to genuine and effective national or regional criminal investigations and prosecutions, the ICC would not have been involved. With all current situations and cases before the ICC arising from Africa, in particular the trial of senior State official in Africa -Kenyatta and Ruto - and the warrants of arrest for President Al Bashir of Sudan for crimes against humanity, war crimes and genocide,¹³³ the AU has decided to 'fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (AfCHPR) to try international crimes, such as genocide, crimes against humanity and war crimes.'¹³⁴ Thus, one unintended impact of the ICC Prosecutor's *proprio motu* investigations and prosecutions of Kenyatta and Ruto would effectively be the establishment of an 'African Regional Criminal Court'.

The ICC investigations in Kenya and trial of Kenyatta and Ruto are a test for the ICC. The ICC Prosecutor has shown readiness to investigate situations of serious international crimes in African States but considerable reluctance to proceed with investigations elsewhere, in particular in situations involving powerful UN Security Council members or their allies e.g. situations in Iraq and Palestine.¹³⁵ While a variety of reasons have been advanced,¹³⁶ they are not legally satisfactory but politically understandable given that the ICC has enough problems to focus on without interjecting itself into some of the world's most intractable conflicts involving interests of powerful States.¹³⁷

This leaves the impression of a double standard - one standard for developing weaker States in the South, and another standard for powerful more developed States in the North. It appears that an investigation, such as one in Kenya, which does not touch the interests of powerful States is suitable for a young developing ICC. Any investigation touching the interests of powerful States particularly the UN Security Council members or their allies is currently too costly and ambitious for the ICC. However, one lesson from the Kenyan investigation as reflected in the AU decisions is that an exclusive focus on investigations in Africa while neglecting similar or worse situations like systematic detainee abuse in Iraq will continue to attract more opposition to the ICC and cause great damage to it.

To strengthen the impact of the ICC investigations and prosecutions in Kenya, other African States in a position to investigate and prosecute perpetrators of alleged crimes against humanity

¹³³ See *The Prosecutor v Omar Hassan Ahmad Al Bashir*, (First) Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (4 March 2009) and Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (12 July 2010).

¹³⁴ AU Decision (n 119) para 10(iv).

¹³⁵ See eg Communication to the Office of the Prosecutor of the International Criminal Court, *The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008*, submitted on 10 January 2014 by the European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL), available at <www.ecchr.de/> accessed 10 January 2014; Situation in Palestine, 3 April 2012, available at <www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> accessed 30 December 2013.

¹³⁶ See The OTP response to communications received concerning Iraq, 9 February 2006, available at <www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 30 December 2013; and Situation in Palestine, 3 April 2012 (n 135).

¹³⁷ See eg William A Schabas, 'The Prosecutor and Palestine: Deference to the Security Council' 8 April 2012, available at <<http://humanrightsdoctorate.blogspot.co.uk/2012/04/prosecutor-and-palestine-deference-to.html>> accessed 30 December 2013.

in Kenya should complement the ongoing ICC efforts by investigating such crimes. The focus should be on criminal investigations given that some States still accord conduct-based immunity (immunity *ratione materiae*) for State officials accused of abusing their authority to commit serious violations of international law in cases concerning *civil* claims brought against named State officials where the impugned acts were carried out in the course of their official duties e.g. in extra-territorial civil claims for torture,¹³⁸ a view supported by a 5:1 judgment of a Chamber of the European Court of Human Rights in January 2014.¹³⁹ South Africa may provide a leading example to undertake extra-territorial criminal investigations following a judgment handed down on 27 November 2013 by the Supreme Court of Appeal of South Africa in the case of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*.¹⁴⁰ The judgment dealt with the exercise of universal jurisdiction over, and extra-territorial investigation of, alleged crimes against humanity by South African authorities in the absence of the alleged perpetrators in South Africa. In particular the judgment considered the following question:

What business is it of the South African authorities when torture on a widespread scale is alleged to have been committed by Zimbabweans against Zimbabweans in Zimbabwe? It is that question that is at the heart of this appeal. Put simply and hopefully concisely, this appeal concerns the investigative powers and obligations of the NPA [National Prosecuting Authority] and the South African Police Service in relation to alleged crimes against humanity perpetrated by Zimbabweans in Zimbabwe. It involves a consideration of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act). Put jurisprudentially, this appeal concerns the exercise of jurisdiction by a domestic court (and the logically antecedent exercise of investigative powers by the relevant authorities) over allegations of crimes against humanity – in particular, the crime of torture – committed in another country.¹⁴¹

The Court set aside the decision of the South African Police Service (the SAPS) taken on or about 19 June 2009, to not investigate the complaints laid by the Southern African Human Rights Litigation Centre (the complainants) that certain named Zimbabwean officials had committed crimes against humanity against Zimbabwean nationals in Zimbabwe (the alleged offences). The Court declared that, on the facts of this case the SAPS are empowered to investigate the alleged offences irrespective of whether or not the alleged perpetrators are present in South Africa,¹⁴² and that the SAPS are required to initiate an investigation under the Implementation of the Rome

¹³⁸ See eg *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* [2006] UKHL 26; *Al-Adsani v The United Kingdom* App no 35763/97 (ECtHR, 21 November 2001), (2002) EHRR 273, para 66; *Jones and Others v The United Kingdom* App no 34356/06 & 40528/06 (ECtHR, 14 January 2013), paras 202-215.

¹³⁹ In *Jones and Others v The United Kingdom* (n 138) para 202 the Court stated:

The first question is whether the grant of immunity *ratione materiae* to State officials reflects generally recognised rules of public international law. The Court has previously accepted that the grant of immunity to the State reflects such rules. Since an act cannot be carried out by a State itself but only by individuals acting on the State's behalf, where immunity can be invoked by the State then the starting point must be that immunity *ratione materiae* applies to the acts of State officials. If it were otherwise, State immunity could always be circumvented by suing named officials. This pragmatic understanding is reflected by the definition of "State" in the 2004 UN Convention ..., which provides that the term includes representatives of the State acting in that capacity. The ILC [International Law Commission] Special Rapporteur, in his second report, said that it was "fairly widely recognised" that immunity of State officials was "the norm", and that the absence of immunity in a particular case would depend on establishing the existence either of a special rule or of practice and *opinion juris* indicating that exceptions to the general rule had emerged.

¹⁴⁰ Case No 485/2012, [2013] ZASCA 168 (27 November 2013).

¹⁴¹ *ibid* para 5.

¹⁴² *ibid* para 3.2.1.

Statute of the South African International Criminal Court Act 27 of 2002 into the alleged offences.¹⁴³ The judgment concluded that ‘there is no universal rule or practice against the initiation of investigations in the absence of alleged perpetrators’ noting that legislation and State practice in various States is inconsistent.¹⁴⁴ If SAPS are empowered to investigate crimes against humanity allegedly committed by certain named Zimbabwean officials (irrespective of whether or not the alleged perpetrators are present in South Africa) and that SAPS are ‘required’ to initiate such an investigation under the South African Implementation of the Rome Statute of the International Criminal Court Act 2002, does it also have an obligation to investigate similar crimes in other African States, and, why not, crimes committed in Kenya? Just as South African police are empowered to investigate the alleged crimes against humanity allegedly committed by certain named Zimbabwean officials - irrespective of whether or not the alleged perpetrators are present in (or on the territory or in the custody of) South Africa - against Zimbabwean nationals in Zimbabwe, Kenyan victims could file their complaints for investigations in South Africa irrespective of whether or not the alleged perpetrators are present in South Africa.

¹⁴³ *ibid* para 3.2.2.

¹⁴⁴ *ibid* para 66.

‘State Practice, Customary Humanitarian Law and Civilian Casualties of Armed Conflict’

Susan Breau*

ABSTRACT: The article examines the customary international law credentials of the humanitarian law rules proposed by the International Committee of the Red Cross (ICRC) in 2005. It relies on the BIICL/Chatham House analysis as a ‘constructive comment’ on the methodology of the ICRC study and the rules formed as a result of that methodology with respect to the dead and missing as an aid to determination of their customary law status. It shows that most of the rules studied have a customary international law pedigree which conforms to the conclusions formed on the rules generally in the Wilmshurst and Breau study. However, the rules with respect to return of personal effects, recording location of graves and notification of relatives of access to gravesites do not seem to have even on a majoritarian/deductive approach enough volume of state practice to establish them as customary with respect to civilians.

Introduction

In 2005 Jean-Marie Henckaerts and Louise Doswald-Beck of the International Committee of the Red Cross (hereafter ICRC) released their landmark Customary Humanitarian Law Study (hereafter ‘the ICRC study’).¹ This compilation of customary rules of humanitarian law had been mandated in 1995 by the International Conference of the Red Cross and Red Crescent.² This study was the first of its kind to comprehensively formulate a set of customary rules in one area of international law based on an analysis of state practice. Not surprisingly, the study attracted equal measures of academic criticism and praise.³ The most important critiques focused on the issue of the methodology used in the study and the collection of state practice. The commentators principally challenged the density of state practice and the relevance of some of the state practice used.⁴ From 2005-2007 the British Institute of International and Comparative Law (hereafter BIICL) and Chatham House convened an international group of expert humanitarian lawyers to prepare a response to the ICRC study, which was later

* Ph.D., London School of Economics. Professor of Law, University of Reading, UK. The author is grateful to SPILJ’s anonymous referees for their comments on earlier drafts of this article.

¹ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol 1 (CUP 2005).

² Jean-Marie Henckaerts, ‘*Customary International Humanitarian Law: A Response to US Comments*’ (2007) 89 IRRC 473.

³ John B Bellinger, III and William J Haynes, II, ‘A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*’ (2007) 89 IRRC 443; George Aldrich, ‘Customary International Humanitarian Law: An Interpretation on behalf of the International Committee of the Red Cross’ (2006) 76 BYIL 503; Malcolm McLaren and Felix Schwendimann, ‘An Exercise in the Development of International Law: The new ICRC Study on Customary Humanitarian Law’ (2005) 6 German Law Journal 1217; W Hays Parks, ‘The ICRC Customary Law Study: A Preliminary Assessment’ (2005) 99 Am Soc Intl L Proc 208.

⁴ See particularly the article by Bellinger and Haynes (n 3).

published.⁵ Although two of its authors Scobbie and Bethlehem also focused on a critique of the methodological issues, other member of the research team's systematic examination of the proposed rules found many of them to be unquestionably customary.⁶

However, there was an omission to that response, as none of the members of the response team examined the rules contained within Chapter 35 (The Dead) and Chapter 36 (The Missing). These two chapters arguably provide a 'road map' of specific and binding legal obligations with respect to civilian casualties.⁷ If these rules as identified within the ICRC study are indeed customary, they will enhance the rather limited treaty provisions in this area. As a result, countries that are not party to Additional Protocol I to the four Geneva Conventions and all those states that are currently involved in non-international armed conflicts may be compelled to bring their practice into compliance with these legal obligations. This gives the international lawyer an opportunity to once again study the methodological critiques and the proposed rules.

This issue has been brought to the forefront of concern in the wake of the armed conflicts in Afghanistan and Iraq. General Tommy Franks with respect to the invasion of Afghanistan was famously quoted as saying "You know we don't do body counts".⁸ This statement was particularly in reference to military casualties but the context included all casualties. The Iraq and Afghanistan conflicts were characterized by confusion as to who was actually a civilian and who a combatant, given the use of such terms as 'militants' and 'unlawful combatants'.⁹ There were also conflicting surveys predicting up to a million civilian deaths in Iraq, which further heightened the tension.¹⁰ The Iraq Body Count Project (IBC) was established in 2003 with an express aim of providing a 'person by person' casualty record and they have thus far recorded between 108,237 and 118,279 civilian deaths, much less than the six hundred thousand to a million predicted, but still a substantial figure.¹¹ A group of non-governmental organizations involved in civilian casualty recording across the globe has formed a coalition of practitioners under the leadership of the Oxford Research Group's Every Casualty Programme (which also hosts

⁵ Elizabeth Wilmschurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007).

⁶ *ibid.* See also Daniel Bethlehem, 'The methodological framework of the ICRC study' *ibid* ch 1, and Ian Scobbie, 'The approach to customary international law in the ICRC study' *ibid* ch 2.

⁷ The author of this article is the legal advisor to the project Recording of Casualties of Armed Conflict project of the Oxford Research Group. See <www.oxfordresearchgroup.org.uk/rcac> accessed 20 January 2014, and the two reports published on this site: Susan Breau, Marie Aronsson and Rachel Joyce, 'Drone Attacks, International Law and the Legal Obligation to Record Civilian Casualties of Armed Conflict' (1 June 2011)

<www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/discussion_paper_legal_obligation_record_civilian_casualty> accessed 20 January 2014, Susan Breau and Rachel Joyce, 'The Legal Obligation to Record Civilian Casualties of Armed Conflict' (1 June 2011)

<http://www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/discussion_paper_legal_obligation_record_civilian_casualty> accessed 20 January 2014. See also 'Every Casualty Group' <www.oxfordresearchgroup.org.uk/rcac> accessed 20 January 2014.

⁸ Edward Epstein, 'Success in Afghan War Hard to Gauge' *San Francisco Chronicle* (San Francisco, 23 March 2002).

⁹ Jonathan Steele and Michelle Goldenberg, 'What is the real death toll in Iraq?' *The Guardian* (London, 19 March 2008).

¹⁰ Peter Ford, 'Surveys Pointing to High Civilian Death Toll in Iraq' (2003) July/August Washington Report on Middle East Affairs 13, 13-14.

¹¹ Official website <www.iraqbodycount.org> accessed 20 January 2014. The total changes daily for the latest casualty figure please go the web site.

the IBC). A key question for all these groups is the extent of the legal obligations of parties to armed conflict to search for, identify and record civilian casualties.¹²

This article will review the proposed customary humanitarian law rules and the analysis of state practice used to justify these rules. It will take a similar approach of the previous BIICL/Chatham House analysis to be a 'constructive comment' on the methodology of the ICRC study and the rules formed as a result of that methodology with respect to the dead and missing to assess their customary status.¹³ The first part of the article will discuss the debate with respect to the density and types of state practice needed to formulate customary rules. The next part of the article will review the proposed customary rules with respect to the missing and the dead in light of the debate on the formation of customary international law and engage an analysis of the practice cited to support these rules.

It is appropriate that this examination will form one of the inaugural articles for this important journal of state practice and international law. The density and type of state practice used is one of the most controversial areas of international law and warrants the debate this journal will provoke.

1. Methodology

The ICRC study has come under close scrutiny by a number of academic experts with the most critical comments reserved for the methodology used for proposing a rule of customary international law.¹⁴ There is no doubt that one of the most contentious areas in international law is the role of state practice in the formation of customary international law.¹⁵ The controversy concerning the ICRC study is hardly surprising, as even the jurisprudence of the International Court of Justice is unclear about the quantity, quality and type of state practice necessary for the formation of a rule of customary international law.¹⁶ Furthermore, there is the equally vexing question of the relationship between the two major sources of international law, treaty and custom and whether one is above the other in a hierarchy of sources.¹⁷

In the BIICL/Chatham House project, Bethlehem is particularly concerned about the difficulty in identifying custom in an area heavily regulated by treaty and the tendency to propose a rule of customary international law using the treaty language, particularly from Additional Protocol I of 1977 to the 1949 Geneva Conventions.¹⁸ Scobbie has a somewhat similar concern in the way in which the rules were developed, in that they are proposed by an academic team (relying on the provisions of Additional Protocol I),

¹² The author is legal consultant to the Every Casualty Project which emerged from the Recording of Casualties of Armed Conflict project.

¹³ Henckaerts and Doswald Beck (n 1) Introduction, viii.

¹⁴ Bethlehem (n 6) and Scobbie (n 6). See also W Hays Parks (n 3) in which he argues that the practice is incomplete.

¹⁵ For example see International Law Association, *Report of the Committee on the Formation of Customary International Law* (London 2000) found at <www.ila-hq.org/en/committees/index.cfm/cid/30> accessed 20 January 2014; Anthea E Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757; Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523.

¹⁶ This is particularly to be noted in the contrast between the cases *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 3, and *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States) (Merits) [1986] ICJ Rep 14.

¹⁷ Igor I Lukashuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law' (1989) 83 AJIL 513.

¹⁸ Bethlehem (n 6) 8-9.

rather than by a process of state-to-state negotiation.¹⁹ In response, it has to be noted that this model has been followed previously, with notable examples being the San Remo Manual on Naval Warfare, the Manual of Non-International Armed Conflict and the recently published Tallinn Manual on the International Law Applicable to Cyber Warfare.²⁰ Indeed it is clear that the ICRC study is just that - a study - and it would have simply been impossible to have groups of states agree on these rules. That process must be left to treaty negotiations. One can certainly agree with Scobbie that having the imprimatur of the ICRC is very influential but surely that is a good thing. The ICRC has for over 150 years been the body that considers the legal regulation of armed conflict and surely their expertise would be fundamental. In the field of casualties, it has been the Central Tracing Agency of the Red Cross that has led the way in the search for the missing. Furthermore, the process of deduction of custom has to test a wording of a rule. In this case many provisions in Additional Protocol I are the treaty rules that custom is being tested against and it would be logical that the wording of the treaty provision would be influential.

It is outside the remit of this article to engage in the discussion of the characterization of state practice as being in accordance with the treaty provisions of Additional Protocol I or as evidence of a higher order acceptance in the content of the obligation outside of the scope of the treaty. The relationship and hierarchy of custom and treaty is one of the fundamental issues in public international law which will I am sure be one of the discussion points in this journal. However, for the purposes of this article it is simply necessary to point out that indeed, formulating the rules in very similar terms to the provisions of the Geneva Conventions and their Protocols engages the scholar in the debate of issues such as *pacta sunt servanda*.²¹ That is why the study and this article emphasis the practice of non-treaty party states to Additional Protocols I and II such as Israel and the United States. The issue of whether a party state is bound by a similar customary rule is very complex and would warrant a separate and extensive discussion.

However, there is another substantial criticism by Scobbie and Bethlehem which is also echoed by Bellinger and Haynes of the methodology employed and that concerns the claim of a lack of density of the state practice relied upon in the study. Bethlehem asserts that ‘notwithstanding the reference in the Introduction to the importance of assessing the “density”, ie, the weight, of relevant items of practice, there is often little or no evidence that this is done’.²² Bellinger and Haynes in their response on behalf of the United States also hone in on this issue of density of state practice stating:

First, for many rules proffered as rising to the level of customary international law, the State practice cited is insufficiently dense to meet the “extensive and virtually uniform” standard generally required to demonstrate the existence of a customary rule.²³

¹⁹ *ibid* 19-21.

²⁰ Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995); Michael N Schmitt, Charles HB Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict* (San Remo, International Institute of Humanitarian Law 2006) reprinted in (2006) 36 *Israel Yearbook on Human Rights* (Special Supplement); Michael N Schmitt (ed), *The Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP 2013).

²¹ For an excellent discussion of this issue see Lukashuk (n 17) 513-18.

²² Bethlehem (n 6) 9.

²³ Bellinger and Haynes (n 3) 444-45.

Scobbie labels the examination of state practice in the study as the ‘move toward *Nicaragua*’ in the ICRC study’s definition of what constitutes custom.²⁴ The critical passage from the *Nicaragua* case states:

‘The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.’²⁵

This statement is characterised by Scobbie as proposing a majoritarian view of state practice.²⁶ He argues that the view of the ICRC study is that widespread participation in the Geneva Conventions and Additional Protocols leads to the ‘normative conclusion of customary status’.²⁷ Scobbie asserts that it would be wise to return to the more ‘articulate and stringent requirements of the *North Sea Continental Shelf* Cases which is also the view expressed in the International Law Association Customary Law Report’.²⁸ This approach would be in keeping with the more traditional approach to identifying customary international law by viewing the general and consistent practice followed by states from a sense of legal obligation – an inductive approach.²⁹ In fact, Henckaerts and Doswald-Beck in their introduction to the Study assert that they are using the ‘extensive and virtually uniform’ standard set out in the *North Sea Continental Shelf* case.³⁰

In the opinion of this writer, in an article released two years after the study, Henckaerts gives a comprehensive response to these critiques and thus gives further support to the methodology employed in the Study. Although he responds directly to the Bellinger/Haynes article, his responses are pertinent to the other critiques of density of practice posed by Scobbie and Bethlehem. Although the reader will benefit from a complete reading of his response in the International Review of the Red Cross, the major points in response can only be briefly discussed and supported in this article.³¹

Firstly, with respect to criticism of the density of practice, Henckaerts does not rely on the *Nicaragua* majoritarian approach but repeats the formulation in the *North Sea Continental Shelf* (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v. Netherlands*) case of ‘extensive and virtually uniform’ to establish a rule of customary law. But he correctly points out that there is no specific mathematical threshold of how extensive practice has to be. He argues that there may be limited practice in some areas, such as the use of a white flag of truce, but what practice there is, is unanimous.³²

²⁴ Scobbie (n 6) 29.

²⁵ *Nicaragua* (n 16) [98].

²⁶ Scobbie (n 6) 29.

²⁷ Scobbie (n 6) 30.

²⁸ *Continental Shelf* (n 16) [73]; International Law Association, *Report of the Committee on the Formation of Customary International Law* (n 15).

²⁹ Roberts (15) 758.

³⁰ *Continental Shelf* (n 16) [74].

³¹ Henckaerts (n 2) 473.

³² *ibid* 475, at note 6 argues ‘in the Wimbledon case, the Permanent Court of International Justice relied on two precedents only, those of the Panama and Suez canals, to find that the passage of contraband of war through international canals was not a violation of the neutrality of the riparian state’. *Case of the SS Wimbledon* (*UK v Japan*) (Judgment) PCIJ Rep Series A No 1 [1], [28]. Obviously the Court could not cite more examples, as the number of international canals is limited. See also Claud HM Waldock, ‘General Course on Public International Law’ (1962) 106 *Recueil des cours* 1, 44 who observes that ‘on a question

Furthermore, a single military manual might contain great density of practice as it might contain ‘numerous precedents and thus a substantial quantum of practice.’³³

Henckaerts divides the proposed rules in the study into the prohibitive and the permissive. Prohibitive rules such as the prohibition from use of blinding laser weapons are supported by abstention from the act, and this occurs ‘every day in every conflict in the world.’³⁴ In respect of permissive rules, Henckaerts argues that acts that recognize the right to behave in a given way do not require positive practice, such as the rule that states have a right to vest universal jurisdiction in their courts over war crimes (Rule 157). He points out that there are numerous cases of national prosecutions but that states may choose to set up ‘ad hoc’ tribunals (East Timor, Kosovo) or turn to the International Criminal Court.³⁵

Finally, with respect to density of state practice, Henckaerts argues that due to extensive and broad-based research including ICRC archives on nearly forty recent armed conflicts, ‘never before has so much practice been proffered in such a systematic and detailed manner’.³⁶ One can agree with Henckaerts, particularly after a thorough view of the two extensive volumes of state practice. In a more recent enhancement, there has been, since this critique, the launching of the Customary Humanitarian Law database, which outlines the supporting practice and is added to on a regular basis.³⁷ Its aim is to view the practice in many countries rather than the by necessity selective method used in the ICRC study and the scope of the review is truly impressive. The most recent update integrates national practice up to the end of 2007 for a set of 27 additional countries. The materials are gathered by a network of ICRC delegations and of Red Cross and Red Crescent Societies around the world and incorporated by a research team based at the Lauterpacht Centre for International Law at the University of Cambridge.³⁸ This enables the analyst to engage in detailed study of the practice of non-party States and allows a review of the volume of practice for each rule. It contains a staggering amount of detailed information and further supports Henckaerts’ assertion of the density of state practice.

A second major critique made by Bellinger and Haynes is that not enough weight is given to negative practice and to the practice of specially affected States. They justify this view that States that have a greater participation in armed conflict have had an opportunity to develop ‘carefully considered military doctrine’ and therefore have contributed significantly greater quantity and quality of practice.³⁹ Bethlehem also argues that not enough attention is paid to persistent objection.⁴⁰

Henckaerts correctly takes issue with this view that the practice of those states should count more, as ‘unlike the law of the sea, where a state either has or does not have a coast, with respect to humanitarian law any state can potentially become involved in armed conflict and become “specially affected”. Therefore, all states would seem to have

concerning international canals, of which there are very few in the world, the quantum of practice must necessarily be small.’

³³ *ibid* 475.

³⁴ *ibid*

³⁵ *ibid*

³⁶ *ibid* 476.

³⁷ See <www.icrc.org/customary-ihl/eng/docs/home> accessed 20 January 2014.

³⁸ See <www.lcil.cam.ac.uk/projects/cihl_project.php> accessed 20 January 2014.

³⁹ Bellinger and Haynes (n 3) 445-46.

⁴⁰ Bethlehem (n 6) 10.

a legitimate interest in the development of humanitarian law.’⁴¹ To argue that the practice of only states who regularly participate in armed conflict should be more influential belies the reality that armed conflict affects the international community as a whole. The current conflict in Syria illustrates how many states can become involved as hosts of those refugees fleeing the conflict.

The next substantial criticism concerns the type of state practice considered, which in the view of Bellinger and Haynes, places too much emphasis on written materials, such as military manuals, and not enough on actual operational practice. They include, as non-reliable, non-binding resolutions of the General Assembly. They also argue that undue weight is given to statements by non-governmental organizations and the ICRC.⁴²

Henckaerts counters this view and correctly argues that operational State practice in connection with actual military operations was collected and analyzed.⁴³ This included reports and statements from the United States with respect to targeting decisions in Korea, Vietnam and the Gulf.⁴⁴ With respect to the United Nations resolutions (of various UN bodies), often condemning activity in contravention of the proposed rules, Henckaerts argues that the voting record of States was appended to General Assembly resolutions and they did not tip the balance of a rule being customary but supported other practice.⁴⁵ An examination of the commentary to the rules and the volume of practice supports this position, as these resolutions were not relied upon alone. One might go further than Henckaerts and argue that certain resolutions in the General Assembly and Security Council may declare rules of international law and are indicative of *opinio juris* and state practice - if there is an overwhelming vote in support.⁴⁶ As Roberts argues:

Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs.⁴⁷ Whether these texts become custom depends on factors such as whether they are phrased in declaratory terms, supported by a widespread and representative body of states, and confirmed by state practice.⁴⁸

With respect to ICRC statements, the same argument was made that they were cited to ‘reinforce conclusions that were reached on the basis of state practice alone’.⁴⁹ Once again this author would go further and argue that the ICRC is the organization with a

⁴¹ *ibid* 482.

⁴² *ibid* 445.

⁴³ This is evident from a review of the extensive volumes of practice.

⁴⁴ Sources for this practice according to Henckaerts are: Robert F Futrell, *The United States Air Force in Korea 1950–1953* (rev edn, Office of Air Force History, US Air Force, Washington, DC, 1983); US Department of Defense, ‘Statement on targeting policy in Vietnam’ (26 December 1966) reprinted in Marjorie Whiteman, *Digest of International Law*, vol 10 (Department of State Publication 8367, Washington, DC, 1968); US Department of Defense, ‘Final Report to Congress on the Conduct of the Persian Gulf War’ (10 April 1992).

⁴⁵ Henckaerts (n 2) 478.

⁴⁶ Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99 AJIL 175 and Blaine Sloan, ‘General Assembly Resolutions Revisited: Forty Year On’ (1987) 58 BYIL 39.

⁴⁷ Roberts (n 15) 758 and the footnotes for this sentence; *Continental Shelf* (n 16) [44]; Eduardo Jiménez de Aréchaga, ‘Remarks [on General Principles and General Assembly Resolutions]’, in Antonio Cassese and Joseph HH Weiler (eds) *Change and Stability in International Law-Making* (de Gruyter 1988) 48.

⁴⁸ Roberts (n 15) 758, footnotes for this sentence; Michael Akehurst, ‘Custom as a Source of International Law’ (1974-75) BYIL 1, 6-7; Jonathan I Charney, ‘Universal International Law’ (1993) 87 AJIL 529, 544-45.

⁴⁹ Henckaerts (n 2) 478.

specific mandate to ‘work for the faithful application of international humanitarian law’ and therefore have a specific expertise in warfare.⁵⁰ The role of ICRC appeals to states to secure compliance with international humanitarian law and of the States’ reaction thereto in the formation of customary international law is acknowledged in the Interlocutory Appeal on Jurisdiction in the *Tadic* case.⁵¹ The statements of other NGO’s are acknowledged by Henckaerts to be not relevant to assess the customary status of a rule and are not relied upon in the study to support any rules.

The argument with respect to military manuals also has to be countered here. Military manuals reflect the instructions to forces from States as to the applicable humanitarian law. If anything, as Henckaerts argues, they contain a large volume of state practice as they instruct on how that particular nation views an obligation under the laws and customs of war. Manuals are an essential source of state practice in armed conflict. Furthermore, they may also reflect *opinio juris* as military manuals propose conduct that would be in accordance with international legal obligations.

Finally, on behalf of the United States Bellinger and Haynes argue that the Study tends to merge *opinio juris* and practice into a single test. They assert that *opinio juris* must be assessed separately. Particularly *opinio juris* should not be established by reliance by what states say in their military manuals.⁵² With respect to this critique, Henckaerts acknowledged that the commentaries in Volume I of the Study did not usually set out a separate analysis of practice and *opinio juris*. But he argues that such an analysis did take place for each and every rule and did not infer the existence of *opinio juris* from practice.⁵³ He assured the critics that the study distinguished between policy statements in military manuals and the conclusion that a rule of law was involved.⁵⁴ For examples, as they contained mainly policy statements, US military manuals were never cited as supporting evidence for rules applicable in non-international armed conflicts.⁵⁵ Once again this article is not the place for a resolution of the long-standing controversy over what constitutes *opinio juris* and state practice. One can recommend the astute discussion of this issue by Jörg Kammerhofer in the European Journal of International Law of the ‘most disputed, least comprehended component of the workings of customary international law..’, in which he proposes a wider view of state practice incorporating both the element of action of states and verbal statements.⁵⁶ The examination of state practice in this article takes this wider view that verbal statements can constitute both evidence of *opinio juris* and state practice depending on the circumstances.

In fact, it could be argued that Henckaerts response and indeed the methodology used in the Study was overly cautious. As Roberts argues in her seminal article, this method of identification of custom has been supplemented by a more modern deductive approach that begins with a statement of rules rather than particular emphasis on practice and relies on statements by states rather than actions, a reliance on *opinio juris*.⁵⁷ This seems to capture the actual approach of the methodology of the Study, which may

⁵⁰ Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross (adopted 23 October 1986, amended 20 June 2006) <www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf> accessed 20 January 2014, art 5(2)(c) and (g).

⁵¹ *Prosecutor v Tadic* (Appeals Chamber) ICTY-94-1-AR72 (2 October 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [109].

⁵² Bellinger and Haynes (n 3) 446.

⁵³ *ibid*

⁵⁴ *ibid* 483.

⁵⁵ *ibid*

⁵⁶ Jörg Kammerhofer (n 15) 523-53, particularly 532-36.

⁵⁷ Roberts (n 15) 758.

be much less traditional than it claims (as Scobbie correctly argues).⁵⁸ As a result there is reliance in the Study on Kirgis' 'sliding scale' proposing that those rules with a large amount of state practice will not necessarily need *opinio juris*, and those with a lesser amount will require more elements of statements and *opinio juris*.⁵⁹ In spite of Scobbie's and Bethlehem's support for a more traditional analysis, this author supports this more modern deductive view of customary international law formation and the majoritarian view of the density of state practice required in the *Nicaragua* decision.

However, given the view of state practice and *opinio juris* that is employed in the study, this article will continue with the analysis of state practice in Chapters 35 and 36 based on the *North Sea Continental Shelf* formulation of 'extensive and virtually uniform' but also acknowledging a reliance on the deductive approach based on statements of States in addition to actual practice, given the paucity of practice in this area - particularly with respect to civilian casualties. Notwithstanding the above analysis, the controversy concerning the development of customary international law will be with us as long as there are international lawyers with opposing views. However, to insist on extensive and virtual uniformity of actual practice in an international community of almost 200 States seems to defy logic and could result in customary humanitarian law rules never emerging. This debate on customary rule formation must continue.

2. Customary Humanitarian law with respect to the dead and missing

Prior to examination of the customary humanitarian law rules, it is necessary to review the status of obligations with respect to dead and missing civilians in treaty law. In the case of civilian casualties, it is not until Additional Protocol 1 of 1977 that there are detailed rules concerning provisions for dead and missing persons. Article 16 of the 4th Geneva Convention contained an important limitation 'as far as military conditions allow' and it only included search for the missing and dead not the recording of information of civilian casualties.⁶⁰ The section of the Protocol, Article 32, begins with a general statement that the following two articles are promoted by 'the right of families to know the fate of their relatives'.⁶¹ There are specific obligations with respect to searching for the missing and the recording of deaths. Article 33 with respect to missing persons also contains a limitation 'as soon as circumstances permit' but it is further qualified with 'at the latest from the end of active hostilities'. The provision mandates searching for persons reported missing by an Adverse Party who shall transmit all relevant information concerning the missing. Furthermore, the parties shall endeavor to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas.⁶²

⁵⁸ Scobbie (n 6) 27.

⁵⁹ Roberts (n 15) 760, and importantly see Frederic L Kirgis, 'Custom on a sliding scale' (1987) 81 AJIL 146, a pivotal article in the concept of *opinio juris*.

⁶⁰ Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art 16:

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

⁶¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 (Additional Protocol I) art 32.

⁶² *ibid* art 33(1) and art 33(4).

Article 34 entitled 'Remains of the deceased' is limited to those who have died for reasons related to occupation or in detention resulting from occupation or hostilities and to those persons not nationals of the country in which they have died, as a result of hostilities. The article mandates that the gravesites of these persons be respected, maintained and marked. Additionally, as soon as circumstances permit, the Parties in whose territories graves are situated shall conclude agreements to (a) facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services, (b) to protect and maintain the gravesites permanently and (c) to facilitate the return of the remains of the deceased and their personal effects to the home country upon its request, or request of next of kin. This Article also contains a subsection, which allows for exhumation of bodies when it is 'a matter of overriding public necessity, including cases of medical and investigative necessity.'⁶³

Additional Protocol II applicable to non-international armed conflict has a more limited provision on the dead Article 8 which states:

Whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

The ICRC study in the two chapters on the dead and missing proposes that the essence of the extensive treaty provisions with respect to civilian casualties in Additional Protocol I are customary humanitarian law rules and argues that, except for one Rule 114, all of these rules will apply equally to non-international armed conflict.

The rules with respect to the dead and the missing are outlined here together with pertinent sections of the ICRC commentary and the volume on practice. It is these rules that propose to clarify the content and scope of the obligation with respect to civilian casualties. The rules will be examined by, (1) stating the rule, and (2) assessing the practice supporting the rule, both in the original publication and the updated database based on above discussion of methodology.⁶⁴

2.1 - Rule 112

Whenever circumstances permit, and particularly after an engagement, each part to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.⁶⁵

This rule is proposed in the Study to be applicable both in international and non-international armed conflict. The commentary indicates that the rule applies to all the dead, without adverse distinction. This means the rule applies to the dead from both sides of the conflict and to civilians. The obligation to search for and collect the dead is an obligation of means. Each party to the conflict has to take all possible measures to search for and collect the dead. This would include permitting humanitarian organizations or civilian populations to assume this task. Permission for either to conduct such an activity must not be denied arbitrarily. Presumably however, permission

⁶³ *ibid* art 34.

⁶⁴ See <www.icrc.org/customary-ihl/eng/docs/home> accessed 20 January 2014.

⁶⁵ Henckaerts and Doswald-Beck (n 1) 406.

would be denied if military operations were still being conducted and there were further risks to life.⁶⁶

The ICRC study commentary to this rule proposes that, as with the collection of the wounded, there should be an arrangement between the parties to suspend hostilities and to remove the dead from the battlefield but these specific details are not included in the rule proper. The commentary highlights the second and paragraph of Article 15 regarding arranging for armistice or suspension of fire and agreeing on local arrangements to collect the dead. With respect to civilians it was not until Additional Protocol I that mandated that parties shall endeavor to agree on arrangements for teams to search for and recover the dead from the battlefield areas.⁶⁷ The ICRC study supports this practice as customary arguing that the United States has expressed its support for this type of arrangement.⁶⁸

This rule, together with the next rule 113, contains all of the obligations in Article 15 of the First Geneva Convention⁶⁹ with respect to all casualties. It eliminates the reservation of ‘as far as military considerations allow’ that was set out in Article 16 of the Fourth Geneva Convention applicable to the collection of civilian casualties. This means that this is a new proposal for customary law for civilian casualties as it deviates from the treaty provision with respect to civilians and, therefore, this rule must be tested against the actual practice of states and *opinio juris*.

The ICRC customary IHL database for this and all the subsequent rules examined here contains a large amount of information to support the customary status of these rules. The data supporting the rules are divided into various sections (i) treaties that contain formulations of the proposed rule; (ii) other international instruments including peace agreements; (iii) military manuals; (iv) national legislation; (v) national case-law; (vi) other national practice; (vii) United Nations materials; (viii) other international organizations; (ix) international conferences; (x) international and mixed judicial and quasi-judicial bodies; (xi) International Red Cross and Red Crescent movement and (xii) any other practice. As Henckaerts acknowledges, none of these sections separate actual practice from *opinio juris*. It is up to the analyst to carefully sift through the volume of material to determine whether both virtually uniform and extensive practice and *opinio juris* exists.

A major portion of the data supporting this particular rule is to be found in the section on military manuals. These contain several examples of statements supporting the rule without the reservation located in the military manuals of such countries as Argentina,

⁶⁶ *ibid* 406-408.

⁶⁷ Additional Protocol (n 61) art 34(2).

⁶⁸ Henckaerts and Doswald-Beck (n 1) 406-408.

⁶⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention) art 15:

At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.

Benin, Cameroon, Croatia, Germany, Italy, Kenya, Madagascar, Netherlands, New Zealand, Nigeria, Philippines, Spain, and Togo.⁷⁰ Given the quantity of these statements in military manuals it is possible to utilize the deductive approach supported above, that *opinio juris* is clearly evident in the various statements of obligations towards all of the dead contained in these manuals, which leads to a rule of customary international law. However, these military manuals are also sources of practice as they mandate how military operations are to be conducted and thus one might assume that the practice of the nation issuing these manuals will be in accordance to the instructions given.

It has to be acknowledged that there are statements at variance with other military manuals for example the US Naval Handbook, states: 'As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead.'⁷¹ The 'as far as military exigencies permit' is almost identical to the 'as far as military considerations allow' reservation. There is a similar statement in the Canadian Law of Armed Conflict Manual of 2001 with respect to civilian dead in the hands of a party to the conflict which states: "As far as military considerations permit, the belligerents must facilitate any steps to search for killed and wounded, to assist shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment."⁷² However, these statements are at odds with the bulk of the military manuals and as argued above, contrary practice from a couple of states is not decisive, as all nations have an interest in armed conflict.

The other important source of support for this rule is found in the sections on national legislation, national case-law and other national practice. Indonesia, Rwanda and the Philippines are all states with legislation providing for searching for the dead in situations of non-international armed conflict, without any reservation, which supports the customary status of the rule in situations of non-international armed conflict.⁷³ The legislation is also particularly important evidence of *opinio juris* as it is bringing domestic law into conformity with international legal obligations.

National case-law gives an example of one case, the Israel High Court of Justice Judgment in the *Jenin (Mortal Remains)* case.⁷⁴ The court states that the obligation to search for and collect the dead derives from 'respect for every dead.'⁷⁵ The Court also holds that locating the dead is a 'highly important humanitarian deed'.⁷⁶ This is a very important as Israel is not a party to either of the Additional Protocols and its practice has a special significance. It has to be noted that in this section, there is not specific evidence that Israel has brought its actual practice into conformity with this ruling.

Reports of actual practice of three states support the existence of this rule. Indonesia reported to the ICRC that whenever circumstances permit all possible measures should be taken to search for the dead. The Philippines also reports that in an armed conflict where guerilla warfare is the strategy used, distinguishing between civilians and combatants is very difficult. Therefore, they use the same rules for both civilians and combatants. The United States reported that each party to a conflict permit teams to

⁷⁰ Henckaerts and Doswald-Beck (n 1) vol 2, 2656-60.

⁷¹ *ibid*

⁷² *ibid*

⁷³ *ibid*

⁷⁴ Israel, High Court of Justice, *Jenin (Mortal Remains) case* (Ruling), 14 April 2002.

⁷⁵ *ibid* para 9.

⁷⁶ *ibid*

search for and recover the dead from the battlefield and that all possible measures to search for the dead is the *opinio juris* of the United States.⁷⁷ Once again the practice of the United States is significant as it is a non-party state to both protocols.

With respect to this rule, there seems to be a virtually uniform and extensive practice and *opinio juris* (as expressed in numerous military manuals) identified to support this rule's applicability to civilians from both party and non-party states to Additional Protocols I and II.

2.2 - Rule 113

Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited.⁷⁸

The ICRC study again supports the application of this rule in international and non-international armed conflict. There are two parts of the rule that contain separate elements of state practice and *opinio juris*. The first part is the practice supporting respect for the dead. This rule is relatively uncontroversial as this provision is included in Article 16 of Geneva Convention IV, now universally ratified. Notwithstanding that fact, the Customary Humanitarian Law database is replete with practice and *opinio juris*, although the practice is far more detailed with respect to military casualties.

With respect to the first part, protection of the dead against despoliation, the commentary in its first part on treaties indicates that this obligation was first codified in the 1907 Hague Convention (X).⁷⁹ The most recent treaty included is the Statute of the International Criminal Court which has set out a war crime in Article 8 (2) (b) (xxi) and (c) (ii) of 'committing outrages upon personal dignity', applicable in international and non-international armed conflict and, which according to the Elements of Crimes, also applies to dead persons. This branch of international criminal law reflects the long-standing prohibition against pillage, defined as 'looting or plundering of enemy, public or private, property by individuals for private ends'.⁸⁰ Support for this provision applying to non-international armed conflict is found in many military manuals and a large sampling of domestic criminal legislation.⁸¹

There were several trials after the Second World War in reference to charges of mutilating the dead. In the *Pohl case* in 1947, the US Military Tribunal at Nuremberg stated that robbing the dead 'is and always has been a crime'.⁸² In a non-international armed conflict, it has been argued by the Prosecutor before Colombia's Council of State

⁷⁷ Customary Humanitarian Law database, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule112 accessed 20 January 2014.

⁷⁸ *ibid* 409.

⁷⁹ Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (adopted 18 October 1907, entered into force 26 January 1910) reprinted in Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff 1988) 314-318 art 16:

After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment. They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.

⁸⁰ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004).

⁸¹ International Criminal Court Elements of Crimes, found at www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf accessed 20 January 2014.

⁸² *ibid* 409.

that the obligation to respect the dead is inherent in Common Article 3 to all four Geneva Conventions.⁸³

Criminalization of violation of this rule by national jurisdictions is important evidence of *opinio juris* but also of state practice as prosecution for violation of these rules represents actual practice. The International Criminal Court has 121 state parties but has yet to issue a prosecution for this offence but practice in other national and international criminal tribunals, as stated above, supports the existence of this rule.

The second part of the rule, the prohibition against mutilation of the dead is a long-standing obligation in armed conflict and is also included in the universally ratified First and Second Geneva Convention with respect to the military dead.⁸⁴ There are statements in support of the rule contained in several military manuals. For example a new piece of state practice mentioned in the database is that of Australia's Law of Armed Conflict Manual of 2006 which states:

The remains of the dead, regardless of whether they are combatants, non-combatants, protected persons or civilians are to be respected, in particular their honour, family rights, religious convictions and practices and manners and customs. At all times they shall be humanely treated.⁸⁵

In its ruling in the *Jenin Mortal Remains case* in 2002, dealing with the question of when, how, and by whom, the mortal remains of Palestinians who died in a battle in the Jenin refugee camp should be identified and buried. The High Court stated 'Needless to say, the burial will be made in an appropriate and respectful manner, maintaining the respect for the dead.' Crucially the court held: 'In this matter, no distinction will be made between bodies of armed combatants and the bodies of civilians.'⁸⁶

Therefore, the practice for this second part of the rule seems to be applicable to military and civilian casualties. Once again there does not seem to be contrary practice identified and the criminalization of the despoiling of bodies both domestically and internationally certainly supports the customary nature of this rule. This rule would be customary based on extensive evidence of *opinio juris* and of uniform but minimal practice.

2.3 - Rule 114

Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.⁸⁷

This rule is to be distinguished from the other rules examined here, as it is argued in the commentary to be customary only in international armed conflict.⁸⁸

⁸³ *ibid* 411.

⁸⁴ Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 19 August 1949, entered into force 21 October 1950) (Geneva Convention II) 75 UNTS 85 art 18.

⁸⁵ Henckaerts and Doswald-Beck (n 1) vol 2, 2663.

⁸⁶ *ibid* 2667.

⁸⁷ *ibid* 411.

⁸⁸ 'For example, when it could not be concluded that Rule 114 was part of customary law in non-international armed conflicts, resolutions in support of such a conclusion did not tip the balance because practice outside them was not consistent.' *ibid* note 1, 413–414.

The practice supporting this rule is divided into two sections, the first with regard to the return of remains and the second concerning the return of personal effects. There is a large volume of practice recorded for the first obligation with respect to return of remains. It has to be noted firstly that again there are no specific treaty provisions until Additional Protocol I with respect to civilian remains except for the second paragraph of Article 130 of Geneva Convention IV with respect to internees which provide that “The ashes shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.”⁸⁹ The obligation to facilitate the return of the remains is located in a number of military manuals. This includes the United States, again not a party to Additional Protocol I.⁹⁰

Examples of practice include agreements to return the remains of both military and civilian dead in the conflict between Egypt and Israel in 1975-76. Another example is the Indonesian hand-over in 1991 of the ashes of 3500 Japanese soldiers killed during the Second World War in Irian Jaya. Finally, in the *Abu-Rijma* case before Israel’s High Court in 2000, the Israel Defence Forces carried out DNA identification tests when asked by family members to repatriate remains.⁹¹

In non-international armed conflict the ICRC study gives examples of practice, as there are no treaty provisions with respect to return of remains or property of deceased. Examples include: an exchange under ICRC auspices of the mortal remains of more than 1000 soldiers and LTTE fighters in Sri Lanka in 1999. In 1985, Colombia’s Administrative Court in Cundinamarca held that families must not be denied their legitimate rights to claim the bodies of their relatives, transfer them to wherever they see fit and bury them. In 1974 the UN General Assembly called upon parties to armed conflicts, regardless of their character, ‘to take such action as may be within their power...to facilitate the disinterment and the return of remains, if requested by their families’. The Plan of Action for the Years 2000-2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, requires that all parties to an armed conflict take effective measures to ensure that ‘every effort is made...to identify dead persons, inform their families and return their bodies to them.’⁹² Notwithstanding this practice and statements, it is argued by the authors of the study that this data is not sufficient enough to support the rule as customary in non-international armed conflict.

Other reported practice includes the Philippines Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains which in Proposal 1.2 provides: ‘At the request of the party on which the deceased depended, the parties to the conflict shall organize the hand-over of the mortal remains.’ The Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines in Article 3 (4) states that ‘breach of [the] duty to tender immediately [the remains of those who have died in the course of the armed conflict or while under detention] to their families” shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.’⁹³

Even though there is some significant practice that supports the rule for civilians in non-international armed conflict, the vast number of military manuals cited only include this

⁸⁹ Geneva Convention IV (n 60) art 130.

⁹⁰ Henckaerts and Doswald-Beck (n 1) 2683-2684.

⁹¹ *ibid* 412-414.

⁹² *ibid*

⁹³ Customary Humanitarian Law database, at <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule114> accessed 20 January 2014.

obligation with respect to military personnel in international armed conflict and therefore, the rule is not said to be established as customary for civilians in non-international armed conflict. However, the large body of practice supports this rule as being applicable in international armed conflict as extensive and uniform, as critically there seems to be no contrary practice reported. On the majoritarian approach of *Nicaragua* one might well make an argument that based on the practice reported above the rule is customary for civilian in non-international armed conflict as the practice relates to rebels who may, or may not be, combatants. However, the point is well made that the density here may not be sufficient on the *North Sea Continental Shelf* test. This is one area that needs further reporting from states to the ICRC.

The return of personal effects is also codified in the Geneva Conventions and they should be returned by way of the Information Bureaux.⁹⁴ But with respect to civilians Geneva Convention IV only covers those civilians who have been interned so that an examination of state practice is necessary to see if there is a customary obligation in international armed conflict to return valuables of non-interned dead civilians.

In this case regrettably the reported practice with respect to the property of civilians seems to be almost non-existent in both the study and the database. It cannot be argued that there is a trend towards customary status on even a majoritarian view unless further work is done with respect to identifying practice with respect to civilians. Although, countries party to Additional Protocol I have this obligation with respect to civilians, the compilation of the practice thus far does not support the same obligation for those states not party to the Protocol. Henckaerts would argue that the lack of contrary practice would support this rule, but in this case, even on a deductive approach one fails to find statements of *opinio juris* leading to a supposition that the rule exists.

2.4 - Rule 115

The dead must be disposed of in a respectful manner and their graves respected and properly maintained.⁹⁵

In spite of the short length of the rule, the ICRC had divided the practice into several sections. The ICRC study asserts that state practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflict.

Section A is the general obligation of disposal of the dead

It has to be noted once again that for civilians this obligation is only established in Article 130 of Geneva Convention IV for internees. An important piece of practice supporting the customary status of this rule for civilians is of the Philippines, which was a non-party state to Additional Protocol I until May of 2012, although it was a party to Additional Protocol II from 1986. The Philippine Army Soldier's Handbook on Human Rights and International Humanitarian Law (2006) provides:

After an engagement:...

6. Bring the bodies to the police, if possible and demand receipt. If possible, bring the dead to proper authorities. If not, bury them and mark their graves so they can be retrieved later. This will dispel any doubts of foul play.

⁹⁴ Henckaerts and Doswald-Beck (n 1) 413.

⁹⁵ *ibid* 414.

7. Inform immediately the bereaved families of the dead. Inform immediately the families of the dead. This includes the dead enemies and crossfire victims. Crossfire victims are entitled of burial assistance from the government. Provide whatever assistance to the families of the dead, to include financial help, if possible.⁹⁶

A non-party state Israel in its Manual on the Rules of Warfare (2006) states: “The bodies of the fallen must not be desecrated and they must be given suitable burial.”

The manual further states:

Following barbaric acts committed by soldiers, such as scalping, cutting off the ears and “collecting” fingers, the Geneva Convention was required to provide for the orderly and honourable burial of the enemy’s fallen. The pressure for this actually came from the combatants who wanted to give the last honours to their enemies and ensure that the same treatment would be accorded to their own fallen.

In addition the manual states:

The IDF [Israel Defense Forces] maintains a cemetery where the bodies are laid to rest of terrorists killed in skirmishes with the IDF. In exchange for the return of the bodies of IDF soldiers who fell, the bodies of Hezbollah fighters were returned to it.⁹⁷

The database identified that no official contrary practice was found with respect to either international or non-international armed conflicts. However, there is one case of contrary practice reported, a case of the disrespectful disposal of dead civilians in Papua New Guinea. This incident was condemned by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁹⁸

The practice here cannot be argued to be extensive but there are several statements of *opinio juris* supporting the rule from non-party states. The lack of contrary practice except for the one incident in Papua New Guinea seems to support Henckaerts contention that whatever practice there is supports the rule.

Section B is the respect for religious beliefs.

Additional Protocol I countries clearly include civilians within this obligation. For example Australia’s LOAC Manual of 2006 states.

9.103 The remains of the dead, regardless of whether they are combatants, non-combatants, protected persons or civilians are to be respected, in particular their honour, family rights, religious convictions and practices and manners and customs. ... The minimum respect for the remains of the dead is a decent burial or cremation in accordance with their religious practices.

9.104 The burial or cremation of the dead shall be carried out individually in accordance with the religious rites and practices of the deceased.⁹⁹

The practice with respect to civilians is limited and is considered below in the discussion of cremation of bodies and mass graves. Again what limited practice there is – seems to support the rule.

Section C concerns the practice regarding cremation of bodies.

⁹⁶ New practice added to the Customary Humanitarian Law database, available at <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule115> accessed 20 January 2014.

⁹⁷ *ibid*

⁹⁸ UNCHR, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ (27 February 1996) UN Doc E/CN.4/1996/4/Add.2, para 73.

⁹⁹ New practice added to the Customary Humanitarian Law database (n 96).

The First and Second Geneva Conventions mandate that dead combatants are not to be cremated 'except for imperative reasons of hygiene or for motives based on the religion of the deceased'. This provision also applies only to civilians in the case of internees. The rule does not specify this obligation in detail except 'disposed of in a respectful manner'. Only the commentary provides this detail. Once again the practice is lacking with respect to civilian casualties as the military manuals seem to deal with dead combatants. For example Israel's Manual on the Rules of Warfare of 2006 states that '[A]s a rule, the enemy's fallen should be buried as per their religious rites as far as possible, and the bodies may only be burned in cases where this is necessary for reasons of hygiene or for religious reasons.'¹⁰⁰ It could be assumed that civilians could be part of the 'enemy's fallen' but it seems more likely the manual is addressing obligations for combatants.

There is an important element of practice that could be very influential in deciding that this part of the rule applies to civilians. In 1994, in the final report of grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission stated with respect to cremation that 'Bodies should not be cremated except for hygiene reasons or for the religious reasons of the deceased'. The context of that statement made it clear that they were referring to found mass graves of civilians and combatants in the former Yugoslavia.¹⁰¹ Further according to a report of practice from Malaysia bodies of members of enemy forces and civilians and who are unclaimed are buried according to their religious rites.¹⁰² Once again limited practice and statements of *opinio juris* from non-party states supports the customary status of this part of the rule.

Section D is burial in individual or collective graves

The obligation under the Geneva Conventions is to bury dead combatants individual graves 'unless unavoidable circumstances require the use of collective graves'.¹⁰³ This also applies in Geneva Convention IV to dead internees. The practice with respect to civilians who are not interned is sparse but in 1995, Colombia's Council of State held that the deceased must be buried individually, subject to all the requirements of the law, and not in mass graves.¹⁰⁴ As Colombia is involved in a non-international armed conflict, some of the deceased will indeed be civilians.

Further practice regarding civilians is with regard to the situation in the Former Yugoslavia. The United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992) in its final report in 1994 on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia noted with respect to mass graves that:

¹⁰⁰ *ibid*

¹⁰¹ UN Commission of Experts Established pursuant to UNSC Res 780 (6 October 1992) UN Doc S/RES/780, Final Report, Annex Summaries and Conclusions (31 May 1995) UN Doc S/1994/674/Add.2, vol 1, para 503 (a) and (b).

¹⁰² Report on the practice of Malaysia, in Henckaerts and Doswald-Beck (n 1) 2699.

¹⁰³ Art 120 of the Third Geneva Convention states: 'wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place'. Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention).

¹⁰⁴ *ibid* 2706.

A mass gravesite is a potential repository of evidence of mass killings of civilians and POW's ...The manner and method by which a mass grave is created may itself be a breach of the Geneva Conventions, as well as a violation of the customary regulations of armed conflict...Parties to a conflict must also ensure that deceased persons are ...buried in individual graves, as far as circumstances permit.¹⁰⁵

Importantly, this committee made no distinction between civilian and combatants on how victims were to be treated. Again the customary nature of this rule is established.

Section E is grouping of graves according to nationality.

There is nothing in treaty law with respect to civilians that the graves be grouped according to nationality. This seems to be well established in the practice and treaty law with respect to prisoners of war and dead military personnel but there seems no such practice with respect to civilians.¹⁰⁶ However, this might only be of significance for interred civilians as civilians killed in conflict are likely to be buried in their home territory. This is not established as customary for civilians.

Section F is respect for and maintenance of graves.

As discussed above, this provision is included in Article 130 of Geneva Convention IV but only with respect to detainees. However, Article 34 of Additional Protocol I extends this protection to all civilians. Canada, a party state, confirms the detail of the obligation in its 1999 Law of Armed Conflict Manual which states that the grave sites of all persons who have died as a result of hostilities or while in occupation or detention in relation thereto shall be 'properly respected [and] maintained.'¹⁰⁷

Once again the practice of Israel is highlighted as a non-party state. Israel's Manual on the Rules of Warfare (2006) states: "The IDF (Israel Defense Forces) maintains a cemetery where the bodies are laid to rest of terrorists killed in skirmishes with the IDF."¹⁰⁸ In the UN report on Yugoslavia referred to in the previous rule the report also states that graves were to be maintained.¹⁰⁹

In examining the rule in totality it is evident that the practice seems very meagre with respect to civilians although the Israeli practice has to be influential in this regard. It is not suggested that Israel, in itself, has special status but it is important evidence of actual practice in a non-party state. The practice in the database emphasized, as Henckaerts suggested, the practice of non-party states.

It has to be noted that although there is extensive reliance on the United States Military Manuals to support the rule, the provisions in these manuals seem to refer only to military casualties. As important as this rule is, with respect to civilian casualties, there is a dearth of practice identified, which cries out for more extensive research. However, one can support this rule as customary based on Henckaerts argument that in some circumstances there will be little practice but what there is, is virtually uniform. This seems to be the case for each part of the rule as there is only one example of

¹⁰⁵ UN Commission of experts (n 101), vol 1, para 503 (a) and (b).

¹⁰⁶ The Commonwealth War Graves commission groups graves into nationalities.

¹⁰⁷ New practice added to the Customary Humanitarian Law database, in <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule116> accessed 20 January 2014.

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

mistreatment of civilian casualties given of Papua New Guinea. In this case this seems to be the circumstances and one can support this rule as customary for civilians in international and non-international armed conflict.

2.5 - Rule 116

With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves.¹¹⁰

The obligation to identify dead military personnel was first codified in the 1929 Geneva Convention, which once again could be argued to be codification of custom with respect to prisoners of war.¹¹¹ Part of Article 26 stated that '[t]he belligerents shall ensure that prisoners of war who have died in captivity are honourably buried, and that the graves bear the necessary indications and are treated with respect and suitably maintained.'¹¹² Identification is required for all military dead in the 1949 Conventions and expanded to the obligation to record the dead and transmit the information to the other party and the Central Tracing Agency. This obligation is also set out in numerous military manuals but this established only compliance with the universally ratified Geneva Conventions.

Regrettably with respect to civilians, the obligation in the Fourth Geneva Convention for identification of casualties is set out in Article 129 but again it is only with respect to detainees. Other deceased civilians do not receive the same protection until Article 33 of Additional Protocol I which mandates the recording of information for persons who died as a result of occupation or hostilities.¹¹³ Therefore, as with Rule 112, this is new proposed new customary law with respect to civilians and must be tested against density of state practice and *opinio juris*.

The relevant practice is again divided into several sections.

A. Identification of the Dead prior to disposal.

The ICRC study discusses the interpretation of this rule. The obligation to identify the dead is an obligation of means, and parties have to use their best efforts and all means at their disposal in this respect. According to the practice collected measures included collecting one half of the double identity disks, autopsies, the recording of autopsies, the establishment of death certificates, the recording of the disposal of the dead, burial in individual graves, prohibition of collective graves without prior identification, and the proper marking of graves. Practice also suggests that exhumation combined with the

¹¹⁰ *ibid* 417.

¹¹¹ *Judgment of the Nuremberg International Military Tribunal* (1947) 41 AJIL 172, 232.

¹¹² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies of the Field (adopted 26 July 1929, entered into force 19 June 1931) 118 LNTS 303.

¹¹³ Additional Protocol I (n 61) art 33(2):

In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

(a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;

(b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

application of forensic methods, including DNA testing, may be an appropriate method of identifying the dead after burial.¹¹⁴

A final comment is that this obligation requires effective cooperation between all parties concerned. The Plan of Action for the years 2000-2003, adopted by the 27th Conference of the Red Cross and Red Crescent in 1999, requires that in order to comply with this rule 'appropriate procedures be put into place at the latest from the beginning of an armed conflict.'¹¹⁵

There is consistent practice that supports this rule as applicable in non-international armed conflict and with respect to civilian deaths. Human Rights Special Rapporteurs and other human rights mechanisms have called for measures in the context of the non-international armed conflicts in Chechnya, El Salvador, and the former Yugoslavia. In December 1991, when the conflict in the former Yugoslavia was characterized as non-international, the parties to the conflict reached an agreement with respect to the exchange of information regarding the identification of the deceased.¹¹⁶ Human rights case-law of Argentina and Colombia has required that prior to their disposal the dead must be examined so that they can be identified and the circumstances of death established.¹¹⁷ Cases with respect to Honduras held that the State was obliged to do all it could to inform the relatives of the location of the remains of persons killed as a result of enforced disappearances.¹¹⁸ However, one cannot use the cases of human rights tribunals to support state practice or *opinio juris* unless these cases referred to the relevant humanitarian law obligations and declared these situations to be armed conflict. In these two cases in Honduras, this did not happen although one could argue with respect to the cases in Colombia and Argentina that non-international armed conflicts existed.

The international community has also acted to support this obligation including the 1974 General Assembly Resolution which called upon parties to cooperate 'in providing information on the missing and dead in armed conflicts'.¹¹⁹ International practice is only relevant in so far as it reflects state agreement to an international legal obligation, and this 1974 Resolution was a consensus resolution reflecting agreement by all member states to the United Nations.

The practice in this case is extensive with respect to civilian casualties particularly the example of the conflicts in Colombia, Chechnya, El Salvador and the former Yugoslavia. This part of the rule is unquestionably customary.

Section B Recording of the location of graves

The practice identified under this section is largely limited to military casualties, although the manuals of Russia and Sierra Leone mention both civilian and military casualties. There is no practice with respect to civilians except for the human rights case law in the Inter-American Court as discussed above. Regrettably one cannot argue that with respect to civilian casualties it is a customary legal obligation to record the location of

¹¹⁴ Henckaerts and Doswald-Beck (n 1) 417-420.

¹¹⁵ *ibid*

¹¹⁶ Henckaerts and Doswald-Beck (n 1) 419.

¹¹⁷ Colombia, Council of State, *Case No. 10941* (Judgment), 6 September 1995, 37-42 and Argentina National Court of Appeals, *Military Junta Case* (Judgment), 9 December 1985.

¹¹⁸ Inter-American Court of Human Rights *Velasquez Rodriguez* (1989) 28 ILM 294; Inter-American Court of Human Rights *Godinez Cruz* Inter-Am Ct HR (Ser C No 4) 21 July 1989.

¹¹⁹ *ibid*

civilian graves except for those who die in detention where it is an obligation under the universally ratified Article 129 of Geneva Convention IV.

In fact, it may well be in this case that there may be contrary practice not identified in this study. One only needs to refer to the armed conflict in Yugoslavia to identify a practice of concealing civilian graves. The whole phenomenon of ‘the disappeared’ confirms that in most cases civilians are left undiscovered and unidentified until years after conflict. This is one area of the study that might well have enumerated examples of concealment of civilian deaths, a practice that continues to this day in Syria.¹²⁰

Section C Marking of the graves and access to gravesites

Once again the practice is limited, particularly for non-party states. A party state, Canada confirms that marking of graves is fundamental for civilians as well. Their Law of Armed Conflict Manual (2001) states in its chapter on the treatment of the wounded, sick and shipwrecked:

The remains of all persons who have died as a result of hostilities or while in occupation or detention in relation thereto shall be respected, and their gravesites properly respected, maintained and marked.¹²¹

The same argument as made above applied to marking of graves and access to gravesites. Mass graves are being discovered in many places in the world where people remain unidentified¹²².

Section D Identification of the dead after disposal

The bulk of the practice reported under this obligation, clearly relates to military dead as the Military Manuals, quoted from several countries, emphasize the practice of retaining one half of the identity discs. However, there is an important non-party state practice by virtue of a domestic case. In Israel, the *Abu-Rijwa* case reported that the Israel Defense force carried out DNA identification tests on the remains of two ‘terrorists’ buried in Israel at the request of the Jordanian family who had petitioned the Israeli High Court in 1992 for the return of the remains of their son.¹²³

Nevertheless, once again one case may not constitute enough evidence to assume the development of a customary rule for civilians. However, in these circumstances one could support Henckaerts’ assertion that within the extensive practice identified there was no contrary practice to this proposed rule and this one case constitutes how dead civilians will be treated.

Section E Information concerning the dead

In this regard there is important practice supporting this portion of the customary obligation as applicable to civilians - namely the sharing of information concerning the dead. The summary of practice reports:

‘In proposal 1.1 of the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains, the parties to the conflict in the

¹²⁰ Susan Breau and Rachel Joyce, ‘The Responsibility to Record Civilian Casualties’ 2013 5(1) Global Responsibility to Protect 28.

¹²¹ Henckaerts and Doswald-Beck (n 1) 2728.

¹²² See, for example, Human Rights Watch, *Iraq: The Mass Graves of al-Mahawil: The Truth Uncovered*, 29 May 2003, E1505, available at <www.unhcr.org/refworld/docid/3f4f59567.html> accessed 20 January 2014.

¹²³ Henckaerts and Doswald-Beck (n 1) 2732.

former Yugoslavia agreed that they shall provide to the adverse party/parties, through the intermediary of the ICRC and National Information Bureaux and, as rapidly as possible, all available information regarding: the identification of deceased persons [and] the gravesites of deceased persons belonging to the adverse parties.¹²⁴

Once again, intriguingly, it is Israel's Manual on the Rules of Warfare of 2006 that supports this practice.

Each side has the duty to record details of the fallen and details of the death, and to send to the other side half the identity tag worn by the fallen, his personal possessions and the death certificate. The Additional Protocols indicate the right of the families to know the fate of [their relatives] and provide that each side is required to search for the enemy's missing in action and allow access to search parties.¹²⁵

The practice seems to support this obligation as applicable to both civilian and military casualties.

In summary of rule 116, the volume of practice with respect to identification of bodies and burial in accordance with religious custom seem to have a volume of practice with respect to civilian persons sufficient on the 'extensive and virtually uniform' test established in the *North Sea Continental Shelf cases* to argue customary status with respect to civilians in international and non-international armed conflict. However, the practice with respect to recording the location of the graves and notification of that location to relatives seems very sparse indeed. There is a dense practice with respect to military casualties and one needs only look to an organization like the Commonwealth War Graves Commission to see its impact. However, this part of Rule 116 does not seem to be unquestionably customary for civilians and more density of state practice and declarations representing *opinio juris* is needed.

2.6 - Chapter 36 Missing persons- Rule 117

Each party to the conflict must take all feasible measures to account for persons reported missing and as a result of armed conflict and must provide their family members with any information it has on their fate.¹²⁶

Section A Search for missing persons:

There is a large volume of practice and statements of *opinio juris* that support this rule. For example Australia's LOAC Manual of 2006 states:

9.99 As soon as possible each party to an armed conflict must search for those reported missing by the enemy...

9.101 *The search.* As soon as circumstances permit, but at the latest once active hostilities have ceased, all protagonists to the conflict shall commence to search to the fullest extent possible for persons reported missing by one of the belligerents ...

9.102 *Particulars of missing persons.* In order to facilitate the search for missing combatants ... each of the protagonists shall ... record ... information for each person detained, imprisoned or otherwise held in captivity for a period of two

¹²⁴ *ibid* 2735.

¹²⁵ Customary Humanitarian Law database (n 107), new practice Rule 116.

¹²⁶ Henckaerts and Doswald-Beck (n 1) 421.

weeks, or who has died.¹²⁷

Canada's LOAC Manual (1999) provides: "As soon as possible, and certainly immediately upon the end of hostilities, each party to the conflict must search for those reported missing by the adverse party." The manual further states: "To facilitate the finding of missing personnel, parties to the conflict shall endeavour to reach agreements to allow teams to search for ... the dead from the battlefield areas."¹²⁸ Croatia's LOAC Compendium (1991) instructs local commanders to offer their assistance to the civil authorities in the search for missing persons. Indonesia's Military Manual (1982) provides: "The parties to the conflict should search for missing persons, who are reported by the adverse party, soon after the hostilities cease" and Israel's Manual on the Laws of War (1998) provides that according to the 1977 Additional Protocols, "each party must ... search for missing persons of the enemy and try to reach arrangements for the dispatch of search teams" and its Manual on the Rules of Warfare (2006) states that according to the 1977 Additional Protocols "each side is required to search for the enemy's missing in action and allow access to search parties". These are among the many military manuals cited to support this obligation, which is also supported by national legislation in several countries (Azerbaijan, Denmark, Ireland, Norway and Zimbabwe).

There is extensive practice supporting this rule in the practice of non-party states. For example the Israel-PLO Agreement on the Gaza Strip states in Article XIX of the 1994 Israel-PLO Agreement on the Gaza Strip, the Government of Israel and the Palestine Liberation Organization (PLO) agreed that:

The Palestinian Authority shall cooperate with Israel by providing all necessary assistance in the conduct of searches by Israel within the Gaza Strip and the Jericho Area for missing Israelis ... Israel shall cooperate with the Palestinian Authority in searching for ... missing Palestinians.¹²⁹

The Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states in Article 4 (9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides: "Every possible measure shall be taken, without delay, to search for ... missing persons".¹³⁰

The volume of practice with respect to searching for missing persons seems to confirm this rule as customary based on military manuals, national legislation, statement in international organizations and complementary practice in human rights committees and courts. This rule clearly passes the *North Sea Continental Shelf Cases* test of extensive and uniform.

Section B Provision of information on missing persons

Once again there is extensive practice by non-party states. Russia is a major non-party state involved in a non-international armed conflict in Chechnya. The practice of Israel is also very relevant. Two major agreements cited to support this part of the rule on providing information are:

Israel-PLO Agreement on the Gaza Strip

In Article XIX of the 1994 Israel-PLO Agreement on the Gaza Strip, the government of Israel and the Palestine Liberation Organization (PLO) agreed that:

¹²⁷ Customary Humanitarian Law database, new practice Rule 117, available at <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule117> accessed 20 January 2014.

¹²⁸ *ibid*

¹²⁹ Henckaerts and Doswald-Beck (n 1) 2743.

¹³⁰ *ibid*

The Palestinian Authority shall cooperate with Israel by providing ... information about missing Israelis. Israel shall cooperate with the Palestinian Authority in ... providing necessary information about missing Palestinians.

Protocol to the Moscow Agreement on a Cease-fire in Chechnya to Locate Missing Persons and to Free Forcibly Detained Persons

In the 1996 Protocol to the Moscow Agreement on a Cease-fire in Chechnya to Locate Missing Persons and to Free Forcibly Detained Persons, the working groups decided:

5. The competence of the joint working group shall extend to the location of persons who have been missing since 11 December 1994 ...

6. By 11 June 1996, the working groups shall exchange lists of forcibly detained persons.¹³¹

To further support this part of the rule is the citation of a large number of military manuals, national legislation and statements in international organisations. It clearly is extensive and uniform.

Section C International Cooperation to account for missing persons

Although the practice for international cooperation in accounting for missing persons is not as extensive, the variety and length of practice seems to support this rule as customary.

The first evidence of practice is the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam which in Chapter III provided that the parties were to help each other in obtaining information about military personnel and foreign civilians of the parties missing in action and to take any measures as may be required to get information about those missing. The Four-Party Joint Military Commission was to ensure joint action by the parties in implementing this part of the agreement. The Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provided in Article 5 that “The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for.”¹³²

A very important element of state practice is the conflict in Yugoslavia which provided evidence of a joint commission to trace missing persons and mortal remains. The 1991 Rules of Procedure of the Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia provides:

Rule 1(2)

... All of the Red Cross organizations concerned ... are designated as permanent advisers to the members of the Joint Commission.

Rule 2(1)

The International Committee of the Red Cross (ICRC), acting as a neutral intermediary, shall put at the Joint Commission’s disposal a delegation which will chair the meetings of the Joint Commission.

Rule 18(1)

The ICRC shall bring to the Joint Commission’s attention, on its own initiative, any communication, proposal, plan of work or information which might contribute to the efficiency of the Joint Commission’s work.¹³³

Furthermore, the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia states:

¹³¹ *ibid* 2751.

¹³² *ibid* 2757.

¹³³ *ibid* 2758.

- 2.1.1 Each party is responsible for compiling a list of its reported missing, as well as a file on each missing [person] ...
- 2.2.1 Each opened file shall be sent ... to the ICRC which shall arrange for it to be forwarded to the party concerned ...
- 2.2.2 ... the adverse party/parties shall take all possible measures (administrative steps and public appeals) to obtain information on the person reported missing ...
- 2.2.3 Once the enquiry has been completed, ... the form "official request for missing person" with the accompanying documents shall be returned in duplicate to the ICRC, which shall forward them to the party on which the missing person depends.¹³⁴

In further national practice arising out of Vietnam, in 1984, a joint Australian-Vietnamese operation was launched "to search for the remains and resolve the cases" of six Australian personnel listed as "missing in action" in Viet Nam and "to follow up any other case which might subsequently be drawn to its attention". The report states that the motive for the operation appears to be based primarily on political considerations (i.e. improvement of bilateral relations with Viet Nam).¹³⁵

In more recent national practice, in 2004, in a written answer to a question concerning civilian fatalities in Iraq, the UK Minister of State for Defence stated that 'UK forces inform the International Committee of the Red Cross of all confirmed civilian fatalities of which they are aware have been caused, or allegedly caused, by UK forces. The ICRC then endeavours to inform the relatives as soon as practicable.'¹³⁶

Section D Right of the Families to know the fate of their relatives:

There is a specific provision in Geneva Convention IV supporting this obligation:

Article 26 provides:

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

Although this is set out in more detail in the Additional Protocol I, it seems clear that for international armed conflict this is a universally binding obligation. In the Annotated Supplement to the US Naval Handbook (1997) states: "The United States also supports the new principles in [the 1977 Additional Protocol] I, art. 32 & 34, that families have the right to know the fate of their relatives."

This part of the rule is supported by a vast variety of practice but the provision in the Geneva Convention IV is decisive in international armed conflict. However, the practice is important for non-international armed conflict. This part of the rule as well is supported by the case law of the UN Human Rights Committee and regional human rights bodies. The right therefore, can be enforced by human rights courts as a free standing right of the family as discussed below. Although, human rights courts do not enforce the humanitarian law obligation it is evident that human rights will view the obligation contained in the right to a family life to search for the disappeared.¹³⁷

¹³⁴ *ibid*

¹³⁵ *ibid* 2759.

¹³⁶ Customary Humanitarian Law Database (n 127), new practice Rule 117.

¹³⁷ *ibid* 421-427.

The practice suggests that exhumation may be an appropriate method of establishing the fate of missing persons. Practice also indicates that possible ways of seeking to account for missing persons include the setting up of special commissions or other tracing mechanisms. Croatia's Commission for Tracing Persons Missing in War Activities in the Republic of Croatia is one example. The parties have an obligation to cooperate in good faith with each other and with the commission. The UN Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law provides that the UN force shall facilitate the work of the ICRC's Central Tracing Agency.¹³⁸

This rule is argued in the ICRC study to be customary by practice as set forth in a number of military manuals. It is also contained in some national legislation and supported by official statements. In an official statement in 1987, the United States supported the rule that the search for missing persons should be carried out 'when circumstances permit, and at the latest from the end of hostilities.' States and international organisations have on many occasions requested that persons missing as a result of the conflicts in Bosnia and Herzegovina, Cyprus, East Timor, Guatemala, Kosovo and the former Yugoslavia be accounted for. In the Yugoslav conflict there was the creation of the position of Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia.¹³⁹

International practice includes General Assembly Resolution 3220 which called on parties to armed conflict to provide information about those who are missing in action. The UN Commission on Human Rights in 2002 passed a resolution affirming that each party to an armed conflict 'shall search for the persons who have been reported missing by an adverse party.'¹⁴⁰

4. Conclusions

It is evident then, that on the stringent test in the *North Sea Continental Shelf* cases as supported by Henckaerts, that most of these rules studied here are customary international law which conforms to the conclusions found on the rules generally in the Wilmschurst and Breau study.¹⁴¹ Sadly, the rules with respect to return of personal effects, recording location of graves and notification of relatives of access to gravesites do not seem to have even on a majoritarian/deductive approach enough volume of state practice to establish these rules as customary with respect to civilians. It might have been preferable if the rules had specified that these rules were established with respect to military casualties. However, an argument could be advanced that these obligations logically follow upon retrieval of any casualty, particularly with respect to treating the body with dignity. Furthermore, the rules found not to be customary are strongly supported in human rights law, particularly based on the right of the families to know the fate of their relatives and it can be argued that human rights law applies in armed conflict.¹⁴² Finally, the large numbers of states parties to Additional Protocol I mean that only a few nations are not bound by those specific obligations.

¹³⁸ *ibid*

¹³⁹ *ibid*

¹⁴⁰ *ibid*

¹⁴¹ Wilmschurst and Breau (n 5).

¹⁴² Rachel Joyce and Susan Breau, 'Identifying and Recording Every Casualty of Armed Conflict' (2011) 5 International Journal of Contemporary Iraqi Studies 357.

For the international law researcher, the identification of state practice for these remaining obligations must continue as the ICRC database continues to be added to. The enormous amount of materials gathered constitutes a unique opportunity to wrestle with issues of density of state practice and the problematic element of *opinio juris*. The ICRC Customary Study will continue to cause debate with respect state practice and the formation of customary international law but these rules with respect to casualties, accord with the fundamental obligations in the laws of war as set out in the *Martens* clause:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.¹⁴³

Public conscience requires that all casualties of armed conflict are located, named, treated with dignity and remembered.

¹⁴³ Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900), available on line at <www.icrc.org/ihl.nsf/FULL/150?OpenDocument> accessed 20 January 2014.

‘Transferring sentenced persons (offenders) to the United Kingdom: Highlighting some of the human rights issues courts have had to deal with’

Jamil Ddamulira Mujuzi*

ABSTRACT: As at 30 September 2013 13 per cent of the prison population in England and Wales were foreign national offenders. Convicted UK nationals are also serving prison sentences in foreign jurisdictions. The UK government has taken measures such as the enactment of domestic legislation and the ratification of bilateral and multilateral agreements with other States for the specific purpose of facilitating the return of its citizens to serve their sentences at home. Many offenders have been transferred to the UK to serve their sentences. This article highlights and examines some of the human rights issues that have exercised UK courts in this endeavour.

1. Introduction

The United Kingdom Ministry of Justice reported that as at 30 September 2013 13 per cent of the total prison population in England and Wales comprised of foreign nationals¹ and over 1000 UK nationals were serving prison terms abroad.² In order to ensure that foreign national offenders are transferred to serve the last part of their sentences in their home countries and also

* Associate Professor of Law, Faculty of Law, University of the Western Cape (UWC) and Research Fellow, Community Law Centre (UWC). LLB (Hons) Makerere University; LLM (University of Pretoria); LLM (University of the Free State); LLD (UWC). I started writing and finished most of this article when I was on research visit to the Max Planck Institute for Foreign and International Criminal Law, in Freiburg, Germany in March 2013. I presented a shortened version of this paper at Migration Policy Conference (Migration, Stockholm and Beyond), organised by the Migration Policy Department of the Netherlands Ministry of Security and Justice, The Hague, December 2013. I am grateful to the Institute for the Research space and also to UWC and the South African National Research Foundation for funding my research stay at the Institute and my travel to attend the conference in the Netherlands. I am also grateful to SPILJ’s independent reviewers for their comments on an earlier draft. Email: djmujuzi@gmail.com

¹ See Ministry of Justice, ‘Offender management statistics (quarterly) – April to June 2013’ published 31 October 2013 at <www.gov.uk/government/publications/offender-management-statistics-quarterly-april-to-june-2013> accessed 29 December 2013. For a discussion of how foreign national prisoners are managed in the UK see Laura Dubinsky, Hamish Arnott and Alasdair Mackenzie, *Foreign National Prisoners: Law and Practice* (LAG 2012) 525-537.

² See Prisoners Abroad at <www.prisonersabroad.org.uk/> accessed 29 December 2013; see also ‘Over 1,000 Britons are jailed over drugs abroad’ BBC News (London, 3 February 2010) at <http://news.bbc.co.uk/2/hi/uk_news/8493551.stm> accessed 29 December 2013. In June 2014 a Private Member’s Bill, Foreign National Offenders (Exclusion from the United Kingdom) Bill, was presented by Mr Phillip Hollobone, to The House of Commons and its broad objective is ‘to make provision to exclude from the United Kingdom foreign nationals found guilty of a criminal offence committed in the United Kingdom.’ The Bill requires the Secretary of State ‘make provision in regulations for any foreign national convicted in any court of law of a qualifying offence to be excluded from the United Kingdom’ (Clause 1(1)). If passed in its current form, it will have far reaching consequences for foreign offenders in the UK as any person who is not a British citizen who is convicted by any court for any offence by which a term of imprisonment may be imposed shall be deprived of any right to remain in the UK. However, the discussion of the Bill falls outside the scope of this article. For a copy of the Bill, see <www.publications.parliament.uk/pa/bills/cbill/2013-2014/0035/14035.pdf> accessed 29 December 2013.

for UK nationals or citizens to be transferred to serve their sentences in the UK,³ the UK government has signed bilateral prisoner transfer agreements with several African, Asian and Latin American countries⁴ and ratified several international agreements, including the Council of Europe's Convention on the Transfer of Sentenced Persons,⁵ the Additional Protocol to the Convention on the Transfer of Sentenced Persons,⁶ the Scheme for the Transfer of Convicted

³ For an offender to be transferred to the UK to serve his or sentence, most of the agreements provide that he/she has to be a national or citizen of the UK. However, the agreements between the UK and Uganda, Antigua and Barbuda, Barbados, Venezuela, Dominican Republic, Nicaragua, St Lucia, Guyana, Pakistan, Peru, Suriname, Vietnam, Libya and Ghana provide that for an offender to be transferred to the UK, such an offender has to be a British citizen or has to have close ties with the United Kingdom. For these agreements see (n 4 below).

⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana concerning the Transfer of Prisoners (17 July 2008); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons (11 February 2010); Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Great Socialist People's Libyan Arab Jamahiriya on the Transfer of Prisoners (17 November 2008); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco on the Transfer of Convicted Offenders (21 February 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Antigua and Barbuda on the Transfer of Prisoners (23 June 2003); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federative Republic of Brazil on the Transfer of Prisoners (20 August 1998) Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Barbados on the Transfer of Sentenced Persons (3 April 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Government of the Republic of Cuba on the Transfer of Prisoners (13 June 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Nicaragua on the Transfer of Prisoners (6 September 2005); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Dominican Republic on the Transfer of Prisoners (18 February 2003); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Bolivarian Republic of Venezuela on the Transfer of Sentenced Persons (12 June 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India on the Transfer of Convicted Persons (18 February 2005); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of St Lucia on the Transfer of Prisoners (27 April 2006); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Cooperative Republic of Guyana on the Transfer of Prisoners (5 April 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Pakistan on the Transfer of Prisoners (24 August 2007); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru on the Transfer of Sentenced Persons (7 March 2003); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka on the Transfer of Prisoners (6 February 2003); Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic on the Transfer of Sentenced Persons (7 May 2009); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Saudi Arabia on the Transfer of Sentenced Persons (2 January 2012); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Suriname on the Transfer of Prisoners (29 June 2002); and Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Socialist Republic of Vietnam on the Transfer of Sentenced Persons (12 September 2008). Copies of these treaties and their official citation are available at <<http://treaties.fco.gov.uk/treaties/treaty.htm>> accessed 29 December 2013. For a detailed discussion of the relevant provisions of these treaties see Jamil D Mujuzi, 'Analysing the Agreements (Treaties) on the Transfer of Sentenced Persons (Offenders/Prisoners) between the United Kingdom and Asian, African and Latin American Countries' (2012) 20 European Journal of Crime, Criminal Law and Criminal Justice 377.

⁵ Convention on the Transfer of Sentenced Persons (adopted 21 March 1983, entered into force 1 July 1985) CETS No 112.

⁶ Additional Protocol to the Convention on the Transfer of Sentenced Persons (adopted 19 December 1997, entered into force 1 June 2000) CETS No 167.

Offenders within the Commonwealth,⁷ and Council Framework 2008/909/JHA.⁸ It has enacted domestic legislation to give effect to its international obligations on the transfer of offenders.⁹

Literature on the issue of offender transfer between the UK and other countries has dealt with issues such as the possible rehabilitation of offenders on the one hand, and on the other, victims' rights in the convicting State.¹⁰ This article focuses on the role of the courts in the transfer of offenders and in particular, the jurisprudence emanating from UK courts on different issues that have emerged during the transfer of offenders mostly to the UK. The issues that are dealt with in this article include the purpose of the transfers; continued enforcement versus conversion; human rights issues; and the relationship between extradition and the transfer of offenders.

2. Purpose of the transfer of a prisoner to the UK

The difficulties that foreign national offenders face in prisons in many parts of the world are well documented.¹¹ According to the German government, these difficulties are the reason why the question of prisoner transfer is regularly taken up by nationals of other Member States.¹² Some of the treaties that the UK has signed up to on this matter stipulate that the purpose of the transfer is to facilitate the rehabilitation of the offenders,¹³ while some refer to facilitating the reintegration of the offender.¹⁴ Other agreements are silent on the question of the purpose of the covered transfers.¹⁵ Courts in the UK have had occasions to make observations on the purpose of the transfer of offenders from other countries to the UK. The House of Lords has held that: '... the primary policy objective of the United Kingdom statute, which is equally reflected in the preamble to the Convention, is the obviously humane and desirable one of enabling persons sentenced for crimes committed abroad to serve out their sentences within their own society.'¹⁶

⁷ Since 27 June 1991, the UK has been a participant to the Commonwealth Scheme for the Transfer of Convicted Offenders. See House of Commons Hansard text of 23 January 2012: Column 92W, available at <www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120123/index/120123-x.htm> accessed 29 December 2013.

⁸ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

⁹ Repatriation of Prisoners Act 1984.

¹⁰ See generally Dirk van Zyl Smit and John R Spencer, 'The European Dimension to the Release of Sentenced Prisoners' in Nicola Padfield, Dirk van Zyl Smit and Frieder Dunkel (eds), *Release from Prison: European Policy and Practice* (Willan 2010) 25-26.

¹¹ See Michal Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Max Planck Institute for Foreign and International Criminal Law 1993) 70-80; Dubinsky, Arnott and Mackenzie (n 1) 523; Anton M van Kalmthout, Femke Hofstee-Van Der Meulen and Frieder Dunkel (eds), *Foreigners in European Prisons* vol 1 (Wolf Legal Publishers 2007); and Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals* (Springer 2012) 509-514.

¹² See Case C/302/02 *Ejffing* [2005] ECR I-553, para 22.

¹³ See agreements between the UK and Saudi Arabia (preamble); Antigua and Barbuda (preamble); Barbados (preamble); St Lucia (preamble); Guyana (preamble); Pakistan (preamble); Sri Lanka (preamble); Peru (preamble); Cuba (preamble); Egypt (preamble); Venezuela (preamble); Brazil (preamble); Ghana (preamble); Dominican Republic (preamble); Nicaragua (preamble); Libya (preamble); and India (preamble) (n 4).

¹⁴ Agreement between the UK and Laos (preamble); Thailand (preamble); Hong Kong (preamble); and Morocco (preamble) (n 4).

¹⁵ Agreements between the UK and Rwanda and Uganda (n 4).

¹⁶ *Regina v Secretary of State for the Home Department, Ex parte Read* [1989] AC 1014, 1048 [*Regina*].

In *The Queen on the Application of: Steven Willcox v Secretary of State for Justice* the Court held that: '[t]he only purpose of the PTA is to enable the prisoner to serve the foreign term at home.'¹⁷ It has been observed in the context of prisoner transfer in Europe that:

[W]hile the early Council of Europe instruments in particular were designed to meet humanitarian concerns for offenders who were held in countries other than their own and were thus less likely to be 'socially rehabilitated', the focus has increasingly shifted to the interests of the sentencing states. These states often want troublesome foreign offenders to be returned to their home countries, not because the offenders' interests would be better served by being returned, but because the sentencing states want to be rid of them to reduce the burden they place on overstretched resources for the implementation of sentences.¹⁸

Whether or not English courts are of the view that the offender's transfer is aimed at his or her rehabilitation is not clear in the light of the fact that courts are yet to expressly state that the aim of the transfers is to rehabilitate offenders. Courts have emphasised the fact the transfer of an offender is done on humanitarian grounds. This could mean many things as case law shows that some British prisoners have requested their transfer from countries such as Laos¹⁹ and Thailand²⁰ because of the appalling prison conditions under which they were being detained compared to inmates back home. However, once they have been transferred, the question of whether or not they have been rehabilitated while serving their sentence in Britain becomes important in determining whether or not they will be released early.

In *Regina v Secretary of State for the Home Department, Oshin* the court held that: '[t]he sentence remains the sentence of the foreign sentencing court. Under Article 10, all we are doing is continuing it. What happens before transfer happens abroad and is governed by the law of the sentencing court.'²¹ The Court added that: '[a]ll we are doing here is enforcing the balance of the sentence and it is to this stage and this stage alone that our law applies as Article 9(3) requires.'²²

The reasoning in *In re Gilbey*²³ appears to suggest that even after the transfer the offender's imprisonment in the UK could still be aimed at serving retributive or deterrence purposes of punishment.²⁴ The Court held that: '[j]udging by the information placed before the court during the hearing, retribution and deterrence are important elements in the Thai approach to sentencing, and I can find nothing in the 1993 Act which would prevent me from confirming 10 years as an appropriate punishment part to serve these purposes in this case.'²⁵ One should recall that before an offender is transferred from Thailand to serve his sentence in the United Kingdom, he or she is required to serve a certain number of years in Thailand.

It probably would have been more appropriate in this case for the court to consider the number of years that the offender had served in Thailand proportionate to the retributive and deterrent aims of punishment and then determine the years to be served in Britain for the purposes of achieving the rehabilitation objective of punishment. This view is supported by the sentencing

¹⁷ *The Queen on the Application of: Steven Willcox v Secretary of State for Justice* [2009] EWHC 1483 (Admin) para 68 [*Willcox v Secretary*].

¹⁸ See van Zyl Smit and Spencer (n 10) 43.

¹⁹ *Samantha Orobator v Governor of HMP Holloway and Secretary of State for Justice* [2010] EWHC 58 (Admin) [*Orobator*].

²⁰ *Willcox v Secretary* [2009] EWHC 1483 (Admin).

²¹ *Regina v Secretary of State for the Home Department, Oshin* [2000] 1 WLR 2311, 2316.

²² *ibid*

²³ *Re Gilbey* [2010] HCJ 4, 2010 SCL 1249.

²⁴ For a recent detailed discussion of the purposes of punishment, see Gabriel Hallevy, *The Right to be Punished – Modern Doctrinal Sentencing* (Springer 2013) 16-56.

²⁵ *Re Gilbey* [2010] HCJ 4, 2010 SCL 1249 para 26.

approach of the UK Court of Appeal (Criminal Division) in *Norman Hull v Regina* where it was stated that: '[i]n the United Kingdom the minimum term is a judicially determined period which the prisoner is required to serve for retribution and deterrence following which the sole issues for determination by the Parole Board are the safety of the public and the reintegration of the prisoner upon his release.'²⁶ If this is correct then the reasoning in *Regina v Secretary of State for the Home Department, Oshin* that emphasis by the Convention on the Transfer of Sentenced Persons on the social rehabilitation of sentenced persons does not in any way impact on the issues of the release of the transferred offender²⁷ should not be taken as laying down a general rule. It should be understood as limited to the facts in each particular case or to cases with similar facts. The observation to be made in light of the foregoing discussion is that although many of the treaties between the UK and other countries on the transfer of offenders emphasise rehabilitation as the purpose of the transfer, and some emphasise reintegration of the offender courts are yet to hold expressly that the purpose of transfer is rehabilitation. This is an issue that courts are called upon to address directly. The challenge that the courts are likely to confront is that some treaties in this area point to social rehabilitation of the offender as their objective while others refer to reintegration and others are completely silent on this issue.

Although offender rehabilitation and reintegration go hand-in-hand, in the author's opinion there is a difference between the two, however subtle, namely: that rehabilitation is a means to reintegration. That is, an offender participates in rehabilitation programmes so that on his release he is able to reintegrate into society and reduce the risk of reoffending. The United Nations Office of Drugs and Crime considers both rehabilitation and reintegration to be critical in the fight against recidivism when it states that 'the rehabilitation of offenders and their successful reintegration into the community [are] basic objectives of the criminal justice process.'²⁸ However, in the same handbook rehabilitation programmes are given as some of the examples of the "social-reintegration programmes."²⁹ Many scholars distinguish between rehabilitation and reintegration³⁰ and courts in different countries also draw a distinction between rehabilitation and reintegration.³¹

²⁶ *Norman Hull v Regina* [2011] EWCA Crim 1261, 2011 WL 1151784, para 28.

²⁷ *Regina v Secretary of State for the Home Department, Oshin* [2000] 1 W.L.R. 2311, 2316, 2313.

²⁸ UN Office on Drugs and Crime, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders* (United Nations 2012) 5.

²⁹ *ibid* 6.

³⁰ See for example, Andrew Day, 'Tony Ward and Lyn Shirley, 'Reintegration Services for Long-Term Dangerous Offenders: A Case Study and Discussion' (2011) 50(2) *Journal of Offender Rehabilitation* 66; Harry R Dammer 'Rehabilitation in German Prisons' (1997) 24 (1-2) *Journal of Offender Rehabilitation* 1; and Keren Bachia 'Equine-Facilitated Prison-Based Programs Within the Context of Prison-Based Animal Programs: State of the Science Review' (2013) 52(1) *Journal of Offender Rehabilitation* 46-74.

³¹ For example, in *R v Mosili and Others* [2004] LSCA 7 (Judgment of 20 October 2004) [27], the Court of Appeal of Lesotho held that '[O]ne must guard against the imposition of sentences that are so high as ultimately to leave little or no hope for the offender's rehabilitation and reintegration into society.' In *Uganda v Waiswa & Others* [2010] UGHC 276 (Judgment of 1 October 2013) the High Court of Uganda held that the purpose of sentencing is rehabilitation and reintegration of the offender into society. Justice Yacoob of the South African Constitutional Court held in *Centre for Child Law v Minister for Justice and Constitutional Development and Others*; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) [80] that '...the possibilities of the rehabilitation of children and their reintegration into society must always be carefully considered by a sentencing court.' In *Bandisa v S* (A83/2010) [2010] ZAWCHC 430 (28 July 2010) the High Court of South Africa, in sentencing the offender to 10 years' imprisonment and suspending half of the sentence to deter him from reoffending, held that the sentence it imposed will ensure the rehabilitation of the appellant and his reintegration into his community and family. In *V v The United Kingdom* (Application No 24888/94) Grand Chamber (Judgment of 16 December 1999) in his concurring opinion Lord Reed stated that 'On the one hand, the importance attached to safeguarding the well-being and future of young children who have offended, and promoting their rehabilitation and reintegration into society, point towards holding their trials in private.'

3. Continued enforcement versus conversion

One of the most hotly debated issues that courts have dealt with is that of whether UK courts have the power to convert the sentences of offenders transferred from other countries. At the time of ratifying the Convention on the Transfer of Sentenced Persons, the UK made a declaration to the effect that it would not convert sentences for offenders transferred to the UK.³² The Repatriation of Prisoners Act does not provide for the conversion of sentences.³³ The Convention on the Transfer of Sentenced Persons provides for both continued enforcement (under Article 10) and conversion (under Article 11). At the time of ratifying the Convention on the Transfer of Sentenced Persons, some countries indicated that they would only allow transfers to their territory in cases where they would be able to convert the sentence in question.³⁴ Other States indicated that they would only allow transfer to their territory to ensure enforcement of the remaining sentence,³⁵ yet others expressly or impliedly allow both conversion and continued enforcement.³⁶

State practice shows that some countries are loathe to transfer offenders to destinations where conversion as opposed to continued enforcement of the transferred sentence was practised.³⁷ In 1988 the House of Lords made it very clear that continued enforcement and conversion are '[t]wo radically different procedures'³⁸ and that '[t]he nature and duration of any sentence...to be served in the United Kingdom as the administering state by a prisoner transferred here under the Convention is governed by the procedure for continued enforcement...to the exclusion of the procedure for conversion of sentence...'³⁹ In support of the continued enforcement of transferred sentences, the court in *In re Gilbey*⁴⁰ where the applicant had challenged the continued enforcement in Scotland of a life sentence that had been imposed on him in Thailand before his transfer, the Court held that:

[I]t must be remembered that the international arrangements which apply in cases such as the present reflect a commitment to mutual respect and recognition between or

³² It is reported that 'Declaration contained in a letter from the Permanent Representative of the United Kingdom, dated 30 April 1985, handed to the Secretary General at the time of deposit of the instrument of ratification, on 30 April 1985 [stated that]: The United Kingdom intends to exclude the application of the procedure provided for in Article 9(1)(b) in cases when the United Kingdom is the administering State.' See List of declarations made with respect to treaty No 112 at www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=1&DF=&CL=ENG&VL=1 accessed 29 December 2013.

³³ See Repatriation of Prisoners Act 1984, Chapter 47, section 3.

³⁴ These countries are: Georgia and Russia.

³⁵ These countries are: France, United Kingdom, Andorra, Bahamas, Belgium, Ireland, Japan, Korea, Luxembourg, Spain, Italy, Malta, Liechtenstein and Switzerland.

³⁶ For example, Greece and San Marino.

³⁷ *Plepi v Albania and Greece* (2010) 51 EHRR 3 the applicant was convicted and sentenced to 20 years' imprisonment for, inter alia, drug trafficking. The Greek court found that the applicants should serve their sentence in Albania because 'it considered that the sentences imposed by the Greek court were compatible with Albanian criminal law...' However, later '...the Albanian Ministry of Justice informed its Greek counterparts that there existed the possibility of conditional release for the applicants after serving half of their sentence, provided that they had displayed good behaviour in prison. Consequently... the Greek Ministry of Justice informed the applicants and the Albanian Ministry of Justice of its refusal to transfer the applicants on the ground that the sentences commuted by the Albanian court were inferior to those imposed by the Greek court and thus incompatible with the gravity of their offence and with the short time they had spent in Greek prisons.' See *ibid* 48. See also *Willcox v Secretary* [2009] EWHC 1483 (Admin) para 87 in which the court states that Thailand refused to sign a prisoner transfer agreement with the Netherlands because the latter has insisted on the possibility of being able to convert the sentences of its nationals transferred from Thailand.

³⁸ *Regina* [1989] AC 1014, 1048.

³⁹ *ibid* 1049.

⁴⁰ *Re Gilbey* [2010] HCJ 4, 2010 SCL 1249.

among the governments and legal systems of participating states. Maintaining such laudable objectives is of practical significance, not merely to the states concerned, but also to those individuals who might benefit from appropriate repatriation arrangements. From their point of view, any state conduct failing to reflect the necessary levels of respect and recognition may carry a serious risk of international cooperation being reduced or even withdrawn, and if any such risk were to materialise prisoners such as Mr Gilbey might be very much worse off than they are now. Against that background I would not, for my part, be prepared to fix a punishment part of a length which might, in Thailand, be regarded as derisory by comparison with the long term ineligibility for parole which characterised the sentence actually imposed.⁴¹

With the exception of a few cases that will be dealt with shortly, courts in the UK have maintained the position that if an offender is transferred to the UK, the UK will continue to enforce the sentence that has been imposed by the courts of the sentencing State unless such a sentence exceeds the maximum sentence that a UK Court would have imposed in terms of the UK legislation. In such a case, 'the Secretary of State adapting the sentence under Article 10 of the Convention has power to reduce the sentence to that maximum but no further...'⁴² Although that decision has been in place since 1988, there have been cases where courts have converted the transferred sentences.

In *In the Matter of Abdur Rashid Khan*⁴³ in which the offender was sentenced to life imprisonment by a Canadian court and transferred to serve his sentence in the UK, the court, after discussing the distinction between conversion and continued enforcement in terms of the Convention on the Transfer of Sentenced Persons held that: 'this country is bound by the legal nature and duration of the original sentence.'⁴⁴ The court emphasised that the offender had been sentenced to life imprisonment but held that there were mitigating factors⁴⁵ and concluded that the minimum sentence to be served by the appellant was 10 years' imprisonment.⁴⁶

In *Norman Hull v Regina*,⁴⁷ the applicant was convicted of murder and sentenced to life imprisonment in the Republic of Ireland. He was transferred to the UK to serve his sentence. In emphasising the fact that the High Court had erred when it converted the applicant's sentence,⁴⁸ the Court held that he was to be 'treated as if he had been sentenced to a term of life imprisonment fixed by a court in England and Wales.'⁴⁹ The court added that 'a mandatory life sentence has the same legal nature in Ireland and in the United Kingdom only to the extent that each is a sentence of imprisonment.'⁵⁰ Most importantly, the Court held that:

[I]t would appear that [the judge *In the Matter of Abdur Rashid Khan*] was [not] informed of the declaration made by the United Kingdom Government at the time of ratification of the transferred prisoners' Convention ...[and] proceeded upon the mistaken assumption that he was involved in a process of conversion of the sentence.⁵¹

⁴¹ *ibid* para 25(xi).

⁴² *Regina* [1989] AC 1014, 1053.

⁴³ *Re Abdur Rashid Khan* [2006] EWHC 2826 (QB).

⁴⁴ *ibid* para 15.

⁴⁵ *ibid* para 16.

⁴⁶ *ibid* para 17.

⁴⁷ *Norman Hull v Regina* [2011] EWCA Crim 1261, 2011 WL 1151784.

⁴⁸ *ibid* paras 45-46.

⁴⁹ *ibid* para 39.

⁵⁰ *ibid* para 47.

⁵¹ *ibid* para 41.

As mentioned above, the Court in *Abdur Rashid Khan* was fully aware that the UK was bound by the legal nature and duration of the sentence in question but chose to convert a life sentence to 10 years' imprisonment. Whether or not the Court's decision to convert the sentence was attributable to the fact that it was not aware that the UK had made a declaration at the time of ratification excluding the option of converting transferred sentences is unclear. In all the agreements on the transfer of offenders that the UK has entered with other countries it has excluded the possibility of converting sentences of convicting States.⁵² While dealing with the issue of whether UK courts were empowered to convert the sentence of an offender transferred from Thailand, the High Court, in *The Queen on the Application of: Steven Willcox v Secretary of State for Justice* held that: 'it is plain on the wording of the PTA that under it, the United Kingdom, has no power to convert a sentence so as to make it a sentence of the kind the United Kingdom courts might have imposed for the offence (and offender) in question.'⁵³

The case of *Samantha Orobator v Governor of HMP Holloway and Secretary of State for Justice*⁵⁴ raises an interesting point. The complainant was a "transferred life prisoner" from Laos to the UK.⁵⁵ The High Court rejected her argument that her trial in Laos had been a flagrant denial of justice and therefore her continued detention in the UK had violated her right to liberty in terms of Article 5 of the European Convention on Human Rights. However, applying the British law on the release of offenders,⁵⁶ the High Court found that there were mitigating circumstances in favour of the applicant⁵⁷ and held that the 'appropriate determinate sentence' was 3 years' imprisonment and that in terms of the English law if she 'had been sentenced to a term of 3 years, she would have been released on licence after serving one-half of her sentence.'⁵⁸ The Court reduced her sentence to a minimum of 18 months' imprisonment.⁵⁹ As the Court observed:

The claimant agreed to be transferred to the UK to serve the remainder of her sentence pursuant to the Treaty between the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic on the Transfer of Sentenced Persons ("the Prisoner Transfer Agreement" or "PTA"). The PTA did not come into force until 25 September 2009. But the UK and Laos signed a Memorandum of Understanding on 28 July 2009 that both states would immediately apply the full provisions of the PTA administratively. She was transferred from Laos to the UK on 7 August 2009 and has been detained in HMP Holloway ever since.⁶⁰

As mentioned earlier, the agreement between Laos and the UK provides for continued enforcement as opposed to conversion.⁶¹ As mentioned earlier, the Repatriation of Prisoners Act does not include conversion and the House of Lords held as early as 1988 that the Repatriation of Prisoners Act provided for continued enforcement at the exclusion of conversion. However, as indicated earlier, in this case the Court converted the sentence from one of life imprisonment to three years' imprisonment.

⁵² See agreements between the UK and Saudi Arabia (art 7); Laos (art 8); St Lucia (art 8); Nicaragua (art 8); Dominican Republic (art 8); Suriname (arts 7 and 8); Guyana (arts 7 and 8); Vietnam (art 9); Pakistan (art 9); India (art 8); Sri Lanka (art 10); Antigua and Barbuda (art 8); Peru (art 8(2)); Cuba (art 9(2)); Venezuela (art 8.2); Barbados (art 8); Brazil (art 7 and 8); Egypt (art 10 and 11); Thailand (art 6); Hong Kong (art 6); Morocco (art 13); Ghana (art 7); Rwanda (art 7); Libya (art 7); and Uganda (art 7) (n 4).

⁵³ *Willcox v Secretary* [2009] EWHC 1483 (Admin) para 86.

⁵⁴ *Orobator* [2010] EWHC 58 (Admin).

⁵⁵ *ibid* para 125.

⁵⁶ *ibid* paras 125-129.

⁵⁷ *ibid* paras 131-137.

⁵⁸ *ibid* para 138.

⁵⁹ *ibid* paras 138-139.

⁶⁰ *ibid* para 3.

⁶¹ Agreement between the UK and Laos art 8.

In refusing to follow the reasoning in *Orobator* the Court *re Gilbey*⁶² observed that: ‘the court had apparently proceeded on a straightforward application of domestic legislation, and without any discussion of the regime under the 1984 Act and relative Convention as authoritatively interpreted by the House of Lords in *Read*’ and that the House of Lords decision in *Read* ‘was, however, briefly mentioned for other purposes.’⁶³ It should be recalled that Ms Orobator had not been transferred on the basis of the Convention on the Transfer of Sentenced Persons. Rather she had been transferred on the basis of the PTA between Laos and the UK. However, the point to be emphasised is the following, namely, that had the court in *Orobator* referred to the House of Lords decision in question and to section 3 of the Repatriation of Prisoners Act in particular when it had dealt with the issue of ‘tariff’, it would probably have come to a different conclusion. Although the court in *Orobator* specifically referred to Article 8 of the PTA between the UK and Laos,⁶⁴ it nevertheless came to the conclusion that it could convert the sentence on the basis of UK law. On the basis of the above discussion, one can confidently conclude that the correct position in the UK is that of continued enforcement as opposed to conversion. This is evident from the treaties that the UK has signed with other countries. Moreover, it is also evident from Section 3 of the Repatriation of Prisoners’ Act, in the UK’s reservation to the Convention on the Transfer of Sentenced Persons and in the majority judgements handed down by courts including the House of Lords.

4. Human rights

One of the most important issues in the context of the transfer of sentenced persons is the rights of the offender in question. Before I embark on the discussion of some of the rights that have been dealt with by courts in the UK in the context of prisoner transfer, it is critical to deal with the issue of how courts have dealt with the issue of the offender’s right to be transferred. None of the agreements in the UK and other countries stipulate that an offender has a right to be transferred.⁶⁵ Even the Convention on the Transfer of Sentenced Persons does not contain a provision to the effect that an offender has a right to be transferred. Two potentially irreconcilable approaches have been taken by the UK courts on the issue of the offender’s right to be transferred. In the first category one finds cases in which it has been held that the treaty does not provide an individual right to to be transferred. For example, in *McKinnon v Government of the United States of America and another*⁶⁶ the House of Lords held that: ‘the Convention [on the Transfer of Sentenced Persons] confers no rights on prisoners: a state is not obliged to comply with a repatriation request nor to provide reasons if it refuses to do so.’⁶⁷ Similarly, the European

⁶² *Re Gilbey* [2010] HCJ 4, 2010 SCL 1249.

⁶³ *ibid* para 14. See also *ibid* para 25(x).

⁶⁴ *Orobator* paras 17-18.

⁶⁵ Although art 8(1) of the agreement between the UK and Uganda states that the offender has a right to ‘express to either the transferring State or the receiving State an interest in being transferred under this Agreement.’ See also common art 8(1) of the agreements between the UK and Rwanda and Saudi Arabia (n 4).

⁶⁶ *McKinnon v Government of the United States of America and another* [2008] UKHL 59 [*McKinnon*].

⁶⁷ *ibid* para 36. The High Court had observed in *Gary McKinnon v Government of the USA, Secretary of State for the Home Dept* [2007] EWHC 762 (Admin), in which the representatives of the government of the United States of America had issued a veiled threat against the applicant that if he had refused to enter into a plea agreement with the prosecutors they would oppose his application for the transfer to the UK to serve his sentence, that ‘Among other things, the evidence points to some unusual features in the particular proposed Plea Agreement and to the opinion that support from the prosecuting authorities is the single most important factor in deciding applications for repatriation. Where a transfer is refused by the Department of Justice, the decision is unreviewable in the American courts. Moreover the reasons for the refusal are exempt from disclosure.’ See para 52.

Court of Human Rights also held that the offender had no right to be transferred from Greece to serve his sentence in Albania.⁶⁸

In the second category one finds the case of *The Queen on the Application of Henry Max Shabeen v The Secretary of State for Justice* in which the High Court held that: “ the Convention gives the sentencing State an unqualified discretion to grant or withhold its consent to a transfer. The only constraints on the exercise of the discretion by the Secretary of State are that his decision must not be in breach of the Human Rights Act, or be unreasonable in the *Wednesbury* sense”.⁶⁹

Unlike the House of Lords which held that a state is not obliged to transfer the offender and also to give the reasons for the refusal to transfer, the High Court recognises that the UK still has discretion to refuse to transfer an offender but that such a discretion has to be exercised in line with the relevant laws. Of the two approaches, the current author is of the view that the High Court decision is more progressive than the House of Lords one. This is because in deciding whether or not to transfer an offender, the Secretary of State has to have reasons that form the basis of that decision. In this sense the offender would clearly possess an implied right to access information, especially information that might affect his dignity negatively, thereby imposing upon the Secretary of State a duty to execute his or her duties reasonably. Where the reasons that have been invoked to refuse the offender’s application for a transfer are unreasonable, courts should be able to set aside a decision based on unreasonableness.

In *The Queen on the Application of Henry Max Shabeen v The Secretary of State for Justice* the applicant was a British national who was domiciled in The Netherlands from where he had committed offences in the UK. He wanted to be transferred to The Netherlands to serve the remainder of his sentence in that country close to his family. The Secretary of State refused to allow his transfer on the ground that he was likely to be released early in The Netherlands and he would have come back to the UK a free man when in fact he should have been in prison had he served his sentence in the UK. The Court held that the refusal to transfer the applicant to The Netherlands was not unreasonable.

It should be noted that although the Convention on the Transfer of Sentenced Persons and indeed most of the treaties that the UK has signed with other countries do not expressly confer rights on prisoners, they include provisions that, if not complied with, could potentially be challenged on purely human rights grounds. For example, Article 4(1) of the Convention on the Transfer of Sentenced Persons states that: ‘[a]ny sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention.’ A provision to the same effect is also found in the agreements that the UK has signed with other countries. In the agreement on the transfer of offenders between the UK and Rwanda, between the UK and Saudi Arabia and between the UK and Uganda, it is clearly stated that one of the rights of the offender is to be informed by the transferring state of the substance of the transfer agreement.⁷⁰

In practice this has happened to all the offenders transferred to the UK.⁷¹ If such an offender were not informed of the substance of the treaty before the transfer, he could argue that his transfer was not based on his consent. This has happened in countries such as Hong Kong

⁶⁸ In *Plepi v Albania and Greece* the Court held that ‘there is no evidence that Greek law confers on the applicants any right to be transferred to Albania and the applicants did not refer to any relevant legal provisions which would indicate the existence of such a right.’ *Plepi v Albania and Greece* (n 37) 53.

⁶⁹ *The Queen on the Application of Henry Max Shabeen v The Secretary of State for Justice* [2008] EWHC 1195 (Admin), para 28 [Shabeen]. For the test see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

⁷⁰ Agreement between the UK and Rwanda, and agreement between the UK and Saudi Arabia common art 8(2) (n 4).

⁷¹ For example, see *Re Abdur Rashid Khan* [2006] EWHC 2826 (QB) para 9.

where transferred offenders have argued, though unsuccessfully, that the information provided to them before the transfers was misleading and that their transfers took place without their consent.⁷² Although what is not clear is whether such an offender could be returned to the sentencing state should courts in the UK reach the conclusion that indeed prior to his transfer he was not informed of the substance of the treaty or properly informed of the substance of the treaty.

There has been a move towards including implied or express human rights provisions in prisoner transfer treaties. For example, some of the treaties that the UK has signed with other countries provide that the transferred offender's right against double jeopardy shall be protected. For example, the treaty between the UK and Antigua and Barbuda provides that: '[a] prisoner who has been transferred under this Agreement shall not be arrested, put on trial or sentenced by the receiving state for the same offence for which he was sentenced in the sentencing state.'⁷³ The preamble to the treaties between the UK and Uganda and the UK and Rwanda on the transfer of offenders provides that both parties reaffirm 'that sentenced persons shall be treated with respect for their human rights.' Article 9 of the agreement between the UK and Uganda specifically provides that:

Each Party shall treat all sentenced persons transferred under this Agreement in accordance with their applicable international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

A provision to the same effect is also to be found in the treaty between the UK and Rwanda.⁷⁴ The agreement between the UK and Rwanda also provides for limited circumstances in which the administering state is allowed to limit the personal freedom of the transferred offender.⁷⁵ Framework Decision 2008/909/JHA,⁷⁶ which has recently been relied upon by the Supreme Court of the UK,⁷⁷ expressly provides that:

This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision should be interpreted as prohibiting refusal to execute a decision when there are objective reasons to believe that the sentence was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced on any one of those grounds.⁷⁸

Framework Decision 2008/909/JHA also imposes an obligation on EU member states to respect rights such as freedom of movement⁷⁹ and other fundamental rights.⁸⁰ Once the offender has been transferred to the UK, he or she is protected under UK legislation and in particular the Human Rights Act, 1998 and UK's international human rights obligations. It should be recalled

⁷² See for example *Lai Hin Cheong v Long-Term Prison Sentences Review Board* 2008 WL 4262510 (CFI), [2008] HKEC 1701; and *Ng King Tat Philip v Post Release Supervision Board* 2010 WL 2214275 (CFI), [2010] HKEC 1306.

⁷³ Art 8(1). See also art 14(1) of agreement with Morocco (n 4).

⁷⁴ Agreement between the UK and Rwanda art 9 (n 4).

⁷⁵ Art 10(1).

⁷⁶ Council Framework Decision (n 8) 27.

⁷⁷ *HH v Deputy Prosecutor of the Italian Republic, Genoa*; *PH v Deputy Prosecutor of the Italian Republic, Genoa*; *F-K v Polish Judicial Authority* [2012] UKSC 25, (2012) HRLR 25, para 105.

⁷⁸ Preamble para 13.

⁷⁹ Preamble para 15.

⁸⁰ Art 3(4).

that the Human Rights Act has no extraterritorial application.⁸¹ This means that UK citizens imprisoned abroad are not protected by UK human rights law.

4.1. The right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment

The right to freedom from torture, inhuman and degrading treatment or punishment is provided for in the UK Human Rights Act which transforms the European Convention on Human Rights into national law.⁸² Further, the UK is also party to the International Covenant on Civil and Political Rights⁸³ and to UN Convention against Torture⁸⁴ which both guarantee this freedom through relevant provisions. Moreover, *ex parte Pinochet Ugarte No. 3*⁸⁵ is clear that the prohibition against torture has achieved the status of *jus cogens*, that is a norm of supreme recognition and importance for the international legal system.

The UK also has an obligation to prevent torture and inhuman and degrading treatment or punishment as a consequence of its recognition of the jurisdiction of UN human rights bodies and the European Court of Human Rights. These entities have developed enormously rich jurisprudence on the recognition, promotion and protection of the right to freedom from torture or inhuman and degrading treatment or punishment, especially in the context of deportation and expulsion of non-nationals.⁸⁶ The question of the relationship between the enforcement of a transferred sentence and the right to freedom from inhuman and degrading treatment or punishment has emerged in cases where offenders have been transferred to serve their sentences in the UK.

In *Regina v Secretary of State for the Home Department*⁸⁷ the applicant was sentenced to 12 years' imprisonment and one day in Spain for introducing counterfeit currency. The Spanish court, when imposing sentence had stated that it would recommend to the government for the applicant's sentence to be reduced to six years' imprisonment and one day. Before the sentence was reduced the applicant was transferred to the UK to serve his sentence and because the UK did not convert the applicant's sentence, the adopted sentence was 10 years' imprisonment. The applicant argued, and the Court agreed with him, that had he been sentenced in the UK for a similar offence, he would have been sentenced to between four and five years' imprisonment. He argued, *inter alia*, that 'a term of 10 years for the particular offence was wholly disproportionate to the gravity of the offence and constituted a cruel or unusual punishment contrary to the Bill of Rights 1688'.⁸⁸ In dismissing the applicant's argument, the Court held that:

[T]his punishment is and remains a punishment imposed by a Spanish court, not subject to the Bill of Rights 1688, and, secondly, the punishment after adaptation comes within

⁸¹ See *R (Smith) v Secretary of State for Defence* [2010] UKSC 29.

⁸² David Feldman (ed), *Oxford Principles of English Law: English Public Law* (2nd edition, OUP 2009) 390-97.

⁸³ See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.

⁸⁴ See UN Committee Against Torture, 'General Comment No 2' (24 January 2008) CAT/C/GC/2.

⁸⁵ *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147.

⁸⁶ See David Weissbrodt and Isabel Hörtreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison With the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 Buffalo Human Rights Law Review 1.

⁸⁷ *Regina v Secretary of State For The Home Department* [1988] 2 WLR 236.

⁸⁸ *ibid* 241.

the statutory maximum laid down by Parliament in respect of this type of offence, so it cannot in English law be regarded as cruel and unusual.⁸⁹

In the above ruling two points are made by the Court. Firstly, because of the fact that the punishment had been determined and imposed by a Spanish court, it could not thereafter be subjected to the Bill of Rights, 1688. Secondly, because similar punishment is allowed by a piece of legislation passed by the UK Parliament, it cannot be regarded as cruel and unusual. One has to recall that the Bill of Rights of 1688 prohibited the imposition of cruel and unusual punishment.⁹⁰ Technically speaking, the punishment in question had been imposed by a Spanish court but there was room for arguing that although the initial punishment had been imposed by a Spanish court, the adopted sentence had been arrived at as a result of an act of the Secretary of State and therefore could be challenged as an unusual punishment. But in the light of the enactment by the UK Parliament in 1998 of the Human Rights Act, the correctness or otherwise of that argument or the Court's reasoning is now moot.

The Court's reasoning that the fact that the sentence in question was consistent with an Act of Parliament meant that it could not be cruel and unusual should also be understood against the background that the decision was handed down 10 years before the Human Rights Act was enacted. However, in the light of the jurisprudence emanating from the European Court of Human Rights and from relevant international human rights treaty bodies such as the Human Rights Committee and the Committee against Torture, specifically on the question that the right not to be subjected to cruel and unusual punishment is an absolute right, such a conclusion cannot be sustained today.

On appeal to the House of Lords in *Regina v Secretary of State for the Home Department, Ex parte Read*⁹¹ the prisoner's lawyer argued, *inter alia*, that:

[A]rticle 10 [of the Convention on the Transfer of Sentenced Persons] must be read in the context of all the relevant provisions of the Convention, including article 9.1 and article 11; the context also includes the other multilateral conventions by which the Council of Europe member states are bound (as paragraph 3 of the explanatory report recognises), and in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms, since plainly the drafters of the Convention did not intend to authorise or require the enforcement of foreign sentences in a manner which would breach article 3 of the European Human Rights Convention (as interpreted by the European Court of Human Rights...⁹²

The respondent argued that 'the Bill of Rights is itself a statute with at least equivalent status to any other statute, and the compatibility of any sentence with the law of England has therefore to be judged in the light of the statutory prohibition against cruel and unusual punishments'.⁹³ The House of Lords held that:

The international arrangement under which the present prisoner's transfer from Spain to the United Kingdom was effected are contained in the Convention on the Transfer of Sentenced Persons 1983 ..., and it is on the provisions of the Convention that the outcome of this appeal turns. But it may be important to bear in mind, in considering the effect of those provisions, that the primary policy objective of the United Kingdom statute, which is equally reflected in the preamble to the Convention, is the obviously

⁸⁹ *ibid* 247.

⁹⁰ For the drafting history of the Bill of Rights of 1688 see Feldman (n 82) 41-42.

⁹¹ *Regina* [1989] AC 1014.

⁹² *ibid* 1038.

⁹³ *ibid* 1039.

humane and desirable one of enabling persons sentenced for crimes committed abroad to serve out their sentences within their own society, which, irrespective of the length of sentence, will almost always mitigate the rigour of the punishment inflicted.⁹⁴

There is no doubt that the Convention on the Transfer of Sentenced Persons and the national legislation in the UK indeed aim at ensuring that prisoners are transferred to serve their sentences in the UK and that if such a transfer is successful, they will not face the well-known problems that foreign national offenders face in prisons. However, the House of Lords' ruling above does not directly address the question of whether there could be circumstances in which the offender's transferred sentence might be regarded as cruel and inhumane. It has been argued that '[i]t is a recognised principle of justice that penalties should not be excessive, as acknowledged in the Bill of Rights of 1689.'⁹⁵

The question of whether an excessive transferred sentence violated Article 3 of the European Convention on Human Rights was raised in *The Queen on the Application of: Steven Willcox v Secretary of State for Justice*.⁹⁶ The prisoner had been transferred from Thailand where he had been sentenced to 33 years and six months' imprisonment for possessing a small amount of drugs. After his transfer to England his sentence was reduced by the Thai authorities to 29 years and three months' imprisonment. If he had been convicted for a similar offence in England he would have been sentenced to between four and five years. His lawyer argued that 'the Thai sentence here is four to five times as great as that which would be imposed by the UK, and that such a disproportion is so gross as to amount to a breach of Article 3.'⁹⁷

The Court stated that: 'there is no ECtHR decision that a determinate sentence imposed by a contracting or non-contracting state breached Article 3 simply because it was grossly disproportionate by virtue of its length,' and that: 'a sentence imposed by a contracting state could amount to a breach of Article 3, for example where a life sentence was imposed on a juvenile, or a life sentence from which there was no chance of release before death whatever the circumstances'.⁹⁸ The Court added that:

The circumstances will be rare...in which the length of a transferred sentence by itself could give rise to a problem of such gross disproportion as to amount to a breach of Article 3, because the UK maximum for the equivalent offence applies to limit the extent of the term to be served whatever the sentence imposed in the transferring country. It does not seem...of any value to consider whether a determinate sentence is or may be so grossly disproportionate as to breach Article 3 simply by virtue of its length. That is because there will always be other factors present to affect the judgment. These will include the nature of the offence, the rationale for the sentencing framework, as well as the specific way in which the offence was committed, and the personal circumstances of the offender.⁹⁹

The Court concluded that:

[T]he question of whether Article 3 creates absolute standards, or whether actions which would breach Article 3 if done by the UK might not do so if done by another state, is a lively one ... The question is always whether the act done by the UK breaches Article 3, rather than whether the act of the foreign state did or would. If the act of the foreign state itself

⁹⁴ *ibid* 1048.

⁹⁵ Feldman (n 82) 726, para 16.22.

⁹⁶ *Willcox v Secretary* [2009] EWHC 1483 (Admin).

⁹⁷ *ibid* para 57.

⁹⁸ *ibid* para 59.

⁹⁹ *ibid* para 60.

would not breach Article 3, the answer in relation to the UK is of course anyway clear. I take the view that, if the act of the foreign state however did or would breach Article 3 were it a state party to the ECHR, the UK may or may not breach Article 3 in the way its own act relates to it, depending on the nature of and justification for the acts and how the two acts inter-relate. Transferring a prisoner into the UK at his request to serve a term which he would otherwise have to serve abroad, and which would breach Article 3 if imposed here, is not the same nature or quality of act as sentencing someone in that way in the first place nor the same as removing someone to serve a such a sentence abroad. There may be differences depending on what gives rise to the asserted cruelty, inhumanity or degradation. I am prepared again to assume that the UK would breach Article 3 were it to impose the same sentence in the same circumstances. But it would be quite unreal to approach the question of whether continued enforcement on transfer into the UK would breach Article 3 on that basis. That is simply not the context in which the issue arises.¹⁰⁰

The above ruling shows that courts in the UK are increasingly paying attention to the human rights implications of adopted sentences. This is attributable to the increasing human rights obligations in terms of the Human Rights Act also in terms of the UK's obligations in international law especially in terms of the European Convention on Human Rights. It has been argued that: '[a]t the most fundamental level, sentences created by Parliament or imposed by the courts must not infringe Article 3 of the ECHR...'.¹⁰¹ It is argued that in the light of the absolute prohibition against inhuman or degrading treatment or punishment in the European Convention on Human Rights (as incorporated by the Human Rights Act), the International Covenant on Civil and Political Rights and the Convention against Torture, courts can invoke a human rights approach to ensure that the Convention on the Transfer of Sentenced Persons is not understood as permitting the enforcement of excessive sentences.

In this author's view, the offender's right not to be subjected to inhuman or degrading treatment or punishment has to be protected in all circumstances irrespective of whether or not s/he is a transferred offender. His/her right not to be subjected to such treatment or punishment is independent of the policy considerations that the executive might want to achieve in ensuring that as many people as possible are transferred to serve their sentences in the UK. Politicians in the UK have also realised that offenders transferred from Thailand serve lengthy prison terms for relatively minor offences and have called upon the UK government to have negotiations with the Thai authorities and have the transfer agreement amended to resolve that issue.¹⁰²

4.2. The right to family life

It should be recalled, as mentioned earlier, that both the House of Lords and the European Court of Human Rights have expressly held that the Convention on the Transfer of Sentenced Persons does not confer any specific rights on the offender. Jurisprudence emanating from courts in the UK shows that one of the issues that have arisen in the context of prisoner transfer

¹⁰⁰ *ibid* para 78.

¹⁰¹ Feldman (n 82) 1193, para 28.05.

¹⁰² See House of Lords, Hansard text of 23 May 2012: Column WA80 where Lord Avebury asked 'her Majesty's Government what progress they have made in including provision for reduced sentences for prisoners transferred to the United Kingdom in a renegotiated prisoner transfer agreement with Thailand; and whether they will ensure that the new agreement will apply to prisoners already transferred.' The Minister of State, Ministry of Justice Lord McNally, replied that the '[p]roposed amendments to the prisoner transfer agreement with Thailand have been presented to the Thai authorities for their consideration. We have not yet had a response to these proposals. Any changes to the prisoner transfer agreement will require the consent of the Thai authorities. The position of those prisoners already transferred to the UK will be considered in any future negotiations.'

is the right to family life. As Easton observes, '[t]he right to family life has arisen in relation to a range of issues in prison including allocation, temporary releases, visits and the right to marry and have children.'¹⁰³ This right is provided for under the European Convention on Human Rights,¹⁰⁴ and also in the International Covenant on Civil and Political Rights.¹⁰⁵ One has to remember that the right to family life has been a contentious right in cases of deportation or expulsion of foreign nationals from the UK.¹⁰⁶ In the context of prisoner transfer, courts have held that the possibility of the offender being transferred back to the UK to serve his sentence could enable him to enjoy his right to family life.¹⁰⁷ A court will not order the UK authorities to transfer an offender to serve his/her sentence in his/her country of domicile simply because his/her continued imprisonment in the UK leads to a violation of his/her right to a family life.

In *The Queen on the Application of Henry Max Shabeen v The Secretary of State for Justice*¹⁰⁸ the applicant, a British citizen, who lived in The Netherlands with his wife and children, was convicted of drug trafficking and sentenced to 16 years' imprisonment in the UK. Before his conviction he had lived in The Netherlands for 15 years. The applicant requested to be transferred to The Netherlands to serve his sentence and the Dutch authorities wrote to the UK authorities 'saying that they were willing to accept the claimant on transfer, and that they intended to convert the sentence under Dutch law upon transfer.'¹⁰⁹

The Secretary of State refused the applicant's request for the transfer on the ground that he would have his sentence significantly reduced by the Dutch authorities and could not be refused to enter the UK even if he chose to come back at a time when he should have been in prison had he served his sentence in the UK. The Secretary of State stated that: '[i]n reaching his decision to refuse [the applicant's] application [he] gave full consideration to [the applicant's] family and residency links with The Netherlands but concluded that [his] right to return to the UK at any time following his release from custody in The Netherlands outweighed these considerations.'¹¹⁰

The applicant's lawyer argued that: 'the maintenance of family contacts is an essential aim of the prison system' and that his imprisonment in the UK meant that he had very limited time to see his wife and children every year when they visited him and that refusing his request to be transferred to The Netherlands meant that 'he will be unable to lead any semblance of normal family life for the next 5–8 years.'¹¹¹ The Court held that the Secretary of State was justified in refusing the applicant's request to the transfer because of, *inter alia*, the fact that there was a risk that he could re-offend in the UK. The Court concluded that:

In assessing the proportionality of the decision, I have considered the extent of the interference with the claimant's right to respect for his family life that will result from the

¹⁰³ Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011) 157.

¹⁰⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

¹⁰⁵ ICCPR (n 83) art 23.

¹⁰⁶ See, for example, 'Theresa May criticises judges for 'ignoring' deportation law' (London, 17 February 2013) at <www.bbc.co.uk/news/uk-21489072> accessed 29 December 2013 where it was reported that figures from Home Office suggested that between 2011 and 2012, '177 foreign criminals avoided deportation...after convincing judges of their right to a family life in Britain' prompting the Home Secretary, Mrs May, to accuse some judges 'of making the UK more dangerous by ignoring rules aimed at deporting more foreign criminals.'

¹⁰⁷ *HH v Deputy Prosecutor of the Italian Republic, Genoa*; *PH v Deputy Prosecutor of the Italian Republic, Genoa*; *F-K v Polish Judicial Authority* [2012] UKSC 25, [2012] HRLR 25, para 105; *Glen Howell v Deputy Attorney General Court of Appeal of Douai France* [2012] EWHC 150 (Admin) para 30.

¹⁰⁸ *Shabeen* [2008] EWHC 1195 (Admin).

¹⁰⁹ *ibid* para 5.

¹¹⁰ *ibid* para 8.

¹¹¹ *ibid* para 18.

refusal to consent to the transfer. I fully accept that serving prisoners have Article 8 rights. But their rights to see members of their families are inevitably and seriously curtailed simply by virtue of their being deprived of their liberty. A decision not to transfer a prisoner to a prison where he will be nearer to his family must be viewed in that light. Even if a prisoner is transferred to a prison closer to his family, he will inevitably only have exiguous rights to see them.¹¹²

The Court rightly concludes that prisoners have a right to family life but that this right is not absolute. One should not lose sight of the fact that the main reason why the Secretary of State refused to transfer the applicant to The Netherlands is that his sentence could be converted by the Dutch authorities resulting in his early release and then possibly, returning to the UK a free man at a time he should have been in prison had he served his sentence in the UK. Had the applicant been a foreign national, like his co-accused, his transfer request would have probably been allowed because of the fact the UK would have barred him from returning to the UK for a certain period of time. This case demonstrates that although the right to a family life is important, it is just one of the factors that have to be considered in determining whether or not a transfer request should be allowed. As the Court rightly observed, ‘neither the Convention nor the 1984 Act gives any guidance as to what the Secretary of State should take into account in determining whether or not to consent to a transfer of a prisoner.’¹¹³

4.3. The right to a fair trial and continued detention in the UK

The right to a fair trial is guaranteed in Article 6 of the European Convention on Human Rights¹¹⁴ and in the International Covenant on Civil and Political Rights.¹¹⁵ In *Drozd and Janousek v France and Spain*,¹¹⁶ the European Court of Human Rights held that: ‘[t]he Contracting States are... obliged to refuse their co-operation [in enforcing a sentence] if it emerges that the conviction is the result of a flagrant denial of justice.’¹¹⁷ Although that was a decision of the ECtHR, the impact of the jurisprudence of that court on the UK courts’ human rights jurisprudence has been steadily increasing.¹¹⁸

Since the *Drozd and Janousek* decision, many transferred offenders have sought to challenge their continued imprisonment in the UK as a violation of their right to liberty on the basis that the criminal proceedings leading to their convictions were unfair. The transferred offenders have largely not succeeded in convincing courts that indeed their trials amounted to a flagrant denial of justice. In *The Queen on the Application of: Steven Willcox v Secretary of State for Justice* the applicant argued, *inter alia*, that his trial had been a flagrant denial of justice because Thai law created an irrebuttable presumption of guilt with respect to the offence of which the prisoner had been convicted and that the prisoner had not been represented at sentencing. The Court held that:

¹¹² *ibid* para 40.

¹¹³ *ibid* para 16.

¹¹⁴ For detailed and recent discussion of the jurisprudence of the European Court of Human Rights on the right to a fair trial see Pinar Ölçer, ‘The European Court of Human Rights: The Fair Trial Analysis under Article 6 of the European Convention of Human Rights’ in Stephen C Thaman (ed), *Exclusionary Rules in Comparative Law* (Springer 2013) 371-399; Feldman (n 82) 573-591.

¹¹⁵ ECHR art 14.

¹¹⁶ *Drozd and Janousek v France and Spain* App No 12747/87 (ECtHR, 26 June 1992).

¹¹⁷ *ibid* para 110.

¹¹⁸ See Steven Greer, ‘The Legal and Constitutional Impact of the European Convention on Human Rights in the United Kingdom’ in Rainer Arnold (ed), *The Universalism of Human Rights, Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2013) 189-207; Jim Murdoch, ‘The Binding Effect of the ECHR in the United Kingdom – Views from Scotland’ in Arnold, *ibid*, 209-221.

[T]here comes a point at which the UK authorities must decline to exercise the power to make a request under the PTA for the transfer of someone who on the face of it falls within its terms, because in reality the sentence is not the sentence of a competent court. The UK could not continue to enforce it in the UK nor, conformably with the ECHR, lawfully hold the individual in detention. It could not dignify the foreign process as a conviction or consequential sentence by a competent court. An example would be a sentence following a show trial, albeit for what on its face could be a conventional criminal offence, but with the result pre-determined by political intervention. It is necessary for the UK as receiving state to ask before transfer whether there was, in substance as well as in form, a conviction before a competent criminal court for the transfer to continued enforcement of sentence to be lawful. I would expect these instances to be obvious and usually to be known to the diplomatic representatives of the UK at the time of trial.¹¹⁹

One has to recall that in this case the prisoner had categorically stated that his consent to be transferred to the UK was not voluntary as he had consented in order to avoid the 'terrible' prison conditions in which he was being held.¹²⁰ The Court also assumes that the UK representatives abroad are always abreast with all the circumstances under which the trials of UK citizens are conducted. The reality is that some people would rather not refuse their transfer on the ground that their trial was unfair, after having exhausted all the available avenues of appeal or review, and challenge their transfer after they have arrived in the UK in the hope that the UK courts will ensure that justice is done.

As the Court rightly observed, the fact that an offender has consented to be transferred to the UK does not mean that he forfeits his right to challenge his continued imprisonment on the basis that his trial was a flagrant denial of justice.¹²¹ On the question of whether the UK courts could, on the basis on *Drozd* release an offender convicted in a foreign country where there was a flagrant denial of justice, the Court added that:

The solution to this dilemma cannot readily be found either in the short unreasoned obiter sentence of the ECtHR in *Drozd and Janousek*, requiring the receiving state not to co-operate with transfers. It did not have to face the problem arising here. It did not have to deal with the problem that, on the basis of his arguments, this claimant should have remained in custody and in very much worse conditions than those from which he has benefited on transfer. Nor did it have to deal with the problem that the consequence of his success in persuading the UK Government to co-operate with Thailand, to his own advantage and in a way which he now says it should not have done, is that others may well be left to languish in Thailand and elsewhere, after trials and for terms and in conditions which could infringe the very principles his arguments would uphold for him... The application of what the ECtHR said in these circumstances could thus be to achieve the very opposite of what it thought would be achieved in *Drozd and Janousek*. It did not have to deal with the way in which its obiter comment on the obligation to refuse co-operation could require the UK to undermine the intent of its international agreements as the alternative, for what probable short term difference it would make, until the transferring states refused their continued co-operation under the PTA, as they are entitled to do. The ECtHR cannot have envisaged that the obligation not to co-operate should mean that transfers should be agreed on one basis and then given effect on another, in a way which would undermine the good faith of the requesting state.

¹¹⁹ *Willcox v Secretary* [2009] EWHC 1483 (Admin) para 32.

¹²⁰ *ibid* para 21.

¹²¹ *ibid* para 37.

These very real problems were simply not before it and were therefore understandably not addressed.¹²²

The Court seems to put a lot of emphasis on what it considered to be the purpose of the prisoner transfer agreement. It held that: '[t]he only purpose of the PTA is to enable the prisoner to serve the foreign term at home. The PTA is designed not to create an appeal against conviction or sentence after transfer, with UK/ECHR standards applying.'¹²³ One has to recall that the purpose of the prisoner transfer agreement between the UK and Thailand is not just to return offenders to the UK to serve their sentences. The preamble to the agreement clearly states that the two countries signed that agreement with the desire 'to facilitate the successful reintegration of the offenders into society.' For an offender to be reintegrated into society, s/he has to be rehabilitated first. An offender who thinks that his/her continued imprisonment is unlawful may find it unattractive to take part in rehabilitation programmes. Firstly, s/he thinks that s/he should not be in prison. Related to the above, from a policy point of view, if Thailand gets to know that offenders transferred to the UK end up being released on the ground that their continued detention was a violation of their right to liberty because of the fact that their trial had flagrantly violated standards of fairness, it might end up refusing to consent to the transfer of offenders to the UK.

But that does not mean that 'a one-size fits all' approach should be applicable with regards to all offenders transferred from Thailand. Each case should be examined and decided on its own individual facts and if there should be evidence that indeed the prisoner's trial had flagrantly violated standards of fairness, then it should be presumed that a UK court would have to make that ruling because one person's human rights should not have to be sacrificed for the hope only, of maintaining the prisoner transfer arrangement. A clear message has to be sent out to other countries, including Thailand, that the UK will not just rubberstamp their courts' convictions. Subsequent cases have not cast doubt on the ECtHR decision in *Drozd and Janousek* and have indeed upheld the reasoning in that case.

In *Samantha Oroborator v Governor of HMP Holloway and Secretary of State for Justice*¹²⁴ it was held that:

[H]er claim that she has been detained in the UK unlawfully cannot succeed unless it is shown that she suffered a *flagrant* denial of justice in Laos. For the reasons that we have given, she has not been able to satisfy this high test. The test is rightly set very high. That is because it is important not to jeopardise or undermine the treaties for the repatriation of prisoners which the UK now has with many countries, so that those who are convicted abroad can serve their sentences here. If persons who have been convicted and sentenced abroad and have procured their transfer to the UK were easily able to obtain their liberty by challenging the fairness of their convictions, there would be a grave danger that these important treaties would be set at naught. That would be highly regrettable.¹²⁵

UK courts' reluctance to hold that the transferred offender's trial amounted to a flagrant denial of justice that justified termination of continued imprisonment in the UK may be attributed to the fact that the ECtHR *Drozd and Janousek* test that the trial should amount to a flagrant denial of justice has not been met by the applicants. However, that does not mean that there are no examples, though in another context, in which a conclusion has been reached that the offender's trial amounted to or would amount to a flagrant denial of justice.

¹²² *ibid* para 69.

¹²³ *ibid* para 68.

¹²⁴ *Oroborator* [2010] EWHC 58 (Admin).

¹²⁵ *ibid* para 140.

In *Stoichkov v Bulgaria*, the European Court of Human Rights held that: ‘criminal proceedings which have been held *in absentia* and whose re-opening has been subsequently refused, without any indication that the accused has waived his or her right to be present during the trial, may fairly be described as “manifestly contrary to the provisions of Article 6 or the principles embodied therein”’.¹²⁶

In *Omar Othman Aka Abu Qatada v Secretary of State for the Home Department*¹²⁷ it was held that deporting the applicant to Jordan where ‘there was a real risk’ that evidence obtained by torture would be admitted at his retrial posed ‘a real risk that he would be subject to a flagrant denial of justice.’¹²⁸ The above examples show that indeed there could be cases where a trial could be found to have been a flagrant denial of justice and that if a court found that the trial was indeed a flagrant denial of justice, the offender’s continued imprisonment in the UK would be a violation of his right to liberty.

5. Extradition and transfer of offenders

Another issue that has come-up in the context of prisoner transfer is the relationship between extraditions on the one hand, and on the other, offender transfers. The issue of extraditing a suspect from one European country to another is less of a problem because of the existence of several instruments regulating extradition.¹²⁹ Courts in the UK have emphasised the importance of extradition in fighting crime.¹³⁰ Unlike extradition which is always almost used to ensure that suspects are returned to stand trial for the offences they allegedly committed, offender transfer is concerned with repatriating people who have already been convicted of offences and are returned to their countries to serve out the remainder of their sentences. The existence of a transfer of offender treaty or arrangement between the extraditing and the requesting country could be a factor to be considered in deciding whether or not to extradite a suspect or for the suspect to agree to surrender voluntarily to the requesting country to stand trial. This is important in the light of the fact that jurisprudence from the UK courts and the European Court of Human Rights is clear that extradition shall not take place if there are reasons to believe that the offender could be sentenced to a punishment that amounts to cruel or degrading treatment.¹³¹

The issue of extradition becomes critical in situations where the prison conditions of the administering state are below internationally acceptable standards. This is an issue that has been raised by the Court of Justice of the European Community member states should not return people to countries where there is a real risk of being subjected to conditions of detention that amount to inhuman or degrading treatment.¹³²

¹²⁶ *Stoichkov v Bulgaria* App No 9808/02 (ECtHR, 24 March 2005), para 56.

¹²⁷ *Omar Othman Aka Abu Qatada v Secretary of State for the Home Department* [2013] EWCA Civ 277.

¹²⁸ *ibid* para 58.

¹²⁹ See generally Ariadna Ripoll Servent, ‘The European Parliament and the Returns Directive: The End of Radical Contestation; The Start of Consensual Constraints’ in Bridget Anderson, Matthew Gibney and Emanuela Paoletti (eds), *The Social, Political and Historical Contours of Deportation: Immigrants and Minorities, Politics and Policy* (Springer 2013) 43-58.

¹³⁰ See *Chalitovas v Lithuania* [2006] EWHC 1978 (Admin) and the cases discussed therein.

¹³¹ See Feldman (n 82) 390 para 8.31, and 393 para 8.39.

¹³² In *Joined Cases C 411/10 and C 493/10 NS (C 411/10) v Secretary of State for the Home Department and ME (C 493/10) and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011, the Court held that ‘Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the “Member State responsible” ...where they cannot be unaware that systemic deficiencies in...the reception

In *McKinnon v Government of the United States of America and another*¹³³ the appellant, a British national, was wanted in the United States of America to stand trial for hacking into several government computers. The possibility of his transfer to the UK to serve the remainder of his sentence, if convicted and sentenced in the US, was highlighted as one of the issues he should consider for not opposing his extradition. A representative of the US Department of Justice informed appellant that:

[H]e was authorised to offer the appellant a deal in return for not contesting extradition and for agreeing to plead guilty to two of the counts laid against him...On this basis it was likely that a sentence of 3–4 years (more precisely 37–46 months), probably at the shorter end of that bracket, would be passed and that after serving 6–12 months in the US, the appellant would be repatriated to complete his sentence in the UK. In this event his release date would be determined by reference to the UK's remission rules namely, in the case of a sentence not exceeding four years, release at the discretion of the parole board after serving half the nominal sentence, release as of right at the two-thirds point. On that basis, he might serve a total of only some eighteen months to two years.¹³⁴

During the plea agreement negotiations, the applicant was informed that if he did not oppose his extradition, then 'the prosecutor would recommend to the section of the US Department of Justice responsible for administering the Convention on the Transfer of Sentenced Persons that the appellant be transferred and this recommendation too was in practice likely to be accepted.'¹³⁵ The applicant understood that statement to mean that if he had opposed his extradition and later extradited, the prosecution would not support his repatriation to the UK to serve his sentence.¹³⁶ However, later an official from the US Attorney General's Office presented an affidavit to the effect that his office would 'not oppose any prisoner transfer application that may be made by Gary McKinnon (if extradited and convicted) based, in whole or in part, on his refusal to waive or consent to extradition from the United Kingdom'.¹³⁷ In the light of the above assurance,¹³⁸ the House of Lords held that:

By the same token that a plea of guilty routinely attracts a lesser sentence, understandably it is likely also to attract a more sympathetic response to a repatriation request where, as here, that involves a greatly enhanced prospect of early release. After all, the extent of remission (the critical consideration in a request for repatriation from the US to the UK) affects the length of the prison sentence to be served no less than the nominal term itself.¹³⁹

The above decision shows the importance of the existence of a transfer of offenders agreement or arrangement in extradition cases. The possibility of the offender's transfer to his/her country to serve his/her sentence could be invoked by the requesting country as a 'carrot' if the suspect does not oppose his extradition. In such cases the repatriation guarantee incentive could influence the suspect's decision to either oppose or not oppose extradition. Courts will also consider the possibility of the person's transfer as one of the factors in approving their extradition.

conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.'

¹³³ *McKinnon* [2008] UKHL 59.

¹³⁴ *ibid* para 18.

¹³⁵ *ibid* para 20.

¹³⁶ *ibid* paras 20-21.

¹³⁷ *ibid* para 23.

¹³⁸ *ibid* para 40.

¹³⁹ *ibid* para 36.

In *Kerry Shanks or Howes v Her Majesty's Advocate*¹⁴⁰ the appellant opposed her extradition to the USA on amongst other grounds that in the light of her mental state her extradition would be unjust and oppressive contrary to the Human Rights Act. The Court, in dismissing her application, held, *inter alia*, that in assessing the extent of risk of self-harm if transferred to the United States, 'it is necessary to have regard to the possibility that the appellant may be acquitted, or given a non-custodial sentence or a short sentence of imprisonment, or transferred to Scotland to serve any sentence here.'¹⁴¹

In *Glen Howell v Deputy Attorney General Court of Appeal of Douai France*¹⁴² the applicant opposed his extradition to France to serve a custodial sentence that had been imposed by a French court. In dismissing his application that his extradition would violate his right to family life, the Court held, *inter alia*, that: '[t]here is no indication...that the French authorities will refuse to consider'¹⁴³ the request by the UK authorities for the offender to be transferred to the UK to serve his sentence and consequently be in close proximity with his family members. Likewise, in *HH v Deputy Prosecutor of the Italian Republic, Genoa; PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority*,¹⁴⁴ in rejecting HH and PH's applications against their extradition on the ground that it would violate their right to family life, the Supreme Court, per Lord Mance, held that:

In reaching my decision relating to HH and PH, I am—though this is not essential to my conclusion—comforted by the hope that it may be possible for both parents to be returned speedily to the UK to serve here the balances of their sentences under Council Framework Decision 2008/909/JHA of November 27, 2008. The Court was informed that this Framework Decision has now been transposed into Italian law. Mr Perry QC's instructions were that, under the previous regime of the Council of Europe Convention on the Transfer of Sentenced Persons of March 21, 1983, repatriation from Italy took 8 to 12 months, although statistics for all repatriations from all Council of Europe countries show a longer average period of around 18 months. Whichever figure is taken, it is to be hoped that much speedier results can be achieved under the Framework Decision, the purpose of which is to limit the rupture of environmental and family links resulting from imprisonment abroad.¹⁴⁵

Of course courts will not likely allow the extradition of a person to a country to serve his/her sentence if s/he has been detained in a UK prison while awaiting extradition for the time that is equal to the sentence he would have served had s/he been extradited.¹⁴⁶ It should be recalled that the offender does not have the right to be transferred and the European Court of Human Rights in *Plepi v Albania and Greece*¹⁴⁷ has emphasised the fact that the Convention on the Transfer of Sentenced Persons confines itself to 'providing the inter-state procedural framework for the transfer of sentenced persons and do[es] not generate any individual substantive rights *per se*.'¹⁴⁸ The Court concluded that the Convention does not 'contain an obligation on the signatory states to comply with a request for transfer.'¹⁴⁹

¹⁴⁰ *Kerry Shanks or Howes v Her Majesty's Advocate* [2009] HCJAC 94.

¹⁴¹ *ibid* para 14.

¹⁴² *Glen Howell v Deputy Attorney General Court of Appeal of Douai France* [2012] EWHC 150 (Admin).

¹⁴³ *ibid* para 30.

¹⁴⁴ *HH v Deputy Prosecutor of the Italian Republic, Genoa; PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority* [2012] UKSC 25, [2012] HRLR 25.

¹⁴⁵ *ibid* para 105.

¹⁴⁶ *Newman v District Court of Krakow — Poland* [2012] EWHC 2931 (Admin).

¹⁴⁷ *Plepi v Albania and Greece* (n 37).

¹⁴⁸ *ibid* 54.

¹⁴⁹ *ibid*

The Court also reiterated its position that the European Convention on Human Rights ‘does not grant prisoners the right to choose the place of detention.’¹⁵⁰ The above jurisprudence shows the importance that the existence of a prisoner transfer agreement between countries could play in extradition cases. However, it should be recalled that the fact that the offender does not have a right to be transferred, and secondly, that States parties to the transfer treaties cannot be compelled to agree to the offender’s request to the transfer, meaning that even in cases where a person has been extradited on the ground that s/he could be transferred to serve his/her sentence in his/her country of nationality, such a person is not certain that s/he would be transferred.

Plachta gives the example of the Extradition Act of The Netherlands in terms of which a Dutch national could be extradited to stand trial ‘if the Dutch Minister of Justice has good reason to believe that there is a sufficient guarantee that, once sentenced to unconditional custody in the requesting state for the offence for which his extradition has been granted, the offender would be able to serve his sentence in the Netherlands.’¹⁵¹

6. Conclusion

The UK has signed prisoner transfer agreements with over twenty countries and is a party to multilateral treaties on the transfer of offenders. The author has dealt with the issues that courts in the UK have grappled with regarding the offenders that have been transferred to the UK and those that have been extradited from the UK. The increasing role of human rights in the transfer of offenders has been discussed. Courts are increasingly called upon to deal with issues of offender transfer from a human rights as opposed to a policy perspective. The article shows that most of the agreements on the transfer of offenders between the UK and other countries emphasise rehabilitation as the objective of the transfer but that courts have not expressly stated that indeed that is the purpose of the transfer. The issue of conversion versus continued enforcement of transferred sentences has resulted into conflicting decisions from different UK courts with some converting the sentences and others emphasising that legislation in the UK does not empower courts to convert transferred sentences.

It has been demonstrated in this article that the correct approach is that UK courts do not have the power to convert transferred sentences. It is recommended that where possible that UK should consider entering into agreements that give it the option of converting sentences in question so that clearly excessive sentences are not adopted, and outcomes of unfair trials abroad maintained after transfer. Another issue that some courts have dealt with relates to the policy considerations on the transfer of offenders to the UK on the one hand and the human rights issues on the other hand. The jurisprudence shows that there is yet to be a case in which an offender has been released after his/her transfer to the UK on the ground that his/her trial was a flagrant denial of justice. One gets the impression that courts are more concerned with ensuring that as many British nationals as possible benefit from the transfer programme. In order not to frustrate that programme, courts require that a trial should have been of such a nature that the prisoner did not get justice at all.

However, human rights issues are slowly but surely taking root in the transfer of offender regime. This is evidenced by the fact that many prisoner transfer agreement include implied human rights such as the right not to be subjected to double jeopardy and the right to access information. Some agreements include express human rights such as the right to freedom from

¹⁵⁰ *ibid*

¹⁵¹ Plachta (n 11) 190.

torture. There is also emerging human rights jurisprudence on rights such as freedom from torture, family life and one hopes that this jurisprudence will continue to develop and offer better protection to offenders.

‘State Practice and the Making and (Re)Making of International Law: The Case of the Legal Rules Relating to Marine Biodiversity in Areas Beyond National Jurisdiction’

Dire Tladi*

ABSTRACT: The article examines the role and impact of state practice on the evolution of the law relating to marine areas beyond national jurisdiction. It shows that States appear to have used state practice as an interpretative tool to advance their own positions about the content of existing rules and also to influence the development of new norms. The positions adopted by States appear to have served first and foremost, a defensive purpose preventing a particular interpretation from becoming authoritative or preventing the evolution of new norms.

I. Statement of the Issues

The process of making international law is notoriously nebulous and dependent on the interaction of various elements often with unclear effects. Oceans governance is particularly illustrative of the hazy process of international law-making. The lack of clarity persists in many issues notwithstanding the fact that the UN Convention on the Law of the Sea of 1982 (hereinafter the ‘Law of the Sea Convention’ or ‘the Convention’) is viewed by many as the constitution of the oceans and the framework for addressing all oceans-related issues.¹

It is often assumed that, unlike the process and substance of customary international law, the process and substance of treaty law are much clearer and more definitive.² However, while the process of negotiating and adopting a treaty is itself relatively clear, the law emanating from such a treaty is often influenced by other processes, including interaction with other norms of international law, fragmentation resulting from non-universal ratification, reservations, subsequent agreements relating to the treaty, subsequent practice as well as the potential for varying pronouncements exacerbated by the lack of unified judicial settlement system. All these causes of uncertainty potentially affect the content of the law of the sea. For example, the law of

* BLC, LLB (Pretoria) LLM (Connecticut), PhD (Rotterdam). Professor of International Law, University of Pretoria; Member of the United Nations International Law Commission. Formerly Legal Adviser of the South African Permanent Mission to the United Nations. The views expressed herein belong to the author and are not attributable to any of the entities associated with the author. The author is grateful to SPILJ’s independent referees for their comments on earlier drafts of this article.

¹ See, for instance, Dire Tladi ‘Oceans Governance: A Regulatory Framework’ in Pierre Jacquet, Rajendra K Pachauri and Laurence Tubiana (eds), *Oceans: The New Frontier* (TERI 2011) 99. See also Kristina M Gjerde and Anna Rulska-Domino, ‘Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead’ (2012) 27 *International Journal of Marine and Coastal Law* 351, 352. See also Richard A Barnes, ‘Consolidating Governance Principles for Areas beyond National Jurisdiction’ (2012) 27 *International Journal of Marine and Coastal Law* 261, 273.

² See Mark W Janis, *An Introduction to International Law* (Aspen 1999) 41. See also Akiho Shibata, ‘International Environmental Lawmaking in the First Decade of the Twenty First-Century: The Form and Process’ (2011) 54 *Japanese Yearbook of International Law* 28, 34-35 who states:

From the inception of studies on international environmental law, it has been noted that custom as its source would play an essentially modest role and would be insufficient for responding to its needs, since international environmental law should establish a kind of regulatory system *equipped with defined standards* ...[while] treaty has always been considered as the source *par excellence* for international environmental law, providing *a regulatory framework consisting of legally binding obligations of States* (emphasis added).

the sea is made up of a complex interaction and network of sources and institutions including, *inter alia*, the Law of the Sea Convention, the UN Convention on Biological Diversity of 1992, the International Maritime Organisation, two implementing agreements under Law of the Sea Convention³ and various regional organisations with different competencies.⁴ Moreover, while in principle Article 309 prohibits reservations except in so far as these 'are expressly permitted by other articles of this Convention', Article 310 does allow declarations and several States have taken advantage of this provision to make declarations some of which could have the same effect as reservations.⁵ Furthermore, Part XV of the Convention endorses three different and unrelated dispute settlement options, namely the International Court of Justice, the International Tribunal for the Law of the Sea and arbitration thus creating the possibility for conflicting interpretations.⁶ With the interaction of all these processes, the process of law-making in relation to oceans, though governed by a framework treaty, remains nebulous and continues to evolve.

The fluidity of the law and law-making process is aptly illustrated by the legal rules relating to the sustainable use and conservation of marine resources in areas beyond national jurisdiction, especially the deep seabed particularly in relation marine genetic resources and the legal regime applicable thereto.⁷ Even under the Convention on the Law of the Sea, the answer to the question of the legal regime applicable to marine genetic resources remains less than clear. When one considers that different sources may be applicable and how these different sources interact, the complexities become pronounced.

State practice – which for the purposes of this article refers to any State behaviour including acts, omissions, statements, negotiations, treaty ratifications and votes on resolution⁸ – plays a role both in the process of defining and making the law relating to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction. In terms of defining the law, state practice is used by States to interpret and give content to the law, whether the Law of the Sea Convention, some other treaty or customary international law relevant to the law of the sea. In

³ Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 21 ILM 1261 (UNCLOS); Convention on Biological Diversity (adopted 6 May 1992, entered into force 29 December 1993) 1760 UNTS 79, (1992) 31 ILM 818; UNGA Res 48/263 (17 August 1994) UN Doc A/RES/48/263 (Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea); UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 'Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' (8 September 1995) A/CONF.164/37 (Fish Stocks Agreement).

⁴ On how some these can be seen as operating together see Tladi (n 1).

⁵ See for a comprehensive list of all declarations

<www.un.org/Depts/los/convention_agreements/convention.htm> accessed 10 December 2013.

⁶ See UNCLOS (n 3) art 287.

⁷ See for discussion Fernanda Millicay, 'A Legal Regime for the Biodiversity of the Area' in Myron H Nordquist, Thomas H Heidar and John N Moore (eds), *Law, Science and Ocean Management* (Nijhoff 2007); Dire Tladi, 'Marine Genetic Resources on the Deep Seabed: The Continuing Search for a Legally Sound Interpretation of UNCLOS' [2008] *International Environmental Law and Diplomacy Review* 65; Dire Tladi, 'Genetic Resources, Benefit Sharing and the Law of the Sea: The Need for Clarity' (2007) 13 *Journal of International Maritime Law* 183. For a recent exposition of the arguments and counter-argument, see Petra Drankier, Alex G Oude Elferink, Bert Visser and Tamara Takács, 'Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit Sharing' (2012) 27 *International Journal of Marine and Coastal Law* 375, esp 399ff.

⁸ See generally for discussion of what constitutes practice Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary international Law* (CUP 2001) 133ff, esp 134. See also John Dugard, *International Law: A South African Perspective* (Juta 2005) 29, and Ian Brownlie, *Principles of Public International Law* (OUP 2003) 6. See also Committee on Formation of Customary (General) International Law, 'Report on Customary International Law' (International Law Association, London 2000) 14, which observes that verbal acts 'are in fact more common forms of practice than physical conduct.'

the law-making process, state practice serves a function of advancing positions on what the law should be and also what the law should not be.

In this article I consider, in the light of state practice, the contestation around the legal rules relating to the use and conservation of marine biodiversity in areas beyond national jurisdiction. The discussion centres around two separate issues. The first concerns the legal regime applicable to marine genetic resources on the deep seabed while the second relates to the legal rules relevant to measures for the conservation and preservation of the marine environment in areas beyond national jurisdiction. In the next section I describe the two main areas of contestation relevant to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. I then proceed to consider the role of state practice in the evolution of the law relating the use and conservation of marine biodiversity in areas beyond national jurisdiction before providing some concluding observations.

II. The Convention and Marine Resources in Areas Beyond National Jurisdiction

The contested terrain in relation to marine resources in areas beyond national jurisdiction concerns two separate but related issues. The first, and legally the most contentious, concerns the legal regime applicable to marine genetic resources on the deep seabed. The second issue concerns the adoption of measures for the preservation and conservation of the marine environment, including through the establishment of marine protected areas. The nature of the legal contestation with respect to the marine genetic resources question concerns not only what the law should be, *lex ferenda*, but also what the law is, *lex lata*. Questions surrounding preservation and conservation measures for marine biodiversity in areas beyond national jurisdiction are concerned primarily with the need to develop the law – although, the line between what the law should be and what it is also becomes blurred in the posturing of States. I proceed now to provide an overview of the contestation relating to legal regime applicable to marine genetic resources in areas beyond national jurisdiction before turning my attention to the issue of measures for the preservation and conservation of marine biodiversity in areas beyond national jurisdiction.

1. Marine Genetic Resources on the Deep Seabed

The contestation over which legal regime applies to marine genetic resources arises mainly from an ambiguity in the Law of the Sea Convention. The deep seabed beyond national jurisdiction, referred to as the ‘Area’ in the Convention, is governed by Part XI of the Convention which establishes the deep seabed as the common heritage of mankind.⁹ In a nutshell Part XI establishes a regime, complete with an international organisation, the International Seabed Authority, to ensure that the benefits from the exploitation of the resources on the deep seabed are shared by all humanity.¹⁰

Article 133 unambiguously provides that for ‘the purposes’ of Part XI, the word ‘resources’ means ‘all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules’. This definition is clear and unambiguous and its application would imply that the regime established by Part XI was not applicable to marine genetic resources which, by definition, are biological and can therefore not be said to be ‘solid, liquid or

⁹ UNCLOS (n 3) art 1(1) defines the Area as ‘the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.’ See also art 136 thereof which determines the Area to be the common heritage of mankind. To avoid confusion between ‘area’ beyond national jurisdiction, marine protected ‘areas’ and ‘Area’, I use the ‘deep seabed’ and not the ‘Area’ throughout the article.

¹⁰ See especially UNCLOS (n 3) art 130.

gaseous mineral resources'. However, this conclusion is complicated by the presence of another, equally clear and unambiguous provision of the Convention, namely Article 136 which provides that the 'Area *and* its resources are the common heritage of mankind' (emphasis added). Thus, it is not just the resources, as defined in Article 136, which are the common heritage of mankind but also the deep seabed itself.

In the face of this ambiguity, different groups of States have advanced different narratives on the law applicable to marine genetic resources on the deep seabed.¹¹ On the one side of the divide, there is a group of States – the United States, Russia, Iceland, Norway, Canada and Japan – in whose view marine genetic resources on the deep seabed are governed by Part VII of the Convention. While Part XI promotes the idea of the common heritage of mankind and benefit sharing, Part VII is the antithesis of this and promotes freedom of the seas and a 'first come, first serve' approach.¹² Another group of States, in particular the Group of 77 and China (hereinafter the 'G77'), argue that marine genetic resources are governed by the common heritage of mankind principle. It is necessary to qualify this typology with a caveat: the existence of negotiating blocs, in particular the European Union (hereinafter the 'EU') and the G77 probably distorts the numbers. It is not inconceivable that some States within the G77 may actually be supportive of the freedom of the high seas approach while some EU members also have strong views either in support of the common heritage of mankind or freedom of the high seas. Some of the discrepancies owing to group membership and internal dynamics become exposed in state practice but for the most part these discrepancies remain hidden. Thus, in assessing the relative position of States, particularly in relation to numbers, the internal dynamics of groups, which often remains hidden, should be borne in mind.

Those States that adopt the approach that Part VII, and not Part XI, applies to marine genetic resources on the deep seabed point, first and foremost, to the definition of resources in Article 133 which, on its face, excludes marine genetic resources. Additionally, even Article 140, which provides that '[a]ctivities in the Area ... shall be for the benefit of mankind' qualifies this statement by 'as provided for in this Part'.¹³ With respect to resources, by virtue of Article 133, Part XI is limited to mineral resources. If Part XI is not applicable to marine genetic resources on the deep seabed, so the argument goes, then Part VII must be applicable. Part VII, which governs the high seas, provides that the high seas are 'open to all States'.¹⁴ Under these provisions of Part VII the resources of the high seas are available for exploitation by whoever is able to exploit them.

Compelling though the argument for the freedom of the high seas approach may be, particularly in the light of the clear text of Article 133, the approach does suffer from some flaws. First, Part VII lists a number of activities which are subject to the freedom of the high seas.¹⁵ The exploitation of marine genetic resources is not included in the list.¹⁶ The exploitation of marine genetic resources is qualitatively different from fishing such that it could not be subsumed under fishing. While exploitation of fisheries is concerned with the individual fish harvested from the oceans with the possibility for others to exploit whatever remains in the ocean, the exploitation of marine genetic resources is concerned more with the identification of gene sequencing or information and not so much the exploitation of the individual resource physically harvested

¹¹ See for discussion Valentina Germani and Charlotte Salpin, 'The Status of High Seas Biodiversity in International Policy and Law', in Jacquet, Pachauri and Tubiana (n 1). See also the literature cited in (n 7).

¹² See UNCLOS (n 3) art 87.

¹³ *ibid*, art 140(1).

¹⁴ *ibid*, art 87(1).

¹⁵ *ibid*

¹⁶ The list includes freedom of navigation, freedom of overflight, freedom to lay cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing and freedom of scientific research.

from the ocean.¹⁷ Thus, what is harvested are samples from the sea, from which genetic information is identified and patented with a view to legally precluding later use of similar resources.¹⁸ Similarly, while an argument could be made that exploitation of marine genetic resources amounts to scientific research, the freedom to conduct marine research in Article 87(1) is subject to Part XIII of the Convention which in turn suggests that marine scientific search in the deep seabed is subject, not to Part VII, but to Part XI.¹⁹

The most serious flaw of the freedom of the high seas argument, however, is that it ignores the fundamental logic of the Convention, namely that the regulation of various resources in the Convention, and the rights and obligations of States Parties in relation to such resources, is dependent on the maritime zone in which the resource is found and not on the nature of the resource. The relevant zones are the territorial waters, the exclusive economic, the continental shelf, the high seas and the deep seabed. The high seas – the water column above the deep seabed – are legally, though not biologically, separate and distinct from the deep seabed. Part VII and the rights contained therein apply only to the high seas and not to the deep seabed.

It is thus safe to say that the differences of views between States on the legal regime applicable to marine genetic resources in areas beyond national jurisdiction cannot be resolved by reference to the text of the Convention. Moreover, the *travaux préparatoire* are unlikely to offer any assistance since, at the time of the negotiation of the Convention, it was assumed that the lack of sunlight in the deep seabed made life impossible. As a result the negotiators focused on mineral resources for which the prospects of exploitation seemed more likely.²⁰ In this respect there was very little discussion of the definition of resources in the course of the negotiations.²¹ The practice of States, whether prior or subsequent to the adoption of the Convention, thus assumes a level critical of importance in the contestation over how the gaps are to be filled.

2. Measures for the Conservation and Preservation of the Marine Environment in Areas Beyond National Jurisdiction

The Law of the Sea Convention creates a general obligation on States Parties ‘to protect and preserve the environment’.²² While it recognises the right of States Parties to exploit marine resources, this right is made subject to the obligation to preserve and protect the marine environment.²³ Concretely, the Convention requires States to take measures, jointly or individually, to ‘prevent, control or reduce’ pollution of the marine environment.²⁴ A central element of the Convention’s approach to the protection and preservation of the marine environment is the obligation to cooperate.²⁵

Over and above the general provisions on the protection and preservation of the marine environment, specific parts of the Law of the Sea Convention governing specific maritime zones also create obligations to preserve and protect the environment. Article 61, for example, obliges

¹⁷ See for discussion of the process Salvatore Arico and Charlotte Salpin, *Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects* (UNU-IAS 2005) 15.

¹⁸ See David Leary, ‘Marine Genetic resources: The Patentability of Living Organisms and Biodiversity Conservation’ in Jacquet, Pachauri and Tubiana (n 1) esp 189ff.

¹⁹ See UNCLOS (n 3) art 256. The freedom to conduct marine scientific research in the high seas, not subject to Part XI, is contained in art 257.

²⁰ See Millicay (n 7) 739. See also Drankier, Elferink, Visser and Takács (n 7) 376.

²¹ See Millicay (n 7) 778-779 on the evolution of the definition.

²² UNCLOS (n 3) art 192.

²³ *ibid* art 193.

²⁴ See *ibid* art 194, 195, 196, 207, 208, 209, 210, 211 and 212.

²⁵ *ibid* art 197.

coastal States to ‘ensure, through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation’.²⁶ With respect to the high seas, the Convention requires States to take measures, individually or collectively, for the conservation of the living resources.²⁷ Given the freedom of the high seas, any such measures can only be applicable to the nationals of the States taking such measures.²⁸ With respect to the deep seabed, the Convention requires measure to be taken to ‘ensure effective protection for the marine environment’ and in particular requires that measures be adopted for ‘the prevention, reduction and control of pollution’ and the ‘protection and conservation of the natural resources and the prevention of damage to the flora and fauna of the marine environment’.²⁹ Moreover, the Convention establishes a duty on States Parties to cooperate in respect of highly migratory species and marine mammals and cetaceans occurring in the various zones.³⁰

While the Law of the Sea Convention contains all these provisions on the conservation and preservation of the marine environment, questions have been asked about the environmental effectiveness of the Law of the Sea Convention.³¹ Gjerde and Rulska-Domino, for example, assert that while the threats to marine biodiversity in areas beyond national jurisdiction – both the high seas and the deep seabed – have grown exponentially, the governance framework, including the Convention ‘has not kept pace’.³² Barnes observes that the Convention has failed to ‘spell out sufficiently coherent obligations [on States Parties] to steward resources’ of the oceans leading to the near collapse of fisheries.³³ Gjerde attributes the declining high seas fish stocks and rising biodiversity concerns specifically to the inadequacy of the Convention.³⁴

At the heart of the environmental problems in oceans governance is the Grotian principle of the freedom of the seas which is not only confirmed but entrenched in the Convention.³⁵ The freedom of the high seas effectively re-enacts Hardin’s ‘tragedy of the commons’ by allowing States (and vessels under their jurisdiction) to behave with few restrictions.³⁶ The vague general obligation to protect and preserve the environment as well as the call for self-regulation in Article 117 of the Convention are clearly not sufficient. In this respect, while States or groups of States could take measures for the conservation of the marine environment, as is called for in Article 117, such measures would only be applicable to the nationals of the cooperating States. At the same time a governance system that purports to mandate a State or group of States to legislate for the international community would not only be inconsistent with the general structure of international law but would be unacceptable to most States.

²⁶ See *ibid* art 61(2).

²⁷ See *ibid* art 116, 117, 118 and 119.

²⁸ *ibid*

²⁹ *ibid* art 145.

³⁰ *ibid* art 64, 65, 118 and 120.

³¹ See for discussion Tladi (n 1).

³² Gjerde and Rulska-Domino (n 1) 352.

³³ Richard Barnes, ‘The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?’ in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006) 233.

³⁴ Kristina Gjerde, ‘High Seas Fisheries Management under the Convention on the Law of the Sea’ in Freestone, Barnes and Ong (n 33) 281.

³⁵ Tladi (n 1) 103.

³⁶ Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243. Hardin’s ‘tragedy of the commons’ postulates that finite resources in the ‘commons’ or areas open to all will eventually be depleted if each actor is free to consume the resources without regulation. In other words, short-term interests will dictate overexploitation even though this is not in the interest of anyone’s long-term interest.

The contestation over the protection and preservation of the marine environment in areas beyond national jurisdiction, unlike the contestation of marine genetic resources in the deep seabed, is not so much about what the law is. Rather it is (mainly) about what the law should be. Even in the contestation over what the law should be, the practice of some actors has played an important role, not only for setting the scene for developing new norms but indeed for creating new prisms from which to observe the current law.

III. Practice and Legal Rules Relevant to Areas Beyond National Jurisdiction

1. Practice and the Norms Embodied in Treaties: General

The relevance of practice during the subsistence of a treaty can take different forms. In the first place, practice is a recognised tool of interpretation of treaties.³⁷ Second, the practice of States could lead to the crystallisation of a treaty provision into a norm of customary international law binding also on non-parties and perhaps possibly beyond the limited application of the treaty in question.³⁸ Third, the practice of States in an area governed by a treaty could lead to the formation of a competing norm of international law.³⁹ It has even been suggested that, in exceptional cases, state practice can lead to the termination of a treaty provision.⁴⁰

There are several ways in which state practice can be relevant for treaty interpretation under the Vienna Convention on the Law of Treaties (hereinafter the 'Vienna Convention'). First, Article 31(3)(b) provides that 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account in the interpretation of a treaty provision. Clearly not any practice qualifies as practice under Article 31(3)(b) of the Vienna Convention. First the practice has to be the practice of parties to the treaty in question. Second, the practice has to establish the agreement of the parties regarding the interpretation of the treaty provision.

This second requirement raises the question whether the practice has to 'establish the agreement' of *all* the parties. Put differently, can the objection of a single party, or the contrary practice of a single party, prevent the establishment of subsequent practice under Article 31(3)(b)? Is it sufficient to establish 'the agreement' of the majority of parties? Must there at least be a significant or perhaps near-universal acceptance of the practice in question. Georg Nolte, the International Law Commission's Special Rapporteur on treaties over time suggests that at the very least 'all parties must have acquiesced' to the respective practice.⁴¹

The process of interpretation is necessarily fluid and a variety of factors should be taken into account when weighing conflicting interpretations, including the nature of the practice (statements or act or omissions), extent of the practice (widespread or not) and the extent and vehemence of objections. Ultimately, however, the treaty in question would have to be interpreted in good faith in accordance with the ordinary meaning of the terms in their context with the subsequent practice, including divergent practice, serving only as an aid to establish the meaning of the terms.⁴²

³⁷ See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1969) 8 ILM 679 art 31.

³⁸ See, eg *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3 [71]. See in the context of the law of the sea, Barnes (n 1) 270.

³⁹ Georg Nolte, *Third Report for the ILC Study Group on Treaties over Time: Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings*, 57ff (on file with the author).

⁴⁰ *ibid* 61ff.

⁴¹ *ibid* 5.

⁴² Vienna Convention (n 37) art 31(1).

Practice could also lead to the formation of customary international law. A new norm of customary international law could become either a competing norm or an aid to interpretation under Article 31(3)(c) – the latter provides for any relevant rules of international law applicable between the parties to be ‘taken into account’ in the interpretation of a treaty. For interpretative norms of customary international law, it is irrelevant whether the norm predated the treaty in question or developed subsequent to the conclusion of the treaty. Finally, practice, regardless of whether it evolves into a norm of customary international law or not, can have an influence in any subsequent agreement to amend, supplement or implement the treaty provisions in question.⁴³

Practice, in the manner described above, can influence the interpretation and/or evolution of law relating to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. I turn now to consider how States have attempted, through practice, to influence the interpretation and evolution of the law relating to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. I begin first by considering the practice of States in relation to the issue of the legal regime applicable to marine genetic resources on the deep seabed where after I shall consider the practice of States in relation to the protection and preservation of marine biodiversity in areas beyond national jurisdiction.

2. State Practice in Relation Marine Genetic Resources on the Deep Seabed

Information about the actual practice of exploitation of marine genetic resources in areas beyond national jurisdiction is, at best, sketchy. The first reason for the difficulty of assessing actual practice for the purposes of interpretation is that most marine genetic resources are sourced from within territorial waters.⁴⁴ However, source organisms are often dispersed across different parts of the oceans, including areas beyond national jurisdiction.⁴⁵ What is apparent from the literature is that deep sea ecosystems including hydrothermal vents and polar oceans provide a hotbed of organisms ‘of biotechnological interest’.⁴⁶ Thus, even with the sketchy information on the exploitation of marine genetic resources, it can be asserted that the exploitation of marine genetic resources in areas beyond national jurisdiction and the potential for even more exploitation is significant.

Another reason for the limits of information pertaining to actual exploitation is that the exploitation that does happen is conducted by entities from very few countries. Arnaud-Haond, Arrieta and Duarte observe that ‘claims associated with marine genes originate from only 31 countries’ and that of these, ninety percent originate from only ten countries ‘with 70% belonging to the top 3 countries’.⁴⁷ These figures reveal the limits of actual practice in this area. First, while for the purposes of interpretation of the Law of the Sea Convention, the practice of

⁴³ The use by states of innovative interpretation of existing norms to influence the elaboration of new norms is considered by the author in a forthcoming publication, Dire Tladi, ‘The Challenges and Opportunities in the Implementation of the Supplementary Protocol: Reinterpretation and Re-Imagination’ in Akiho Shibata (ed), *The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to Cartagena Protocol on Biosafety* available at http://bch.cbd.int/protocol/NKL_text.shtml accessed 10 December 2013

⁴⁴ Sophie Arnaud-Haond, Jesús M Arrieta and Carlos M Duarte, ‘Global Genetic Resources: Marine Biodiversity and Gene Patents’ (2011) 331 *Science* 1521.

⁴⁵ *ibid*

⁴⁶ *ibid*. See also Millicay (n 7) 773ff, who provides examples of patented marine genetic resources including some sourced from the deep seabed.

⁴⁷ See Arnaud-Haond, Arrieta and Duarte (n 44) 1521. The figures of patent claims origin that they present are startling: US (199), Germany (149) and Japan (128). The fourth country on the list is France with 34, followed by the UK (33), Denmark (24), Belgium (17), the Netherlands (13), Switzerland (11) and Norway (9).

the largest player, the United States, can perhaps be discounted as it is not a State Party to the Convention, it can hardly be ignored that two State Parties in the top ten States from which marine genetic resource patents originate (Japan and Norway) object to the application of the common heritage of mankind while not a single G77 country - the champions of the common heritage of mankind application, feature on the list.⁴⁸ On the other hand, given the vociferous objection of such a large bloc of countries, little conclusion on the state of the law can be drawn from the practice of the 'top ten'.

Indeed, precisely because the few known cases of exploitation are concentrated in few countries and not well-publicised, the G77 has used the only means available to it, diplomatic forums, to record an alternative practice, namely that the continued exploitation of marine genetic resources in areas beyond national jurisdiction is, under the current circumstances, inconsistent with international law.⁴⁹ The diplomatic forums in which this has taken place has been mainly the General Assembly and its subsidiary bodies including the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (hereinafter the 'Informal Consultative Process') and the UN *Ad Hoc* Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction (hereinafter the '*ad hoc* Working Group'). However, the contestation has not been limited to the General Assembly and it has spilled over into other forums including forums of the Convention on Biological Diversity and the preparations for the Rio plus 20 World Summit on Sustainable Development.

The statements of the G77 have been fairly consistent in their approach to marine genetic resources in areas beyond national jurisdiction question in the General Assembly, in particular in the Informal Consultative Process and the *ad hoc* Working Group.⁵⁰ These statements have also often been supported by interventions of individual delegations of the G77, as a strategy to emphasise the group's solidarity on the issue. Needless to say, the few States supporting the freedom of the high seas as the applicable legal regime have also spoken to ensure that their narrative is reflected in the diplomatic forums. The various reports of the Co-Chairs of the *ad hoc* Working Group, for example, consistently reflect the divergence of views of States.⁵¹

⁴⁸ See the top ten list in (n 47).

⁴⁹ See, eg, Statement on behalf of the G77 and China by Minister Holger Martisen, Permanent Mission of Argentina to the United Nations, to the UN Informal Consultative Process on Oceans and the Law of the Sea, New York, 20 June 2011, available at <www.g77.org/statement/getstatement.php?id=110622> accessed 10 December 2013.

⁵⁰ See, eg, Statement on behalf of the G77 and China by Minister Holger Martisen, *ibid* (hereinafter G77, ICP, 2011); Statement on behalf of the G77 and China by Fernanda Millicay, Counsellor, Permanent Mission of Argentina to the United Nations, on the Fourth Agenda Item during the *Ad Hoc* Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 1 June 2011, New York (hereinafter G77, ABNJ2, 2011), available at <<http://www.g77.org/statement/getstatement.php?id=110601>> accessed 10 December 2013; Statement on behalf of the G77 and China by Minister Diego Limeres, Deputy Permanent Representative of the Mission of Argentina, during the *Ad Hoc* Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 31 May 2011, New York (hereinafter G77, ABNJ, 2011), available at <<http://www.g77.org/statement/getstatement.php?id=110531>> accessed 10 December 2013. See also South African Statement on Behalf of the G77 and China during the Informal Consultative Process on Oceans and the Law, 15 June 2006, New York (hereinafter G77, ICP, 2006), available at <<http://www.g77.org/Speeches/061506.html>> accessed 10 December 2013.

⁵¹ See, eg, *Ad Hoc* Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 'Recommendations to the General Assembly and the Co-Chair's Summary of the Discussions of the Meeting' (7-11 May 2012) A/67/50, para 14; *Ad Hoc* Working Group on Marine Biological Diversity in Areas Beyond National Jurisdiction, 'Recommendations to the General Assembly and the Co-Chair's Summary of the Discussions of the Meeting' (31 May-3 June 2011) para 15. See also *Ad Hoc* Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 'Recommendations to the General Assembly and the Co-Chair's Summary of the Discussions of the Meeting' (1-5 February 2010) A/65/68, paras 71-72; *Ad Hoc* Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, Joint Statement of the Co-Chairpersons (28 April-5 May 2008) A/63/79, para 36. See

The primary purpose of the G77 consistently raising this issue is precisely to spotlight the divergence of views in order to prevent the establishment of a practice that might be construed as establishing the agreement of the parties to the interpretation of the Law of the Sea Convention under Article 31(3)(b) of the Vienna Convention. This practice is so important to the countries of the G77 that in 2007 when, during the Informal Consultative Process, the United States refused to accept reference to the divergence of views in the agreed consensual elements⁵² the G77, under the chairmanship of Pakistan, refused to negotiate on any other part of the text. In a marathon session ending at midnight of the last day of the Informal Consultative Process, the meeting ended without the adoption of the agreed consensual elements – a rare event up to that date.⁵³

However, the G77's insistence on highlighting the issue is not just for defensive purposes i.e. to prevent the entrenchment of an alternative interpretation of the law. The insistence is also very much designed to advance a particular vision of the state of the law. Several statements of the G77 invoke other principles and sources of law which, they argue, support the application of the common heritage of mankind principle to marine genetic resources on the deep seabed. The statement by Argentina, on behalf of the G77, during the 2011 *ad hoc* Working Group is an apt example:

As established in General Assembly resolution 2749(XXV), *which is part of customary international law*, activities in the area 'seabed and ocean-floor, and the subsoil thereof, beyond the limits of national jurisdiction' shall be carried out for benefit of mankind as a whole.⁵⁴

The invocation of GA Resolution 2749(XXV) has several implications. First, the resolution, and in particular, the voting pattern, itself reflects state practice to be taken into account in the interpretation of the Convention – the resolution was adopted by consensus, with 108 votes in favour, 14 abstentions and none against.⁵⁵ Second, if, as is suggested in the statement by Argentina, the resolution embodies customary international law, it should, in accordance with Article 31(3)(c) of the Vienna Convention, be used as a tool to interpret the Law of the Sea Convention. Moreover, beyond serving as an interpretative tool, if GA Resolution 2749(XXV) is customary international law then it continues to apply and coexists with the Convention i.e. it has binding force independent of and even beyond the Convention.⁵⁶ Therefore, to the extent that the Convention is silent on the legal regime applicable to marine genetic resources on the deep seabed, then these would be covered by the existing customary international law which, as the argument goes, establishes the common heritage of mankind as the appropriate legal regime.

State practice in this area serves yet another function in addition to defining the current state of law. If there is, in fact, a governance gap not filled either by customary international law or the

also *Ad Hoc* Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction, 'Co-Chairperson's Summary of Discussions' (13-17 February 2006) A/61/65, paras 39 and 30.

⁵² The 'agreed consensual elements', a set of recommendations to the General Assembly, was the outcome of choice for the Informal Consultative Process. As its name suggests, this outcome document reflects the consensus of states.

⁵³ It has since been agreed, in 2009, that the Informal Consultative Process will no longer strive for agreed consensual elements as outcomes.

⁵⁴ See G77 ABNJ 2011 (n 50) (emphasis added).

⁵⁵ On the voting record see UNGA, 'Per Verbatim Records of the 1933rd Meeting of the General Assembly' UN Doc A/PV.1933 (1970), para 230.

⁵⁶ See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14 [175].

Convention, state practice can contribute to filling such a gap. The obvious way that this can occur is through the formation of a new norm of customary international law. However, given the contestations and the strongly held conflicting views of states the development of a *new* norm of customary international law is unlikely to emerge from practice in this area.⁵⁷ Nonetheless, the practice of States, even if not lacking in the necessary consistency and uniformity to form the basis of a norm of customary international law, can be used by states in support of particular positions during negotiations of new treaties.⁵⁸

During the negotiations of an access and benefit sharing regime under the Convention on Biological Diversity, the African group of States led by Namibia, had proposed that the scope of the regime should include genetic resources in 'areas beyond national jurisdiction'. In a proposed preambular paragraph, reference was made to the discussions in the *ad hoc* Working Group clearly signalling that the proposal was inspired by the common heritage of mankind discussions in the General Assembly. The final text of the Nagoya Protocol on Access and Benefit Sharing, however, limits the scope of the Protocol to genetic resources 'within the scope of Article 15 of the Convention'.⁵⁹ While the final text of the Nagoya Protocol did not extend the scope of the Protocol to marine genetic resources in areas beyond national jurisdiction, it did leave the door slightly open for the reconsideration of the issue. Article 10 of the Nagoya Protocol provides that the

Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of [benefits from genetic resources] that occur in transboundary situations or *for which it is not possible to grant or obtain prior informed consent*.

It is difficult to conceive of genetic resources for which 'it is not possible to grant or obtain prior informed consent' other than genetic resources that occur in areas beyond national jurisdiction. And indeed the African group, in its submission to the Second Meeting of the Intergovernmental Committee for the Nagoya Protocol has made clear its intention to pursue the widening of the scope of the Nagoya Protocol in the process established under Article 10 of that Protocol.⁶⁰ The submission stresses that 'Africa has [also] consistently promoted the idea that the [Access and Benefit Sharing Regime] must have the widest possible scope'.⁶¹ The submission further states that benefits arising from genetic resources sourced without prior informed consent 'because, for example, they have been accessed from areas beyond national jurisdiction' should be also subject to the regime.⁶²

To be true, there are a significant number of G77 countries that oppose the idea of using the Biodiversity Convention for issues that, in their view, should properly be considered under Law of the Sea Convention – and indeed not all African countries are truly on board with this initiative. But the position adopted by the African group contributes to state practice and could, potentially, be relevant in the formation, either of customary norms, assuming widespread acceptance, or more likely, in the elaboration of an instrument on marine genetic resources in

⁵⁷ cf *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 277.

⁵⁸ See Tladi (n 43).

⁵⁹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (adopted 29 October 2010)

UNEP/CBD/COP/DEC/X/1 Art 3. Genetic resources in art 15 are clearly those found in national jurisdictions. Art 15(1), for example, provides that authority for determine access to genetic resources 'rests with the national authority' while Art 15(3) refers to genetic resources 'being provided by a Contracting Party'.

⁶⁰ See the African group Submission to the Second Meeting of the Intergovernmental Committee for the Nagoya Protocol (on file with author).

⁶¹ *ibid*

⁶² *ibid*

areas beyond national jurisdiction. While the G77 countries as a bloc have not been on board with the Africa group position on formulating rules relating marine genetic resources in areas beyond national jurisdiction under the Biodiversity Convention, the group itself has called for an implementing agreement to the Law of the Sea Convention within the framework of the *ad hoc* Working Group. This aspect will be considered together with practice in relation the conservation and preservation of the marine biodiversity.

3. Practice in Relation to Conservation and Preservation of the Marine Biodiversity

As mentioned above, the contestation in relation to the conservation and preservation of the marine environment in areas beyond national jurisdiction has not been so much about what the content of the law is. The content and limits of the law are clear (more or less). The practice of States (and other actors),⁶³ in this area, has been aimed at two objectives.⁶⁴ First, the practice has focused on pushing the boundaries of the current law in order to create innovative applications of the Convention. Second, the practice has been aimed at producing an impetus for establishing new norms, preferably through the adoption of a new instrument. By and large, the charge for more effective conservation and preservation norms has been led by the EU.⁶⁵

The precautionary principle provides an illustration of how practice, in its different incarnations, has contributed to developing conservation and preservation norms in the law of the sea. While the status of the precautionary principle under general international law remains in doubt,⁶⁶ it is clear that the Convention on the Law of the Sea does not make provision for a precautionary approach to conservation. However, it would be hard to deny that, as a result of practice, precaution is part of the fabric of the law of the sea. Precaution is reflected, first and foremost, in the Fish Stocks Agreement – an implementing agreement under the Law of the Sea Convention.⁶⁷ While Nolte has opined that the Fish Stocks Agreement is probably not a subsequent agreement (or practice) within the meaning of Article 31(3)(a) of the Convention due to the large number of States Parties to the Law of the Sea Convention that oppose it,⁶⁸ the opposition of these States Parties is directed at the provisions of the Fish Stocks Agreement authorising the boarding of vessels on the high seas.⁶⁹ The precautionary principle, as reflected in the Fish Stocks Agreement, is generally accepted by States Parties and indeed non-States Parties as being part of the law of the sea and the practice of States implementing the Fish Stocks Agreement, invoking the precautionary approach in negotiations and supporting annual General Assembly resolution on oceans and the law of the sea which consistently includes precaution,

⁶³ While the focus of this paper is on state practice, non-state actors, especially non-governmental organisations, have played a significant role in the development of law in this area. On the influence of non-state actors on international (environmental) law see Thilo Marauhn, 'The Changing Role of the State' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) and Peter J Spiro, 'Non-Governmental Organisations and Civil Societies', in Bodansky, Brunnée and Hey above.

⁶⁴ For a detailed discussion of some of the initiatives discussed in this section see Gjerde and Rulka-Domino (n 1) and Tladi (n 1).

⁶⁵ See, eg EU Presidency intervention during the discussion of agenda 5 in the *ad hoc* Working Group on 28 April 2008 (on file with the author). See also EU Presidency Statement on the role of Area-Based Management Tools during the *ad Hoc* Working Group meeting on 29 April 2008 (on file with author).

⁶⁶ See *The Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgement) [2010] ICJ Rep 14. See especially the separate opinion Judge Cançado Trindade, ibid 135.

⁶⁷ See Fish Stocks Agreement (n 3) art 5 and 6.

⁶⁸ Nolte (n 39) 40.

⁶⁹ See Fish Stocks Agreement (n 3), esp art 21 and 22.

amounts to subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention.⁷⁰

Developments in the area of bottom fishing provide yet another illustration of how practice has contributed to the evolution of the law of the sea in relation to marine biodiversity in areas beyond national jurisdiction. One of the most serious concerns for the state of the marine environment has been the enhancement in fishing technologies and the damage they can cause to the marine environment, in particular sensitive marine habitats such as cold water corals, sponge beds, and seamounts which are home to rich biodiversity and unique life-forms.⁷¹ Concerned about the impact of bottom fishing, several States, in particular the small island States and some European States, pushed for regulation of bottom fishing – the role of Non-Governmental Organisations, while falling outside the scope of this article, was critical for the development of consensus among States.

It should be recalled that there is nothing in the Law of the Sea Convention or the Fish Stocks Agreement that places qualitative restrictions on fishing practices of states. However, through General Assembly resolutions, States have produced a catalogue of practice that could contribute towards the development of norms relating to the protection of vulnerable ecosystems from destructive fishing practices.⁷² In 2004, in the omnibus resolution on oceans and the law of the sea, the General Assembly called on States ‘to urgently consider ways to integrate and improve ... in accordance with the Convention ... the management of risks to the marine biodiversity of seamounts, cold water corals, hydrothermal vents and certain other features’.⁷³

The efforts to deal with destructive fishing practices resulted in the adoption by the General Assembly of measures to combat destructive fishing practices in a 2006 resolution on fisheries.⁷⁴ First, the resolution called upon States ‘to take action immediately’ to protect ‘vulnerable marine ecosystems, including seamounts, hydrothermal vents and cold water corals, from destructive fishing practices’.⁷⁵ Additionally, and more importantly, the resolution called upon States to conduct environmental assessments of the impact that bottom fishing would have on vulnerable ecosystems before authorising bottom fishing and to prohibit vessels flying their flags from engaging in bottom fishing in areas having vulnerable marine ecosystems ‘unless conservation and management measures have been established to prevent significant adverse impacts’.⁷⁶

While the General Assembly reviews of the measures referred to above concluded that the measures had ‘not been fully implemented in all cases’,⁷⁷ the adoption of such measures and the willingness of States to subject themselves to a review is a practice that cannot be ignored in the determination and interpretation of legal norms under the Convention and international law relevant to the conservation and preservation of the marine environment in areas beyond national jurisdiction. Indeed General Assembly Resolution 66/88, reviewing the implementation of the measures, calls for added effort in implementing those measures, including by closing

⁷⁰ See UNGA Res 66/231 (24 December 2011) UN Doc A/RES/66/231, paras 135, 156 and 173; UNGA Res 65/37 (7 December 2010) UN Doc A/RES/65/37, paras 151 and 173; UNGA Res 64/71 (4 December) UN Doc A/RES/64/71, paras 133 and 150.

⁷¹ Gjerde (n 34) 286. See also Gjerde and Rulska-Domino (n 1) 363ff.

⁷² See Tladi (n 1) 108.

⁷³ UNGA Res 59/24 (17 November 2004) UN Doc A/RES/59/24, para 68 (adopted by 141 votes in favour, one vote against and 17 abstentions).

⁷⁴ See UNGA Res 61/105 (8 December 2006) UN Doc A/RES/61/105, paras 80-93 (adopted by consensus).

⁷⁵ *ibid* para 80.

⁷⁶ *ibid* para 83.

⁷⁷ See, eg UNGA Res 66/88 (9 December 2011) UN Doc A/RES/66/88, para 129 (adopted by consensus).

areas to bottom fishing as necessary.⁷⁸ These resolutions and the support they garnered from states, constitute state practice. They form an important part of the law of the sea and contribute to the interpretation of the environmental norms in the Convention and related instruments. Moreover, these resolutions seem to contract the boundaries of the freedom of the high seas by potentially creating restrictions on the freedom to fish in a manner not contemplated by the Convention.

Efforts at advancing the cause of conservation and preservation and, as a consequence, eroding freedom of the high seas have perhaps been most evident in the practice of States relating to marine protected areas.⁷⁹ Marine protected areas in areas beyond national jurisdiction are fully consistent with the Convention on the Law of the Sea and can be seen as joint measures for the protection of the environment under, *inter alia*, Articles 194 and 197 of the Convention. However, flowing from the freedom of the high seas, the rules arising from the establishment of any marine protected area will only be binding on the States that established the marine protected area and the vessels flying their flags.⁸⁰ Some States, groups of States and other actors have sought to go around the freedom of the high seas by seeking international legitimacy for marine protected areas with a view to creating political pressure, if not a legal obligation, on third States to respect the rules of the relevant marine protected areas.

The principal way in which the marine protected areas agenda has been advanced is through inclusion of language in the General Assembly's annual oceans resolution oceans and the law of the sea. The World Summit on Sustainable Development's Plan of Implementation had, already in 2002, committed States to "promote the conservation and management of oceans" including by through taking action to develop and "facilitate the use of diverse approaches and tools, including the ecosystem approach" and "the establishment of marine protected areas consistent with international law and based on scientific information, including a representative network by 2012".⁸¹ The EU has relied on this language to ensure that the General Assembly resolutions on oceans consistently encourage the establishment of marine protected areas. The General Assembly, for example, has consistently called on States to "strengthen, in a manner consistent with international law, in particular the Convention, the conservation and management of marine biodiversity and ecosystems and national policies in relation to marine protected areas".⁸²

Similarly, the General Assembly has been consistent in reaffirming the need for States to 'develop and facilitate the use of diverse approaches and tools for conserving and managing vulnerable marine ecosystems, including through the possible establishment of marine protected areas, consistent with international law as reflected in the Convention'.⁸³ The General Assembly also perennially encourages States to make progress 'towards the 2012 target for the

⁷⁸ *ibid* para 131.

⁷⁹ Marine protected areas can be loosely defined as marine area which has been reserved by law or other means for the purposes of conserving and protecting the environment therein.

⁸⁰ See generally P Dee Boersma and Julia K Parrish, 'Limiting Abuse: Marine Protected Areas, A Limited Solution' (1999) 31 *Ecological Economics* 287, 289.

⁸¹ WSSD, 'Report of the World Summit on Sustainable Development' A/CONF/199/20 ch I, Res 2 Annex (Johannesburg Plan of Implementation), para 32(c).

⁸² See, eg UNGA Res 66/231 (n 70), para 175; UNGA Res 65/37 (n 70), para 176, and UNGA Res 64/71 (n 70), para 152.

⁸³ See, eg UNGA Res 66/231 (n 70), para 176; UNGA Res 65/37 (n 70), para 177, and UNGA Res 64/71 (n 70), para 153. See also UNGA Res 66/231 (n 70), para 177, which recognises the work of the Biological Diversity Convention to develop criteria for the identification of marine areas that require protection in the light of objectives of the World Summit of Sustainable Development to 'use diverse approaches and tools, such ecosystem approaches and the establishment of marine protected areas.'

establishment of marine protected areas, including a representative network ...'.⁸⁴ While the language in the General Assembly resolutions has gone some way to mainstreaming marine protected areas, States concerned about the emergence of a legal obligation to respect marine protected established by third states have consistently ensured that references to marine protected areas are qualified by 'consistent with international law, as reflected in the Convention'. The effect of this qualifier is that the General Assembly's calls for marine protected areas have to be interpreted in the light of the principles of the Convention, including the freedom of the high seas, which would insulate those not party to the establishment of the marine protected area from the obligation to respect any such marine protected area.

A second approach to obtaining international legitimacy for marine protected areas has been initiatives to obtain recognition of individual marine protected areas. The best example, although thus far unsuccessful, has been the Oslo Paris Convention (hereinafter OSPAR).⁸⁵ In 2010, at the Bergen Ministerial Meeting, OSPAR established several marine protected areas beyond national jurisdiction in the North-East Atlantic Ocean.⁸⁶ During the negotiations for the 2010 and 2011 oceans resolutions respectively, Norway supported strongly by the EU, proposed language that would welcome the establishment of these marine protected areas. The language was rejected by some States precisely because of the fear that this could legitimise the marine protected areas established by OSPAR and create an expectation that these marine protected areas and the rules flowing from them would be binding on all.

Another initiative designed to create legitimacy for a specific area of protection is the Sargasso Sea Alliance.⁸⁷ The initiative aims at the establishment of marine protected areas both within national jurisdiction (of Bermuda) and beyond national jurisdiction. The approach of the initiative is to use existing sectoral mechanisms to garner the required legitimacy and compliance with the marine protected area regime. If, for example, the Sargasso Sea Alliance could obtain the cooperation of the International Seabed Authority to close off mining in the relevant marine protected area, the International Maritime Organisation – the organisation responsible for shipping – to identify the Sargasso Sea as Particularly Sensitive Sea Area with consequent restrictions on shipping activities in the area while also working with the relevant regional fisheries management organisations, the Sargasso Alliance would have a marine protected area which all members of the respective sectoral organisations would be obliged to respect.⁸⁸ The Sargasso Sea initiative is in its infant stages and only time will tell whether it will be successful and whether its successes could be duplicated elsewhere. But it does reflect an important example of how the boundaries of the law of the sea in relation to marine protected areas have been pushed through State practice.

All these initiatives, however, are short-term measures. The practices described above, while serving to push the boundaries of what is possible under the current law, are also aimed at

⁸⁴ See UNGA Res 66/231 (n 70), para 178; UNGA Res 65/37 (n 70), para 179, and UNGA Res 64/71 (n 70), para 155.

⁸⁵ Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) (1993) 32 ILM 1072 (OSPAR Convention). The parties to OSPAR are fifteen European states and the EU.

⁸⁶ See OSPAR Commission, '2010 Status Report on the OSPAR Network of Marine Protected Areas' (2011), 21 <www.maia-network.org/upload/iedit/10/553_1874_OsparCommission_2010_list_of_OSPAR_MPAs.pdf> accessed 10 December 2013. The marine protected areas established by OSPAR are: Charlie-Gibbs South Marine Protected Area, Milne Seamount Complex Marine Protected Area, Mid-Atlantic Ridge north of the Azores High Seas Marine Protected Area, Altair Seamount High Seas Marine Protected Area and Josephine Seamount Complex High Seas Marine Protected Area.

⁸⁷ See for further information on the Sargasso Sea Alliance the website of the initiative at <www.sargassoalliance.org> accessed 10 December.

⁸⁸ For a comprehensive discussion of the said mechanisms see Gjerde and Rulska-Domino (n 1) 358ff.

establishing legitimacy for the conservation and perseverance measures yet to be put in place. The ultimate objective of these measures would be the conclusion of a legally binding (and implemented) instrument which establishes a global process for the establishment of marine protected areas along with other conservation measures. It is here that the contestation of the legal regime for marine genetic resources meets with the contestation for the conservation and preservation of marine biodiversity in areas beyond national jurisdiction.

4. The Quest for an Implementing Agreement

The discussions on the governance of areas beyond national jurisdiction have been dominated by the contestations over conservation and preservation measures in areas beyond national jurisdiction on the one hand and the question of the legal regime applicable to marine genetic resources in areas beyond national jurisdiction, on the other hand. The former has been championed by the EU while the latter has been championed by the G77. With the G77 insisting that progress on the conservation and preservation issues would depend on the progress on the marine genetic resources question, the discussions appeared to be headed for a terminal impasse.

The impasse is reflected in the constant restatement of both debates in the reports of the *ad hoc* Working Group.⁸⁹ The most recent report of the *ad hoc* Working Group is illustrative of the impasse.⁹⁰ On the area based-management tools, including marine protected areas, the report begins by stating that the “the importance of area-based management tools” was noted and that the view was expressed that marine protected areas ‘should be established’.⁹¹ The report also refers to the suggestion by some delegations to consider a process for the identification of marine protected areas in areas beyond national jurisdiction.⁹² At the same time, however, the report refers to the position of some delegations that there was no multilaterally agreed legal regime for marine protected areas in areas beyond national jurisdiction and that the establishment of marine protected areas unilaterally or by a group of States raised questions of the legitimacy of such marine protected areas.⁹³ Similarly divergent views on the legal regime applicable to marine genetic resources are reflected in the report.⁹⁴ The result of the impasse has been that the General Assembly has been able only to request States to consider the two issues in the context of the mandate of the *ad hoc* Working Group without providing any guidance on the direction that should be followed.⁹⁵

The dynamics changed in the *ad hoc* Working Group meeting of 2011 when the EU and the G77 joined forces in calling for an implementing agreement to address these contested issues. The

⁸⁹ The marine genetic resources debate, for example, is reflected in Recommendations and Co-Chairs Summary of the *ad hoc* Working Group meeting of 2010 (n 51) paras 71 and 72; Recommendations and Co-Chairs Summary of the *ad hoc* Working Group meeting of 2011 (n 51) paras 15, 16 and 17; Recommendations and Co-Chairs Summary *ad hoc* Working Group meeting paras 36 and 37. The debate over conservation tools is reflected in, for example, Recommendations and Co-Chairs Summary of the *ad hoc* Working Group meeting of 2010 (n 51) paras 64, 65, 66 and 67; Recommendations and Co-Chairs Summary of the Working Group meeting paras 26 and 27.

⁹⁰ *Ad Hoc Working on Marine Biodiversity in Areas Beyond National Jurisdiction, ‘Recommendations to the General Assembly and Co-Chair’s Summary of the Discussions of the Meeting’* (7-11 May 2012) (advanced, unedited version, on file).

⁹¹ *ibid* para 19.

⁹² *ibid* para 21

⁹³ *ibid*

⁹⁴ *ibid* paras, 14, 15 and 16.

⁹⁵ See, eg UNGA Res 64/71 (n 70) para 142, which calls for states to ‘further consider’ the issue of ‘the relevant legal regime on marine genetic resources in areas beyond national jurisdiction’. In para 148 thereof the General Assembly invites states ‘to further consider’ the issue of ‘marine protected areas’. See also UNGA Res 61/222 (20 December 2006) UN Doc A/RES/61/222, para 91.

alliance was a tenuous one mainly because it was built not on substance but on process. However, it did serve the important function of isolating the seven States – United States, Russia, Iceland, Norway, Canada and Japan – as the only States not willing to consider the elaboration of binding instrument to clarify and further develop the governance and legal principles applicable to marine biodiversity in areas beyond national jurisdiction.

The EU had always supported the idea of a new binding instrument to “further specify and implement” the provisions of the Convention on the Law of the Sea, in particular as it relates to conservation measures.⁹⁶ The G77, on the other hand had never fully embraced the idea of an implementing agreement. South Africa was the main driver within the G77 to call for an implementing agreement.⁹⁷ However, in the *ad hoc* Working Group meeting of 2011 the G77 agreed to support the call for an implementing agreement. With the G77 and the EU, with cautious support from States like Australia, Mexico and New Zealand, calling for an implementing agreement the seven objecting countries were forced to agree to initiate a process that *could* lead to the development of a binding instrument. The *ad hoc* Working Group recommended that

A process be initiated, by the General Assembly, with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea.⁹⁸

The *ad hoc* Working Group further recommended that the process should address, inter alia, ‘marine genetic resources, including the question of sharing benefits, measures such as area-based management tools, including marine protected areas ...’⁹⁹ This recommendation was taken up by the General Assembly which decided to initiate the process as recommended by the *ad hoc* Working Group i.e. a process that could lead to the elaboration of an implementing agreement.¹⁰⁰

While the G77 and EU had hoped also to pursue the implementing agreement through the Rio plus 20 process,¹⁰¹ Venezuela, due to its opposition to the Law of the Sea Convention, blocked a G77 position on the implementing agreement. In response, South Africa organised a group of like-minded countries which, supported by the EU, called for an implementing agreement. In the final text adopted at the Rio plus 20 conference, world leaders took note of the work of work of the *ad hoc* Working Group and committed themselves to ‘address, on an urgent basis [and before the end of the 69th session of the General Assembly], the issue of the conservation and

⁹⁶ See, eg, EU Presidency intervention (n 65) para 12 (on file with the author). See especially the EU Presidency Statement on the role of Area-Based Management Tools (n 65) in which the EU argues that there is ‘a need for a global regime in this regard.’

⁹⁷ See, South Africa, ‘Statement to the UN General Assembly on Oceans and the Law of the Sea’ (4 December 2009). See also South Africa, ‘Statement during the *ad hoc* Working Group’ (2 February 2010) (both on file with the author)

⁹⁸ Recommendations and Co-Chairs Summary of the *ad hoc* Working Group meeting of 2011 (n 51) para 1.

⁹⁹ *ibid*

¹⁰⁰ UNGA Res 66/231 (n 70) para 167.

¹⁰¹ The first draft of the Rio plus 20 outcome text included a paragraph, proposed by G77 and supported by the EU, going beyond UNGA Res 66/231, para 167, by actually committing to initiating a process ‘towards negotiation of an implementing agreement to’ the Convention on the Law of the Sea. See the chair’s zero draft of the Rio plus 20 Outcome Document, para 80 (on file with author).

sustainable use of marine biological diversity of areas beyond national jurisdiction including by taking a decision on the international instrument under' the Law of the Sea Convention.¹⁰²

This paragraph does not, in and of itself, create a mandate for the elaboration of an instrument. But what it does do is to endorse the process initiated by the General Assembly under the *ad hoc* Working Group and in this way contributes to the impetus to elaborate an instrument to address gaps in the conservation and sustainable use of marine biodiversity. That it was accomplished in the face of strong opposition from major powers and – due to the Venezuela's position – without G77 unity, is testament to the intense pressure brought to bear by the EU and the G77 countries over a period of several years. The agreement reached in Rio is important also because it sets out that a decision on how to proceed should be made at the end of the 69th session – roughly three years from the time Rio Summit. Within this period, state practice will play a crucial role in determining whether an implementing agreement should be elaborated and, if so, what the content of such an agreement should be.

The decisions of the General Assembly and the Rio plus 20 Summit to initiate a process that could lead to an implementing agreement is a significant milestone in the path towards the establishment of a legal regime to more equitably and sustainably govern marine areas beyond national jurisdiction. Whether the process initiated by the General Assembly will lead to the adoption of a new binding instrument remains to be seen. What is clear, however, is that the resolve of States will determine not only whether an implementing agreement will be negotiated and adopted but also the content of such an implementing agreement.

IV CONCLUSION

The role and impact of state practice on the evolution of the law relating to marine areas beyond national jurisdiction has been varied. In the first place, state practice has been an interpretative tool used by States to advance their own positions about the content of existing rules. In the second place, through practice, States have sought to influence the development of new norms. While, due in large part to the strongly held contradictory positions, it is not possible to argue that state practice has resulted in an objectively accepted interpretation of existing international law or to argue that state practice has resulted in the evolution of new norms on the oceans governance in areas beyond national jurisdiction, the practice of States has not been without effect.

The positions adopted by States have served, first and foremost, a defensive purpose preventing a particular interpretation from becoming authoritative or preventing the evolution of new norms. Thus, without the constant restatement of positions by the United States, Russia and others, it is conceivable that the notion that marine genetic resources on the deep seabed are governed by the common heritage of mankind could have taken hold. The reverse is true, i.e. but for the constant restatement of the G77 position, it is conceivable that the idea that marine genetic resources are governed by freedom of the high seas may have come to be accepted. Similarly, but for the restatement of positions by some delegations with respect to marine protected areas, the idea that a marine protected area established by a group of States in the high seas has to be respected by all States may have come to be accepted.

Finally the milestone achievement of initiating a process that *could* lead to an implementing agreement to regulate more equitably and sustainably marine areas beyond national jurisdictions

¹⁰² UNGA Res 66/288 (27 July 2012) UN Doc A/RES/66/288 Annex, para 162.

was achieved through the continuous and collective efforts of States. As States embark upon what is likely to be a marathon process towards a possible implementing agreement, the practice of States will continue to be important, not only in determining whether an implementing agreement will be elaborated and adopted but also in defining the content of the norms in any such agreement.

‘Emergent State Practice on the creation and practice of Standards on Corporate Social Responsibility’

*Olufemi Amao**

ABSTRACT: This article examines the emerging State practice on the evolving corporate social responsibility (CSR) standard. It examines its public international law instruments and particularly analyses the role of States in the development of CSR norms and the potential of these norms to impact the recognition, promotion and protection of human rights. The article also assesses the UN effort to consolidate the standards that have emerged from soft law instruments in public international law, focusing on the Ruggie’s process and its potential impact on the future development of the law and practice in this area. The article shows an emerging convergence of standards and practices and coherence on certain themes that could ultimately lead to the establishment of stronger international norms on CSR. A key example is human rights standards for corporations regarding their activities in host States.

Introduction

CSR has emerged in recent times as a tool or concept for creating or setting new standards¹ against corporations both at national and international levels. The concept is premised on the need to extend the responsibility of corporations beyond the limited traditional set of responsibilities to include responsibilities for externalities emanating from their enterprises, especially in the international context. In the last few decades, States and their international organizations have been active in deliberately trying to establish both a normative framework and an ethical framework within which corporations operate. Significantly, because of the complexity of the issues involved and the difficulty around reaching agreements in this area, CSR standards are emerging mainly from soft law instruments.² Furthermore, the key landmarks in the evolution of these standards have happened at the international level. It is therefore pertinent to examine the evolving CSR standards from the perspective of State practice because of the implications this may have for norm creation.³

The Concept of CSR and Its Scope

CSR is a concept that is like the story of the proverbial blind men and the elephant. In the ancient story, a group of blind men touched an elephant in order to determine the shape and size of the creature. Each of the men touched and felt around a different part of the animal, leading to contradictory descriptions of what an elephant looked like. Similarly, establishing fixity about the concept of CSR has proven to be a major ask across disciplines, leading to a

* Centre for International and Public Law (CIPL) and Lecturer, Brunel University, London. The author is grateful to SPILJ’s independent referees for their comments on an earlier draft of this article.

¹ The ‘standards’ are sometimes called ‘principles’ or ‘norms’ depending on the source. These terms generally mean ‘rules’, binding or non-binding.

² The so-called ‘soft law’ are products of normative creation processes outside the classical and familiar legal categories. Pierre-Marie Dupuy, ‘Soft Law and the International Law of the Environment’ (1991) 12 Michigan Journal of International Law 420; Christine M Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 International and Comparative Law Quarterly 850.

³ Consistent State Practice and a belief in legal obligation to implement elements of CSR standards may lead to creation of new norms of customary international law. North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 3 [44].

proliferation of definitions and difficulty in understanding the concept.⁴ It has been observed that States, international organisations, companies, consultants, lawyers, non-governmental organisations (NGOs), and other interest groups have different definitions of the idea.⁵

For example, environmentalists define CSR in environment-centric terms. Some have inclined their definitions to philanthropic or charitable elements of the idea.⁶ Others have defined CSR in human or labour rights-focused terms.⁷ Apart from definitional variations it has also been observed that institutions alter or change their definition of the idea from time to time. The World Business Council for Sustainable Development (WBCSD) defined the concept in 1998 as ‘the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large’.⁸

However, only four years later, the same organization developed its understanding of the idea of CSR to ‘the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life’.⁹ The change was made to align the idea of CSR to the growing popularity of the concept of sustainable development¹⁰ – a contextual influence. Previously, the European Commission, defined the idea as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’.¹¹ In 2011, the Commission put forward what it called a new, simpler definition of CSR to mean: ‘the responsibility of enterprises for their impacts on society’¹² – an accountability approach. The tendency to change and adapt understanding of the idea shows both the importance and fluidity of the idea and exemplifies the challenge faced in the development of common standard for CSR. However, in attempting to delineate the scope of the concept, the EU Commission correctly observed that:

CSR at least covers human rights, labour and employment practices (such as training, diversity, gender equality and employee health and well-being), environmental issues (such as biodiversity, climate change, resource efficiency, life-cycle assessment and pollution prevention), and combating bribery and corruption. Community involvement and development, the integration of disabled persons, and consumer interests, including privacy... The promotion of social and environmental responsibility through the supply-chain, and the disclosure of non-financial information...

⁴ Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge 2011) 67.

⁵ See the white paper, sponsored by Oracle, from the Economist Intelligence Unit, ‘The Importance of Corporate Responsibility’ (2005).

⁶ Kenneth Amaeshi, Bongo Adi and Olufemi Amao, ‘Corporate Social Responsibility in Nigeria: western mimicry or indigenous influences?’ (2006) 24 *Journal of Corporate Citizenship* 83, 95.

⁷ The white paper (n 5)

⁸ Michael Blowfield and Jędrzej G Frynas, ‘Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World’ (2005) 81 *International Affairs* 499.

⁹ *ibid*

¹⁰ The most common definition of sustainable development is ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’ See World Commission on Environment and Development (WCED), *Our common future* (OUP 1987) 43.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, ‘A renewed EU strategy 2011-2014 for Corporate Social Responsibility’ of 25 October 2011 COM(2011) 681 final.

¹² *ibid*

Examination of current CSR discourse across disciplines shows that the issues identified by the EU commission represent the emergent and recurring themes with varying degrees of emphasis.¹³ Generally, CSR standards require corporations to go beyond their current legal obligations and aim for best practices. The concept urges corporations not only to focus on the traditional needs of shareholders but also to serve the need of other stakeholders whom they should have reasonable contemplation of in the execution of their operations.¹⁴ They very much echo the neighbour principle so elegantly enunciated in *Donoghue v Stevenson*.¹⁵

Creation of Standards and the Internalisation of CSR

The global growth and expansion of Multinational Corporations (MNCs) has increased corporations' influence and significance as international actors. The implication of this development is that MNCs' activities increasingly impact on rights and duties of stakeholders other than shareholders at both the domestic and global levels. While it is generally acknowledged that corporations have rights under international law,¹⁶ the question of their obligations/duties under international law revolves around the theoretically complex but related questions of whether MNCs are subjects of international law on the one hand and, on the other, whether MNCs have international legal personality and international legal capacity.¹⁷ Despite the post World War II increase in subjects of international law to include non-state actors such as intergovernmental organisations and individuals, the legal personality of MNCs is not that clear-cut.¹⁸

Some writers have suggested that private and public corporations 'may to a limited extent, be directly subject to rights and duties under international law'.¹⁹ However, there is scant evidence of this in practice. One consequence of the failure to make MNCs direct subjects of international law is that international law cannot then enforce any obligations directly upon them. Consequently, more attention has been devoted to closing this lacuna by developing international CSR standards, resulting in soft law regimes.²⁰ While soft-law regimes are non-binding, they often develop into binding regulatory regimes by influencing/promoting the establishment of treaty regimes, or establishing common practices that crystallise into binding norms of customary international law.²¹

A Research Agenda: State practice and CSR

Generally, standards may be brought about by recognised competent authority through recognised procedures²² or they may 'gradually evolve by custom'.²³ Where an international

¹³ Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 Boston University International Law Journal 309, 327.

¹⁴ Deborah Leipziger, Benjamin Simmons and Anna Autio, 'Corporate Social Responsibility and Regional Trade and Investment Agreements' (United Nations Environment Programme, 2011) 11.

¹⁵ *Donoghue v Stevenson* [1932] All ER Rep 1.

¹⁶ See Merja Pentikäinen, 'Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations' (2012) 8 Utrecht Law Review 146, 148.

¹⁷ *ibid*

¹⁸ Antonio Cassese, *International Law* (2nd ed, OUP 2005) 1.

¹⁹ Roger P Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 Pepperdine Law Review 233, 234.

²⁰ (n 2)

²¹ Herbert M Morais, 'The Quest for International Standards, Global Governance vs Sovereignty' (2001-2002) 50 University of Kansas Law Review 779, 781; Bernard H Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 New York University Journal of International Law and Politics 110, 119.

²² Hans Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concept, Part I' (1934) 50 Law Quarterly Review 475.

standard is established by a competent authority, for example, by treaty, its identification is relatively straightforward and so is the understanding of its scope. However, where an international standard evolves through custom or consensus, it is more challenging to track its development and to identify when a new international standard has been established. These two approaches to creating international standards (treaty law and customary international law (CIL) respectively) are the two main sources of international law.²⁴

The secondary rules of recognition require evidence of two elements for the inauguration of a norm of CIL, namely State practice and '*opinio juris*'. State practice is also regarded as the objective element of customary international law as opposed to the subjectivity of *opinio juris*.²⁵ In relation to treaties, the concept of State practice is important in the interpretation of treaties.²⁶ However, in the context of this article, we are more concerned with State practice in the context of the creation of standards. The forms that State practice takes are numerous and this makes its identification a difficult task.²⁷ Furthermore, there are diverse views on what should be considered as a State practice. The modern view however is 'to have regard to what States say, what they do, and what they say about what they do, in so far as this reflects their legal beliefs'.²⁸ The sources of State practice are diverse in form and also in the values attached to them. According to Brownlie, the forms that State practice takes include:

diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.²⁹

Wood added to this list, 'positions taken by States in their written and oral pleadings in international and domestic court proceedings; and under certain conditions their actions in drawing up and becoming parties to treaties'.³⁰

The task of this article is to establish and evaluate the emergent State practice on the creation and practice of international standards on CSR. The article will examine significant developments to date and explore whether there is emerging a coherent international standard on CSR.³¹ This is important because it will provide clarity to MNCs in relation to their CSR responsibilities and also provide better understanding of the prospect for international law in this area. While it is obvious that at present there is no CIL or treaty on CSR, the question is

²³ Morais (n 21) 779-780.

²⁴ Michael Akehurst, 'The Hierarchy of Sources of international Law' (1975) 47 British Year Book of International Law 273; Ben Chigara, *Legitimacy Deficit in Custom: Towards a Deconstructionist Theory* (Ashgate 2001).

²⁵ Michael Wood, 'State Practice' Max Planck Encyclopedia of International Law, available at <<http://opil.ouplaw.com/home/EPIL>> accessed 13 December 2013.

²⁶ William J Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice' (1996) 17 University of Pennsylvania Journal of International Economic Law 995, 1043.

²⁷ Ian Brownlie, *Principles of Public International Law* (8th ed, OUP 2012) 24.

²⁸ Wood (n 25).

²⁹ Brownlie (n 27) 24.

³⁰ Wood (n 25).

³¹ Jennifer Zerk, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 243.

whether the considerable effort that has been put into devising voluntary standards or soft law for MNCs is driving coherent State practice on international CSR standards.

This article argues that it does. There are recurring themes in the efforts at the international level which is shaping the emerging international standards on CSR. Commenting on the various international soft law instruments on CSR, Zerk writes that the, "...various 'codes of conduct', 'guidelines' and 'principles' contain a number of recurring themes which, if given sufficient support by the international community, could eventually develop into binding obligations."³² It is therefore plausible to cautiously posit that the existing international soft law regimes on international CSR standards indicate the possibility of the emergence of uniform standards on CSR.³³ However, for these developments to lead to the emergence of a new customary international law principle, "... there must be consistent state practice, evidencing a high degree of consensus around the desirability of the new principle, and evidence of a conviction on the part of states that the new principle is legally binding."³⁴ The article also discusses the practice of incorporating international CSR standards into investment agreements and the emerging trend in domestic regulation of CSR standards by States.

Going forward, progress towards the development of new international norms on CSR depends on States taking up the principles emerging from international CSR standards and incorporating them in national and international legal frameworks.³⁵

Creation of CSR Standards through Public International Soft Law Instruments

It is important to underscore that generally States have been very active in the development of international standards for CSR.³⁶ It is acknowledged that these standards do not as yet constitute public international law. However, because of the significant State involvement in the creation and implementation of these standards, they may ultimately lead to the emergence of new international norms in the future.

Today, it is acceptable to speak of 'internationally recognised CSR standards'. According to the European Union, '[F]ive instruments together make up an evolving and increasingly coherent global framework for CSR.'³⁷ The five instruments are the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises (OECD Guidelines), the 10 principles of the United Nations Global Compact (Global Compact), United Nations Guiding Principles on Business and Human Rights (The Guiding principles), the International Labour Organisation's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy (The Tripartite Declaration) and the ISO 26000 Guidance Standard on Social Responsibility (ISO 26000). (These instruments are discussed in details in subsequent sections.) These instruments are universally accepted among States as international standards on CSR albeit non-binding. According to the EU Commission, '[T]his core set of internationally recognised principles and guidelines represents an evolving and recently strengthened global framework for CSR.'³⁸

³² *ibid*

³³ *ibid* 262.

³⁴ *ibid*

³⁵ *ibid* 243.

³⁶ Gunther Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18 *Indiana Journal of Global Legal Studies* 17, 18-19.

³⁷ EU, 'CSR guidelines and principles', online at <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/guidelines-principles/index_en.htm> accessed 12 December 2013.

³⁸ COM(2011) 681 final (n 6) 6.

Despite the fact that these instruments are strictly speaking soft law and non-binding, they are still important from a legal standpoint. As stated earlier, the soft law could develop into binding obligations by prompting treaty development or by being incorporated into customary international law. According to Zerk, the instruments are significant as ways of 'testing attitudes, developing consensus around an issue and shaping future norms.'³⁹ Teubner has interestingly argued that these instruments, which he describes as 'public codes':

...define certain politically desired obligations and establish the boundary between permitted and banned activities, they are only informal recommendations and mere appeals for certain conduct. They are also valid law, yet in paradoxical form; they are law in force but without legal sanctions.⁴⁰

It is trite to say that most international law scholars may not agree with the description of these standards as 'valid laws' or 'law in force'. But more significant and relevant is Teubner's argument that '[T]he public codes...provide templates, behavioural models, principles, best practices, and recommendations for the private codes'.⁴¹ In other words, States set standards through these various voluntary instruments which have informed the standards set by MNCs themselves in their own corporate codes of conduct.⁴² It is therefore pertinent to examine these instruments and their impact on the development of international standards for CSR.

CSR and International Labour standards for MNCs

The International Labour Organisation's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy⁴³ (Tripartite Declaration) is reputed to be the first effort by the international community to cover the social dimension of business and sets corporate responsibility standards for MNCs. The ILO consists of a significant number of States in its membership, 183 States to date. The instrument therefore has considerable States' endorsement and backing. It also includes workers' and employers' organisations. The tripartite structure of the ILO's membership makes it a unique international organisation. According to the ILO, the Declaration '...[I]s the only international instrument on socially responsible business practices that has been agreed to by governments and representatives of workers' and employers' organizations.'⁴⁴

The social justice sentiment behind the establishment of the ILO (as an Agency of the United Nation) is similar to the main rationale behind the CSR movement. The Preamble to Article 13 of the Treaty of Versailles establishing the ILO states that the High Contracting Parties to the treaty 'moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world' agreed to the establishment of the ILO. The focus of the agenda was the creation of global standards that would improve labour conditions on an international scale.⁴⁵ The ambition was also to establish a global standard that would not put

³⁹ Zerk (n 31) 262.

⁴⁰ Teubner (n 36) 34.

⁴¹ *ibid* 36.

⁴² Corporate Codes of Conduct has been described as 'policy statements that outline the ethical standards of conduct to which a corporation adheres'. Bantekas (n 13) 322.

⁴³ See ILO, 'Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration) - 4th edition', available at <www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm> accessed 12 December 2013.

⁴⁴ See ILO, 'MNEs contributors to creation of employment', available at <www.ilo.org/empent/areas/mnes-contributors-to-creation-of-employment/lang-en/index.htm> accessed 12 December 2013.

⁴⁵ See generally Ben Chigara, 'Latecomers to the ILO and the Authorship and Ownership of the International Labour Code' (2007) 29 Human Rights Quarterly 706, 710.

any country or industry adopting social reform at an economic disadvantage.⁴⁶ It was therefore important to create a level playing field that would improve social conditions and also lead to economic growth. The ILO'S strategy was to develop guidelines for companies operating internationally. This was achieved through the introduction of the Tripartite Declaration.

Following deliberations between member States' governments, labour organisations and employer groups, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was passed on the 16th of November 1977. It was revised in 2000 to include the fundamental principles and rights at work, and again in 2006 to update references to other ILO instruments. The recommendations in the Declaration apply to all Member States Parties and non-States Parties. The Declaration laid down the principles which Member States governments and employers' and workers' organisations are enjoined to observe albeit on a voluntary basis.

Some parts of the Declaration reflected existing binding obligations on Member States Parties which, according to Clapham is probably declaratory and a reminder of those existing obligations.⁴⁷ An example is the obligation to realize the fundamental principles and rights at work.⁴⁸ However, apart from this, the inclusion of such provisions in an instrument that also addresses MNCs led to the perception that these provisions are the minimum requirement that voluntary corporate initiatives such as corporate codes of conduct need to meet in order to be credible.⁴⁹ Nevertheless, there are provisions in the Declaration which appear to alter significantly the international standards on CSR.

A key provision in this regard is the specific reference to 'human rights' in paragraph 8 of the Declaration. The paragraph provides that: '[A]ll the parties concerned by this Declaration should respect ... the Universal Declaration of Human Rights (1948) and the corresponding International Covenants adopted by the General Assembly of the United Nations...' According to Clapham, this was a 'clear recognition by states, and employers' and workers' organizations...that they should all take on human rights obligations as defined in the Universal Declaration and the two human rights Covenants of 1966'.⁵⁰ The ILO guidelines further provide standards on employment and industrial relations, training, living and working conditions.

The ILO Tripartite Declaration can thus be seen as an important summary of the standards States expect MNCs to apply. The gradual embedding of these standards in MNCs' codes of conduct is an apposite example of how the Declaration is shaping standards at the international level.⁵¹ A survey conducted by Vigeo, a European Agency in 2008 examined how the largest publicly-listed European Companies were using the ILO's Tripartite Declaration, the OECD Guidelines and the UN Global Compact.⁵² 89 companies participated in the

⁴⁶ William B Gould IV, 'Labor Law for a Global Economy: The Uneasy Case for International Standards' (2001) 80 Nebraska Law Review 716, 720

⁴⁷ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 213.

⁴⁸ Tripartite Declaration (n 43) para 1.

⁴⁹ Clapham (n 47) 215.

⁵⁰ *ibid* 214.

⁵¹ Kathryn Gordon and Maiko Miyake, 'Deciphering Codes of Conduct: a Review of their Contents' OECD Working Papers on International Investment 1999/2, revised March 2000, 14. Kenneth Amaeshi and Olufemi Amao, 'Corporate Social Responsibility in Transnational Spaces: Exploring Influences of Varieties of Capitalism on Expressions of Corporate Codes of Conduct in Nigeria' (2009) 86 Journal of Business Ethics 225, 232.

⁵² Fouad Benseddik and Annabelle Szwed, 'International Public Standards in the Conception and Practice of Social Responsibility by Large European Companies' (2008, Vigeo, SRI Research).

survey and the researchers analysed 281 corporate CSR and sustainability reports. In answer to the question 'Is your Company's CSR approach based on/inspired by international CSR guidance, standards or instruments?' 64% of the respondents (two-thirds) refer to the ILO's Tripartite Declaration. Furthermore, 53.9% of the companies referenced the Tripartite Declaration in their annual CSR or sustainability report. The survey also revealed that the companies prefer to base their CSR approach on international standards rather than national laws. 52.8% of the respondents stated this in the affirmative. The preference for international standards may be explained by the fact that these instruments are well developed when compared to national laws on CSR.⁵³

International Human Rights Standards for Corporations

Perhaps a logical follow up to the discussion on the Tripartite Declaration is to examine the recent United Nations Framework and Guiding Principles on Business and Human Rights.⁵⁴ With these two instruments, the UN attempted to consolidate all previous efforts on setting international standards for CSR. In 2005, the UN Secretary General appointed Professor John Ruggie as the special representative for the establishment of international human rights standards applicable to corporations. Six years later Ruggie and his team produced a governance framework and guiding principles on business and human rights - the Ruggies process.

The framework was proposed in 2008. In 2011, the guiding principles were established to aid the implementation of the framework. The guiding principles were endorsed by the UN Human Rights Council in 2011.⁵⁵ The instrument is the first of its kind in the UN history to define the responsibilities of States and of businesses in relation to human rights impact of business activities. The Ruggie's process is significant because it identifies international standards against which conduct of MNCs can be measured. Notably, these standards go beyond compliance with local laws. The significance of this development is summed up in the Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises as providing:

... a "single, logically coherent template" for all States and all businesses in every part of the world - an approach which draws on existing international law, standards and practice, and formulates, after taking into account the gaps in such body of hard and soft law, a series of comprehensive principles. In addition, the Guiding Principles provide substantial clarification on the role of States and corporations with regards to business impacts that was not present in previous standards.⁵⁶

The main idea behind the instrument itself is the notion that MNCs should share human rights responsibilities and the provision of remedies with States.⁵⁷ This notion is in contrast to

⁵³ Discussed fully at a later stage in this article.

⁵⁴ HRC, 'Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprises' (7 April 2008) UN Doc A/HRC/8/5 (hereafter 'the framework'); HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31 (hereafter 'the guiding principles').

⁵⁵ HRC, 'Human rights and transnational corporations and other business enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4.

⁵⁶ UNGA, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Addendum: Uptake of the Guiding Principles on Business and results from Pilot Surveys of Governments and Corporations' (16 April 2013) UN Doc A/HRC/23/32/Add.2 para 21.

⁵⁷ See the guiding principles (n 54) paras 11-15.

the traditional view that places these responsibilities solely upon States. Therefore, the governance framework's purpose is to clarify the roles and responsibilities of governments and companies in relation to the human right impact of business activities. The framework rests on complimentary responsibilities which are encapsulated in three core principles (or pillars), namely, the State duty to protect against human rights abuses by third parties - including business; a separate and independent corporate responsibility to respect human rights; and the need for the provision of effective access to (judicial and non-judicial) remedies.⁵⁸ The principles or pillars are designed to support each other.

The first two pillars clarify the duties of States and corporations for human rights respectively. On the part of States, it recognises the settled position in international law that the State has a duty to protect human rights and prevent abuses by entities including MNCs. While not recommending specific legislative intervention or policy actions, the framework pinpoints certain innovative approaches which may be useful in the achievement of the States' duty to protect. The first is for governments to foster a corporate culture that incorporates the recognition, promotion and protection of human rights as an integral part of business operations. States can achieve this by introducing statutory provisions that require comprehensive sustainability reporting, wider fiduciary duties of company officers and supports the use of shareholder proposals. Also significant is the provision in the first pillar on the requirement to focus on company policies, rules and practices in the criminal determination of culpability of MNCs. The second is for both the host and the home State to jointly coordinate to develop better means of achieving balanced outcomes between for all concerned parties in the context of international investment and dispute resolution.

The framework further encourages cooperation and partnership between States, especially with States that may lack the technical know-how or financial resources to regulate and monitor companies. In conflict zones where the institutional system may be broken down or deficient, the framework recommends that home States identify key indicators that may help signpost human rights issues for MNCs. Business access to this information would enhance their potential to plan for and to respond effectively to human rights challenges around their spheres of operation.

On the part of corporations, the framework seeks to advance further the responsibility recognised in the Tripartite Declaration and the OECD Guidelines for Multinational Enterprises (discussed below), namely, that MNCs have the duty to respect the principles recognised in those instruments. According to the framework, except in situations where companies perform a public function or where they have voluntarily undertaken additional responsibility, the duty to respect means that companies 'should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.'⁵⁹ The framework stipulates that MNCs' responsibility can be achieved by due diligence. It is significant that the concept of due diligence was originally established and applied to State responsibility to protect human rights.⁶⁰ The principle is also found in legal tools used at State level to shape the behaviour of corporations.⁶¹ The Ruggie's process has thus adopted the concept in defining the responsibility of MNCs.

⁵⁸ *ibid*

⁵⁹ *ibid*, Introduction, 4; the framework (n 54) para 24.

⁶⁰ See Inter-American Court of Human Rights *Velasquez Rodriguez* (1989) 28 ILM 294.

⁶¹ Examples include environmental assessment tools. See Olivier De Schutter, Anita Ramasastry, Mark B Taylor and RC Thompson, 'Human Rights Due Diligence: The Role of States' (Human Rights Due Diligence Project, 2012).

The framework prescribes that a basic due diligence process should include adoption of a human rights policy, conduct of human rights assessment prior to operations, integrating human rights policy throughout the company and tracking performance through monitoring and auditing company procedures. According to the framework, the substantive content of due diligence is contained in the international bill of human rights and the ILO core conventions. These are instruments that are traditionally addressed to States. The due diligence process is further guided by three key factors that companies should consider, namely, the country context where they operate and the specific human rights challenges in that context; the impact their own activities may have in the context and the possibility that they may contribute to abuse through relationships connected to their activities.

The third pillar states that both States and MNCs have the responsibility to ensure remedies, legal and non-legal, to victims of corporate abuse or misconduct. On the part of the State, the responsibility is to provide effective judicial mechanisms both in the host and home territories. States could facilitate credible and effective non-judicial mechanisms through a variety of means, including national human rights institutions and the National Contact Points under the OECD framework.⁶² On the part of companies, the framework suggests that providing an effective grievance mechanism is part of the corporate responsibility to respect.⁶³ Company-initiated mechanisms, such as mediation, advisory services for complaints and provision of hotlines for raising complaints may be provided directly by the company or through external resources. For effectiveness and credibility, the mechanism is required to comply with the minimum requirement laid down in the Ruggie's framework.⁶⁴ The mechanism may be a joint effort of several companies but the design and oversight should involve representatives of groups who may seek to use the mechanism.⁶⁵

Principles from the Ruggie's process have already featured in the adjudication before an international court in the case of *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. President of the Federal Republic of Nigeria & Others*.⁶⁶ The parties before the Community Court of Justice of the Economic Community of West African State (ECOWAS) included the Nigerian State, its State owned corporation, the Nigerian National Petroleum Corporation (NNPC) and six other six MNC subsidiaries. A key issue at the preliminary stage was whether the Court had jurisdiction to pronounce on the responsibility and liability of the defendant corporations for alleged human rights violations alongside that of the State.

Counsel for the Plaintiffs argued that MNCs have obligations under international law not to be complicit or assist in human rights violations.⁶⁷ Further, the violations or abuse of human rights by the corporations was a direct consequence of the absence of due diligence and proper planning and also a failure to observe the minimum requirement to respect human rights.⁶⁸ To support this contention, counsel for the Plaintiff referred to the Ruggie's process, and specifically to the concept of due diligence as a mechanism for discharging the

⁶² The framework (n 54) paras 82-85, 96-99.

⁶³ *ibid*, paras 93-95.

⁶⁴ The framework (n 54) para 92.

⁶⁵ *ibid*, para 95.

⁶⁶ ECOWAS Community Court of Justice, *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria & Others* (10 December 2010) ECW/CCJ/APP/07/10.

⁶⁷ Plaintiffs' Brief of Argument (on file with author) 10.

⁶⁸ *ibid*

responsibility to respect human rights. Counsel for the Plaintiff quoted with approval the following passage from the Ruggie's process: 'To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.'⁶⁹

In its ruling, the Court acknowledged the fact that the accountability of corporations, especially for violation of human rights or complicity in human rights abuse is one of the most controversial issues in international law.⁷⁰ The Court further acknowledged the widely held international concern regarding the challenges attendant upon any effort under present international law to hold MNCs to account for actions that affect human rights.⁷¹ Commenting on the Ruggie's process the Court observed:

This need to make corporations internationally answerable has led to some initiatives, namely the nomination of Special Representative of the Secretary General of the United Nations whose Report titled "Protect, Respect and Remedy: A framework for Business and Human Rights" (The Ruggie Report) is one of the greatest reference on the accountability of multinationals for Human Rights violation in the world.⁷²

However, the Court concluded that despite these developments, 'the process of codification of international law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts.'⁷³ Nevertheless, the significance of this case is the reference to the Ruggie's framework by Counsel for the plaintiffs and also by the Court. This is indicative of the potential of the Ruggie's process to influence developments in this area.

Furthermore, the potential of the Ruggie's process to inform State practice is gradually taking shape. The process' principles are steadily shaping CSR standard setting at national and international levels. A new chapter incorporating its core provisions has been included in the OECD guidelines. Similarly its provisions have been incorporated into the EU's latest strategy on CSR⁷⁴ and also in the International Finance Corporation's sustainability policy.⁷⁵ Furthermore, the 2013 Guide for developing country negotiators on international investment agreements published by the Commonwealth Secretariat refers to the responsibility of corporations to respect human rights in line with the Guiding Principles.⁷⁶

Recently, the Working Group on the issue of human rights and transnational corporations and other business enterprises conducted a pilot survey on the uptake and implementation of the Guiding Principles by States. Out of 193 UN Member States Parties, there were responses from 26 States. Obviously, this constitutes a small sample size, which arguably may affect the reliability of the result of the survey as representative of State practice. Nonetheless, while no clear conclusions can be drawn from the survey, the report gives a good indication of the

⁶⁹ The framework (n 54) para 56.

⁷⁰ *SERAP v President of the Federal Republic of Nigeria* (n 66) para 66.

⁷¹ *ibid* paras 66-68.

⁷² *ibid* para 68.

⁷³ *ibid* para 69.

⁷⁴ (n 11)

⁷⁵ IFC, IFC's Sustainability Framework - 2012 Edition', available at <www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/> accessed 12 December 2013.

⁷⁶ See Anthony VanDuzer, Penelope Simons and Graham Mayeda, 'Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators' (Commonwealth Secretariat, 2013).

potential of the Guidelines to influence State practice. Convergence of practice could ultimately lead to the achievement of coherent global CSR standards at the international level. Out of the 26 responding States, 17 indicated that they had CSR policies. The majority of this number (10) reported that their CSR policies had been premised on the UN Global Compact principles (mentioned with the highest frequency); the OECD Guidelines, and the ISO 26000. Only two States had updated their policies to incorporate the Guiding principles.⁷⁷ Notwithstanding, it was further reported that outside of the survey, at least 30 States were already developing national action plans for the purpose of implementing the Guiding Principles.⁷⁸

Notably, the survey found that a significant number of States have policies that ‘mandated or encouraged high-level corporate oversight over human rights due diligence’ and ascribed board responsibility to the monitoring of corporations’ human rights performance. Eleven countries mandated high-level oversight while 12 States outlined board involvement in the monitoring of human rights performances in State policies.⁷⁹ Furthermore, 16 States altogether have requirements for business to report on their human rights performance. Out of these 10 stated that such requirements were mandatory. In five States, the reporting requirements are voluntary while in one State the requirement is a mix of mandatory and voluntary rules. In addition, 7 States have follow-up procedures in place to assess company reports pursuant to these requirements.

Another notable finding is in the area of international trade and investment agreements. Fourteen States reported that they had explicit human rights provisions (including labour and environmental issues) in international trade and investment agreements that they were involved with. However, when it comes to the practice of including human rights impact assessment in investment agreements or the framework governing trade and investments, only 4 States had this in place. In addition only 5 States reported that their export and foreign investment promotion policies include specific human rights provisions.⁸⁰

The foregoing discussion makes clear that the UN through the Ruggie’s process is working towards evolving convergence of State practice on international standards of human rights for business and in particular, MNCs. There is growing consensus that MNCs have human rights obligations. What the Ruggie’s process has done is to identify the common elements of the obligations and how the standards can be met. From the discourse, certain themes such as the corporate responsibility to respect human rights and the concept of due diligence are emerging as recognised international principles on CSR.

The OECD and International Standards of CSR

A guideline on acceptable international standards for multinational enterprises was produced by the OECD in 1976 as part of the OECD Declaration on International Investment and Multinational Enterprises.⁸¹ The organisation consists of 34 countries and about five States are currently in talks to join the organisation. Significantly a number of other States have opted to commit to the organisation’s principles or participate in its activities. There are about 50 non-

⁷⁷ UN Working Group (n 56) para 15.

⁷⁸ *ibid* para 28.

⁷⁹ *ibid* para 18.

⁸⁰ *ibid* para 33.

⁸¹ OECD, ‘Guidelines for Multinational Enterprises’ (1976) 15 ILM 9.

member State participants. Gordon describes the rationale for the development and implementation of the instrument as:

... an expression of the shared expectations of the adhering governments. These governments agree to promote them among 'their' multinational enterprises and sign a binding Council Decision that requires them to set up National Contact points...to participate in other facets of Guidelines implementation.⁸²

It has also been suggested that the adhering States in effect 'signed up' to the Guidelines on behalf of MNCs based within their territories to uphold the standards contained in the Guidelines.⁸³

The instrument was revised in 1991 to take into account environmental considerations.⁸⁴ The latest revision of the guidelines occurred in 2011.⁸⁵ The negotiations of the guidelines involved participating countries of the OECD, business associations, trade unions and some civil society organisations. The document set out 'the principles for acceptable behaviour for corporations in the social and environmental sphere globally'.⁸⁶ It has been suggested that the document is the most comprehensive instrument on CSR standards.⁸⁷

This instrument emphasizes MNCs' obligations in relation to a range of international standards including the standard of disclosure, employment and industrial relations, environment, combating bribery and consumer protection.⁸⁸ It also makes direct reference to some important international instruments, including the Universal Declaration of Human Rights (1948) and the ILO Declaration on Fundamental Principles and Rights at Work (1998). MNCs are encouraged to comply with these instruments in line with host States' international obligations and commitments. The revised version (2000) extended the scope of the instrument to corporations operating in or from OECD territories to capture the global nature of MNCs operations.⁸⁹ The instrument enjoined MNCs to encourage, where practicable, business partners including suppliers and contractors to follow the Guidelines in their business dealings. On labour standards, the OECD Guidelines supplemented the core ILO standards by specifying additional standards and creating additional ones on occupational health and safety requirements.

A recently updated version of the Guidelines was put in *inter alia* to introduce a new Chapter on human rights in light of the Ruggie's process.⁹⁰ This again shows a level of convergence on standards of human rights for corporations. The responsibility of MNCs under the Guidelines is to '[a]void causing or contributing to adverse impacts, on matters covered by the

⁸² Kathryn G Gordon, 'The OECD Guidelines and other Corporate Responsibility Instruments: A Comparison' OECD Working papers on International Investment No 2001/5 (2001).

⁸³ Joris Oldenziel, Joseph Wilde-Ramsing and Patricia Feeney, '10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct' (OECD Watch, 2010) 5.

⁸⁴ Text of the revised version of the OECD Guideline for Multinational Enterprises is available at <<http://mneguidelines.oecd.org/text/>> accessed 12 December 2013.

⁸⁵ *ibid*

⁸⁶ Sorcha Macleod and Douglas Lewis, 'Transnational Corporations: Power, Influence and Responsibility' (2004) 4 Global Social Policy 77.

⁸⁷ Ran Goel, *Guide to Instruments of Corporate Responsibility: An Overview of 16 Key Tools for Labour Fund Trustees* (York University 2005) 65.

⁸⁸ OECD Guidelines (n 81).

⁸⁹ *ibid*

⁹⁰ *ibid*

Guidelines, through their own activities, and address such impacts when they occur.⁹¹ Where they have caused or contributed to such outcomes MNCs are required to provide or cooperate in the provision of remedies for adverse human rights impact. Furthermore, the Guidelines provide that in situations where the MNC has not directly contributed or caused an adverse impact but the impact is linked to the MNCs' operations, products or services by a business relationship, the company should use its position or influence acting by itself or in cooperation with other entities to prevent or mitigate the adverse impact.⁹²

The Guidelines are implemented and promoted through National Contact Points (NCP) which members are obliged to set up as a result of the OECD Council Decision of June 2000.⁹³ States have a wide latitude in respect of structural arrangements in this regard.⁹⁴ The NCPs promote the Guidelines, entertain enquiries and resolve problems in specific processes of implementation. The NCPs also handle complaints against companies for violations of OECD principles. Between 2001 and 2010, a total of 213 cases were brought before the NCPs on the violations of standards contained in the Guidelines.⁹⁵ NCPs also gather and collate information on experiences on the implementation of the Guidelines at the national level. These experiences are shared at the general meetings and then published in annual reports submitted by the NCPs⁹⁶

In the survey conducted for Vigeo, 55% of the companies surveyed based their CSR approach on the OECD Guidelines while 53% referenced the instrument in their annual CSR or sustainability report.⁹⁷ Companies were generally favourable to the standards laid down in the Guidelines, with 85% stating that the Guidelines may help companies report on their social responsibility to their stakeholders. Further, 77% of the surveyed companies stated that the Guidelines would help address social and environmental dumping risks in the world market. However, the use of the OECD Guidelines is not limited to European companies as there is evidence of its use in other countries such as Canada, Japan, Australia, Switzerland and the USA.⁹⁸

A Global Compact for Corporations

The Global Compact is another international standard-setting initiative that emerged from the United Nations system. The Global Compact programme was initiated by Kofi Anan, as a voluntary initiative designed to help create a fairer world order by enjoining businesses to follow ten principles concerning human rights, labour, the environment, and corruption.⁹⁹ It should be noted that the compact was developed by committees and individuals within the UN system and not by States. This fact may weaken its potential to shape State practice.

⁹¹ *ibid*

⁹² *ibid*

⁹³ OECD Council, Decision of June 2000, available at

<www.oecd.org/document/39/0,3343,en_2649_34889_1933095_1_1_1_1,00.html> accessed 12 December 2013.

⁹⁴ Macloed and Lewis (n 86).

⁹⁵ Joris Oldenziel, 'The Added Value of the UN Norms: A Comparative Analysis of the UN Norms for Business with Existing International Instruments' (SOMO Centre for Research on Multinational Corporations, 2005) 9.

⁹⁶ See generally Christopher N Francoise, 'A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises' (2007) 30 Boston College International and Comparative Law Review 223.

⁹⁷ Benseddik and Szwed (n 52)

⁹⁸ Paul Hohnen, 'OECD MNE Guidelines: A Responsible Business Choice' OECD Observer No 270/271 December 2008-January 2009.

⁹⁹ Oliver F Williams, 'The UN Global Compact: The Challenge and the Promise' (2004) 14 Business Ethics Quarterly 755.

However, taken into consideration the popularity of the instrument among companies, policy makers are likely to take its principles into consideration in designing their CSR standards. Furthermore, the ten principles share similar characteristics with those of State sponsored instruments on CSR previously discussed. This is further evidence of convergence on CSR norms.

The ten principles were derived from the Universal Declaration of Human Rights (1948),¹⁰⁰ the Rio Declaration (1992),¹⁰¹ the four fundamental principles and rights at work adopted at the World Summit for Social Development (1995)¹⁰² and the UN Convention against Corruption (2003).¹⁰³ The principles include:

- Corporations' responsibility to support and respect international human rights and not to be complicit in human right abuses.
- Labour related responsibilities including the upholding of freedom of association and the right to collective bargaining, elimination of forced and compulsory labour.
- Abolition of child labour and elimination of discrimination in employment and occupation.
- Environmental responsibility including support for a precautionary approach to environmental challenges, undertaking initiatives that promote greater environmental responsibility and the development and use of environmentally friendly technologies.
- Businesses requirement to work against all forms of corruption including extortion and bribery.¹⁰⁴

The idea behind the initiative was to get businesses to internalise these principles in their practices.¹⁰⁵ The Global Compact encourages companies to embrace good practices, 'rather than rely on their often superior bargaining position vis-à-vis national authorities'.¹⁰⁶

Corporations that sign up to the initiative are required to make an unambiguous statement of support and include some reference in their annual report or other public documents on the progress they have made to internalise the Principles within their operations.¹⁰⁷ Companies are further required to submit a brief description of their report to the Global Compact's website. Failure to submit the brief description within one year of signing up and every year thereafter may result in the defaulting company being removed from the list of participants. The instrument also encourages participating companies to participate in the Global Reporting Initiative - sometimes called the triple bottom line or sustainability reporting. Nonetheless, participation is not yet mandatory.¹⁰⁸

It has been suggested that the global Compact is an attempt to retrieve the moral purpose of business.¹⁰⁹ It has been opined that, the instrument is designed as an incremental process of

¹⁰⁰ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR) 71.

¹⁰¹ Rio Declaration on Environment and Development (adopted 14 June 1992) (1992) 31 ILM 874.

¹⁰² World Summit for Social Development, 'Report of the World Summit for Social Development' (1995) UN Doc A/CONF.166/9.

¹⁰³ United Nations Convention against Corruption (adopted 31 October 2003) UNGA Res 58/4, available at <www.unodc.org/unodc/en/treaties/CAC/index.html> accessed 21 September 2013.

¹⁰⁴ United Nations Global Compact, 'The Ten Principles', available at <www.unglobalcompact.org/aboutthegc/thetenprinciples/> accessed 12 December 2013.

¹⁰⁵ Surya Deva, 'Global Compact: A Critique of the U.N.'s 'Public-Private' Partnership for Promoting Corporate Citizenship' (2006-2007) 34 Syracuse Journal of International Law and Commerce 107.

¹⁰⁶ John G Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection' in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity Press 2003) 93.

¹⁰⁷ Williams (n 99) 756.

¹⁰⁸ *ibid*

¹⁰⁹ *ibid* 761.

learning and improvement, rooted in local networks that share the same universal values.¹¹⁰ According to Ruggie, the Compact “operates on the premise that the socially legitimated good practices would help drive out the bad ones through the power of transparency and competition”.¹¹¹ Ruggie hopes that experience learnt through the Global Compact implementation will strengthen the desire for greater benchmarking so that some of the soft laws produced by voluntary initiatives will possibly develop subsequently into positive obligations.¹¹²

It is interesting to note that the Global compact features more than other instruments in the corporate code of MNCs. According to the Vigeo survey, 92% of the companies surveyed reported that their CSR approach is based on or inspired by the Global Compact.¹¹³ Furthermore, 87.2% of the companies refer to the compact in their annual CSR or sustainability report. This shows the extent to which the instrument may be shaping corporate standards and the popularity of the instrument in the corporate world makes it influential on States’ policy decisions on CSR.

The ISO 26000 Guidance Standards on Social Responsibility

Another notable international standard-setting instrument is the International Standard Organisation’s ISO 2600: Guidance Standards on Social Responsibility. The ISO is a Geneva based independent non-governmental organisation made up of members from national standards bodies of 163 countries from around the world. It is the world’s largest and most widely accepted international industrial and commercial standards developer. The institution represents a strong confluence between the public (States) and the private sector in the creation of international standards. It has been observed that ISO international standards often become law, either through international treaties or transforming national legislation.¹¹⁴

The ISO 26000 was launched in Geneva in 2010. The instrument was produced by the ISO Working Group on Social Responsibility whose mandate was to develop an authoritative standard on social responsibility. The membership of the working group includes participants from the industrial sector, States, labour organisations, consumers, non-governmental organisations, service, support, research and others. The wide representation of stakeholders in the working group has been described as the broadest in the history of ISO standards development.¹¹⁵ The document is a voluntary international standard which, unlike other ISO standards, is not meant to be used by organisations for certification purposes. The term ‘social responsibility’ was used to accommodate ‘corporate social responsibility’ in the private sector and the social responsibility of public organisations.¹¹⁶

According to Rob Steele, the ISO’s secretary general, ‘What makes ISO 26000 exceptional among the many already existing social responsibility initiatives is that it distils a truly international consensus on what social responsibility means and what core subjects need to be addressed to implement it.’¹¹⁷

¹¹⁰ *ibid*

¹¹¹ Ruggie (n 106).

¹¹² *ibid*

¹¹³ Benseddik and Szwed (n 52)

¹¹⁴ Thomas Hemphill, ‘The ISO 26000 Guidance on Social Responsibility International Standard: What Are the Business Governance Implications?’ (2013) 13 Corporate Governance 305, 312.

¹¹⁵ *ibid*

¹¹⁶ *ibid* 306.

¹¹⁷ Available at <www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1366> accessed 9 February 2014.

The ISO 26000 aims to build a consensus around CSR by drawing its principles and guidelines from existing public and private initiative such as the United Nations Global Compact. Hemphill writes that:

Nowhere else is there such a comprehensive and concise document bringing all the elements of social responsibility together, helping to develop an international consensus on what social responsibility means to business enterprises, identifying the social responsibility issues which business enterprises need to address, and explaining how the principles and objectives of social responsibility can pragmatically integrated into such business enterprises.¹¹⁸

The standard is based on seven core principles. These include accountability, transparency, ethical behaviour, respect for stakeholders' interests, respect for rule of law, respect for international norms of behaviour and respect for human rights. These principles are not dissimilar from the principles in the instruments previously discussed.

International CSR Standards and International Investment Treaties and Framework Agreements

According to United Nations Conference on Trade and Development (UNCTAD), as at 2013, the international investment regime consists of over 3200 agreements. These agreements include more than 2860 Bilateral Investment Treaties (BITs) and over 340 other agreements.¹¹⁹ Traditionally investment instruments are put in place to protect investors and investments. However, recent trends have seen the inclusion of CSR standards as a *quid pro quo*.¹²⁰ Therefore, while the home State secures protection for the property right of the investor from its territory under the instrument, the host State secures the right to regulate CSR standard in the agreement.¹²¹ Another significant trend is the practice of incorporating by reference the international soft law CSR instrument into investment agreements.¹²²

UNCTAD also noted that some of the recently concluded International Investment Agreements (IIAs) include features that are meant to ensure that the treaty framework contribute to sustainable development strategies that focus on inclusive economic growth, support policies for industrial development, and address the environmental and social impacts of investment.¹²³ This development has engendered the challenge to balance the rights and obligations of States and investors¹²⁴ by paying attention to the corresponding responsibilities of investors. UNCTAD recommends that IIAs give more prominence to the issue of CSR. In the organisation's view, States' investment policies should be aligned with sustainable development goals and 'should promote and facilitate the adoption of and compliance with best international practices of CSR and good corporate governance'.¹²⁵

¹¹⁸ Hemphill (n 114) 313.

¹¹⁹ UNCTAD, 'International Investment Policy Making in Transition: Challenges and Opportunities of Treaty Renewal' IIA Issue Note No 4 (June 2013).

¹²⁰ Mary E Footer, 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investments' (2009-2010) 18 Michigan State Journal of International Law 34.

¹²¹ *ibid* 34.

¹²² *ibid* 61.

¹²³ UNCTAD, 'Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making' IIA Issue Note, No 5 (July 2013).

¹²⁴ *ibid*

¹²⁵ *ibid*

It is also worth mentioning the 2010 European Parliament's resolution that demanded the inclusion of CSR clauses into trade agreements signed by the EU.¹²⁶ The resolution made reference to the international instruments discussed in this article and other CSR initiatives as the basis for the demand.

In emerging practice the provisions on CSR related issues can be found in pre-ambular texts.¹²⁷ However, such provisions are now appearing in substantive provisions of the agreements. An example is Article 1106 of the North American Free Trade Agreement which allows States to put in place measures necessary for the protection of the environment to protect human, or plant health and safety or the conservation of exhaustible natural resources.¹²⁸ Furthermore, there is an emerging practice of conditioning the support that home States provide for MNCs on CSR issues. States use Export Credit agencies to assist MNCs with financing in the form of credit or credit insurance/guarantees and control the terms of the arrangement. An example in this regard is the Dutch Export Credit Insurance facility which is expressly used to promote CSR through the OECD guidelines. The State requires all applicants to indicate their familiarity with the OECD Guidelines and undertake to implement it in their companies.¹²⁹

CSR and State Legislation

CSR principles are increasingly evident in national legislation albeit at a very slow pace. At the moment, the development is rather haphazard, but the development is significant because it shows that States are engaging with the CSR concept at the national level. This development may be part of the process of the emergence of coherent State practice on CSR standards.¹³⁰ It is interesting to note that governments in the developing world have taken the lead in this regard.

In 2007, the Indonesian parliament passed a new company law, the Limited Liability Company Law, 2007, repealing the Limited Liability Company Law No.5 of 1995. In addition, a new investment law was introduced, the Investment Law No. 25 of 2007. Under these laws, the Indonesian government made CSR a mandatory concept for companies. The relevant provisions of the laws are Article 1 and 74 of the Limited Liability Company Law, 2007 and Article 15b of the Investment Law No. 25 of 2007. Article 74 which is on the 'Social and Environmental Responsibility' provides as follows:

1. Companies conducting business activities in the field of and/or related to natural resources have the obligation to carry out Social and Environmental Responsibility.
2. Social and Environmental Responsibility as referred to in paragraph (1) is the company's obligation, which is budgeted for and calculated as a cost of the company, and which is implemented with attention to appropriateness.
3. Companies which do not carry out their obligation as referred to in paragraph (1) shall be subject to sanctions according to the provisions of laws and regulations.

¹²⁶ European Parliament Resolution 2012/C 99 E/19 of 25 November 2010 on corporate social responsibility in international trade agreements (2009/2201(INI)) [2012] OJ 99 E/101.

¹²⁷ Footer (n 120) 38.

¹²⁸ *ibid* 42.

¹²⁹ Governments of the Netherlands, 'Export Credit Insurance', available at <www.government.nl/issues/entrepreneurship-and-innovation/excport-credit-insurances-eci> accessed 12 December 2013.

¹³⁰ Renginee G Pillay, 'Legislating Philanthropy: New Corporate Accountability' (2012) 12 Contemporary Issues in Law Journal 75, 77.

4. Further provisions on Social and Environmental Responsibility shall be regulated by Government Regulation.

Article 1 of the Law defines social and environmental responsibility as:

the company's commitment to participate in sustainable economic development in order to improve the quality of life and beneficial environment, both for the company itself, the local community, and society in general.

The Investment Law No 25, 2007 provides in Article 15 b that 'Each investor is obliged to...carry out corporate social responsibility'.

These provisions thus formalise regulatory backing to CSR at the national level, reflecting generally the CSR principles developed at the international level.

Similarly, Mauritius introduced in 2009 a statutory requirement under its Mauritius Income Tax Act 1995¹³¹ to the effect that all companies of a certain size have the legal obligation to contribute two per cent of their profit after tax to CSR activities such as socio-economic development, including gender and human rights issues; environmental protection and eradication of poverty. India introduced in 2011 a Company Bill, which requires companies of a certain net-worth to spend at least 2% of their average net profits within the three previous year on CSR initiatives. Also, Nigeria continues in its attempt to introduce a law on CSR.¹³²

However, these developments are not limited to developing countries. The provision on Directors' duties in the UK Company Act 2006 is presented in CSR language.¹³³ Section 172 (1)(c) of the Companies Act 2006 on the general duty of Company Directors to act in ways that promote the success of the company also obliges Company Directors to have regard to the "impact of the company's operations on the community and the environment."

In 2001 France amended its laws to include mandatory CSR reporting. The law requires extensive disclosure of social and environmental issues by corporations. Notably, article 116 of the New Economic Regulation makes it mandatory for all companies trading on the French Stock Exchange to report annually on the social and environmental impact of their activities commencing from 2003. Article 116 was implemented by Decree Number 2002-221 (Decree) of February 20, 2002 which established nine separate categories of social information that must appear in the annual report. These include matters relating to human resources, community issues and engagement, labour standards, health and safety and environmental issues. Furthermore, mandatory CSR reporting requirements now exist in several countries including Sweden, Netherlands, Norway, Denmark and Australia.

At the EU level, CSR is recognised as an essential component of the European Social model. Corporations are required to disclose in their consolidated annual reports non-financial matters, including information relating to environmental and employee matters.¹³⁴ However,

¹³¹ The Mauritius Finance (Miscellaneous Provisions) Act 2009. Act No 14 of 2009 amended the Act by incorporating Sub-Part AD on CSR.

¹³² Olufemi Amao, 'Mandating Corporate Social Responsibility: Emerging Trends in Nigeria' (2008) 6 Journal of Commonwealth Law and Legal Education 75.

¹³³ See Companies Act 2006.

¹³⁴ Council Directive 2003/51/EC of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings [2003] OJ L 178/16.

the disclosure requirement is only applicable where it is deemed necessary for an understanding of the company's development.¹³⁵ More recently, the EU Commission adopted a Directive on disclosure of non-financial and diversity information by EU companies with the objective of increasing EU companies' transparency and performance in relation to policies, risks and results on environmental, social and employee related matters, respect for human rights, anti-corruption and bribery issues and diversity on the board of directors.¹³⁶ Significantly, the directive is a legal requirement though its mode of implementation appears flexible. Companies are enjoined to use international or national CSR guidelines such as the UN Global Compact or ISO 26000 in determining the relevant information to disclose. This directive is expected to take effect in 2017.

There are similar developments in the U.S. The Dodd Frank Wall Street Reform and Consumer Protection Act signed into law in 2010 both have provisions which have widely been described as 'Corporate Social Responsibility requirements'. The provisions are designed to promote greater sensibility to human rights issues and greater transparency.

Section 1502 of the Act targets oil, gas and mining companies and other companies that purchase minerals from the Democratic Republic of Congo (DRC) i.e. the conflict region and its surrounding areas. Furthermore, the provisions bind companies that are required to file reports with the US Securities and Exchange Commission. The section imposes significant due diligence requirements on companies and requires companies that use minerals sourced from the area of conflict to disclose annually the origin of minerals that they use. Where the minerals are from the areas specified in the Act, companies are required to disclose the facilities used in processing the minerals and the minerals' country of origin and the effort the company took to determine the mine or location of the origin of the mineral.

Section 1504 requires companies involved in resource extraction (such as drilling for oil, mining for precious minerals or extraction of natural gas etc.) to disclose payments made to foreign governments or to the US government in order to promote transparency and prevent bribery and corruption.

Even at the preparatory stage of the implementation process of Section 1502 provisions, the US Department of State advised companies to start performing meaningful due diligence in relation to conflict minerals. To achieve this, the Department endorsed the OECD Guidelines on due diligence.¹³⁷

Conclusion

CSR has emerged as an important concept in the creation and setting up of standards for corporations both at the national and international levels. The concept is more significant at the international level because of the globalization of MNCs' operations and the lack of a global governance regime for MNCs. In addition, the inability of most domestic legal frameworks to hold MNCs to account in their global operations has led attention to be focused on the creation of international CSR standards. States and their organisations have played important, and in most cases leading roles in facilitating the creation of these standards.

¹³⁵ See Ruben Zandvliet, 'Corporate Social Responsibility Reporting in the European Union: Towards a more Univocal Framework' (2011) 18 Columbia Journal of European Law 38.

¹³⁶ On non-financial reporting, see the EU website at <http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm> accessed 12 December 2013.

¹³⁷ Celia R Taylor 'The New Disclosure Requirements under the Dodd-Frank Financial Reform Act: A move towards Greater Transparency' (2012) 9 European Company Law 64, 67.

This article shows that the involvement of States in the creation and practice of CSR raises the question of the emergence of new State practice that may have important implication for customary international law in the future. The article examined the key public international soft law provisions that are widely regarded as internationally recognised CSR standards. These include the OECD Guidelines, the United Nations Global Compact, The ILO's Tripartite Declaration, the ISO 26000 and the United Nations Framework and Guiding Principles on Business and Human Rights. The article shows that the emerging themes from these instruments and the linkages between the instruments are driving convergence. It is significant that even though these instruments approached the subject of CSR standards from different perspectives, the themes that have emerged from them are not dissimilar. Significantly, the United Nations Framework and Guiding Principles on Business and Human Rights attempt to consolidate previous efforts and bring a level of coherence into the CSR discourse. Furthermore, the emerging standards are increasingly being reflected in international treaties and framework agreements. These standards are already shaping MNCs' practices globally. Notably, as it has been shown in this article, CSR standards are increasingly evident in national legislation in developing and the developed countries. Therefore, looking at how these developments are beginning to influence international investment treaties/agreements, regional and domestic policies, it is plausible to conclude that in the near future new international law is likely to emerge from this discourse.

‘Building a Taxonomy of UN Security Council Decisions: a Biased Compliance with the UN Charter Obligations?’

Rossana Deplano*

ABSTRACT: There is a tendency among scholars and practitioners to assess the role of the UN Security Council from the limited perspective of the actions taken pursuant to its resolutions, irrespective of other significant considerations contributing to the final adoption of those actions. This article seeks to reconstruct the legal mind of the Security Council from an empirical perspective. How does the Security Council deal with the issues covered by its mandate? Which decisions does it adopt in relation to specific subject-matters and what is the rationale behind such decisions? Although the inquiry is restricted to a limited time-frame (2001 - 2012), this article shows that the powers of the Security Council are characterized by an inherent tension between compliance with the terms of its mandate and a degree of discretion related to the selection of the subject-matters, which ultimately amounts to a biased compliance with its UN Charter obligations.

1. Introduction

Scholarship exploring the mandate and the powers of the UN Security Council (SC) abounds. Literature routinely examines various aspects of the functions of the SC stemming from Article 24 of the UN Charter¹ and how they relate to general international law. Certain scholars argue that the SC has gradually developed its legislative competencies beyond the text of the UN Charter and probably in violation of international law.² Consequently, other scholars have proposed different approaches to what they perceive as a necessary curtailment of SC enforcement powers.³

Although proposals on the limitation of SC powers show doctrinal and normative insights, there is scant research systematically examining SC practice beyond selected case

* LL.B, LL.M (Cagliari), Ph.D. (Brunel), Lecturer, Brunel University, London, UK. The author is grateful to SPILJ’s anonymous referees for their comments on earlier drafts of this article.

¹ See, in general, Jost Delbrück, ‘Article 24 – Functions and Powers’ in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed, OUP 2002) 442.

² Cathleen Powell, ‘The Legal Authority of the United Nations Security Council’ in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007) 157. See also Nicholas Tsagourias, ‘Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity’ (2011) 24 *Leiden Journal of International Law* 539; Eric Rosand, ‘The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?’ (2005) 28 *Fordham International Law Journal* 542; Munir Akram and Syed H Shah, ‘The Legislative Powers of the United Nations Security Council’ in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (Nijhoff 2005) 431; Axel Marschik, ‘Legislative Powers of the Security Council’ in Macdonald and Johnston, *ibid*, 457. Fassbender also argues that the legislative power is jointly held by the UN General Assembly and the SC, which also exercises executive powers. Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529, 574.

³ In a celebrated book, de Wet assessed the role of *jus cogens* and human rights norms in limiting the SC’s enforcement powers, as set forth in Chapter VII of the UN Charter. Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004). The issue is dealt with extensively in section 4.3 below.

studies. Moreover, existing scholarship appears to focus on select individual SC resolutions or, clusters of SC resolutions that are relevant to the theoretical inquiry, to the exclusion of other types of SC decisions. For instance, Henderson and Lubell focus on the legal effects on state and non-state armed groups of SC resolutions on ceasefire.⁴ Similarly, Johnstone uses SC deliberations on the situation in Kosovo as a case study⁵ to analyse the legal arguments shaping debate on the legitimacy of humanitarian intervention in the absence of explicit SC authorization.

The present study targets these knowledge gaps. It utilises evidence from a substantial and systematic quantitative study designed to examine SC procedures in the exercise of its enforcement powers under the UN Charter. Crucially, the study analyses SC preferences in the exercise of its enforcement powers based on subject categories. Further, the research provides a detailed analysis of the working methods of the SC and of the categories of SC decisions, which include, but are not limited to, resolutions.

This study complements existing studies on the SC by introducing an empirical framework for analysing SC dynamics. Using an original database, which includes 2,712 decisions adopted by the SC from 2001 to 2012, the research seeks to establish a taxonomy of SC decisions that may help determine *significant selection preferences* in the exercise of SC enforcement powers under the UN Charter. It shows that although individual decisions may appear to comply with the terms of the SC mandate, the selection of subject-matters representing the object of SC decisions – which is dominated by issues concerning Africa and the Middle East, ultimately amounts to a biased compliance with the UN Charter obligations.

Section 2 describes the intellectual background and flags the distinctive features of the empirical legal studies movement, which inspires the research methodology adopted for the present study. Section 3 provides an overview of the normative background of the SC, with a focus on its working methods and procedures and the existent categories of SC decisions. Section 4 introduces the empirical framework for assessing SC practice. The first sub-section outlines the research design while the second one presents the database and provides some descriptive statistics. The third one discusses the empirical results and their legal implications. Section 5 concludes.

2. Why an Empirical Study?

The methodology adopted for this study falls within the tradition of empirical legal studies (ELS).⁶ This is an innovative approach in international law because by using quantitative

⁴ Christian Henderson and Noam Lubell, 'The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions' (2013) 26 *Leiden Journal of International Law* 369.

⁵ Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437. On international human rights law and humanitarian law as the basis for SC action, see section 4.3 below.

⁶ Herbert M Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' in Herbert M Kritzer and Peter Cane (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 875; Id, 'Empirical Legal Studies before 1940: A Bibliographic Essay' (2009) 6 *Journal of Empirical Legal Studies* 925. On the growing demand for empirical research on law, see Lee Epstein and Gary King, 'Building an Infrastructure for Empirical Research in the Law' (2003) 53 *Journal of Legal Education* 311; Dame Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works. Final Report and Recommendations* (Nuffield Foundation, 2006).

techniques, it provides new insights on how UN law actually works in practice.⁷ The analysis, however, is meant to complement doctrinal scholarship on SC powers without replacing it.

Quantitative analysis depends on the language of numbers, which makes the empirical evidence particularly hard to contradict or deny.⁸ Thus, the bulk of the analysis is based on simple statistics describing patterns of SC decisions – namely, those that entail some form of adoption by the SC members. The caution though is that ELS cannot be regarded as an end in itself, because counting for the sake of counting amounts to nothing. This means that any empirical study on law, including the present one, presupposes a background of doctrinal and normative analysis.

As an autonomous research field, ELS possesses its own distinctive features. Generally speaking, two elements characterize the empirical research in social science. The first one is represented by the systematic nature of the process of collecting and analysing the information.⁹ The second one consists of the rather descriptive way of presenting the results of empirical legal research, which is followed by a discussion of the implications of the empirical evidence. A corollary of the second rule is that, unlike other empirically oriented fields such as socio-legal studies and law and economics, ELS is limited to the analysis of a strictly legal issue and does not address other extra-legal concerns.¹⁰ In this study, both elements are dealt with in Section 4 below.

The self-contained nature of ELS entails that the empirical analysis is usually preceded by a brief overview of the normative background of research, which also makes the analysis accessible to the non-specialist reader. The following section provides the normative framework regulating the SC decision-making process, followed by a systematic analysis of SC decisions.

3. Normative background

The rules governing its working methods and procedures enable the SC to execute its mandate and make decisions that ensure prompt and effective action regarding the maintenance of

⁷ UN law, like the law of the sea and the law of diplomatic protection, is virtually unexplored from an empirical perspective. On this issue, see Tom Ginsburg and Gregory Shaffer, 'How Does International Law Work?' in Kritzer and Cane (n 6) 753, 780. Other studies have analysed selected aspects of international economic law, international investment law, international criminal law and international human rights law. See, for example, Beth A Simmons and Andrew B Braidenbach, 'The Empirical Turn in International Economic Law' (2011) 20 *Minnesota Journal of International Law* 198; Susan D Franck, 'Empiricism and International Law: Insights for Investment Treaty Dispute Resolution' (2008) 48 *Virginia Journal of International Law* 767; Ole K Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 *European Journal of International Law* 301; Michael Bohlander and Mark Findlay, 'The Use of Domestic Sources as a Basis for International Criminal Law Principles' (2002) 2 *The Global Community Yearbook of International Law and Jurisprudence* 3; Zachary Elkins, Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harvard International Law Journal* 61.

⁸ See, for instance, Rebecca Crotoft, 'Constitutional Convergence and Customary International Law' (2013) 54 *Harvard International Law Journal Online* 195.

⁹ Herbert M Kritzer and Peter Cane, 'Introduction' in Kritzer and Cane (n 6) 4. Data collected may be either quantitative or qualitative. See Kritzer, *The (Nearly) Forgotten Early ELR* (n 6) 883. For an overview of qualitative techniques in social science research, see Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Kritzer and Cane (n 6) 926ff.

¹⁰ On the intellectual origins of the ELS movement and its relation to other disciplines, see Theodore Eisenberg, 'The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns' (2011) 5 *University of Illinois Law Review* 1713; Michael Heise, 'The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism' (2002) 4 *University of Illinois Law Review* 819; Daniel E Ho and Larry Kramer, 'Introduction: The Empirical Revolution in Law' (2013) 65 *Stanford Law Review* 1195.

international peace and security.¹¹ More specifically, SC working methods and procedures serve two functions. Firstly, they enhance the efficiency of the work of the SC while making its activities more transparent.¹² Second, they improve interaction and dialogue with the wider UN membership.¹³

The UN Charter authorises the SC to meet at any time if circumstances so require.¹⁴ By Article 30, the SC is authorised to adopt its own rules of procedure. The SC Provisional Rules of Procedure were adopted in 1946¹⁵ and have been modified several times over the years.¹⁶ They are supplemented by specific working methods adopted by the SC over time to keep up with changing realities. In particular, 'Note 507' by the SC President contains consolidated practices of the SC¹⁷ while the 'Green Book' (2010) of the Informal Working Group on Documentation and Other Procedural Questions of the SC contains additional working methods and current practices of the SC.¹⁸ In order to perform its functions, the SC can also establish subsidiary organs as it deems necessary.

Twice a year, the SC holds periodic meetings at the seat of the UN.¹⁹ Other meetings may be called by the SC President at any time if necessary, but the interval between meetings cannot exceed fourteen days.²⁰ Additionally, the SC President shall call a meeting either at the request of any SC member²¹ or if a dispute or situation which is likely to endanger international peace and security is brought to the attention of the SC by a UN member, by the UN General Assembly or by the UN Secretary-General in accordance with the relevant provisions of the UN Charter.²²

As a complement to the above-mentioned provisions, 'Provisional Rule of Procedure No. 5' establishes that upon request by a member of the SC or the Secretary-General, the SC may hold meetings at places other than the seat of the UN as in its judgment will best facilitate its work while Rule 6 thereof states that the Secretary-General shall immediately bring to the attention of the SC all the communications from States, organs of the UN and the Secretary-General concerning any matter for consideration of the SC. Only such matters may be included in the provisional agenda for meetings of the SC.

The provisional agenda is drawn up by the Secretary-General²³ and any item of the agenda, the consideration of which has not been completed is automatically included in the

¹¹ For an overview of the institutional trait of the SC, see David M Malone, 'Security Council' in Thomas G Weiss and Sam Daws (eds), *The Oxford Handbook of the United Nations* (OUP 2008) 117. For a detailed reconstruction of SC powers, see Wolfgang Weiß, 'Security Council Powers and the Exigencies of Justice after War' (2008) 12 Max Planck Yearbook of United Nations Law 45.

¹² United Nations, *The Security Council Working Methods Handbook* (United Nations, 2012) 4-5.

¹³ *ibid* 2.

¹⁴ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 28, para 1.

¹⁵ UN Security Council, 'Provisional Rules of Procedure of the Security Council' (27 June 1946) UN Doc S/96.

¹⁶ The last revision was made in 1983. See UN Security Council, 'Provisional Rules of Procedure of the Security Council' UN Doc S/96/Rev.7, reprinted in *Handbook* (n 12) 59-75. Previous versions of the SC provisional rules of procedure were issued under the symbols S/96 and Rev.1-6.

¹⁷ Note by the President of the Security Council (26 July 2010) UN Doc S/2010/507. Note 507 incorporates and further develops the notes by the President of the Security Council (19 July 2006) UN Doc S/2006/507, (19 December 2007) UN Doc S/2007/749 and (31 December 2008) UN Doc S/2008/847 by superseding them.

¹⁸ *Handbook* (n 12).

¹⁹ UN Charter (n 14) art 28, para 2 and Provisional Rules of Procedure (n 15) Rule 4.

²⁰ Provisional Rules of Procedure (n 15) Rule 1.

²¹ *ibid* Rule 2.

²² *ibid* Rule 3. See also UN Charter (n 14) arts 11, paras 2-3, 35 and 99.

²³ Provisional Rules of Procedure (n 15) Rule 7.

agenda of the next meeting. Additionally, each week the Secretary-General communicates to the SC members a summary statement of matters of which the SC is seized and of the stage reached in their consideration.²⁴ To facilitate the work of SC members, Rule 8 of the Provisional Rules of Procedure requires that the provisional agenda for a meeting is circulated to the members of the SC at least three days before the opening of the meeting or, if it is a periodic meeting, twenty-one days before the opening of the meeting. However, in urgent circumstances the provisional agenda may be communicated simultaneously with the notice of the meeting.

3.1 SC Decision-Making Process

The decision-making process at the SC is governed by a three-tiered set of rules. The first tier comprises relevant provisions of the UN Charter. Article 27 thereof provides that each member of the SC has one vote and that procedural matters are made by affirmative vote of nine members while decisions on all other matters also require the concurring votes of the five permanent members. Subsequent Articles 31 and 32 regulate the participation, without vote, of non-SC and non-UN members. The former establishes that a non-SC member may participate in the discussion of any question brought before the SC whenever the SC considers that the interests of that member are especially affected. The latter provides that either a non-SC member or a non-UN member may be invited to participate in the discussion of the dispute under consideration by the SC if it is a party of that dispute.

The second tier comprises provisions of the Provisional Rules of Procedure. Some of them complement the text of the UN Charter. For instance, Rule 40 establishes that the voting in the SC must be in accordance with the relevant Articles of the UN Charter and of the Statute of the International Court of Justice (ICJ).²⁵ Others regulate aspects of the SC decision-making process uncovered by the UN Charter provisions. Thus, Rules 41-47 regulate the official and working languages of the SC – which include Arabic, Chinese, English, French, Russian and Spanish – and establish that all SC documents must be published in the languages of the SC.²⁶ Likewise, Rules 48-57 regulate the conduct of SC meetings while the Appendix contains the provisional rules of procedure for dealing with communications from private individuals and non-governmental bodies.

The third tier is represented by *ad hoc* documents establishing specific working methods which complement the Provisional Rules of Procedure. Such documents may be both formal documents, such as ‘Note 507’ consolidating and improving existent working methods of the SC,²⁷ or informal papers, such as the background note on the ‘Arria-formula’ meetings prepared by the UN Secretariat in 2002.²⁸

²⁴ *ibid* Rule 11.

²⁵ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Annex I (ICJ Statute).

²⁶ Additionally, Rule 47 provides that such documents may be published in any language other than the languages of the SC, if the SC so decides.

²⁷ *Ad hoc* mechanisms regulated in the Annex to Note 507 include briefings by the SC President, meetings and informal consultations. Briefings are provided by the SC President to members of the SC, Chairs of SC subsidiary bodies or the Secretariat in a timely manner, shortly after informal consultations, on their work as well as in cases in which an emerging situation which justifies a briefing arises. Meetings serve the primary function of increasing the transparency of the SC’s work. Non-SC members with a direct interest in the outcome of the matter under consideration and relevant regional and sub-regional organizations may participate in the SC’s public and private meetings, if appropriate. At meetings with troop-contributing countries, the SC members also encourage the attendance of appropriate military and political officers from each participating mission. Informal consultations

For the purpose of this article, the study of the regulation of the SC conduct of business is of particular importance as it offers insights into the level of transparency of the SC decision-making process. In line with the perceived primacy of SC resolutions over other types of decisions, the next sub-section analyses the legal nature of SC decisions separately. Thus, sub-section 2.4.1 examines the procedural and normative character of resolutions while sub-section 2.4.2 evaluates the remaining categories of SC decisions.

3.2 SC Decisions

Chapter IX of the Provisional Rules of Procedure regulates the conduct of SC meetings and the record of the documents adopted at such meetings. As a general rule, the SC meets in public, unless it decides otherwise,²⁹ and the verbatim record of each meeting is made available to the representatives of the SC and to those of any other states which have participated in the meeting.³⁰ Once it is signed by the SC President, the verbatim record becomes the official record of the SC.³¹ Rule 57 further establishes that once a year, the UN Secretary-General submits to the SC a list of the records and documents which up to that time have been considered confidential. Upon receipt of the list, the SC decides which of these documents is to be made available to other UN members, which to the public and which is to be kept confidential.

Some SC documents contain action point decisions. The text of such decisions is negotiated and agreed upon beforehand in a precise manner.³² Once adopted, access to all SC decisions is made available to UN members and other organizations through correspondence, the UN website, outreach activities and other means.

SC decisions comprise resolutions, statements by the SC President, press statements, notes by the SC President and letters from the SC Presidents. Other documents which are subject to some kind of decision-making, either in the form of adoption or request by the SC cannot be regarded as SC decisions so long as they do not establish a decision of the SC to act. For instance, the Annual Report of the SC to the UN General Assembly is submitted pursuant to Article 15(1) and Article 24(3) of the UN Charter and is drafted in accordance with Section XII of the Annex to 'Note 507' (2010).³³ The text of the report must be approved by all current members of the SC and adopted at a public meeting.

Likewise, the reports of the UN Secretary-General to the SC are submitted to the members of the SC on matters under consideration by the SC. The reports are usually

with interested members and/or the Secretariat focus on key issues and may follow briefings delivered by senior members of the Secretariat supplementing and updating, as necessary, written reports of the UN Secretary-General.

²⁸ "Arria-formula" meetings are very informal and confidential gatherings convened at the initiative of individual SC members other than the SC President and, therefore, do not constitute an activity of the SC. They are held in a Conference Room instead of the SC Consultation Room. The convening member(s), which is the chair of the meeting, issues a written invitation to the other fourteen SC members by fax from his Mission rather than by notification from the Secretariat. Such meetings are not announced in the daily Journal of the United Nations and members of the Secretariat are not expected to attend, unless so invited. The background note on "Arria-formula" meetings is reprinted in *Handbook* (n 12) 78-79.

²⁹ Provisional Rules of Procedure (n 15) Rule 48.

³⁰ *ibid* Rule 49. A verbatim record is a full transcript of all statements made during a SC meeting. Verbatim records of a public meeting are published as an official SC document in all six official languages while the verbatim record of a private meeting is available for consultation only upon request.

³¹ *ibid* Rule 53.

³² Bruno Simma, Stefan Brunner and Hans-Peter Kaul, 'Article 27 - Voting' in Simma (n 1) 476, 519-520.

³³ Annex to Note 507 (n 17), paras 70-75.

requested by the SC through a formal decision and issued as an official document of the SC.³⁴ Other SC documents entailing some form of acceptance or request by the SC are the work of the SC subsidiary bodies, which is regarded as an inseparable part of the SC's work,³⁵ and the letters from the UN Secretary-General or representatives of other UN or non-UN bodies, organs or institutions to the SC President, usually as part of an exchange of letters between them. Each of the above-mentioned documents relies upon existent SC decisions, but none of them contains a new, separate decision to act by the SC.

3.2.1 Resolutions

Resolutions are generally regarded as the category of substantive SC decisions endowed with the greatest political importance.³⁶ All SC members are allowed to participate fully in the preparation of the text of resolutions and may informally consult with UN members as well as with regional organizations and Groups of Friends.³⁷ In the conduct of SC business draft resolutions have precedence in the order of submissions for consideration,³⁸ although they can at any time be withdrawn before a vote has been taken.³⁹

According to Article 27, paragraph 3, of the UN Charter, resolutions are adopted by an affirmative vote of nine SC members, including the concurrent votes of the five SC permanent members, in a public meeting. Draft resolutions may be proposed by any UN member. However, those proposed by non-SC members may be put to a vote only at the request of a representative on the SC.⁴⁰ Once a resolution is adopted, the UN Secretariat ensures its promptest communication to the parties concerned as well as its widest possible dissemination.⁴¹

Although there is no agreement on the legal effects of resolutions, the ICJ in *Certain Expenses*⁴² established that UN resolutions may contain binding and non-binding provisions, or a combination of both. Thus, binding resolutions are those containing provisions which are capable of creating binding obligations on their addressees. Non-binding resolutions, on the contrary, contain declarations or recommendations.⁴³ Other classifications include three categories of legal effects. Substantive effects comprise binding, authorizing and empowering effects. Causative effects consist of determinations of fact or of law which are capable of bringing substantive effects into existence. Modal effects refer to the how and when

³⁴ For an overview of current SC practice related to the reports of the UN Secretary-General, see Section III of the Annex to Note 507 (n 33), paras 11-19.

³⁵ Annex to Note 507 (n 33), para 72(f). A subsidiary body of the SC is a committee, working group or other small entity created by the SC to carry out specific responsibilities under its direction.

³⁶ Simma, Brunner and Kaul (n 32) 519-520. On the interpretation of SC resolutions, see Alexander Orakhelshvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143.

³⁷ Annex to Note 507 (n 33) Section VII, paras 42-43. A Group of Friend is a group of UN member states which is self-organized to take the lead in connection with a specific item on the agenda of the SC. See *Handbook* (n 12) 92.

³⁸ Provisional Rules of Procedure (n 15) Rule 32.

³⁹ *ibid* Rule 35.

⁴⁰ *ibid* Rule 38.

⁴¹ Annex to Note 507 (n 33) Section VII, para 45.

⁴² *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151 [163].

⁴³ There is no agreement on the legal effects of non-binding decisions, especially as to whether declarations constitute a sub-category of recommendations or a separate category. On this issue, see Marko D Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16 *European Journal of International Law* 879, 880.

substantive effects come into existence, including retroactive, non-retroactive, immediate, deferred, reversible or irreversible effects.⁴⁴

The main problem associated with the legal effects of SC resolutions is the determination of which provisions are legally binding and which are not. Regarding this, the ICJ in the *Namibia Advisory Opinion*⁴⁵ established that the question is to be determined on a case-by-case basis, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision(s) invoked and, in general, all circumstances that might assist in determining the legal consequences of the SC resolution.

3.2.2 Other Types of Decisions

According to established publication practice, written SC decisions other than resolutions comprise presidential statements, press statements, notes by the SC President and letters of the SC President on behalf of the SC.⁴⁶ The official records of all SC decisions are collected in the *Resolutions and Decisions of the Security Council*, a yearly publication which is available to the general public through the UN website.⁴⁷

Presidential statements and letters of the SC President are generally regarded as two categories of substantive decisions.⁴⁸ They have different degrees of political importance and require a different adoption procedure.

A presidential statement is a statement by the SC President on behalf of the SC. All SC members are granted adequate participation in the drafting of presidential statements, which are adopted at a formal meeting of the SC.⁴⁹ Draft presidential statements are made available, as appropriate, to non-SC members as soon as the statements are introduced within informal consultations on the whole.⁵⁰ The adoption of press statements requires consensus in informal consultations or a no-objection procedure.⁵¹

The letters from the SC President are formal letters by the SC President on behalf of the SC. They are often drafted by the SC President as part of an exchange of letters with Presidents and Chairs of international institutions. They are usually agreed upon in some kind

⁴⁴ *ibid.*

⁴⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16 [53]. Although SC resolutions have been considered in other cases before the ICJ and other international tribunals, none of these fully engage with the issue of their interpretation.

⁴⁶ There is no general agreement on the list, which stems from SC practice and is not peremptory. Thus, certain scholarship does not include the notes by the SC President as SC decisions. See Simma, Brunner and Kaul (n 32) 519.

⁴⁷ The list of SC annual cumulation is available at

<<http://lib-unique.un.org/DPI/DHL/unique.nsf/link/R00672>> accessed 17 February 2014. Access to the full text of individual resolutions is granted through the UN Library website

<www.un.org/en/sc/documents/resolutions/index.shtml> accessed 17 February 2014.

⁴⁸ Procedural decisions, as opposed to substantive decisions, of the SC include, for example, decisions to invite representatives of concerned states to participate, without vote, in the discussion of certain items and issues under consideration by the SC. See Simma, Brunner and Kaul (n 32) 519. The third category of SC substantive decisions consists of resolutions. See section 3.2.1 above.

⁴⁹ See Annex to Note 507 (n 33) Section VII, para 42.

⁵⁰ Consultations on the whole are consultations held in private in the Consultation Room with all 15 SC members present. They are announced in the UN Journal, have an agreed agenda and interpretation and may involve one or more briefers. Such consultations are closed to non-SC members. See *Handbook* (n 12) 91.

⁵¹ *ibid* 90.

of no-objection procedure, although in exceptional cases they are adopted in a public meeting.⁵² Current SC practice shows that they have their greatest practical relevance in the relationship between the SC President and the UN Secretary-General.

Other less official utterances of the SC are the statements made by the SC President to the press on behalf of all fifteen SC members. They are issued as a UN press release, both in English and French.⁵³ Like presidential statements, press statements are drafted by SC members and made available, as appropriate, to non-SC members.⁵⁴ Unlike presidential statements, they are adopted only by consensus and are subsequently read out by the SC President to the press.

The last type of written SC decisions consists of notes of the SC President. A note is described as a document published in the name of the SC President on behalf of all fifteen SC members and most often sets out decisions by the SC concerning its working methods and procedures.⁵⁵ The adoption procedure for notes consists of either consensus in informal consultations or no-objection procedure. Established in 1993, the SC Informal Working Group on Documentation and Other Procedural Questions (IWG) is the main forum where the notes are discussed by SC members. IWG meets as agreed by SC members and makes recommendations, proposals and suggestions to the SC members concerning the SC's documentation and other procedural questions.⁵⁶

4 Empirical Analysis of SC Decisions

The previous section provided an overview of the rules governing the conferral of powers to the SC as well as those regulating its decision-making. By adopting a quantitative methodology, this section analyses recent SC practice, thus offering new information about the functioning of the SC. The basis of the present research is coding and analysing 2,712 decisions adopted by the SC in the period of time from 2001 to 2012. The classification is based on the descriptive formulation of the subject-matters addressed in each SC document, as reported in the relevant pages of the official website of the SC. Using an original database, the analysis is aimed at establishing a taxonomy of SC decisions and, subsequently, finding significant selection effects.

4.1 Research Design

Decisions of the SC merit systematic analysis because of their significance for the legitimacy of international law and more importantly, for the maintenance of international peace and security and recognition, promotion and protection of international human rights standards. The first challenge in this process refers to the drawing of appropriate research design and the selection of a population representative of current SC practice in the discharge of its mandate. The easiest and most reliable way to gather relevant SC documents was to refer to the UN Department of Public Information⁵⁷ free digital archive developed in 1995. Another source on SC decisions is the SC Annual Report to the General Assembly, where all questions

⁵² *ibid*; Simma, Brunner and Kaul (n 32) 520.

⁵³ *Handbook* (n 12) 98.

⁵⁴ See Annex to Note 507 (n 33) Section VII.

⁵⁵ *Handbook* (n 12) 94.

⁵⁶ *ibid* 4-5.

⁵⁷ <www.un.org/en/sc/documents/> accessed 17 February 2014.

considered by the SC under its responsibility for maintaining international peace and security are reported. Since the information provided for in the SC Annual Report and in the SC website is identical, reliance was placed on the SC website as it provides direct access, via hypertext links, to each SC decision referred to in the analysis, thus facilitating the consultation.

The second challenge was to restrict the inquiry within a time-frame which is representative of the current trend in SC practice. To single out the relevant time-frame, consideration was focused on existing types of SC decisions and how they have been archived in the SC website.⁵⁸ The findings show that the availability of data is different in relation to individual types of decisions. Specifically, published resolutions cover the period of time from 1946 to the present whereas the availability of the full text of the remaining types is sensibly circumscribed – notes by the SC President (1993 to present), presidential statements (1994 to present), letters from the SC President (1997 to present), press statements (2001 to present). Thus, the period of time from 2001 to 2012 was selected as the working time-frame for analysis particularly because it represents the maximum time-slot in which all the five types of SC decisions are present at the same time.⁵⁹

With the sources of data and the relevant time-frame identified, the coding method was organized into two parts. Firstly, to identify and classify existent categories of decisions within the five types of SC decisions, individual decisions were grouped into different categories by using the descriptive formulation provided for each decision in the digital archive of the SC. Secondly, each scrutinized SC decision was assigned to a sub-category. Based on easy text normalization (“regions”, “SC functioning”, “general issues” and “other/UN related issues”), the same process of coding was applied to all types of SC decisions. The findings show that individual decisions address a single issue except six press statements and five letters from the SC President, which address two or more issues. Such documents have been included in the sub-category of decisions by regions as they primarily address regional actions by the SC and, within this sub-category, counted as a stand-alone issue, separated from the others.

Summary and descriptive statistics are presented for both aggregated data and disaggregated data (by types of SC decision and by categories of decisions). Table 1 provides descriptive statistics for each category of resolutions. Figure 1, Figure 2 and Figure 3 provide descriptive statistics on disaggregated data related to the classification of SC by type of decision, the four categories of action and the number of decisions adopted according to specific regions, respectively. Finally, Table 2 provides summary statistics on significant selection bias effects.

4.2 Results of Data Analysis

In the period from 2001 to 2012, the SC issued 2,712 documents. The majority of SC decisions is represented by press statements – 801, and resolutions – 751, followed by letters from the SC President – 515, presidential statements – 500, and notes by the SC President –

⁵⁸ According to the *Handbook* there are five major types of actions taken by the SC, although the list, which is based on SC practice, is not intended to be exhaustive. Other official documents, which are usually requested by the SC members from other UN principal organs or SC subsidiary bodies, have not been taken into account, since they do not entail any act of decision by the SC. These documents include the reports of the UN Secretary-General to the SC, letters to the SC President and the work of SC subsidiary bodies.

⁵⁹ For the sake of convenience, the year 2013 has been excluded from the time-frame of analysis since the present research is taking place in the same year. For the purpose of this study, a year is represented by the whole period of time of 12 months.

145. Grouped by categories of actions, the majority of SC decisions address issues with a regional scope while nearly a third of decisions include actions previously agreed upon or, taken by the broader family of UN institutions and seconded by the SC. Finally, less than a quarter of decisions equally target general issues, such as children in armed conflict and the role of women in securing international peace, and other matters related to the functioning of the SC.

Figure 1: Aggregated data

Figure 1A: Classification of SC Decisions by Type of Decision

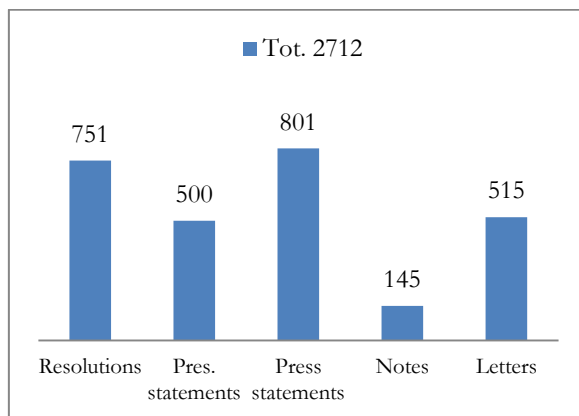


Figure 1B: Classification of Decisions by Categories of Action

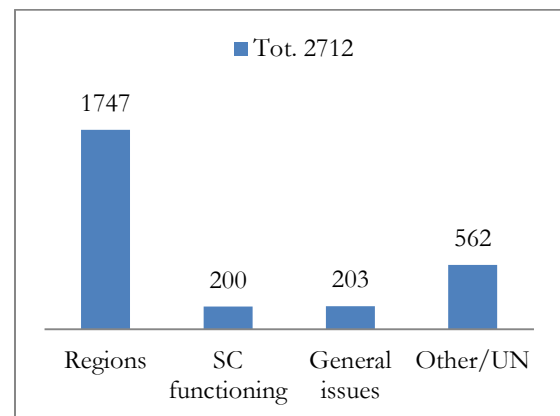


Figure 2 shows the disaggregated data of the composition of SC decisions by type of decisions. The analysis shows similar results for resolutions, presidential statements and press statements, with the number of decisions by region ranging from 64 percent to 89 percent, although presidential statements have the highest number of decisions on general issues among the five types of SC decisions. The remaining types of decisions, notes and letters from the SC President stand out for the highest number of decisions on the functioning of the SC – 81 percent, and other/UN related issues – 67 percent respectively.

Figure 2: Disaggregated Data

Figure 2A: Composition of Resolutions

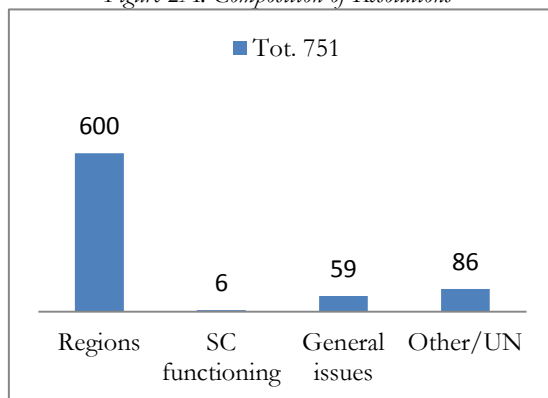


Figure 2B: Composition of Presidential Statements

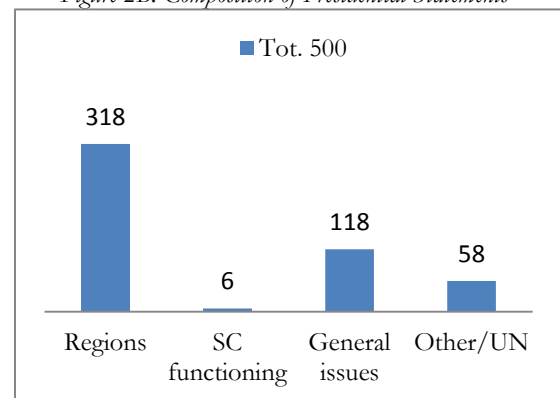


Figure 2C: Composition of Press statements

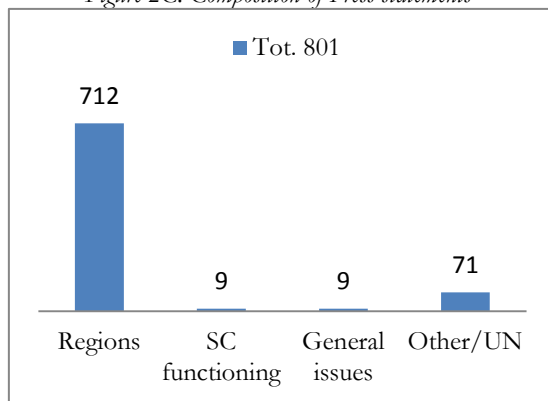


Figure 2D: Composition of Letters from the SC President

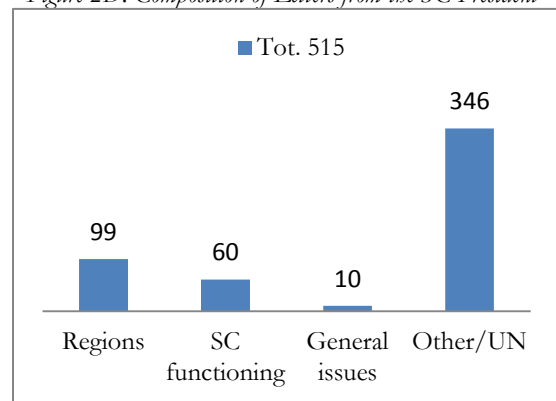
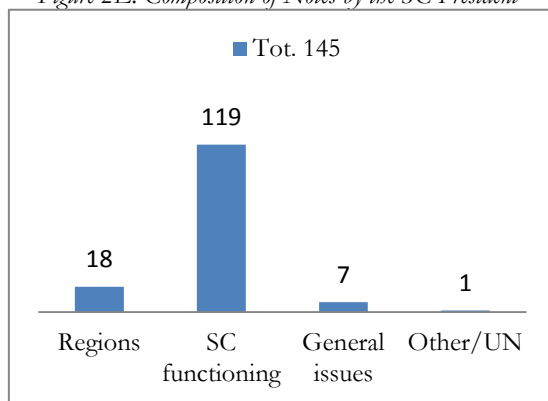


Figure 2E: Composition of Notes by the SC President



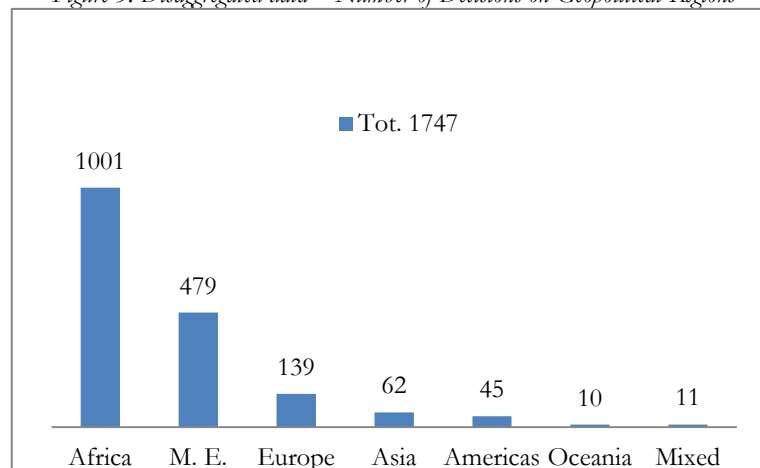
The aggregated data analysis demonstrates that 65 percent of all SC decisions address topics related to a specific geo-political area. The disaggregated data in this section further demonstrates that 1,001 decisions – comprising 57 percent, concern the African continent while 479 decisions – comprising 27 percent, concern the Middle East region.⁶⁰ Taken together, the number of SC decisions addressing issues taking place in Africa and in the Middle East is equal to 1,480 out of 1,747, comprising 85 percent.

Table 1: Decisions divided by categories of actions

Category of action	Resolutions	Presidential statements	Press statements	Notes	Letters
Regions	600 (80%)	318 (64%)	712 (89%)	18 (13%)	99 (19%)
SC functioning	6 (1%)	6 (1%)	9 (1%)	119 (81%)	60 (12%)
General issues	59 (8%)	118 (24%)	9 (1%)	7 (5%)	10 (2%)
Other/UN	86 (11%)	58 (11%)	71 (9%)	1 (1%)	346 (67%)
Tot.	751 (100%)	500 (100%)	801 (100%)	145 (100%)	515 (100%)

⁶⁰ There is no generally accepted definition of Middle East. For the purposes of this study, the broadest concept is used. See Huseyn Yilmaz, 'The Eastern Question and the Ottoman Empire. The Genesis of the Near and the Middle East in the Nineteenth Century' in Michael E Bonine, Abbas Amanat and Michael E Gasper (eds), *Is There a Middle East? The Evolution of a Geopolitical Concept* (Stanford University Press 2012) 11.

Figure 3: Disaggregated data – Number of Decisions on Geopolitical Regions



Finally, 20 percent of the SC decisions fall within the residual category of actions of support and endorsement of decisions not directly, or exclusively, taken by the SC while the remaining 15 percent of decisions address topics of marginal relevance, at least from the perspective of SC practice.

4.3 Discussion and Implications

The findings of the analysis show that between 2001 and 2012, the SC issued 2,712 documents. The majority of SC decisions is represented by press statements, comprising 30 percent; resolutions, comprising 28 percent; letters from the SC President, comprising 19 percent; presidential statements, comprising 18 percent; and notes by the SC President, comprising 5 percent.

The empirical data confirm the doctrinal assumption that resolutions – the only type of SC decisions to be put to a vote for adoption – are the most important political tool at the disposal of the SC in general, and for the permanent five in particular.⁶¹ They are accompanied by a very similar composition of presidential statements and press statements, which both require consensus for adoption, especially with regard to SC decisions on regional security issues and the function of the SC.

Presidential statements also stand out as the preferred means of discussion of general issues, which can be regarded as SC self-imposed restraint on its own powers.⁶² With regard to notes and letters from the SC President, the former, which requires consensus in informal consultations or no objection, proves to be the preferred forum for discussion of SC practice on documentation and other procedural issues. The latter, which does not necessarily require a prescribed form of adoption, can be regarded as formal utterances of the SC President that occur as part of a dialogue with the UN Secretary-General and, therefore, have a relevance restricted to the internal functioning of the UN and do not directly address UN member states.

⁶¹ Simma, Brunner and Kaul (n 32) 519-520; Rhona KM Smith, *Textbook on International Human Rights* (4th ed, OUP 2010) 52-54.

⁶² A full list of general issues discussed by the SC in the period of time between 2001 and 2012 is reported in the Appendix below.

Taking stock of the preceding discussion, it can be argued that there is a correlation between different voting systems for different types of actions and political effects of types of SC decisions, with resolutions having the greatest political relevance and Presidential letters the least.

The aggregated data analysis demonstrates that 1,747 decisions, comprising 65 percent of the total address topics related to a specific geo-political area while the disaggregated data of this section further demonstrates that 1,001 decisions, comprising 57 percent concern the African continent while 479 decisions, comprising 27 percent concern the Middle East region. Taken together, the number of SC decisions addressing issues taking place in Africa and in the Middle East is equal to 1,480 out of 1,747, comprising 85 percent.

Considered in light of the total number of decisions taken by the SC from 2001 to 2012, 2,712 decisions in total, the results of the analysis show that the number of decisions on Africa represent 37 percent of SC decisions while the number of decisions on the Middle East represents 18 percent. Specifically, press statements and resolutions dominate, making up 75 percent of all SC decisions on Africa and the Middle East. Presidential statements comprise over 18 percent of SC decisions. The figures do not take into consideration any decision addressing UN activities in those geopolitical areas (which have been classified as “other/UN related issues”), but only actions taken by the SC.

Table 2: Composition of SC Decisions on Africa and the Middle East

Type of decision	Africa	Middle East
Resolutions	358	136
Presidential statements	193	81
Press statements	409	207
Notes by the SC President	5	13
Letters from the SC President	36	42
Tot.	1001	479

In light of the above, it is significant that 55 percent of all SC decisions adopted between 2001 and 2012 specifically target Africa and the Middle East whereas the remaining 45 percent addresses all the remaining issues without giving prominence to any particular subject-matter. Assuming that the SC has not acted *ultra vires*,⁶³ the findings of the empirical analysis of SC practice also suggest that although the actions taken by the SC are political in nature, they address situations causing threats to international peace and security. This would be consistent with its UN Charter mandate.

The major point of concern stemming from the preceding discussion is that the margin of discretion in the hands of SC members in general, and the permanent five in particular, reflects the scenario of international relations and diplomatic interactions between members of the international community. Tellingly, no decision has been taken in relation to much debated issues such as the situation in Tibet, Cuba or Chechnya, which touch directly upon the interests of the five permanent members of the SC and their allies.⁶⁴ Nonetheless, these

⁶³ On this issue, see Rosand (n 2).

⁶⁴ Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, OUP 2000) 651-653 (discussing gross violations of human rights and the SC's impasse caused by political convenience of the five permanent members).

ongoing situations certainly represent acts or threats to international peace and security and, therefore, fall under the purview of the SC mandate.

If, as it seems, certain decisions turn out to be impractical because of the veto power, alternative approaches and levels of discussion might help ameliorate the situation, provided that, under the current provisions of the UN Charter, only political (and moral) pressure could persuade the SC to take action. For instance, the level of decision-making regarding potential threats or breaches of international peace and security could be shared with other primary organs of the UN primary, at least at the preliminary stages of discussion leading to the possible inclusion of a matter on the SC agenda. For instance, as the empirical analysis shows, there is an ongoing exchange of letters between the SC President and the UN Secretary-General on current and potential issues on the SC agenda. Although such an exchange is meant to improve the SC's action strategy, the SC recognizes the role of the Secretary-General as merely consultative. The issue of the protection of children in armed conflict, which has been on the SC agenda since 1999, is exemplificative of the consequences of reliance by the SC on totally discretionary powers.

The SC has consistently reaffirmed that the deliberate targeting of children in situations of armed conflict, the use of children as soldiers and the harmful and widespread impact of armed conflict on children have long-term consequences that severely hinder the achievement of durable peace, security and sustainable development.⁶⁵ The SC's concern for the protection of children affected by conflict is explicit, since the text of numerous resolutions and presidential statements make several references to its commitment to address the impact of armed conflict on children⁶⁶ and to give the fullest attention to the question of the protection of children in armed conflict when considering the matters of which it is seized.⁶⁷

The SC strategy on the protection of children in armed conflict has culminated with the creation of a UN monitoring and reporting mechanism aimed at collecting and providing "... timely, objective, accurate and reliable information on the recruitment and use of child soldiers in violation of applicable international law."⁶⁸ However, by providing that "the implementation of the monitoring and reporting mechanism by the Secretary-General will be undertaken only in the context of and for the specific purpose of ensuring the protection of children affected by armed conflict and *shall not thereby prejudice or imply a decision by the Security Council as to whether or not to include a situation on its agenda*",⁶⁹ the SC has preserved its own prerogative to discriminate between which children's human rights violations occurring at the same time throughout the world are worth protecting and which are not. This strategy of the SC to pick and choose which situation is worth dealing with ultimately runs counter to the purpose of international human rights law that the SC is bound by.

⁶⁵ UNSC Res 1314 (11 August 2000) UN Doc S/RES/1314 para 1.

⁶⁶ UNSC Res 1379 (20 November 2001) UN Doc S/RES/1379 Preamble, para 4; UNSC Res 1460 (30 January 2003) UN Doc S/RES/1460 Preamble, para 3; UNSC Res 1539 (22 April 2004) UN Doc S/RES/1539 Preamble, para 5; UNSC Res 1612 (26 July 2005) UN Doc S/RES/1612 Preamble, para 6; UNSC Res 1882 (4 August 2009) UN Doc S/RES/1882 Preamble, para 9; UNSC Res 1998 (12 July 2011) UN Doc S/RES/1998 Preamble, para 1; UNSC Res 2068 (19 September 2012) UN Doc S/RES/2068 Preamble, para 1; UNSC Presidential Statement 8 (2005) UN Doc S/PRST/2005/8 para 1; UNSC Presidential Statement 33 (2006) UN Doc S/PRST/2006/33 paras 1 and 5; UNSC Presidential Statement 28 (2008) UN Doc S/PRST/2008/28 para 1; UNSC Presidential Statement 9 (2009) UN Doc S/PRST/2009/9 paras 2 and 8; UNSC Presidential Statement 8 (2013) UN Doc S/PRST/2013/8 para 2.

⁶⁷ UNSC Res 1379 (n 66) para 1; UNSC Presidential Statement 18 (1998) UN Doc S/PRST/1998/18 para 6.

⁶⁸ UNSC Res 1612 (n 66) para 2(a).

⁶⁹ Emphasis added. UNSC Res 1612 (n 66) para 4; UNSC Res 1882 (n 66) para 2; UNSC Res 1998 (n 66) para 2; UNSC Presidential Statement 10 (2010) UN Doc S/PRST/2010/10 para 16.

Another alternative which would require amendment to the UN Charter, might consist of a duty of the SC to take into consideration matters referred to it by the UN General Assembly and publicly justify its decision regarding whether or not to take action in light of applicable provisions of the UN Charter and international law. Thus, to bridge the abstract argument to the example above, the SC resolutions and presidential statements on children in armed conflict should be interpreted in light of those decisions adopted by the SC in relation to the broader issue of protection of civilians in armed conflict, which was introduced in its agenda in 1999.⁷⁰ In those decisions, the SC recognized that acts of violence, abuses and sexual exploitation committed against civilians in general, and women and children in particular, in the context of armed conflict represent a flagrant violation of international humanitarian law and human rights law, including refugee law, and, on this ground, must be addressed.⁷¹ This suggests that the rationale behind SC interventions is represented exclusively by violations of rules and principles of international law⁷² and, in line with this, the SC has repeatedly demanded all parties to a conflict to strictly comply with international law and with its resolutions on this matter - thus establishing that SC resolutions have the same force as international provisions.⁷³

Despite this premise, the SC has established that consideration of issues pertaining to the protection of civilians in armed conflict must be decided on a case-by-case basis,⁷⁴ taking into consideration the particular circumstances, and that the *Aide Memoire* does not represent a blueprint for action.⁷⁵ This leads to the awkward conclusion that while all actors involved in armed conflict are strictly bound to observe their obligations under international law, the SC turns out to be self-legitimized to choose which situations address (and redress) for violations of international law. Beyond political considerations, this amounts to saying that the SC has authorized itself to inaction whenever convenience allows. Thus, it has arrogated to itself the right to perpetual immunity from prosecution for omissions to act for similar circumstances

⁷⁰ UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265/1999; UNSC Presidential Statement 6 (1999) UN Doc S/PRST/1999/6.

⁷¹ Aide Memoire, fourth edition, UNSC Presidential Statement 25 (2010) UN Doc S/PRST/2010/25, Annex, para I.A. see also UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674/2006 Preamble, para 3 (stressing that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being”).

⁷² In this regard, over the years the Security Council has reiterated its “willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed.” UNSC Res 1265 (70) para 10. See also UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738/2006 Preamble, para 6; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894/2009 Preamble, para 4 (stressing that “the Geneva Conventions of 1949 [and] their Additional Protocols constitute the basis for the legal framework for the protection of civilians in armed conflict”).

⁷³ UNSC Presidential Statement 2 (2013) UN Doc S/PRST/2013/2 para 7. Section F of the fourth edition of the Aide Memoire (2010) regulates the issue of compliance by parties to an armed conflict with applicable international humanitarian law and human rights law. Paragraph 2 thereof, in particular, explicitly recognizes the power of the Security Council to apply targeted sanctions against those parties that commit violations of applicable international humanitarian law and human rights law. Aide Memoire, fourth edition, UNSC Presidential Statement (n 71) Annex, para I.A.

⁷⁴ Security Council Resolutions 1296 (19 April 2000) UN Doc S/RES/1296/2000 para 1.

⁷⁵ Aide Memoire, fourth edition, UNSC Presidential Statement (n 71) Annex, para 4. The Aide Memoire has been adopted by the SC as a means to facilitate its consideration of issues pertaining to the protection of civilians in armed conflicts. UNSC Presidential Statement 6 (2002) UN Doc S/PRST/2002/6 para 3; UNSC Presidential Statement 41 (2002) UN Doc S/PRST/2002/41 para 4; UNSC Presidential Statement 27 (2003) UN Doc S/PRST/2003/27 para 3; UNSC Presidential Statement 46 (2004) UN Doc S/PRST/2004/46 para 13.

already addressed, overtly in violation of the spirit of the UN Charter and of its own resolutions.⁷⁶

If, as suggested above, the SC had a duty to take into consideration situations of potential breach of international peace and security brought to its attention by other UN organs such as the General Assembly, then the mandatory requirement that parties to an armed conflict ought to ensure strict compliance with the relevant rules of humanitarian and human rights law as well as the UN Charter and previous SC resolutions⁷⁷ would stand a better chance of eliciting compliance of its addressees. The SC commitment would not be in doubt regarding the ensuring that the Purposes of the Charter of the United Nations as set out in Article 1 (1-4) of the Charter, and to the Principles of the Charter as set out in Article 2 (1-7) of the Charter are complied with always.⁷⁸

Absent any such or similar duties, the goal of the UN to create the minimal conditions for a peaceful world, as set forth in Chapter I of the UN Charter, turns out to be constantly jeopardized by the practical inability of the SC to align as much as possible its actions (and inactions) to the position taken by the other principal organs of the UN and to subject them to general international law. Unfortunately, the wording of the UN Charter, regarding the purposes of the Organization appears vague and ambiguous. Article 1 lists the purposes of the UN as the maintenance of international peace and security. Article 24 establishing the SC mandate also refers to the maintenance of international peace and security. This overlap without clarification of the normative parameter of legitimacy for SC actions on the one hand, and the UN on the other is worrying. Likewise, the principle laid out by the International Court of Justice on the political character of an organ of the UN, such as the SC, and the margin of appreciation for its decisions is not helpful in determining the legitimacy of SC actions or inactions:

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter *when they constitute limitations on its powers or criteria for its judgment*. To ascertain whether an organ has *freedom of choice for its decisions*, reference must be made to the terms of its constitution.⁷⁹

As things stand, the SC has the power to decide the degree of necessity of its intervention based on political considerations.⁸⁰ Conversely, the reform of powers proposed above would shift the attention from a discretionary parameter of global politics to an objective parameter of international legality. This would bring benefits in the international legal system since international law does not discriminate on the basis of political convenience but legal certainty.

⁷⁶ “[T]he overwhelming majority of internally displaced persons and other vulnerable groups in situations of armed conflict are civilians and, as such, are entitled to the protection afforded to civilians under existing international humanitarian law.” UNSC Res 1296 (n 74) para 3.

⁷⁷ UNSC Res 1265 (n 70) paras 3-4; UNSC Res 1296 (74) Preamble, para 7; UNSC Presidential Statement 2002/41 (n 75) para 3; UNSC Presidential Statement 2003/27 (n 75) para 2; UNSC Presidential Statement 2004/46 (n 75) para 3; UNSC Presidential Statement 2010/25 (n 71) para 9.

⁷⁸ UNSC Res 1296 (n 74) Preamble, para 6; UNSC Res 1674 (n 71) Preamble, para 2; UNSC Res 1738 (n 72) Preamble, para 3; UNSC Res 1894 (n 72) Preamble, para 2.

⁷⁹ *Admission of a state to the United Nations (Charter, Article 4)* (Advisory Opinion) [1948] ICJ Rep 57, 64 (emphasis added).

⁸⁰ In the SC resolutions and presidential statements on women, children and the protection of civilians in armed conflicts there are countless references to the unlimited discretion of the SC in assessing matters brought to its attentions (“where necessary” and “on a case-by-case basis”). See, for instance, UNSC Presidential Statement 2002/6 (n 75) para 3.

The Security Council calls upon all parties concerned to comply strictly with their obligations under international law, in particular their relevant obligations under the Hague Conventions, the Geneva Conventions of 1949 and their Additional Protocols of 1977, and the United Nations Convention on the Rights of the Child of 1989, as well as with *all decisions of the Security Council*.⁸¹

As the numerical evidence yielded by this study shows, 85 percent of issues of regional concern involve Africa and the Middle East and, within this figure, it turns out that there is a concentration of decisions in specific areas. Thus, with regard to Africa, the majority of SC decisions address issues in the Democratic Republic of the Congo,⁸² Ivory Coast,⁸³ Somalia⁸⁴ and Sudan.⁸⁵ However, considerably less attention is given to issues in areas such as the Great Lakes region⁸⁶ and Libya⁸⁷ while consideration of other areas characterized by political instability and popular unrest, such as Tunisia and Egypt, is absent. With regard to the Middle East, the vast majority of SC decisions address issues taking place in the Middle East region as a whole,⁸⁸ and Afghanistan⁸⁹ and Iraq⁹⁰ in particular. Other areas such as Iran, Israel, Syria and Yemen are given marginal attention.⁹¹

As a matter of fact, the coverage of issues – real or potential – threatening international peace and security by the SC is uneven. Since the SC can avail itself of an absolute discretion in the determination whether a threat to or breach of international peace and security under Chapter VII of the UN Charter exists,⁹² serious doubts have been raised about the legitimacy of the actions and inactions of the SC.⁹³ This has led certain international scholarship to conclude that “such lack of accountability and failure to provide remedies against an injudicious Security Council in itself poses a threat to international peace and security.”⁹⁴

The findings of this study show that although individual decisions comply with the terms of the SC mandate,⁹⁵ the selection of subject-matters representing the object of SC decisions between 2001 and 2012 ultimately amounts to a biased compliance with its UN Charter obligations.

⁸¹ UNSC Presidential Statement 1999/6 (n 70) para 6 (emphasis added).

⁸² Resolutions - 53, presidential statements - 36, press statements - 66, letters from the SC President - 9.

⁸³ Resolutions - 49, presidential statements - 28, press statements - 34, letters from the SC President - 5.

⁸⁴ Resolutions - 44, presidential statements - 29, press statements - 38, letters from the SC President - 4.

⁸⁵ Resolutions - 46, including 21 referring to the Secretary-General's reports on Sudan, press statements - 18, including 15 statements on Darfur and 3 on South Sudan, letters from the SC President - 1 on South Sudan.

⁸⁶ Resolutions - 2, presidential statements - 6, press statements - 1, letters from the SC President - 2.

⁸⁷ Resolutions - 6, presidential statements - 1, press statements - 5, notes - 2, letters from the SC President - 1. For a comment on SC actions in Libya, see Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2013) 751-758.

⁸⁸ Resolutions - 59, presidential statements - 49, press statements - 24, letters from the SC President - 2.

⁸⁹ Resolutions - 33, presidential statements - 11, press statements - 53, notes - 1, letters from the SC President - 2.

⁹⁰ Resolutions - 17, presidential statements - 7, press statements - 45, notes - 3, letters from the SC President - 18.

⁹¹ Iran: press statements - 7, notes - 9; Israel: press statements - 2; Syria: press statements - 12, letters from the SC President - 1; Yemen: press statements - 12, letters from the SC president - 1. For a comment on the SC inaction in Syria, see Alston and Goodman (n 87) 751-758.

⁹² Vera Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in Light of the Lockerbie Case' (1994) 88 *American Journal of International Law* 643, 662.

⁹³ Smith (n 61) 54 (arguing that “[t]he most serious complaint raised against the Security Council is that it is less likely to take action against its permanent members”).

⁹⁴ Javaid Rehman, *International Human Rights Law* (2nd ed, Pearson Higher Education 2010) 39.

⁹⁵ If the SC remains inactive, states keep their right to self-preservation under Article 51 of the UN Charter. See Karl Doehring, 'Unlawful Resolutions of the Security Council and Their Legal Consequences' (1997) 1 *Max Planck Yearbook of United Nations Law* 91, 97-98.

5 Conclusion

While it is common to talk about the powers of the SC, it is worth underscoring that, according to Chapter VII of the UN Charter, such powers do exist to allow the SC to perform its duties within the UN system. If the powers of the SC can be exercised beyond the literal scope of its mandate under Chapter VII of the UN Charter, consistently with international law, then the question is whether these powers are means to carrying out the duties listed in the UN Charter or actually further duties that the SC has taken upon itself – and, if so, what is the extent of these duties.

Based on publicly available documents, this article has assessed current trends in the decision-making processes at the SC with the aim of establishing a taxonomy of SC decision-making which can be relied upon to systematically analyse behavioural regularities of the SC in a given time-frame.

To test explicitly whether the actions (or inactions) of the SC are tainted by selection bias, 2,712 decisions were analysed. The findings of the analysis show that between 2001 and 2012, the majority of decisions adopted by the SC addressed issues taking place in two specific geo-political areas, namely, Africa and the Middle East. It appears that selection bias to act or not act under the UN Charter mandate to ensure international peace and security is legitimated by the provisions of the UN Charter through the allocation of powers among members of the SC. Specifically, the composition of the SC with the five permanent members, the SC voting procedures and the quasi-universal scope of its mandate confer on the SC a large amount of discretionary power which can be exercised without the need to be justified before the international community.

These results have significant practical implications. The key implication is that as a political actor, the SC has the power to determine the course of international relations while as a principal organ of the UN, it is legally bound by the provisions of the UN Charter and although its decisions must be implemented by UN members, it cannot oblige any state to implement unlawful acts, such as those contrary to peremptory norms of international law.

This inherent tension between compliance with the terms of its mandate and a degree of discretion related to the selection of the subject-matters seems unavoidable, as the concept of peace and international security itself, as well as those of international law, responsibility and state sovereignty among many, are, generally speaking, contested. However, a more rigorous process of codification and periodic revision of current SC working methods and practices would help predicting patterns of behaviour of the SC and, thus, shed light on the legal mind of the SC as it evolved and crystallized over the years. Public availability of information about the making of SC decisions is, in this sense, a necessary precondition of transparency and must be enhanced.

Whether international law is regarded as a system of cooperation or as a supranational system, secrecy in the international decision-making process appears to contradict the purpose of international law in general, and the UN in particular. The maintenance of international peace and security is first and foremost, a manifold act of dialogue among sovereign states and international institutions. Drawing from this assumption, this article has provided some numbers, which reconstruct, for the first time, the areas of concentration of SC decisions, along with a brief description of the main features of the rationale behind the adoption of different types of SC decisions.

Although the study of the legal implications of selection bias effects goes beyond the scope of the empirical treatment of this important legal phenomenon, further research could

examine the political and legal significance of the systematic and prolonged intervention of the SC in two specific geopolitical regions and how the international community as a whole benefits from that, as well as the impact of the SC politics on the development of international law.

APPENDIX – Relevant disaggregated data**Figure A: Resolutions**

Regions		SC functioning		General issues	
Africa	358	Internal functioning	0	Children and armed conflict	7
Middle East	136	Other	6	Maintenance of international peace and security	1
Europe	67			Nuclear non-proliferation	14
Asia	23			Protection of civilians in armed conflict	3
Americas	16			Post-conflict peacebuilding	3
				Women and peace and security	4
				Threats to international peace and security caused by terrorist acts	27
Tot. 600		Tot. 6		Tot. 59	

Figure B: Presidential statements

Regions		SC functioning		General issues	
Africa	193	Internal functioning	2	Children and armed conflict	8
Middle East	81	Other	4	Maintenance of international peace and security	20
Europe	23			Nuclear non-proliferation	4
Asia	11			Protection of civilians in armed conflict	8
Americas	10			Justice and the rule of law	2
				Women and peace and security	13
				Post-conflict reconciliation	1
				Post-conflict peacebuilding	7
				Role of civil society in conflict prevention	1
				Role of SC in pacific settlement of disputes	1
				Rule of law	3
				Small arms	5
				Threats to international peace and security	3
				International terrorism	40
				Importance of mine action for peacekeeping operations	1
				Civilian aspects of conflict management and peacebuilding	1
Tot. 318		Tot. 6		Tot. 118	

Figure C: Press statements

Regions		SC functioning		General issues	
Africa	409	Internal functioning	9	Children and armed conflict	1
Middle East	207	Other	0	HIV/AIDS	1
Europe	42			Protection of civilians in armed conflict	2
Asia	21			Terrorism	5
Americas	19				
Oceania	8				
Mixed	6				
Tot. 712		Tot. 9		Tot. 9	

Figure D: Notes by the SC President

Regions		SC functioning		General issues	
Africa	5	Internal functioning	28	International terrorism	1
Middle East	13	Other	91	Non-proliferation of nuclear weapons	5
				Women and peace and security	1
Tot. 18		Tot. 119		Tot. 7	

Figure E: Letters from the SC President

Regions		SC functioning		General issues	
Africa	36	Internal functioning	1	Children and armed conflict	2
Middle East	42	Other	59	Peacekeeping	1
Europe	7			Non-proliferation of arms of mass destruction	1
Asia	7			Women and peace and security	2
Oceania	2			Rule of law	2
Mixed	5			Sexual violence in conflict	2
Tot.	99		Tot. 60		Tot. 10

‘Has Recent State Practice transformed the Law on the Use of Force?’

Sven Simon*

I. Introduction

In 1970, *Thomas M. Franck* wrote an article about changing norms governing the use of force, which he titled: ‘Who killed Article 2(4)?’¹ The same Article of the UN Charter is in trouble once more. For several weeks the international community discussed the question of *if and how* they should react to the Syrian conflict where hundreds of people were killed following the use of chemical weapons in the Ghouta area of Damascus on 21 August 2013.² The gruesome pictures of people showing neurotoxic symptoms intensified the debate over the desirability of possible military action against Syria. The UK government set out its position regarding the legality of strikes in a Legal Memorandum and justified its ‘legal basis’ for a targeted military response ‘under the doctrine of humanitarian intervention’.³ The United States was less explicit in its justifications of the possible use of military force.⁴ Nonetheless, military intervention for humanitarian purposes was back on the agenda, as always happens either after it has happened – as in Somalia, Bosnia and Kosovo; or when it has failed to happen – as in Rwanda⁵ and now the Syrian Arab Republic.

The debate on possible intervention in Syria has moved beyond the discussion of whether any such action would be legal under international law. It would be futile to stop the debate now because mass atrocities do not confine themselves to, nor keep their residences in the past. Thus, the requirement on the prohibition against the use of force on the one hand, and the doctrine of humanitarian intervention on the other must always inform and evaluate considerations about possible responses to breaches of international peace and security.

* Assistant Professor of Law at the Justus Liebig University Giessen (Chair for Public Law, International and European Law, held by Prof. Dr. Thilo Marauhn, M.Phil.) sven.simon@recht.uni-giessen.de. The author is grateful to SPILJ’s independent referees for comments received on earlier drafts of this paper.

¹ Thomas M Franck, ‘Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States’ (1970) 5 *American Journal of International Law* 809.

² The use of chemical weapons was evidenced by the findings of the UN Investigation Commission and condemned by Security Council Resolution 2118 (2013), which established a disarmament and compliance regime for the destruction of Syrian stocks. See UN Mission to Investigate Allegations of the Use of Chemical Weapons in Syrian Arab Republic, ‘Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013’

<www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf> accessed 31 January 2014 and UNSC Res 2218 (27 September 2013) UN Doc S/RES/2218.

³ See UK Government, ‘Chemical Weapon Use by Syrian Regime – UK Government Legal Position’, 29 August 2013, para 4, at

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf> accessed 31 January 2014.

⁴ See Senate Foreign Relations Committee Resolution on Syria, at <<http://blogs.wsj.com/washwire/2013/09/03/full-text-senate-foreign-relations-committee-resolution-on-syria/>> accessed 31 January 2014.

⁵ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (International Development Research Centre 2001) VII

<<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 31 January 2014.

II. The Prohibition against the Use of Force

Based upon the experience gained from two World Wars, the founders of the UN sought to establish a system for ensuring peaceful coexistence among States regardless of differing political systems, incompatible goals and values of justice. The UN Charter was innovative to the extent that it outlawed, across the board, the use of force. The only exceptions are self-defence in confronting a prior armed attack, and authorization by the Security Council – a new international institution given unprecedented authority to act in cases of threats to international peace and security. The prohibition against the use of force, as set out most crucially in Article 2(4) is seen by an overwhelming majority of scholars as the archetypical example of a ‘peremptory norm’ of general international law.⁶ The International Law Commission holds a similar view.⁷ So does the International Court of Justice (ICJ) particularly in the *Corfu Channel*⁸ and *Nicaragua*⁹ cases.

However, a new generation that has lived relatively peacefully without the experience of war appears eager and keen to advocate, insist and enforce a curious counter-Article 2(4) prohibition against the threat or use of force. Their arguments often casually revolve around a right of humanitarian intervention,¹⁰ reprisals and the responsibility to protect or at least a duty¹¹ for the members of the Security Council to react. Thus, the question arises whether state practice after NATO’s intervention in Kosovo has minimised the prohibition against the threat or use of force. Could States now regard intervention for subjective protectionist as a free for all?

III. Humanitarian Intervention

The principles that underpin humanitarian intervention have origins in 15th century ‘just-war’ theories, although the term itself was not used. *Vitoria* (1492–1546) viewed it as the duty of

⁶ Academic acceptance of this view is extremely widespread. Some examples include: Oliver Dörr, ‘Prohibition of use of Force’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2011) paras 1, 32 and 33, available at <www.mpepil.com> accessed 31 January 2014; Jochen A Frowein, ‘Ius Cogens’, *ibid* (2009) paras 6 and 8; James Crawford, *The Creation of States in International Law* (2nd ed, OUP 2006) 146; Yoram Dinstein, *War, Aggression and Self-Defence* (5th ed, CUP 2005) 99-104; Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 50; Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *European Journal of International Law* 1, 3; for a critique, see James A Green, ‘Questioning the Peremptory Status of the Prohibition of the Use of Force’ (2011) 32 *Michigan Journal of International Law* 215.

⁷ UNGA ‘Reports of the International Law Commission’, UN GAOR 21st Session Supp No 9 UN Doc A/6309/Rev.1 (1966) pt II; ILC, ‘Yearbook of the International Law Commission 1966’ UN Doc A/CN.4/SER.A/1966/Add.1. The ILC arguably reaffirmed this view when it proceeded to set out a list of examples of *jus cogens* norms that had been proposed by its members, of which the prohibition of the use of force was the first. ILC, ‘Report of the International Law Commission on the Work of its 53rd Session’ (23 April–1 June, 2 July–10 August 2001) UN Doc A/56/10, 283.

⁸ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4 [29].

⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14 [268].

¹⁰ A few examples are the ECOWAS intervention in Liberia (1990), the operation in the Iraqi Kurdistan (1991), Somalia (1992) and the NATO intervention in Kosovo in 1999.

¹¹ See Anne Peters, ‘The Security Council’s Responsibility to Protect’ (2011) 8 *International Organizations Law Review* 1, 2.

‘civilised’ states to intervene in ‘backward’ states to end inhuman practices such as cannibalism and human sacrifice, and to spread Christianity.¹² *Grotius* (1583–1645) added to these criteria the suppression of idolatry, atheism and sexual immorality.¹³ More generalized sentiments of this nature can be traced even further back to the work of *Aristotle*. Politics ‘posit[ed] that war was a means to defend “the good life” and to help others “to share in the good life”’.¹⁴ Since then, military intervention for humanitarian purposes has been controversial.

When NATO States used force against the Federal Republic of Yugoslavia without Security Council authorization, the immediate controversy of ‘unilateral’ or ‘unauthorized’ intervention arose. Further, it was queried whether subsequent authorization of a NATO-led peace keeping force by the UN Security Council¹⁵ had in fact legitimised a prior illegal action. *Antonio Cassese* for example suggested from these developments that there may be emerging a customary law norm allowing for unilateral intervention under narrow circumstances in cases of humanitarian crisis.¹⁶ Further, *Anne-Marie Slaughter* argued that one could transfer the Kosovo-verdict on preventive warfare.¹⁷ This illustrates a growing trend to merge different rationales (human rights, democracy and the responsibility to protect) into a case for military action.

IV. State Practice after Kosovo

The majority of States inclined themselves away from NATO, regarding its intervention in Kosovo as illegal under international law. Shortly after the beginning of the air strike campaign, Belarus, the Russian Federation and India sponsored a Security Council resolution condemning NATO’s military intervention in Kosovo. The resolution was supported by China, Namibia, and Russian Federation but opposed by another twelve, namely, France, US, UK, Canada, The Netherlands, Argentina, Bahrain, Brazil, Gabon, Gambia, Malaysia and Slovenia.¹⁸ The Russian Federation immediately declared that ‘attempts to justify the military action under the pretext of preventing a humanitarian catastrophe bordered on blackmail, and those who would vote against

¹² Bhikhu Parekh, ‘Rethinking Humanitarian Intervention’ (1997) *International Political Science Review* 50, 51.

¹³ *ibid* 51.

¹⁴ Sean D Murphy, *Humanitarian Intervention* (University of Pennsylvania Press 1996) 37.

¹⁵ The result of the Organization’s involvement was the establishment of a UN administration in Kosovo through Security Council resolution 1244. See UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 para 7.

¹⁶ Antonio Cassese, ‘Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10 *European Journal of International Law* 23, 26.

¹⁷ Shortly before the beginning of the U.S. attack on Iraq in 2003, she wrote: ‘What we are witnessing today is an unruly process of pushing and shoving toward a redefined role for the United Nations. Practices have to evolve without formal amendment. On Kosovo, a majority of the people, at least in the NATO countries, rejected a system that blocked a humanitarian intervention because of the political allegiances of a prominent Security Council member. In the next crisis, over East Timor, the council was once again able to reach a consensus and authorize a United Nations force. That is the lesson that the United Nations and all of us should draw from this crisis. Overall, everyone involved is still playing by the rules. But depending on what we find in Iraq, the rules may have to evolve, so that what is legitimate is also legal.’ *Anne-Marie Slaughter*, ‘Good Reasons for Going Around the UN’ *The New York Times* (New York, 18 March 2003) A33.

¹⁸ UNSC ‘Security Council Rejects Demand for Cessation of Use of Force against Federal Republic of Yugoslavia’ (26 March 1999) Press Release SC/6659.

the text would place themselves in a situation of lawlessness'.¹⁹ India, China and a group of Latin American States jointly condemned the intervention as unlawful.²⁰

Shortly after the intervention, supporting States distanced themselves from its potential legal implications. The US and Germany claimed that Kosovo was not to be viewed as a precedent for future intervention,²¹ while Slovenia and Canada welcomed the Security Council's Resolution 1244²² which placed the situation under UN authority. Later in the same year, the Non-Aligned Movement (NAM),²³ issued a statement that 'reject[ed] the so-called "right" of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law'²⁴ and also firmly condemned 'all unilateral military actions including those made without proper authorization from the Security Council'.²⁵

The question of the legality of the use of force by NATO was brought before the ICJ by Serbia (then Serbia and Montenegro). The respondent States were not so clear in explaining to the Court the reasons for their interventions into Kosovo. Belgium relied on Security Council resolutions and a doctrine of humanitarian intervention and necessity. The US also relied on Security Council resolutions and, together with Germany, The Netherlands, Spain and the UK, made reference to the existence of a humanitarian catastrophe. Canada, France, Italy and Portugal did not offer the ICJ a clear argument for their actions.²⁶ Nevertheless, the ICJ refused to address the issue of the legality of NATO's intervention on jurisdictional grounds.²⁷

Thus, by the end of the 1990s there was no evidence of any international consensus on the legality of humanitarian intervention without the authorization of the Security Council. Previous attempts to develop a less stringent application of Article 2(4) have been vociferously rejected.

Significantly article 4(h) of the Constitutive Act of the African Union,²⁸ signed on 11 July 2000, provides that:

'The Union shall function in accordance with the following principles:

¹⁹ *ibid*

²⁰ UNGA, 'Letter dated 26 March 1999 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General' UN Doc A/53/884 - S/1999/347, Annex (Statement by the Rio Group); see also UNSC Verbatim Record (24 March 1999) UN Doc S/PV.3988, for the positions of India and China.

²¹ Christine D Grey, *International Law and the Use of Force* (3rd ed, OUP 2008) 39 and 47.

²² UNSC Verbatim Record (10 June 1999) UN Doc S/PV.4011, 11 (Slovenia) and 13 (Canada).

²³ See (n 20). See also 'The Non-Aligned Movement: Description and History, Non-Aligned Movement' <www.nam.gov.za/background/history.htm> accessed 31 January 2014.

²⁴ NAM, XIII Ministerial Conference, 8–9 April 2000, Cartagena, Colombia, Final Document, 263 <www.nam.gov.za/xiiiminconf/minconf.pdf> accessed 31 January 2014.

²⁵ *ibid* 11.

²⁶ Simon Chesterman, *Just War or Just Peace?* (OUP 2003) 213.

²⁷ *Legality of Use of Force (Yugoslavia v United States of America)* (Request for the Indication of Provisional Measures) [1999] ICJ Rep 916; *Legality of Use of Force (Serbia and Montenegro v United Kingdom)* (Preliminary Objections) [2004] ICJ Rep 1307; *Legality of Use of Force (Yugoslavia v Spain)* (Provisional Measures) [1999] ICJ Rep 761; *Legality of Use of Force (Serbia and Montenegro v Portugal)* (Preliminary Objections) [2004] ICJ Rep 1160; *Legality of Use of Force (Serbia and Montenegro v Netherlands)* (Preliminary Objections) [2004] ICJ Rep 1011; *Legality of Use of Force (Serbia and Montenegro v Italy)* (Preliminary Objections) [2004] ICJ Rep 865; *Legality of Use of Force (Serbia and Montenegro v Germany)* (Preliminary Objections) [2004] ICJ Rep 720; *Legality of Use of Force (Serbia and Montenegro v France)* (Preliminary Objections) [2004] ICJ Rep 575; *Legality of Use of Force (Serbia and Montenegro v Canada)* (Preliminary Objections) [2004] ICJ Rep 429; *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279.

²⁸ Constitutive Act of the African Union, adopted 11 July 2000 <www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm> accessed 31 January 2014.

...

(h) The right of the Union 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'.²⁹

This provision has not been invoked to date and it remains to be seen if and when it is, what the response of the Security Council and the rest of the international community will be. Resort to this provision could be contrary to the UN Charter, as it seems to suggest that the African Union could take a decision to authorize intervention without resort being had to the Security Council.

In relation to the US-led intervention in Afghanistan in 2001, one might argue that no plausible evidence has been presented to demonstrate that it was undertaken in response to an armed attack required under Article 51 of the UN Charter,³⁰ neither have any attempts to characterise it in terms of a reprisal.³¹ Regarding the latter, armed reprisals are prohibited.³²

The question of the contribution of the Iraq war of 2003 to State practice regarding the prohibition against intervention in States has been widely examined. When the Security Council was discussing whether to authorize a Chapter VII measure against Iraq, the United States had claimed the right to use force pre-emptively against threats caused by Iraq, even without the authorization by the Security Council.³³ Later on, however, the US ceased claiming the entitlement to defend itself pre-emptively and instead advanced the claim that Resolution 1441 authorized the use of force, contrary to its previous position.³⁴

The justifications issued in reaction to the military campaigns in Iraq and Afghanistan are not particularly helpful on the question whether State practice on the prohibition against force has changed even slightly to allow for other exceptions. They only relate to a (doubtful) interpretation of the well-established right to self-defence and not to a form of humanitarian intervention. Thus, the question remains whether the reaction of States to the concept of the responsibility to protect (R2P) has transformed the law on the use of force.

²⁹ As amended in 2003: ... as well as a serious threat to legitimate order to restore peace and stability to the Member State the Union upon the recommendation the Peace and Security Council. Similar provisions are contained in several regional treaties concluded among African States, for example the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (1999); art 7 Economic Community of Central African States Pact on Mutual Assistance (2000); and art 4 (8) Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region (2006).

³⁰ Eric Myjer and Nigel White, 'The Twin Tower Attack: An Unlimited Right to Self-Defence?' (2002) 7 *Journal of Conflict and Security Law* 5, 7.

³¹ Javaid Rehman and Saptarshi Ghosh, 'International Law, US Foreign Policy and Post-9/11 Islamic Fundamentalism: The Legal Status of the "War on Terror"' (2008) 77 *Nordic Journal of International Law* 87, 94.

³² ILC, Draft Articles on Responsibility of States for Wrongful Acts, ILC Report 2001 (n 7) ch IV.E.1, art 50.

³³ UNSC 'Security Council Holds Iraq "in Material Breach" of Disarmament Obligations, Offers Final Chance to Comply, Unanimously Adopting Resolution 1441 (2002)' (11 August 2002) Press Release SC/7564; UNSC 'Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (21 March 2003) UN Doc S/2003/351.

³⁴ Abdul H Ghafur, 'The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Reappraisal' (2007) 54 *Netherlands International Law Review* 441, 479; Sean D Murphy, 'Assessing the Legality of Invading Iraq' (2004) 92 *Georgetown Law Journal* 173. For detailed analysis of the pre-emption argument, see Marc Weller, *Iraq and the Use of Force in International Law* (OUP 2010) 134.

V. The Responsibility to Protect (R2P)

Following the Rwanda genocide in 1994 UN Secretary-General *Kofi Annan* posed his much cited question at the United Nations Millennium Summit,

‘(...) if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?’³⁵

Emergence of the R2P principle has added to the doubt about the enduring strength of the prohibition against the threat or use of force under international law. While re-affirming the primacy of the role of the Security Council in matters relating to international peace and security, the International Commission on Intervention and State Sovereignty (ICISS) report ‘expressed some misgivings about relying on the Security Council to act as the “proper authority” for military action related to R2P’.³⁶ The ICISS insisted that where the Security Council was deadlocked and unable to intervene, other alternatives could be pursued. The UN General Assembly could consider the matter of intervention; regional or sub-regional organisations could intervene under Chapter VIII of the UN Charter; and ‘seeking subsequent authorization from the Security Council’.³⁷ Even more firmly, the ICISS warned that Security Council reticence to intervene in the face of atrocities was no justification for inaction. ‘The Security Council should take into account ... that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned States may not rule out other means to meet the gravity and urgency of that situation...’.³⁸

1. The Position of States at the General Assembly

However, when it came to negotiating R2P paradigm at the UN’s World Summit in 2005, the contours laid out by the ICISS inspired little consensus among States.³⁹ Nonetheless, the idea was taken up by the General Assembly, in the 2005 World Summit Outcome Document,⁴⁰ which stated:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity (...) The international community

³⁵ ICISS Report (n 5) VII.

³⁶ Jennifer Welsh, ‘Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP’ (2011) 25 Ethics and International Affairs 3.

³⁷ ICISS Report (n 5) XIII.

³⁸ *ibid*

³⁹ The notion that the responsibility to protect doctrine is devoid of any legal basis and favours the most powerful States against the weakest ones was advocated by Pakistan, UNGA Verbatim Record (6 April 2005) UN Doc A/59/PV.86, 5; Algeria, *ibid*, 13; Egypt, *ibid*, 13; Colombia, *ibid*, 15; Vietnam, *ibid*, 22; Venezuela, *ibid*, 24-25; Iran, *ibid*, 17-18; Cuba, *ibid*, 14-15; Syria, *ibid*, 19; and Tanzania, *ibid*, 26. Egypt in its statement that it delivered on behalf of the NAM noted the ‘concerns about the possible abuse of R2P by expanding its application to situations that fall beyond the four areas defined in the 2005 World Summit Outcome, and by misusing it to legitimize unilateral coercive measures or intervention in the internal affairs of States.’ UNGA Verbatim Record (23 July 2009) UN Doc A/63/PV.97, 5). China, Gambia, Israel, Serbia, Solomon Islands and Sudan were among States that indicated a concern about possible abuse/misuse of the concept. Venezuela also opposed intervention in weak and failed States as a breach of the principle of self-determination of peoples. See UNGA Verbatim Record (6 April 2005) Doc A/59/PV.86, 24-25.

⁴⁰ UNGA Res 60/1 (15 September 2005) UN Doc A/RES/60/1 (World Summit Outcome Document 2005).

should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, (...) we are prepared to take collective action, in a timely and decisive manner, *through the Security Council, in accordance with the Charter*, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity ... (emphasis added).

Some authors advocate the use of force outside of the auspices of the Security Council and argue that R2P as expressed at the 2005 World Summit actually 'strengthens the legal justification' for this type of unilateral and regional action should the Security Council fail to act.⁴¹ That view appears to contradict the World Summit position that R2P would operate within the existing framework of Chapter VII.⁴² The adoption by the 2005 World Summit Outcome Document of the R2P principle may signify the crystallization of customary international law in respect of the interpretation of 'threat to peace' in Chapter VII of the UN Charter. However, the paragraphs that seek to embrace the R2P are entirely limited to those aspects which speak to collective action *through the Security Council*. Thus, neither State practice nor *opinio juris* in respect to a change of the prohibition of the use of force can be drawn from this document. To hold otherwise would be an attempt at re-writing of what was actually decided and the intentions of States Parties.

While accepting that R2P does not at present advocate the use of force outside of the Security Council, other writers submit that it is a 'crucial component' which R2P should incorporate.⁴³ However, such a position could only be arrived at through customary international law. Thus, two criteria must be fulfilled, namely, that the actions concerned must 'amount to a settled practice', and 'the states concerned must... feel that they are conforming to what amounts to a legal obligation.'⁴⁴

During the General Assembly debate in July 2009, ninety-four member states (of whom one representative spoke on behalf of the European Union and the other on behalf of the Non-Aligned Movement) presented their countries' positions regarding the Report of the Secretary-General on the Implementation of the Responsibility to Protect.⁴⁵ Member States argued that their current task should be the implementation of R2P on the basis of paragraphs 138 and 139 of the 2005 World Summit Report. Later on, in its 105th plenary meeting on 14 September 2009, the UN General Assembly adopted a resolution on R2P⁴⁶ in which it recalled the two paragraphs of the 2005 Outcome Document. It appears that under the auspices of the UN General Assembly, the international community is still building up the framework for implementation of R2P, and appears anxious not to undermine the UN Charter prohibition on the unilateral use of

⁴¹ Alicia L. Bannon, 'The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism' (2006) 115 Yale Law Journal 1157, 1158.

⁴² World Summit Outcome Document 2005 (n 40), para 139.

⁴³ Paul R. Williams, J. Trevor Ulbrick and Jonathan Worboys, 'Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis' (2012) 45 Case Western Reserve Journal of International Law 473.

⁴⁴ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3 [77].

⁴⁵ UNGA 'Report of the Secretary-General 63/677' (2009) UN Doc A/63/677; see also UNGA Verbatim Record (23 July 2009) UN Doc A/63/PV.97; UNGA Res 63/304 (23 July 2009) UN Doc A/RES/63/304.

⁴⁶ UNGA Res 63/308 (14 September 2009) UN Doc A/RES/63/308.

force against States. Even States that comprise the foremost proponents of R2P underscored their commitment to the view that the decision to take military intervention remains the prerogative of the UN Security Council.⁴⁷

2. The Position of States at the UN Security Council

Open debates subsequently took place at the Security Council on the question of the protection of civilians in situations of armed conflict. In these discussions too, a tendency in support of R2P emerged. Nonetheless, in the open debate of 28 June 2006 States failed to take a position on the question of humanitarian intervention.⁴⁸ A widespread, but vague consensus emerged at the open debate of 22 June 2007.⁴⁹ Mexico, stated:

[d]espite the consensus reached in 2005, we cannot deny that an atmosphere of mistrust prevails over that subject. While some States see in the new principle the mere continuance of interventionist policies aimed at destabilizing political regimes, others promote its application in a selective manner, limiting its scope to cases significant for their foreign policy interests⁵⁰.

In the open debate of 20 November 2007, besides numerous states supporting the R2P in general terms⁵¹ and a few opposing it,⁵² certain states pronounced themselves specifically on humanitarian intervention and on the possibility to adopt measures under Chapter VII of the UN

⁴⁷ Carlo Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13 *Journal of Conflict and Security Law* 191, 203. The responsibility to protect was upheld by San Marino, UNGA Verbatim Record (6 April 2005) UN Doc A/59/PV.86, 24; France, UNGA Verbatim Record (7 April 2005) UN Doc A/59/PV.87, 5; Japan, *ibid*, 29; Australia, UNGA Verbatim Record (7 April 2005) UN Doc A/59/PV.88, 4; Canada, UNGA Verbatim Record (8 April 2005) UN Doc A/59/PV.89, 27 and UNGA Verbatim Record (9 May 2005) UN Doc A/59/PV.96, 9; New Zealand, UNGA Verbatim Record (7 April 2005) UN Doc A/59/PV.88, 4; Norway, *ibid*, 13; and Liechtenstein, *ibid*, 19. Uganda stated that it was favourable to the responsibility to protect, provided that it would be formulated in greater detail, *ibid*, 9). Ukraine affirmed that 'such measures can be taken only as a last resort and under the explicit mandate of the Security Council,' *ibid*, 22. A bit vague was the position adopted by Indonesia, whereby 'although there are some moral justifications', the issue should be further discussed both politically and legally, *ibid*, 26.

⁴⁸ UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 (including favourable statements from the United Kingdom, 6-7; Slovakia, 8; Ghana, 11; Tanzania, 13; Congo, 15; Argentina, 16; France, 20; Denmark, 21; Austria on behalf of the European Union, 22; Liechtenstein, 26; Canada, 27; and Guatemala, 31). Slovenia suggested permanent members of the Security Council abstain from casting their veto (*ibid*, 24) while China again took a critical stance (*ibid*, 10).

⁴⁹ UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 (including favourable statements from Panama, 7-8; Peru, 8; Italy, 10-11; Congo, 16; Slovakia, 17; the United Kingdom, 20; Ghana, 20-21; Belgium, 24; Guatemala, 25; Japan, 26; Argentina, 27; Germany on behalf of the European Union, 30; Nigeria, 32; Canada, 35-36; Liechtenstein, 35; Korea, 36-37; and Rwanda, 37).

⁵⁰ UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703, 28.

⁵¹ UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 (including statements of Belgium, 7; Panama, 10-11; France, 13; South Africa, 15; Ghana, 17; Slovakia, 22; Peru, 24; Congo, 25; Iceland, 29; Portugal on behalf of the European Union, *ibid*, Resumption, 2; Senegal, 8; Guatemala, 9; Nigeria, 12-13; Australia, 13; Canada, 13; Liechtenstein, 16; Nepal, 18; Argentina, 19; Mexico, 20; and Colombia, 22).

⁵² In particular, Qatar observed that '[w]hile the principle of the responsibility to protect reflects a noble human value, it is easily exploited and abused; this prompts us to be cautious in dealing with this principle. Our objectives must therefore not be politicised; they must transcend individual interests and reflect pure humanitarian motives.' UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781, 18. Cautious was also the attitude of Vietnam, *ibid*, Resumption, 22).

Charter.⁵³ Against military intervention was China,⁵⁴ while a favourable position was taken by the United Kingdom.⁵⁵

VI. Conclusion

Neither the doctrine of humanitarian intervention nor the R2P principle recommends the view that use of force without Security Council authorization would be legal under international law any more than it was in 1945. Still, the use of force other than in self-defence remains contrary to international law. However, events in the 1990s showed that serious or systematic, widespread and flagrant violations of international law may contribute to a threat to international peace and security.⁵⁶ Genocide, war crimes, ethnic cleansing and crimes against humanity, can now be said to constitute 'threats to peace' pursuant to Article 39 of the UN Charter.⁵⁷ Thus, the question of whether and to what extent a State respects the human rights of its citizens has converted from an internal affair and become a matter of primary concern for the international community.

The international community's 'responsibility to protect' is to be achieved through primarily non-military means, such as developing a better 'early warning capacity',⁵⁸ using 'appropriate diplomatic, humanitarian and other peaceful means' in order to prevent crises from breaking out and to help them 'build capacity to protect their populations'.⁵⁹ As such, until such time as reforms have been concluded regarding world order that is presently premised on the UN Charter (1945), the legal doctrine of non-intervention will remain a fundamental principle of the international legal system. Any use of force that falls outside the UN Charter paradigm remains illegal. R2P needs to develop in light of this sense. This can be best achieved, not by advocating controversial legal changes, but through modest political developments. R2P's strength comes from its status as a political principle,⁶⁰ not a legal one. Therefore, it creates no legal change and is itself governed by international legal order. While R2P may have 'significantly changed the grammar of political discourse with regard to the prevention of, and reaction to massive human rights violations'⁶¹ – shifting political discourse away from justifying interventions to stopping

⁵³ Focarelli (n 47) 191, 207.

⁵⁴ UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781, 10. The Chinese delegate added that '[t]he Security Council should not become a forum for extrapolating this concept or engaging in other similar legislative activities, because that is a task for the whole membership of the United Nations. At present, this concept is not yet mature, and many Member States have considerable concerns about it'.

⁵⁵ UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781, 11. The United Kingdom affirmed that 'in those exceptional cases in which States cannot or will not protect civilians from the gravest abuses of their human rights, the international community not only has a right to act, but a responsibility to do so. That action can come in a range of forms, from sanctions against those responsible to direct intervention to protect civilians and should always be proportionate and carefully chosen'.

⁵⁶ See, for example, UNSC Res 808 (22 February 1993) UN Doc S/RES/808, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, and UNSC Res 955 (8 November 1994) UN Doc S/RES/955 establishing the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY).

⁵⁷ See UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 (Somalia); UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (Libya).

⁵⁸ World Summit Outcome Document (n 40), para 138.

⁵⁹ *ibid*, para 139.

⁶⁰ Alex J Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press 2009) 7.

⁶¹ Mehrdad Payandeh, 'With Great Power Comes Great Responsibility?' (2010) 35 *Yale Journal of International Law* 469, 471.

atrocities, and to questioning why there has been no intervention – it has not however, changed the legal paradigm regarding the prohibition of the threat or use of force under the UN Charter.

Jeremy Waldron, *The Rule of Law and the Measure of Property*, Hamlyn Lecture Series (2012), Cambridge University Press, 118 pages. ISBN 978-1-107-65378-8

Keywords: property rights, rule of law, legitimacy, legality, economic freedom, human rights, democracy

In this Hamlyn Lecture Series, Jeremy Waldron examines the clash between property rights and national legislation. In seeking a solution to the impasse between both areas, he applies the concept of Rule of Law from a historical perspective, the various schools of thoughts on the concept, and the impact of these views on contemporary legal scholarship. Waldron starts off critiquing John Locke's property theory. He set to achieve this by relying on the facts of the classical United States case of *Lucas vs South Carolina Coastal Council*.¹ The *Lucas* case opens up the controversial topic of 'Environmental Takings'² in the United States and its overall nexus to the rights of the individual to property. Waldron avoids an in-depth discussion of the American Takings Clause jurisprudence and the controversy surrounding it, but merely relies on the facts of the Lucas Case to examine the central issue of ownership and its relation to the Rule of law.

Based on the facts of the *Lucas* case, Waldron establishes clearly, the confrontation between private property rights on the one hand and environmental regulations on the other. Linking this dichotomy to the Rule of Law, Waldron asks three key questions that pull through the entire work. Does the Rule of Law condemn these restrictions on property? Does it require the owner's lawful property rights to be upheld? Or does it recognize the environmental regulations as law also, and command that they too should be respected, upheld and complied with as part of our general respect for the law of the land? Waldron examines the various definitions of the Rule of Law, chiefly to establish if it is the 'role of the Rule of Law... to protect people's property from ...regulative incursions?'³ Waldron relies heavily on Joseph Raz's separation thesis on the Rule of Law,⁴ while at the same time admitting that there may be overlaps. In the same vein, other Rule of Law thinkers that were discussed but established no link between Rule of Law and Property rights include Aristotle, A.V Dicey, Lon Fuller and Tom Bingham.

On the other side of the intellectual divide are a handful of scholars who argue that there is a link between the Rule of Law and property rights.⁵ Waldron gives thought to Richard Epstein who has written most extensively in this regard. Epstein argues that an analytic separation of the two ideals may leave the Rule of Law impoverished.⁶ It is in Epstein's arguments which Waldron finds the most interest, admitting that 'a lot of what I am doing in this book can be read as a

¹ 505 US 1003 (1992).

² On Environmental Takings, see Nancie G Marzulla, 'State Property Rights Initiatives As a Response to 'Environmental Takings' (1994) 46 South Carolina Law Review 613.

³ Jeremy Waldron, *The Rule of Law and the Measure of Property* (CUP 2012) 5.

⁴ Raz insisted on analytic grounds that the Rule of Law should not be regarded as the name of all good things and that the Rule of Law must be separate from other political values like human rights or democracy. See Joseph Raz, 'The Rule of Law and Its Virtue' cited in *ibid* 13.

⁵ These include Freidrich Hayek and Ronald Cass both discussed by Waldron.

⁶ Epstein goes ahead to state that "a close connection" between both ideals 'can be established empirically by showing... that the cumulative demands of the modern social democratic state require a range of administrative compromises and shortcuts that will be eventually gut the rule of law in practice, even if it honors it in theory'. Waldron (n 3) 19-20.

response to Professor Epstein's extraordinarily rich, provocative, and influential ideas'.⁷ Closely related to Epstein's position is the Lockean thesis that property rights are natural rights.⁸ Locke argues that the reason why men enter into society is the preservation of their property and that presupposes that people already have property and that property is neither the work nor tool of public law. Hence, suggesting a 'bottom up' private law origin of property rights. Waldron faults this argument on the basis that the entitlement to property is historically based according to Locke and the legitimacy of the title is at the mercy of history. For him this school of thought fails because a distinction cannot be made between private law and public law to vindicate any claim that property rights are privileged over public legislation. Citing James Tully's interpretation of Locke's substantive Rule of Law principle as seeking to protect private property only in the sense of positive law rights and not natural law rights, Waldron concludes that 'property is no longer privileged as a special or primeval form of law'.⁹ Therefore, public law should be judged in relation to public policy, and in relation to other laws, without at the same time assuming its untouchability.

In chapter 2, Waldron further expands the discussion on the dichotomy in the understanding of the Rule of law along two axes, the purely formal/procedural ideal that solely seeks to satisfy formal constraints of generality, prospectivity, clarity, etc., on one hand, and the substantive dimension on the other hand. His aim here is to explore the possibility of moving from the purely formal/procedural approach to the Rule of Law to a substantive conception. Proponents of the latter aspect, already identified above, argue that there is a special connection between the Rule of Law and the vindication and support of property rights. Connected to this argument is the group Waldron refers to as the 'World Bank types' who stress that the real interest should lie in getting governments to respect property rights, investor concerns, and the principle of free market and adopt whatever means to promote these ideals. The Rule of Law they further propose, should be leveraged due to its strong positive connotation to bolster the Washington consensus. While this appears a calculated attempt to use the phrase in a certain way, Waldron offers more respectable ways that this instrumental proposition may be presented.

The first he says, is to bring the surface values that motivate traditional procedural aspects of the Rule of Law, the other possibility is to attempt a substantive definition of some of the acknowledged formal and procedural elements. Waldron identifies legal stability as one of the procedural elements that may move the discourse towards a particular substantive direction. The need for individuals to be able to guide their actions, short –medium – and long-term, on the basis of a secure knowledge of the law falls within the essence of the Rule of Law. Waldron relies on Bentham's account on the importance of legal expectations. According to Bentham, expectation is immeasurably important in human affairs. Expectation he further argues is largely the work of the law, and the principle of secure expectations or security, is a vital constraint on the action of law. The principle of security requires that events, so far as they depend on laws, ought to conform to the expectations set by the law.¹⁰ Bentham also argues that the legislator in applying the grand principle of security ought to respect the mass of extant property and must maintain the distribution as it is actually established. This principle of respecting the existing distribution Bentham believes is general and simple, applying itself to all states.

Waldron views this position as a step in the wrong direction but sees it as a natural procession of Bentham's logic. Dismissing this position, Waldron draws on the works of Friedrich Hayek who also shares a property-oriented account of the Rule of law. Hayek acknowledges that the security

⁷ *ibid* 20.

⁸ John Locke, *Two Treaties of Government*, Book II, Chapter 5, §§ 25-51.

⁹ Waldron (n 3) 40.

¹⁰ *ibid* 55.

and independence that historically has been associated with property is in the modern world associated with much more diverse and complex legal structures and arrangements – many of them contractual in character, putting Bentham's argument to rest in this regard. Waldron concludes this chapter after having considered the possibility of substantiating the Rule of Law with regards to property rights, by stating that if the Rule of Law protects private property, it will do so presumably on its own terms and these may not be the terms in which the principle of private property is extolled. He advises that 'we are better off arguing for the Rule of Law the respects in which the Rule of Law's concerns cannot be duplicated under the auspices of any other political ideal'.¹¹

It is not hard to see that attempting to merge the Rule of Law to the concept of private property opens up the possibility of various ideals being misread as constituting the Rule of Law. Waldron's separation thesis avoids this possibility, which serves the larger risk of forgetting the very essence of the Rule of law. Attempting to bring it within the confines of private property creates a loop of interpretations and ideals that would be distracting to the more important discussion of seeking a balance between individual property rights and state regulation. In Waldron's words, 'it bogs us down in debates about substantive conceptions and about the sticks in the bundle [of rights].... And it prevents us saying what we want to say about private property for fear that will not be something that comes under the auspices of the Rule of Law ideal'.¹² However, this is not to say that legal scholars should be afraid to explore the various connections that might exist between both ideals. At the same time attempting to impress one concept on the other, may lead to value leaks and eventually discrediting the Rule of law in every respect.

In Chapter 3, Waldron makes a case for national legislation. He attacks the scepticism about social, economic and environmental legislation that seem to be characteristic of most academic and judicial commentators, spurred by the World Bank's approach to the Rule of Law. This theory of the Rule of Law focuses on administrative irregularities and legislations that facilitate them by conferring excess untrammelled discretion. Applying this theory to the facts of the Lucas case, Waldron establishes that the plaintiff in the case was aware of Federal and State laws making provision for the regulation of coastal areas in the interest of the environment and setting up administrative agencies, and providing a framework for the specification of areas where land was to be zones and where permits were to be required for development. Although Mr Lucas bought his property earlier than the new legislation that affected his property, he was not a neophyte in these matters as he belonged to a conservation consortium and like all its members was attuned to the legislation's interest and concerns regarding the coast.

Waldron argues that it seems at least on the basis of the Lucas case that the Legislative business was conducted lawfully and for good purposes, clearly articulated in the statutes. There were deliberations; public commissions; the usual notice-and-comment period for agency rule-making. Hence the process of promulgation and implementation of the legislation was a legitimate process from a procedural perspective. The procedure of legislation in this case, like most established national legislations, Waldron argues, is in line with Lon Fuller's eight principles of the Rule of Law – the inner morality of law. Generality, clarity, constancy, publicity, prospectivity, and practicability are all understood as virtues of legislation. After further analysis of Mr Lucas's case along these lines, Waldron comes to the conclusion that the discontent with legislation (epitomized by Hayek's works) appear to be about voluntarism- the role of human will and agency in a legal system.¹³

¹¹ Waldron (n 3) 75.

¹² *ibid.*

¹³ *ibid* 90-91.

This suspicion of the human role in legislation is a manifestation of World Bank approach to economy and development. On this account, the point of the Rule of Law is the promotion of market institutions and the establishment of an atmosphere conducive to profitable investment. Concomitantly, there is the need to control the managerial aspect of the state – legislation. To this school, it is essential that control of the State's power in this respect be exercised under the auspices of the Rule of Law. On this view and the general perception on the incompatibility between legislation and the Rule of law due to human agency, Waldron submits that legislation is the political construction of law – intentionally and explicitly. He admits that while it is hard to make the case that Common law operate apolitically, the case-by-case incremental nature of the decision making process avoids the imperious and comprehensive visions that legislators aspire to, and seek, by their human rule to impose. He further describes the idea of society being ordered acephalously without deliberation, directly ruled by morality, as a fantasy. For Waldron, the procedural virtues of legislative due process are of the utmost importance for the Rule of Law. Such virtues as bicameralism, checks and balances, reason-giving, production of texts, step by step reading of clauses etc., in the process of legislation all ensure that the Rule of Law is applied in the process of law making.

Waldron concludes by declaring that human beings subject themselves to the discipline of the Rule of Law so that we can be governed in a way that respects our dignity in the forms and procedures that are used. All the ideals discussed; economic freedom, free markets and private property, human rights and democracy are all responses to human limits and fallibility. The promise and the limitations of these ideals, Waldron advises, should be confronted explicitly and honestly without myth or fable and a balance maintained between the demands of one of these ideals and the demands of others. Essentially, Waldron argues the attempt to privilege private property and free markets under the Rule of Law can be likened to tricking people into exaggerating the importance of one particular value over another. He stresses that both concepts are equally important to human needs and despite their controversial nature, they are both best debated directly.

Finally, Waldron's work in this Hamlyn lecture series is very insightful not just because of the depth of arguments examined on the concepts in question, but due to its relevance to contemporary State practice. By adopting a historical approach to the Rule of Law, Waldron opens up the origins of the concept of Rule of Law and evinces its importance to the understanding of related concepts such as human rights, democracy, economic freedom, and property rights. Regarding contemporary State practice, he indirectly sheds light on the legitimacy of governance at the international level by analysing the World Bank model of the Rule of Law and also on the legitimacy of the legislation process at the national level as well. Consequently, this book is multidisciplinary in its delivery, affecting public and private international law, international relations, international political economy and philosophy. A slight weakness of the book is the reluctance of the author to discuss the American Takings clause and the controversies surrounding it. However, this is understandable given the circumstances from which the book was published. It might be time consuming examining American jurisprudence on Takings at a public lecture. The author makes up for it by relying on one of the most important cases on Takings. For comparative studies this could be restrictive, but the theoretical analysis of the concepts and the variety of legal scholarship on display minimizes the plausibility of that argument. Does this book do justice to the concepts in question? Yes appears to be the answer.

Chidebe Matthew Nwankwo, Ph.D. Candidate (2014); Fellow of the Centre for International and Public Law (CIPL), Brunel Law School, Brunel University, London, UK.

Levitt, J.I., *Illegal Peace in Africa: An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta* (Cambridge University Press 2012)

Keywords: power-sharing structures and agreements, agreements, rule of law, human rights, conflict resolution, coerced peace, warlords, peace and justice, amnesty, war criminals, intervention

In his book, 'Illegal Peace in Africa: An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta', Levitt identifies a gap (or more accurately, lacuna) in the discourse on political power sharing and the negotiation of peace agreements; namely, that the rule and role of law have been predominantly marginalised, thus he seeks to address this. He begins by rejecting the favoured approach of political scientists, which is to subordinate law to power sharing and peace agreements, rather than have these informed by, and subordinated to, the law. He asserts that part of the inspiration for the book was the disregard of law in many scholarly articles; thus, in seeking to highlight the 'manifold ways in which unlawful political power sharing tortures the souls and law subject to it'¹, he contemplates the law as regards peace agreements. His primary focus is enshrined in the question 'what role, if any, does law indicate for itself to play in informing, shaping, and regulating political power sharing?'²

While Levitt's approach in conflict resolution is holistic, he is less concerned with the issue of the role of law in creating peace out of internal conflict and focuses on power sharing. This is attributable to the fact that his primary focus is sustainable peace, which he argues is a corollary of the supremacy of law and justice. He advocates not exclusive recourse to law but the supremacy of law. This is in contradistinction with the approach of political science, which is more focussed on peace in the short-term, even where constitutional law (the supreme law of nations) has to be suspended to accommodate extra-legal agreements, which Levitt argues undermines long-term peace, and has a destabilising effect, exacerbating new conflict. Additionally, Levitt asserts that peace built upon corrupt foundations is unsustainable. In this case, peace on corrupt foundations occurs where an illegal regime is legitimised through the brokering of a power sharing agreement with the democratically elected party; furthermore, since such agreements supplant the rights of the victims of humanitarian atrocities to redress, the foundations are further corrupted. Levitt argues for 'just peace'. He argues for peace within the law. Rather than simply presenting a 'paper over cracks' solution, Levitt argues for the observance of instituted domestic, sub-regional and international law; thus, creating a paradigm shift where insurrection and humanitarian atrocities are punishable by law rather than rewarded in defiance of law.

The case studies employed are demonstrative of different scenarios of power sharing; however, present challenges due to the overlap between different types of regimes. In the case of Liberia, Charles Taylor led a coup d'état, following which he was democratically elected, not for his commitment to peace and rule of law, but rather out of fears that he would continue the war and humanitarian atrocities if he were not elected. In the case of Guinea-Bissau, João Bernardo Vieira led a coup, following which he lifted the ban on other parties and was democratically

¹ Jeremy I Levitt, *Illegal Peace in Africa: An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta* (CUP 2012) ix.

² *ibid* 210.

elected. In the case of Sierra Leone, the government of Tejan Kabbah was democratically elected, and committed to peace and the rule of law. The latter two leaders were considered lawful examples and the former was regarded as having a legal platform to carry out government by illegal means. This raises the challenge of determining which regimes are legal and which are not. For example, it is unequivocal that Charles Taylor was the choice of the electorate in Liberia; however, given the reason behind the electorate's decision and his *modus operandi* while in government, for the purposes of international law, was this government legal? Also, since the Constitution of Guinea-Bissau prohibits coups, should João Bernardo Vieira's regime have been considered legal?

Further challenges are presented as Levitt examines the regional legality of power sharing as the dichotomous practice of the African Union, which forms the anchor of the NKM and a wider part of the body of international law, are illuminated; on the one hand it prescribes adherence to, and enforcement of human rights and democracy, but on the other hand it has abrogated its own rules by granting amnesty and power sharing in Liberia, Sierra-Leone and Guinea-Bissau. This highlights a gap between theory and practice and although Levitt attempts to offer reasons, he is not very persuasive. However, this does not detract from his methodology or over-all thesis as he points to the NKM's proclivity towards pre-existing laws during armed conflict, and the similarities between the NKM and the Vienna Convention on the Law of Treaties on the point of practice.

Another challenge that Levitt faces in addressing his main question is the lack of constructive examples, in the international arena, of power sharing that is both lawful and successful, resulting in sustained peace and democracy. Notwithstanding, the book rejects the idea of imposing power sharing on a democratically constituted government on the grounds that it violates the right to internal self-determination.

The main moral challenge presented by the book is, where power sharing with warlords and junta is proscribed, is it immoral for a government to allow deadly conflict to continue until the attainment of legal peace? Levitt highlights this challenge; however, he does not attempt to provide an answer since he seeks to deal with legal questions rather than purely political or moral questions. It is a question that governments under siege will not be able to dismiss so readily; however, the question is beyond the scope of the book and to open up a discussion would have obfuscated the main issue; namely, the legality of power sharing.

Other questions and themes arising from the main question are: which laws govern peace agreements in internal conflicts? Is power sharing a euphemism for 'guns for jobs'?³ Which laws govern power sharing? Where a democratically constituted government is forced to share power with warlords and junta, are the objectives of peace, justice, democracy and rule by law attainable?

In response to these questions, the author employs three case studies, which form the backbone of the book. He begins with a critical analysis of arguments for and against power sharing. Following this, he gives a historical narrative of the countries in question, to confer upon the reader an understanding of the historical backdrops of the peace accords. He then examines the domestic, regional and international legality of power sharing with reference to the accords at the centre of the case studies. This legal analysis is detailed and each chapter is further subdivided in order to demonstrate that sacrificing justice, rule of law and democracy, for the short-term cessation of armed conflict, cultivates a culture of impunity. He vividly demarcates how far these peace accords have derogated from every type of law; thus, derogating non-derogable

³ *ibid* 3.

rights. Through this, he highlights the complicity that appears to have befallen the international community as regards the legality of power sharing and amnesty as a means of attenuating armed conflict.

Some of the book's major strengths derive from Levitt's willingness to contravene the dominant logic that African nations are unable to live by rule of law and are predisposed to anarchistic societies with no semblance of law or order. Furthermore, where enlightenment ideals still undergird much socio-political/socio-legal literature on Africa, portraying it as the 'Dark Continent', Levitt boldly gives Africa its place as regards its contribution to international law, which he states, pre-dates Grotius, Vattel and others regarded as protagonists of international law. This is pivotal to the strength of the book for two primary reasons; first, it immediately curbs the propensity of the reader to view the book through apologist lenses, viewing Africa as the legal 'other', unused to laws, thus requiring them to be put aside in order to accommodate peace. Secondly, by acknowledging Africa's contribution in originating domestic and international law, and bringing to the fore the fact that Africa has the oldest legal tradition, the book implicitly demonstrates how even the most civilised of nations will continue in instability where law and justice no longer occupy supremacy. That is to say, a paradigmatic application of the example of Africa with all of its legal accolades and demerits suggests that once law and justice are relegated from the supreme position in a nation, peace will be fleeting and humanitarian atrocities will abound.

Further strengths of the book unequivocally lie in the adoption of case studies; namely, Sierra Leone, Liberia and Guinea-Bissau. Since this is virgin territory in terms of published research, these case studies add to the integrity of the book in terms of the vivid illustrations they provide. Rather than succumb to the temptation of using the worst-case scenarios to substantiate his thesis, Levitt chooses countries on the basis of a similar evolution socially, politically and economically, with geographic proximity and finally, with peace accords that complement each other.

Heretofore, the issues of law and peace, in the area of power sharing and peace agreements, have been treated as two separate enquiries. In this volume, Levitt succinctly demonstrates that in fact they are not two enquiries but one; thus adding to the strength of the book. This, he achieves with elegance; rather than deprecating the work of previous scholars he simply highlights the differing focal points of their work and his, stating that theirs was to achieve the short-term cessation of armed conflict, whereas his seeks to address the long-term question of conflict resolution including political, economic and social stability. Throughout the book, he demonstrates the fact that the latter enquiry can only be answered with respect to the former; thus, illustrating the manner in which treating peace and law as separate enquiries, in the initial short-term stage, adversely affects the propensity for peace in the long-term. Again this is aptly demonstrated by the use of the aforementioned case studies, further demonstrating that the question of power sharing is both a legal and political question.

The methodology underpinning the book assists in elucidating the integrity of Levitt's assertions of Africa's contributions to law as he employs the Neo Kadeshean Model (NKM) of analysis, which is derived from the world's oldest known peace treaty -The Kadesh Treaty- in terms of foundation, logic and structure. This was a treaty between Egypt (when it was inhabited by Black Africans) and the Hittites. This treaty derives its normative lineage from Kemetic law and the Ancient Egyptian Bill of Rights. The modern epitome of the NKM is rooted in the law of the African Union, Economic Community of West African States and the African Charter on Human and Peoples' Rights. This is important to the narrative, as the methodology adopted is one that demonstrates the continuity, in Africa, of the supremacy of law from time immemorial

to this present age; thus, it demonstrates both the established law as substantiated by history and also the modern pronouncement as demonstrated by the evolution into the modern era. Levitt's ability to carry this methodology through, using case studies from only the 'Dark Continent' bringing the book to a bold conclusion, which returns us to law as regards State Practice in power sharing, enhances his argument that the issue of power sharing can and must be informed by law rather than simply politics.

The book is not large and the language and style employed have transformed what could have been a dry and legalistic book into an interesting, informative and accessible book. Therefore, Levitt could have enhanced his work by spending more time explaining the Neo-Kadeshean Model of analysis since this is the first time this framework is being utilised, as regards power sharing, in published research. Instead of allowing a chapter to explain the nuances of this model, to the extent that the book requires, he has limited himself to part of the introduction, and attempts to expand on his explanation of the NKM throughout the book. By the end of chapter 8, we know that the NKM incorporates textual interpretive and original intent doctrine; the African Union and Economic Community Of West African States serve as an anchor to the NKM; International law (International Humanitarian Law, International Human Rights Law, International Criminal Law) underwrites it; and the Vienna Convention on Treaty Law compliments it, but the book lacks clarity as regards the specific substance of the NKM. Ordinarily the author's approach would have been sufficient; however, where a new conceptual framework is being employed, less is not always more.

The Vienna Convention on the Law of Treaties takes a conservative approach towards derogation of international responsibilities during intrastate conflict; furthermore, it does not permit derogation from treaty provisions relating to humanitarian law and the protection of the human person.⁴ Therefore, current State Practice as illustrated by the peace accords inherent in the case studies, exists in material breach of the Vienna Convention on the Law of Treaties including regarding the objectives of democracy.⁵

State Practice as regards power sharing in conflict resolution, as demonstrated by the aforementioned case studies, involves: granting unconditional amnesty to warlords and creating power sharing agreements even where this requires the suspension of constitutional law; the retroactive application of new laws validating extra-legal treaties; and the derogation of non-derogable rights including the internal right to self-determination, and the right to redress where egregious crimes have been committed. Furthermore, State Practice permits warlords to transform into legitimate political regimes and hold public office. State Practice thus contravenes international law, allowing entire constitutions to be set-aside to accommodate power sharing, and promoting a message that bloody coups are legitimate methods of taking control of a country, setting the aggressors beyond the reach of international law.

In conclusion, following his deconstruction of current processes and practices employed in creating 'illegal peace' and power sharing, Levitt offers principles guided by the NKM, for peace negotiations and legal power sharing that return the central role to law. Levitt demonstrates vividly the vagaries of amnesty and power sharing that is in contravention of international law. Furthermore, he successfully challenges the idea that warlords can be transformed into good democratic citizens on the advent of power sharing, which gives the lie to the current approach. He also implicitly demonstrates that the processes culminating in power sharing with warlords and granting amnesty where justice is required, are processes that begin with only warlords

⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1969) 8 ILM 679 (VCLT).

⁵ *ibid* art 60(3)(b).

contravening domestic, regional and international laws but ends with sub-regional and international entities contravening these laws. This is an important book for academics in this field, scholars, political scientists, lawyers and those in a position to influence peace negotiations and amnesty.

Aimee Asante, Ph.D. Strathclyde University, Scotland, UK.

Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)*, Cambridge University Press, 2009, 330 pages, ISBN 978-0-521-50994-7.

Keywords: Democracy, justice, post-conflicts, the rule of law, legitimacy, sovereignty, human-rights violations and States practice.

With great expectations, the book examines challenges of rebuilding societies emerging from conflict - States in transition, under the light of international law. Using diverse perspectives, contributions explore post-conflict state-building experiences of States in transition.

Democracy is portrayed as a system of government by a population or the eligible members of a state, normally through elected representatives. The contributions historicise their critique of democracy from the ancient Greeks to the American federalists and examine the challenges that attend attempts to build democracy which is commonly championed as a lasting remedy for States that are emerging from conflict, and an 'antidote' to the causes of conflict.

Furthermore, the contributors present democracy as 'a political technology of peace engineering'. China and Vietnam are flagged as examples that economic success is possible without the nurturing of democratic elements such as 'the rule of law' and Pakistan as an example that an independent judiciary could be seen as a threat to an autocratic government (Pakistan, 2007-2008). Elections are seen as the link between democracy and its formal institutions - a process of regeneration. The book calls for greater democratisation (legitimacy) at the international level in inter-governmental institutions and non-governmental organisations.

Key landmarks on the pathway to post-conflict rebuilding are identified as 'democratization and legislation'. The authors suggest four challenges from the Afghanistan experience, namely, (1) that 'democracy' is more than just elections; (2) that in the event of a collapsed State - some degree of state building must precede democratisation if the latter is to be meaningful; (3) that the relationship between democracy and legitimacy is complex and more than mere elections; and (4) that domestic politics more than international law will determine whether it is possible to vindicate the understandable desires of ordinary people for some say in how they wish to be governed.

The book establishes that the internal characteristics of a State including State practice and other attributes such as: legal certainty, the protection of legitimate expectation and foreseeability of legal relationships play a big part in determining a State's standing (sovereignty) among the family of nations. The authors acknowledge the rarity of neat transitions from a state of conflict to peace. Conflicts do persist long after peace agreements have been signed, making it a complex delicately calibrated continuum. The era of the League of Nations, when colonial possessions were deemed not ready or insufficiently mature for self-governance is a case in point.

In the process of determining the challenges involved in rebuilding stability after conflict, the authors have addressed the tasks under various terms, including: States practice, state-building, political technology, peace-keeping, democracy, democratisation, international law, international treaties, the rule of law, legitimacy, gender rights, collective security, international justice, human rights, cases and other legal doctrines.

The chapter on 'Impossible Expectations' reiterates, the view that the rule of law is the 'Elixir' for many economic and political 'ails', and that the rule of law appears to possess a power or a force of its own. However, it shows also that the rule of law is susceptible to 'promiscuous' use and that there are almost as many conceptions of the rule of law as there are people defining it. Consequent examination of the United Nations Security Council's promotion of the rule of law in post-conflict societies shows how the rule of law is transformed from abstract to a formal state based approach encompassing understanding of the rule of law which embraces customary law.

Contributions vigorously examine how the application of international legal standards to manage transitions from conflict towards democracy can affect post-conflict states and explore the role of treaty ratification in rebuilding societies after conflict. This process can facilitate affected States' review of their domestic policies and regulations in a creative and positive.

Chapter 9 examines the current United Nations legal framework for managing post-conflict transitions away from autocracy to democratic practice and the reluctance of some entities to accept institutional responsibility for human-rights violations. Chapter 10 evaluates the role of international law in protecting women's security after conflict, advocating gender security approaches capable of empowering women to participate in the process of transforming their post conflict society.

Lastly, chapter 11 explores major challenges faced by international criminal justice institutions in the bid to help facilitate peace, reconciliation or some other wider social goal - the tangible benefits for victims of mass violence. Overcoming this political challenge is paramount for the sustainable operation of international justice institutions and for delivering genuine hope of those most affected by the outrage.

The editors and contributors to the book are from varied backgrounds and disciplines. They discuss real life ideas and scenarios (in Afghanistan, Rwanda and others) in an effort to understand the dynamics that underpin post-conflict rebuilding processes. This, by no small means makes the book broad-gauged in the title it sought to explore. Reference is made to Joël Migdal regarding the capacities of States to penetrate society, regulate social relationships, extract resources and appropriate or use resources in determined ways. Other references to State practice in the book include: international legal obligation, compliance with international legal standards, legitimacy, interstate relation and the application of international norms.

The volume brings together a series of analyses of the state-building processes and expresses no natural fit for international law in state-building. Its regulative idea of a universal community has the potential to influence the course of events in post-conflict locations. In conclusion, the book is well written. It will prove most useful to academics, professionals, practitioners, analysts, researchers, students, commentators and others interested in States practice, democracy, the rule of law, international law and the management of post-conflict situations.

Oluwarotimi Charles Olubokun, Fellow of the Centre for International and Public Law (CIPL), Brunel Law School, Brunel University, London, UK

Author guidelines

Focus:

SPIIJ is a bi-annual peer-review law journal that focuses on the legitimacy of international law by examining specific aspects of State practice and specific practices of inter-governmental organizations, agencies and institutions in light of established international legal standards. Submissions for publication must seek to provide up-to-date, crystal clear understanding on points of law regarding a specific issue on an aspect of international law broadly defined to include public and private law, including: international human rights law, international criminal law, international administrative law, international intellectual property law, international environmental law, international investment and trade law, international financial law, public international law, international labour law, etc.

Aim:

The aim is to ensure *clarity* regarding the creation and application of international norms on the one hand, and on the other, the revision and suspension of particular legal standards of the International Legal System. Authors should focus on 'problematic' acts of States and of inter-governmental organizations, agencies and institutions that may be consequential to the legitimacy of international law. Submissions should assess international law for its efficacy and attempt developmental recommendations in terms of procedures and substantive standards required to enhance clarity and legitimacy of international law.

Objective:

The objective is to ensure that SPIIJ documents, analyses and evaluates unfolding State practice for compliance with international legal standards.

Exclusive submission policy:

SPIIJ operates an exclusive submission policy, and proceeds only on that basis. SPIIJ welcomes submissions for consideration for publication from academics and practitioners on a rolling basis throughout the year. **Articles** should normally be around 9,000 words, including footnotes. **Commentaries** of up to 3,000 words are published under the **Digest of International Law** section of each issue. The **Digest** section focuses on the significance to the legitimacy and development of international law of emergent State practice and unfolding events.

Document format:

All submissions should:

- (i) Comply with The Oxford Standard for Citation of Legal Authorities 4th edition - OSCOLA referencing system, available at: <http://www.law.ox.ac.uk/publications/oscola.php>
- (ii) Be presented in a 'Word document' attached to an email with the subject heading of "SUBMISSION" and addressed to The Editor, SPIIJ. Email: spilj@live.co.uk

Book Reviews

It is preferred that book reviews of 1, 500 and 3,000 words in length should be sent as an email attachment to the Book Reviews Editor, Dr Khanyisela Moyo, School of Law, Transitional Justice Institute, University of Ulster, Magee, BT48, 7JL k.moyo@ulster.ac.uk. **Reviews** can cover more than one publication if possible. Submissions should follow the journal style for articles.

Highlights

- ▶ State Practice as Metaphor: A Reconciliation Approach p. 1
PROFESSOR J. PATRICK KELLY
- ▶ Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya's Serving Senior State Officials p. 17
PROFESSOR MANISULI SSENYONJO
- ▶ State Practice, Customary Humanitarian Law and Civilian Casualties of Armed Conflict p. 45
PROFESSOR SUSAN BREAU
- ▶ State Practice and the Making and (Re)Making of International Law: The Case of the Legal Rules Relating to Marine Biodiversity in Areas Beyond National Jurisdiction p. 97
PROFESSOR DIRE TLADI

