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Professor Tomoya Obokata, Professor of International Law and Human Rights, Keele University, UK
Dr. Sven Simon, Assistant Professor, Faculty of Law, Free University of Berlin, Germany

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'Implementing International Law on Human Trafficking: State Practice of United Kingdom and Ireland'

*Tom Obokata**

Abstract

This article examines how international law on human trafficking is implemented at the national level, with particular reference to the State practice of the United Kingdom and Ireland. It begins by exploring the definition of human trafficking provided under the relevant instrument and highlights so-called 3P obligations - prohibition/prosecution, protection and prevention. The article then analyses how these core obligations are implemented in the United Kingdom and Ireland. The main conclusion reached is that while both States have been instrumental in implementing international law on human trafficking, they need to do more to enhance the national, regional and international endeavours to manage/combat this crime.

Keywords: Human trafficking, Human Rights, EU Criminal Justice, United Kingdom, Ireland

Introduction

Human trafficking has become one of the biggest concerns of modern times. The majority of States are affected one way or another, and a large number of people, especially women and children, are victimised every year. The transnational and sophisticated nature of this crime requires a concerted action, and the international community took an important step by adopting the United Nations Convention against Transnational Organised Crime [1] (Organised Crime Convention) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons [2] (Trafficking Protocol) in 2000. These instruments are designed to strengthen domestic criminal law and justice processes and to facilitate international co-operation for prevention and suppression of human trafficking. It has been 15 years since their adoption, and the time is ripe to examine how they have assisted State Parties to promote effective action against this crime.

The purpose of this article is to provide a detailed analysis of how key obligations established under international law on human trafficking have been implemented at the national level, with particular reference to the State practice of the United Kingdom and Ireland. It begins by exploring a definition of human trafficking as provided by the Trafficking Protocol, and its incorporation at the national level. The article then identifies key obligations imposed upon States, namely 3P obligations (prohibition/prosecution, protection and prevention). As instruments to strengthen a criminal justice response, the Trafficking Protocol and the Organised Crime Convention establish a solid obligation in relation to prohibition and prosecution. However, the other two obligations need to be supplemented by international human rights law so that States can facilitate a holistic approach. It is also evident that 3P obligations have been interpreted and implemented differently by State Parties due to the principle of State sovereignty. The article continues with national case studies of the United Kingdom and Ireland. It will be shown that, although both jurisdictions have been fulfilling 3P obligations to some extent, there

*Professor of Law, Keele University, United Kingdom. This article is partly based upon a research project "North-South Irish Responses to Transnational Organised Crime" which was funded by the Arts and Humanities Research Council.

[1] See *United Nations Convention against Transnational Organised Crime* , UNGA Res 55/25, 2225 UNTS 209, 2000.

[2] See *Protocol to Prevent, Suppress and Punish Trafficking in Persons,* UNGA Res 55/25, 2237 UNTS 319, 2000.

is much scope for improvement in all areas of prohibition/prosecution, protection and prevention.

Towards an international definition of Human Trafficking

One of the important contributions which the Trafficking Protocol has made is undoubtedly the adoption of an international definition of human trafficking. According to Article 3:

> Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; [3]

There are three key elements in this definition: 1) act, 2) means and 3) purpose. The first element is the core *actus reus* of trafficking, that is, recruitment, transportation, transfer, harbouring or receipt of trafficked people. The second element explains how these victims are transported. The use of coercion and/or deception by traffickers undermines the existence of genuine consent on the part of victims. Finally, the third 'purpose' element relates to the reasons as to why people are trafficked. Traffickers transport victims for them to be exploited in sex and other industries.

Contrary to the popular perception, the above definition does not require that victims must be exploited for an act to be classified as trafficking. This is so because the purpose element relates to *mens rea*, ulterior intention in particular, rather than *actus reus* of the crime. A good comparison is the offence of burglary in the United Kingdom. This offence is complete as soon as one enters into premises as a trespasser with intention to steal, even when one does not actually steal anything.[4] An important question here is what one is thinking at the time of entry. By analogy, the definition under the Trafficking Protocol suggests that trafficking is established when a trafficker moves people from one place to another with intention to exploit them subsequently or with full knowledge that they will be exploited by others at their destination. When trafficked victims are actually exploited, that would technically be regarded as a separate offence of slavery or forced labour and/or as an aggravating factor which would increase the level of punishment.

From a practical point of view, the key aim of adopting a common definition is to facilitate a degree of approximation in substantive criminal laws among State Parties, which will naturally make international co-operation much easier in combating human trafficking. In reality, however, many States have adopted definitions which do not necessarily reflect the one provided by the Trafficking Protocol. For instance, under the Anti-Trafficking in Persons Act 2008 of Tanzania, the purpose element of trafficking includes arranging adoption and foreign marriages as well as organising sex tourism,[5] whereas the Pakistani definition does not contain the element of deception.[6] In South Korea, the legislation mainly applies to sex trafficking,[7] and Article 127

[3] *Ibid*, Article 3(a).
[4] See Section 9 of the Theft Act 1968.
[5] *Ibid*, Section 4.
[6] See Prevention and Control of Human Trafficking Ordinance 2002.
[7] See Act on the Prevention of Sexual Traffic and Protection, etc. of Victims Thereof 2004.

of the Russian Criminal Code does not provide a sufficient list of the "means" element, making the scope of the offence much wider.[8]

These discrepancies in the understanding of human trafficking are inevitably influenced by cultural, social and political factors. To illustrate this further, the use of child soldiers has been a serious problem in Uganda, and the definition of "exploitation" under its legislation, the Prevention of Trafficking in Persons Act 2009, specifically includes the use of a child in armed conflict.[9] Similarly, "exploitation" under the Anti-Human Trafficking Act 2005 of Sierra Leone mentions "exploitation during armed conflicts."[10] In addition, the Pakistani legislation stipulates "human sports" as part of "exploitative entertainment," and this is perhaps due to the fact that many Pakistani boys are sold or trafficked as jockeys for camel racing in the Middle East.[11] However, it is also important to acknowledge that many other States have adopted or amended their definitions in line with the Trafficking Protocol. The United Nations Office of Drugs and Crime (UNODC) in this regard reported that of 157 Parties to the Trafficking Protocol, 134 States enacted legislation covering all forms of human trafficking in line with the instrument by 2012.[12] This may be compared with 98 States in 2008[13] and indicates the increasing willingness on the part of States to abide by international law on human trafficking.

3P Obligations under International Law on Trafficking

1. *Obligation to Prohibit/Prosecute Trafficking*

Article 5 of the Trafficking Protocol obliges State Parties to criminalise human trafficking as well as associated conduct such as attempt, and secondary participation (e.g. aiding and abetting) and incitement. However, this treaty does not provide any guidance on punishment. While it is important to respect State sovereignty in crime control, this lack of guidance is a significant shortfall as it leaves a wide margin of appreciation among States. Indeed, the State practice reflects this. Section 3 of the Finnish Criminal Code,[14] for instance, provides for a maximum of 6 years' imprisonment, whereas in Saudi Arabia, trafficking attracts 15 years' imprisonment under the Law on Combating Crimes of Trafficking in Person 2009.[15] Some States such as Poland,[16] Thailand[17] and the United Arab Emirates[18] set a minimum penalty, while life imprisonment is imposed in others.[19] These discrepancies indicate an inherent difficulty in reaching a global consensus on the seriousness of this crime.

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[8] See Federal Law No. 63-FZ of June 13, 1996, as amended.
[9] *Ibid*, Section 2.
[10] It is also interesting to note that forced or servile marriage is included as part of "practice similar to slavery" under the same Act. This might be read in conjunction with the legal developments in Sierra Leone in relation to forced marriage during armed conflicts. See for instance, Rachel Slater, 'Gender Violence or Violence against Women? The Treatment of Forced Marriage in the Special Court of Sierra Leone' (2012) 13 *Melbourne Journal of International Law* 1
[11] See Syed Asghar, *Camel Jockeys of Rahimyar Khan* (Save the Children Sweden, 2005); and United Nations Children's Fund (UNICEF), *Starting Over: Children Returned Home From Camel Racing* (UNICEF, 2006).
[12] See UNODC, *Global Report on Trafficking in Persons* (2012), 82.
[13] *Ibid.*
[14] See The Criminal Code of Finland 39/1889 as amended.
[15] *Ibid*, Article 1.
[16] 3 years' imprisonment under Article 115 of the Penal Code as amended in 2010.
[17] 4 years' imprisonment for adult trafficking and 6 years for child trafficking under Section 52 of the Anti-Trafficking in Persons Act 2008.
[18] 5 years' imprisonment under Article 2 of the Federal Law No. 51 of 2006.
[19] See for instance, Section 3 of the Counter Human Trafficking in Persons Act 2010 (Kenya); and Section 13 of the Prevention and Combating of Trafficking in Persons Act 2013 (South Africa).

Human trafficking is a sophisticated criminal enterprise, often facilitated by organised criminal groups and syndicates. This means that the law enforcement agencies should be equipped with special investigative powers, in addition to regular powers to stop, search and seize, so that they can facilitate proactive intelligence-led law enforcement. Article 20 of the Organised Crime Convention is important as it encourages States to adopt special investigative techniques such as surveillance and undercover operations. These measures are actively used by the relevant law enforcement agencies on the ground. Under the Special Powers of Investigation Act 2000, the Dutch authorities are able to conduct surveillance (e.g. covert following or observations) and undercover operations.[20] Japan also has the Law on Communications Interception during Criminal Investigations 1999 which authorises a senior police officer and a prosecutor to intercept communications related to organised crime.[21]

As these special investigative techniques are implemented covertly, States must make extra efforts to safeguard the human rights of suspects as well as the general public. An often discussed issue in this context is the right to privacy. The Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights 1966 (ICCPR),[22] has made it clear in the past that any interference with the right to privacy requires a clear legal basis, and that relevant legislation must provide a detailed account of when such interference would be permitted.[23] In other words, the principle of legality must be fully observed. The European Court of Human Rights has gone further to articulate that, in addition to a legal basis, the use of surveillance must have a legitimate aim and be proportionate.[24] Another important issue is the right to a fair trial. It has been recognised that undercover operations could amount to entrapment if a crime was instigated by law enforcement agencies, and that this would undermine the right to a fair trial.[25] The use of improperly obtained evidence in court also raises an issue, particularly when it is the sole evidence relied upon and/or the accused does not have an opportunity to challenge its authenticity.[26] It is therefore essential that all States abide by the relevant human rights norms and principles to ensure the legitimacy of covert law enforcement operations in combating human trafficking. It is regrettable in this regard that Article 20 of the Organised Crime Convention does not make any reference to international human rights law.

In addition, mutual assistance in criminal matters is an essential aspect of the obligation to prohibit/prosecute, given the transnational nature of human trafficking. The Organised Crime Convention in particular has strengthened this aspect. The measures stipulated include, but are not limited to, extradition (Article 16), broad mutual legal assistance (taking evidence, effecting judicial/legal documents, and executing searches, seizures and freezing – Article 18) and transfer of criminal proceedings (Article 20). A good example of inter-State co-operation can be seen in Europe, particularly within the context of the European Union. Compared to other regions of the world, the EU and its Member States have been instrumental in facilitating action against human trafficking, and it is worth noting that the EU is the only regional organisation to date to

[20] See Wet Bijzondere Opsporingsbevoegdheden.
[21] See Hanzaisosanotameno Tsushinbojunikansuru Horitsu, Law No. 137.
[22] See *International Covenant on Civil and Political Rights*, UN GA Res 2220A(XXI), 999 UNTS 171, 1966.
[23] See Human Rights Committee, *General Comment No. 16 (Right to Privacy)*, UN Doc. A/43/40, 29 September 1988.
[24] See *Malone v United Kingdom* (1984), Application No. 8691/79; and *Kruslin v France* (1990), Application No. 11801/85.
[25] See *Teixeira de Castro v Portugal* (1998), Application No. 25829/94; and *Ludi v Switzerland* (1992), Application No. 12433/86.
[26] See *Schenk v Switzerland* (1988), Application No. 10862/84; and *Khan v United Kingdom* (2000), Application No. 35394/97.

have signed both the Organised Crime Convention and the Trafficking Protocol.[27] One relevant measure is the European Arrest Warrant (EAW).[28] This instrument has simplified extradition procedures among Member States, enabling them to bring criminals to justice sooner rather than later. Human trafficking has been included in the list of offences under which double criminality is relaxed,[29] and the EAWs have indeed been relied upon by Member States, including Italy, the Netherlands, Portugal and Spain[30] to surrender traffickers. The EU action against human trafficking will also be strengthened with the adoption of the European Investigation Order which was approved in March 2014.[31] This will allow Member States to carry out various investigative measures to gather evidence, such as the transfer of evidence, suspects and financial information. In summary, the obligation to prohibit and prosecute trafficking has clearly been established by the Trafficking Protocol and the Organised Crime Convention, although variations are evident at the national level.

2. Obligation to Protect Victims of Human Trafficking

Human trafficking is widely regarded a gross violation of human rights, and therefore protection of victims must constitute the core of any action against this crime. Article 2 of the Trafficking Protocol lists victim protection as one of its aims, and other provisions establish certain obligations in this regard. Article 6 touches upon protection of a victim's privacy, assistance during criminal proceedings, and protection of physical and mental well-being of victims through, among others, provision of accommodation, medical/psychological assistance, and compensation. Article 7 provides for a possibility of arranging temporary or permanent residence. These are essential so that victims can recover from their ordeal and decide whether or not to co-operate with the law enforcement authorities to prosecute and punish traffickers.

While this list of protection measures looks reasonable in theory, it is unfortunate that the obligation to protect is very weak under international law on human trafficking in practice. Articles 6 and 7 contain phrases such as 'to the extent possible,' 'shall consider implementing measures' and 'shall endeavour to provide.' This in effect means that States will not be held accountable under international law even if they cannot /do not take action, as long as they make some efforts or think about implementing protection measures. During the drafting stage of the Trafficking Protocol, international organisations such as the Office of the United Nations High Commissioner for Human Rights, the International Labour Organisation and the UNICEF called for a more robust provision which would involve additional measures including access to embassies and protection against reprisal.[32] The retention of the weak language demonstrates that States were generally reluctant to be bound by hard obligations. This was even more so for developing States, which expressed concerns that they might not have enough resources to provide sufficient protection.[33] The only hard obligation ('shall ensure') relates to assistance during criminal investigation and proceedings. This enhances the perception that victims are to be used as tools for criminal justice and undermines the key aim of the Trafficking Protocol stipulated in Article 2.

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[27] See Council Decision on the signing, on behalf of the European Community, of the United Nations Convention against Transnational Organised Crime and its Protocols on Combating Trafficking in Persons, Especially Women and Children, and the Smuggling of Migrants by Land, Sea and Air, 2001/87/EC, [2001] OJ L 30/44.
[28] See Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1.
[29] *Ibid*, Article 2.
[30] See Boaventura De Sousa Santos and Others, *The European Arrest Warrant in Law and Practice: A Comparative Study for the Consolidation of the European Law Enforcement Area* , October 2010, 85.
[31] See PE-CONS 122/13, 7 March 2014.
[32] See UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto*, 2006, 366-367.
[33] *Ibid.*

The weak nature of protection obligations has once again resulted in the divergence of measures taken by States, creating large gaps depending on where victims are identified. Some, including Ghana,[34] Jamaica,[35] and Thailand,[36] have specific legislative provisions on protection, ranging from establishment of care centres and a victims' fund, to compensation and education/vocational training. Although the Trafficking Protocol does not require States to enact legislation on protection, this is desirable from the point of view of legality, accountability and transparency. Other States have provided protection outside of legislative frameworks. In India, for instance, child protection cells have been established in major train stations to detect cases of child trafficking,[37] and it has been a practice of Israel to provide legal aid to victims so that they can participate in criminal proceedings against traffickers.[38] Whatever the variations in protection, the role of NGOs must be recognised. Indeed, some are heavily dependent upon them.[39] Although it is encouraging to see that States actively co-operate with these organisations, it is essential simultaneously that they give sufficient financial and other forms of assistance as the main bearers of the international legal obligations.

While a degree of improvement in victim protection can be recognised globally since the adoption of the Trafficking Protocol, a number of issues have emerged simultaneously. For instance, a lack of sufficient support to NGOs by States has been reported in countries such as Albania, Barbados, Ethiopia, India, and Romania.[40] Many victims are also prosecuted and punished for immigration and criminal offences as the direct result of human trafficking despite the fact that they have been forced to do so by traffickers.[41] In addition, it seems to be the practice among many States, including Bosnia and Herzegovina, Cambodia, France, South Korea, Malta, Poland, Spain, and the United States of America,[42] to provide more substantial assistance such as temporary residence permits on the condition that victims co-operate with the law enforcement authorities to investigate and prosecute human trafficking.

While this may seem natural from the point of view of law enforcement, such a condition should not be attached as many victims are not willing to approach the authorities due to a fear of reprisal by traffickers or enforcement action against them. It further demonstrates that victims are indeed used as tools for law enforcement, and that their human rights are not regarded as the primary concern. Others such as Croatia, Italy and Serbia provide protection without such a condition,[43] and this approach should be taken by all States to demonstrate their commitment to protect the human rights of trafficked victims. Moreover, it has emerged that different measures are taken at the local level, demonstrating difficulties in facilitating a unified response to human trafficking on the ground.[44] Finally, protection has been regarded as insufficient in many States, particularly those from the third world,[45] underscoring the importance of international co-operation and assistance by the developed States.

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[34] See Human Trafficking Act 2005.
[35] See Trafficking in Persons (Prevention, Suppression and Punishment) Act 2007.
[36] See Anti-Trafficking in Persons Act 2008.
[37] See U.S. Department of State, *Trafficking in Persons Report 2014* (TIP Report, 2014), 205.
[38] *Ibid*, 216.
[39] They include Greece, Haiti, Honduras, Indonesia, Laos, Liberia, Malawi, Morocco, Niger, Solomon Islands and Uganda. See the respective country narratives in the TIP Report 2014.
[40] *Ibid.*
[41] *Ibid.* These include Denmark, Egypt, Eritrea, Greece, Indonesia, Lebanon, Mongolia, Pakistan and Serbia.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.* These include Brazil, France, Honduras, India, Italy, Kenya, Laos, Madagascar, Mexico, and Ukraine.
[45] *Ibid.* This is evident in Algeria, Argentina, Bangladesh, Bolivia, Gabon, Honduras, Iraq, Lesotho, Morocco, Niger, Peru, Seychelles, Vietnam, and Zimbabwe.

What becomes apparent in looking at the protection provisions and State practice is that the Trafficking Protocol is not adequate. There is an instrument other than the Trafficking Protocol which clearly recognises the importance of protection. The Council of Europe Convention on Action against Trafficking of Human Beings 2005[46] is the case in point. This instrument has extensive provisions on protection of victims, ranging from provision of accommodation to medical/psychological assistance, in addition to penal provisions.[47] The existence of this treaty further demonstrates that obligations to prohibit/prosecute trafficking and protect victims can co-exist in one instrument. In fact, these obligations reinforce each other. Prosecution of traffickers will reduce the risk of people being trafficked or re-trafficked in the future, and protection of victims can facilitate more effective criminal investigations and prosecutions as they are likely to co-operate more willingly when their human rights are sufficiently respected and protected. Unfortunately, the scope of application of this particular treaty is limited to Europe, and therefore an important question is how other States can be held accountable when they fail to provide sufficient protection.

International human rights law can fill this gap. To begin with, some human rights treaties, such as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 to the Convention on the Rights of the Child 1989[48] and the Inter-American Convention on International Traffic in Minors 1994,[49] contain specific provisions on protection of victims of trafficking. In relation to other instruments, this obligation to protect derives from a general duty to secure, ensure or restore rights and to provide remedies. The ICCPR in this regard obliges States to 'ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy.'[50] The United Nations Human Rights Council explicitly recognised that Article 2(3) of this treaty applied to the victims of trafficking,[51] and the Special Rapporteur on Trafficking of Human Beings has also argued that the right to an effective remedy is a fundamental human right of the victims.[52] Regionally, the European Court of Human Rights in *Rantsev v Cyprus and Russia* held that Article 4 (prohibition on slavery and forced labour) may require a State to take operational measures to protect victims, or potential victims of trafficking.[53] In view of these developments, it is clear that the obligation to protect under the Trafficking Protocol can be greatly enhanced by international human rights norms and principles. This branch of law is also useful as it binds those States which are not Parties to the Trafficking Protocol.

3. Obligation to Prevent Human Trafficking

The nature and extent of this obligation depends on whether a State is an origin or destination. In relation to States of origin, the core obligation is to prevent their citizens from being trafficked. In other words, they have to address 'push factors' of this crime such as poverty, gender/racial discrimination and humanitarian crises. As to States of destination, they have to deal with so-called 'pull factors,' things which attract trafficked victims, including the demand for trafficked people. A key provision in relation to prevention is Article 9 of the Trafficking Protocol. It begins by obliging States to establish comprehensive policies and programmes for prevention.[54] Article 9(3) is also important as they have to co-operate with the non-

[46] See *The Council of Europe Convention on Action against Trafficking of Human Beings*, ETS No. 197, 2005
[47] *Ibid*, Chapter 3.
[48] See Articles 8-10, *Convention on the Rights of the Child*, UNGA Res 44/25, 1989
[49] Articles 6 and 16, *Inter-American Convention on International Traffic in* Minors , OAS Treaty Series No. 79, 1994.
[50] *Ibid*, Article 2.
[51] See Trafficking in Persons, Especially Women and Children: Access to Effective Remedies for Trafficked Persons and Their Right to an Effective Remedy for Human Rights Violations, UN Doc, A/HRC/20/L1, 29 June 2012.
[52] See *Trafficking in Persons, Especially Women and Children: A Note by the Secretary General*, A/66/238, 9 August 2011, 12.
[53] See *Rantsev v Cyprus and Russia ,* Application No. 25965/04, 286.
[54] See Article 9(1), Protocol to Prevent, Suppress and Punish Trafficking in Persons, supra n 2.

governmental/civil society sector. In addition, States are under an obligation to strengthen measures to alleviate major causes of trafficking such as poverty and under development.[55] While this obligation is mainly relevant to States of origin as noted above, Article 9(4) makes it clear that this should be done through bilateral or multilateral co-operation, thereby recognising the contribution to be made by other States and the international community as a whole. Further, under Article 9(5), States have to implement measures to reduce the demand for trafficked people. In relation to the Organised Crime Convention, Article 31 establishes a general obligation to prevent organised crime.

There are several shortcomings in the prevention provisions of the Trafficking Protocol and the Organised Crime Convention. For instance, the phrase 'shall endeavour' is used throughout Article 31 of the Organised Crime Convention. This is also reflected in Article 9(2) of the Trafficking Protocol which merely obliges States to 'endeavour to undertake' measures relating to research, information and media campaigns and social/economic initiatives to prevent trafficking. Although the Special Rapporteur on Violence against Women argued that this language should be strengthened during the drafting stage,[56] this was not accepted ultimately. A lack of comprehensive research into trafficking will prevent the law enforcement authorities from facilitating intelligence-led law enforcement, and the supply/demand chain for trafficked people in sex and other industries will remain unaffected without effective information and an awareness raising campaign. Another problem is that Article 9 does not provide detailed guidance on preventive measures to be implemented. While it is impossible for a single treaty to provide an exhaustive list, clearer guidance can facilitate a degree of uniformity among States. Once again, the Council of Europe Convention may be regarded as an example of good practice as it provides more concrete examples such as gender mainstreaming, facilitation of legal migration, and human rights education.[57]

Aside from legal issues for the Trafficking Protocol, some concerns were expressed in relation to the actual implementation of prevention measures by States. For instance, the restrictive immigration policies in States of destination have been recognised as counterproductive, as they have encouraged people to turn to traffickers. [58] In relation to the demand for trafficked people, while recognising the importance of targeting clients who continue to seek goods and services provided by trafficked victims, the Special Rapporteur on Trafficking has also stressed that the labour sectors likely to be occupied by trafficked victims should be properly regulated so that these workers are granted more rights and freedoms.[59] These causal factors should not be considered in isolation as it is often the case that a combination of several factors facilitates the trafficking process. This requires States to take a holistic approach capable of addressing the major causes simultaneously.

Once again, the predominant focus on criminal justice within the Trafficking Protocol and the Organised Crime Convention means that this branch of international law alone is not capable of facilitating effective prevention of trafficking. This can be ameliorated by international human rights law as it provides further guidance on what States must do to prevent trafficking. For instance, it has been argued elsewhere that the relevant instruments such as the International Covenant on Economic, Social and Cultural Rights 1966,[60] the Convention on the Elimination

[55] *Ibid*, Article 9(4).
[56] See *Travaux Préparatoires*, supra 32, 393.
[57] See Chapter II, The Council of Europe Convention on Action against Trafficking of Human Beings, supra n 46.
[58] See *Trafficking in Persons, Especially Women and Children: A Note by the Secretary General*, A/65/288, 9 August 2010, 24
[59] *Ibid*, 38.
[60] See *International Covenant on Economic, Social and Cultural Rights*, UNGA Res 2200(XXI), 1966.

of All Forms of Discrimination against Women 1979,[61] and the Convention on the Rights of the Child 1989 impose various obligations such as poverty reduction, elimination of discrimination, and education of those who may be at risk of being trafficked such as children[62] so that 'push factors' in States of origin can be dealt with more effectively.

In relation to the demand for goods and services provided/produced by trafficked victims in States of destination, a duty to prohibit slavery and forced labour has long been established in international human rights law.[63] This duty constitutes customary international law, *jus cogens* as well as an *erga omnes* obligation, [64] thereby enjoying a higher status in international law. Prohibition of slavery and forced labour is further strengthened by a general obligation to prevent non-State actors from breaching the human rights of others.[65] All of these would certainly be relevant to pimps and brothel owners who exploit the prostitution of women as well as employers in relevant sectors such as shellfish, agriculture, and construction industries who rely on cheap/forced labour. In relation to clients who purchase goods and services provided by victims of trafficking, the nature and extent of obligations is not straightforward, as they do not necessarily engage in direct exploitation of victims. This is the case, for example, when consumers buy cheap goods produced by them. Nevertheless, States should at least implement more proactive awareness-raising and education campaigns, and this is provided for under the Optional Protocol to the CRC on the Sale of Children[66] and recognised by the Special Rapporteurs on Trafficking of Human Beings,[67] Sale of Children,[68] Contemporary Forms of Slavery[69] as well as the Committee on Economic, Social and Cultural Rights.[70]

In looking at State practice, many have made certain efforts in prevention of human trafficking since the adoption of the Trafficking Protocol. For instance, most States nowadays have initiated educational/awareness campaigns on human trafficking one way or another. In Macedonia, the government conducted human trafficking workshops educating over 8,000 school children in 2013.[71] All students of tourism in France are also required to take an assessment on child sex tourism as part of their degree.[72] One of the important trends in education/awareness-raising is the use of social media, and this has been implemented in a

[61] See *Convention on the Elimination of All Forms of Discrimination against Women*, UNGA Res 34/180, 1979.
[62] See Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers, 2006) 161-164.
[63] See Article 8 of the ICCPR; Article 4 of the ECHR; Article 6 of the American Convention on Human Rights, OAS Treaty Series No. 36; and Article 5 of the African Charter on Human and Peoples' Rights 1981, 21 ILM 58, 1982.
[64] See *Prosecutor v. Kunarac* (2001), IT-96-23-T & IT-96-32-1T, 520 ; *Barcelona Traction Case (Second Phrase),* ICJ Report 1970, 33; *Restatement (Third), Foreign Relations Law of the United States*, § 702; M Cherif Bassiouni, 'International Crimes: 'Jus Cogens' and 'Obligation Erga Omnes'' (1996) 59 *Law and Contemporary Problems* 68.
[65] See *Velasquez Rodriguez v Honduras* , Inter-American Court of Human Rights 1988. In relation to economic and social rights, an obligation to "protect" also requires States to prevent third parties from abusing the human rights of others. See *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,* 6, reprinted in (1998) 20 *Human Rights Quarterly* 691.
[66] See Article 9(2), *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children*, UNGA Res 54/263, 2000.
[67] See *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, A/HRC/23/48, 18 March 2013.
[68] See *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, E/CN.4/2006/67, 12 January 2006, 130.
[69] See *Report of the Special Rapporteur on Contemporary Forms of Slavery*, A/HRC/21/41, 10 July 2012, 98.
[70] See Human Rights Committee, *General Comment No. 13 (Right to Education*), UN Doc. E/C.12/1999/10, 8 December 1999.
[71] See TIP Report 2014, supra 37, 255.
[72] *Ibid*, 179.

number of States.[73] In addition to educational measures, various States have taken steps to reduce exploitation of victims at destination. In 2013, the UAE government conducted 100,000 labour inspections to ensure that employers complied with national laws and regulations, and both Malaysian and Bangladeshi governments agreed upon a Memorandum of Understanding on legal labour migration to prevent instances of human trafficking.[74] In addition, in Haiti, the government and community representatives continued to monitor night clubs to prevent child sexual exploitation.[75] These and other examples of good practice certainly demonstrate that more and more States are taking prevention seriously.

Nevertheless, a number of issues can be identified simultaneously. For instance, it is still evident that numerous developing as well as developed States have not put sufficient effort into demand reduction.[76] In its recent report, the Conference of Parties established by the Organised Crime Convention stated in this regard that there were more measures taken to address the supply side of the chain compared to the demand side.[77] This unbalanced approach is counterproductive, and States must pay equal attention to the demand for trafficked people in various sectors. It has also emerged that the lack of funding and other resources has prevented poorer States from implementing prevention measures.[78] Further, despite the fact that people are trafficked for a variety of reasons, it is evident that many governments still focus on sex trafficking issues moreso than labour ones.[79] This to an extent is understandable, given that the majority of victims are women and girls who are exploited in sex industries. However, it is important to clearly acknowledge the existence of labour exploitation in order to be able to implement a holistic and effective response. In conclusion, 3P obligations are clearly stipulated in the Trafficking Protocol and the Organised Crime Convention, and international law on human trafficking has made some positive changes in the way this crime is addressed at the national level. However, the weak nature of some obligations and the principle of State sovereignty have resulted in a divergence of actions being taken by States, creating unnecessary legislative and other gaps.

Case Studies of the United Kingdom and Ireland

1. Prohibition/Prosecution

There are currently two statutes proscribing human trafficking in the United Kingdom. They are the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as amended, which apply to trafficking for both sexual and labour exploitation. Under the first legislation, trafficking is defined as:

> A person commits an offence if he intentionally arranges or facilitates the arrival in or the entry into, the United Kingdom of another person (B) and either
>
> (a) He intends to do anything to or in respect of B, after B's arrival but in any part of the world, which if done will involve the commission of a relevant offence, or

[73] They include Egypt, Philippines, Serbia and Singapore. See country narratives in the TIP Report 2014.
[74] *Ibid.*
[75] *Ibid.*
[76] Based on the authors analysis of the TIP Report 2014 and other sources.
[77] See Conference of Parties to the United Nations Convention against Transnational Organised Crime, *Best Practice for Addressing the Demand for Labour, Services or Goods That Foster the Exploitation of Others*, CTOC/COP/2012/4, 2 July 2012, 7
[78] *Ibid.*
[79] *Ibid.*

> (b) He believes that another person is likely to do something to or in respect of B, after B's arrival but in any part of the world, which if done will involve the commission of a relevant offence.[80]

The 2004 Act provides a similar definition for labour exploitation. It is apparent that the second "means" element is not present in the UK definition. Therefore, the scope of human trafficking offences is wider. In relation to punishment, a maximum of 14 years' imprisonment is imposed under both statutes. It is important to mention that a Modern Slavery Bill has been under consideration in this jurisdiction. When enacted, the punishment for human trafficking will be increased to life imprisonment.[81] This is a welcome change, as the UK government can send a stronger message that it takes human trafficking seriously. Another important aspect of the Bill is the issuance of judicially authorised "slavery and trafficking prevention orders" which would prohibit convicted traffickers from doing certain things, such as travelling abroad.[82] If properly implemented, this measure has the potential to prevent further victimisation.

In Ireland, the relevant legislation is the Criminal Law (Human Trafficking) Act 2008 as amended, which has given effect to the Trafficking Protocol as well as the Council of Europe Convention. The first "act" element includes procuring, recruiting, transporting or harbouring, causing a person to enter/leave Ireland, taking custody of a person, and providing accommodation or employment.[83] A particularly noteworthy aspect is "providing accommodation or employment." Under Irish legislation, landlords and employment agencies in effect can be punished for trafficking. This is not evident in the Trafficking Protocol, nor the UK definition, and therefore the scope is much wider. Section 4 of the 2008 Act touches upon the means and purpose elements in line with the Trafficking Protocol, and the maximum penalty is life imprisonment, substantially higher than the current UK legislation. Here, the Irish government clearly recognises that human trafficking deserves a severe punishment.

In addition to legislation on substantive offences of human trafficking, both the United Kingdom and Ireland have arrangements for special investigative techniques. The key legislation in the United Kingdom is the Regulation of Investigatory Powers Act 2000 (RIPA), which contains provisions for interception of communications, surveillance, and covert human intelligence sources (CHIS). In relation to interception of communications generally, a warrant must be issued by the Home Secretary,[84] whose power is monitored by the Interception of Communications Commissioner who holds or must have held a high judicial office,[85] thereby providing some safeguards against the abuse of power. However, prior judicial approval for interception is not needed under RIPA. Such approval is beneficial as it would ensure compliance with the Human Rights Act 1998 which incorporated the European Convention on Human Rights 1950.[86] This has been implemented in Australia,[87] Canada,[88] Germany,[89] the Netherlands,[90] South Africa,[91] and the United States of America.[92] There is therefore scope for the United Kingdom to consider this further.

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[80] See Section57. Sections 58 and 59 address trafficking within and out of the United Kingdom.
[81] *Ibid*, Clause 2.
[82] See Part 2.
[83] See Section 1.
[84] See Sections 6-8.
[85] See Section 57.
[86] See ETS No. 5.
[87] See Telecommunications (Interception and Access) Act 1979, as amended.
[88] See Part VI of the Canadian Criminal Code .
[89] See Section 100b of the Criminal Procedure Code 2009, as amended.
[90] See Special Powers of Investigation Act 2000.

In terms of surveillance, there are three types stipulated under RIPA, namely: directed surveillance, intrusive surveillance, and CHIS.[93] Directed surveillance largely involves surveillance that takes place in public places and is considered less serious. If surveillance is to take place in private premises (e.g. in a dwelling or private vehicle), then it is considered intrusive. In both cases a test of proportionality must be employed before authorisation can be given.[94] In relation to intrusive surveillance, an independent Surveillance Commissioner determines whether or not to support it.[95] Finally, CHIS generally refers to informants or undercover officers.[96] All special investigative techniques stipulated in RIPA can be reviewed by the Investigatory Powers Tribunal.[97] All in all, these measures are in line with Article 20 of the Organised Crime Convention and there are some safeguards against their misuse.

In Ireland, the use of surveillance by law enforcement agencies is regulated by the Criminal Justice (Surveillance) Act 2009. Surveillance under this Act means 'monitoring, observing, listening to or making a recording of a particular person or group of persons, or their movements, activities and communications' or 'monitoring or making a recording of places or things.' Unlike the United Kingdom, surveillance is to be approved by a judge.[98] He/she must be satisfied that surveillance is proportionate and that its duration is reasonable in achieving its objectives. This undoubtedly is a better model than the United Kingdom. However, the scope of the 2009 Act is limited to surveillance with the use of devices, and other measures such as covert following, observation without surveillance devices and the use of CHIS are not covered.[99] It is essential that all forms of surveillance are regulated by legislation for clarity and consistency, as has been ruled by the European Court of Human Rights on numerous occasions.[100]

Another relevant piece of legislation in Ireland is the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 which allows the relevant agencies to undertake interceptions for investigation of serious crimes. Unlike surveillance as noted above, the authorisation is given by the Minister of Justice, Equality and Defence. There is a designated High Court Judge who monitors the operation of interception,[101] similar to the Interception of Communications Commissioner in the United Kingdom. However, it has been pointed out that the judicial oversight lacks transparency, and that annual reports do not contain an in-depth examination.[102] In order to promote consistency and transparency, it makes sense to apply prior judicial approval to all forms of special investigative techniques.

While the legislative frameworks in both jurisdictions seem to be sufficient generally, there have been some problems in actual law enforcement. To illustrate this with an example, of 389 prosecutions against traffickers instituted in England and Wales between 2009 and 2012, only 49

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[91] See Regulation of Interception of Communications and Provision of Communication Related Information Act 2002.
[92] See 18 USC Chapter 19, §2518 (Procedure for Interception of Wire, Oral or Electronic Communications)
[93] See Part II.
[94] See Sections 28 and 32.
[95] See Section 36.
[96] See Section 26.
[97] See RIPA, Part IV.
[98] See Sections 4-5.
[99] See Tom Obokata and Others, *North-South Irish Responses to Transnational Organised Crime : Research Report of Findings* (Irish Organised Crime Report, 2014) 34.
[100] See *Taylor-Sabori v United Kingdom* (2002), Application No. 47114/99; *Rotaru v Romania* (2000), Application No. 28341/95; and *Liberty and Others v United Kingdom* (2008), Application No. 58243/00.
[101] See Section 8.
[102] See Privacy International, *Evaluation Report of Ireland's Privacy and Surveillance Laws, 2011*, available at <https://www.privacyinternational.org/countries/ireland> (Last accessed on 28 July 2014).

resulted in convictions.[103] This illustrates difficulties, *inter alia*, in securing useful and credible evidence against traffickers, often forcing the authorities to charge them for non-trafficking offences instead.[104] Also, the average penalty for trafficking offences in 2011 was calculated as 27 months' imprisonment,[105] substantially lower than the statutory maximum. While judges must consider various factors such as defendants' previous convictions, character as well as mitigating circumstances, these lenient sentences do not exactly serve as strong deterrence, and whether the new legislation mentioned above would make much difference is open to question. Ireland is much worse in terms of prosecution. Between 2008 and 2011, there were no prosecutions or convictions,[106] although some improvements can be recognised in 2012 with several prosecutions and convictions.[107] While it may be the case that human trafficking is much less common in Ireland, this low rate of prosecution and conviction was indeed regarded as a major concern by the Group of Experts on Action against Trafficking in Human Beings (GRETA)[108] established by the Council of Europe Convention. These statistics also raise a question as to whether special investigative techniques are used efficiently in both jurisdictions.

In relation to international co-operation, both States seem to have good measures in place. For instance, the United Kingdom's Extradition Act 2003 incorporates the regime of EAWs. In return for streamlining extradition among EU Member States, the legislation contains several safeguards to protect the rights of suspects/defendants. It lists several grounds for refusal, including double jeopardy, extraneous consideration (where there is the likelihood of persecution or no guarantee of a fair trial), passage of time, age, and the rule of speciality.[109] Another notable aspect of the Extradition Act 2003 is the inclusion of human rights considerations as an additional ground for refusal.[110] There are a few more relevant statutes to be mentioned. The Criminal Justice (International Co-operation) Act 1990 enables the United Kingdom to co-operate with other States in criminal proceedings and investigations, and the Crime (International Co-operation) Act 2003 provides for mutual provision of evidence between the UK and other governments, execution of asset freezing orders, and transfer of prisoners. Another important aspect of the 2003 Act is that, together with the Police Reform Act 2002, it has incorporated the EU Council Framework Decision on Joint Investigation Teams (JITs).[111]

Ireland also seems to have a good legislative framework to facilitate international co-operation. The European Arrest Warrant Act 2003 is one example. Similar to the United Kingdom, the Irish legislation also contains a number of safeguards, including compatibility with the ECHR. In addition, the Criminal Justice (Joint Investigation Teams) Act 2004 incorporates the aforementioned EU Framework Decision on JITs. The Irish government has enacted another piece of legislation, the Criminal Justice (Mutual Assistance) Act 2008, which provides for taking evidence in connection with criminal investigations or proceedings in another country,[112] search for and seizure of materials on behalf of another country,[113] and execution of confiscation and forfeiture orders issued in another country.[114] It is apparent therefore that the legislative

[103] See HM Government, *Report on the Review of Human Trafficking Legislation,* May 2012, 8-9.
[104] See British–Irish Parliamentary Assembly, *Report on Human Trafficking,* October 2013, 14.
[105] See U.S. Department of State, *Trafficking in Person Report 2012*, 358.
[106] See Eurostat (European Commission), *Trafficking in Human Beings 2013 Edition*.
[107] See Anti-Trafficking Unit (Department of Justice and Equality), *Annual Report of Trafficking in Human Beings in Ireland for 2012*, 29-30.
[108] See GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland*, 8.
[109] See Sections 12-17.
[110] See Section 21.
[111] See [2002] OJ L 162/1.
[112] See Sections 62-75.
[113] See Sections 31-48.
[114] See Sections 49-57.

frameworks on international co-operation/mutual legal assistance in criminal matters reflect the international standards, the Organised Crime Convention in particular.

There are recent examples of international co-operation against human trafficking facilitated by the United Kingdom and Ireland. Between 2009 and 2013, for instance, the United Kingdom made 112 arrests in connection with human trafficking and other immigration crimes under the EAW regime.[115] In contrast, Ireland received 313 EAW requests from other Member States in 2012, and only one related to human trafficking.[116] In terms of actual cross-border prosecution, the case of *Matyas Pis*[117] provides an interesting example. The defendant, a Hungarian national, trafficked two women from Hungary via Dublin airport to Belfast for the purpose of sexual exploitation. At the request of Northern Ireland, the relevant evidence was transferred from Dublin to Belfast, and the defendant was successfully prosecuted and convicted in that jurisdiction.[118] Furthermore, the UK authorities also operated 6 JITs on human trafficking with 7 States in 2013[119] underscoring the transnational nature of this crime.

Despite these examples of international co-operation, some issues have been identified simultaneously. Cross-border surveillance is one such example. Within the context of the European Union, this is facilitated by the *Schengen Acquis*[120] which incorporated the Schengen Convention into the European Union Law. Article 40 permits authorised cross-border surveillance, and in urgent cases surveillance of up to 5 hours without prior authorisation. Article 41 touches upon hot pursuit. The United Kingdom has opted into Article 40 but not Article 41.[121] The government has recently expressed the view that Article 40 is a quite effective arrangement compared to international letters of request which are slow and time-consuming.[122] Consequently, it is likely that the United Kingdom will remain part of this arrangement. In contrast, Ireland opted into neither of these provisions.[123] Another point to be noted is the reluctance of An Garda Síochána (Irish police) to take an active part in JITs, as they believe that JITs are resource-intensive, and that other arrangements already facilitate effective co-operation.[124] It is evident therefore that two States which share national borders and the common law tradition have somewhat different views on international co-operation, highlighting the importance of State sovereignty.

2. *Protection of Victims*

The United Kingdom and Ireland have also been implementing some measures to protect victims of human trafficking. The protection obligations are additionally strengthened by the Council of Europe Convention which was ratified by both governments. For instance, in the United Kingdom, the National Referral Mechanism (NRM) was introduced in 2009 to meet the requirement stipulated under Article 10 of the Convention. In order to take advantage of the

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[115] See Home Office, *European Arrest Warrants Data: 2009 to 2013*, <https://www.gov.uk/government/publications/european-arrest-warrant-data-2009-2013> (Last accessed on 1 April 2014).
[116] See Department of Justice and Equality, *Annual Report for 2012 on the Operation of the European Arrest Warrant Act 2003*, 8.
[117] See [2012] NICC 14.
[118] See Irish Organised Crime Report, supra n 99, 47.
[119] See HM Government, *Second Report of the Inter-Departmental Ministerial Group on Human Trafficking* (October 2013), 37.
[120] See [2000] OJ 239/1.
[121] See Irish Organised Crime Report, supra n 99, 50.
[122] See House of Commons European Scrutiny Committee, *The UK's Block Opt-Out of Pre-Lisbon Criminal Law and Policing Measures*, October 2013, 346-349.
[123] See Irish Organised Crime Report, supra n 99, 50.
[124] *Ibid*, 50-51.

NRM, so called first responders[125] have to refer victims to the Competent Authorities (CAs), which consist of the UK Human Trafficking Centre and the UK Border Agency. Upon referral, these CAs have 5 days to decide whether there are reasonable grounds to believe that the individuals referred are victims of trafficking.[126] If a positive decision is taken , then they can receive initial assistance such as safe accommodation and a recovery period of 45 days.[127] During this period, the CAs will issue conclusive decisions as to whether individuals are indeed trafficked victims. If they are willing to co-operate with the law enforcement authorities, they can be granted temporary residence permits of up to 12 months in the first instance.[128]

Although there is no doubt that some progress has been made to facilitate proper identification of victims in the United Kingdom, the current system is still inadequate. While the recovery period of 45 days is longer than what is provided for under the Council of Europe Convention,[129] it is rather unrealistic to expect the victims of trafficking, who have potentially suffered from gross violations of human rights, to recover from their ordeal very quickly. Other EU Member States such as Italy provide for a 3 month initial period, and this has been recommended by various stakeholders, including the UK Parliamentary Joint Committee on Human Rights.[130] Conducting interviews with victims during the reflection period is also seen as inappropriate as they have to recount their experience, possibly adding further to the distress and trauma. In addition, there is no formal process of appeal or review of the decisions made by the CAs.[131] Although the victims can challenge decisions through judicial review, this is often lengthy and expensive. It should also be noted that judicial review relates to the conduct of the CAs and is not designed to re-examine the merits of each case.[132] This can put the victims at a more disadvantaged position, if the facts or individual circumstances are misinterpreted for instance.

In Ireland, protection measures have been in place in line with the National Action Plan on Human Trafficking 2009-2012. Generally speaking, victims have to approach An Garda Síochána, medical personnel or other public bodies such as the Office of the Refugee Applications Commissioner.[133] They will then decide on the types of protection measures and refer them to appropriate bodies, including NGOs. In the meantime, the Garda National Immigration Bureau determines whether there are reasonable grounds to believe that someone is a victim of human trafficking within one month.[134] The Irish identification system therefore affords more time to the authorities and is better than the mere 5 days afforded in the United Kingdom. If a positive decision is reached, then a victim is granted a reflection period of 60 days, and he/she can live in a safe house and receive subsistence and medical assistance.[135] After this period, a victim *may* be given a renewable temporary residence permit of 6 months under the so-called "Administrative Immigration Arrangements" established in 2008, but this is conditional upon the willingness of the victims to assist the law enforcement authorities in investigation and

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[125] They include the local authorities, the police, UK Human Trafficking Centre, and civil society organisations such as the Poppy Project, Migrant Helpline and Kalayaan. See National Referral Mechanism at <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism> (Last accessed on16 July 2014).

[126] *Ibid.*

[127] *Ibid.*

[128] *Ibid.*

[129] A minimum of 30 days under Article 13.

[130] See Joint Committee on Human Rights, *Human Trafficking: Twenty-Sixth Report of Session 2005-2006*, 203

[131] See Ant-Trafficking Monitoring Group, *Wrong Kind of Victim?,* June 2010, 41-42.

[132] *Ibid.*

[133] See Anti-Trafficking Unit (Department of Justice and Equality), *Guide to Procedures for Victims of Human Trafficking*, 5.

[134] *Ibid*, 6.

[135] *Ibid*, 9.

prosecution.[136] If they co-operate, the government will find them longer-term accommodation and victims are also allowed to receive education and vocational training or engage in employment.[137] If they choose not to co-operate, they must leave their temporary safe houses, and their temporary residence permit may not be granted.[138]

There are a couple of common issues evident in both the United Kingdom and Ireland. First, protection is not clearly stipulated in their national legislation. As noted above, the lack of a legal basis can be problematic from the point of view of legality, consistency and accountability, and the importance of having legislation on protection was stressed by the GRETA in relation to both jurisdictions.[139] It is regrettable that the aforementioned Modern Slavery Bill in the United Kingdom is somewhat weak. Although the creation of an independent "Anti-Trafficking Commissioner"[140] is an important step forward, it is regrettable that his/her function does not include a sufficient level of victim protection under the current Bill, apart for victim identification.[141] Therefore, the United Kingdom has missed an important opportunity in this regard. In contrast, the Immigration, Residence and Protection Bill, currently under consideration in Ireland, contains a provision on reflection periods and residence permits,[142] thus representing a better model. However, the Bill has been in consideration for over 4 years prior to the present date, and this casts some doubts on the commitment of Ireland. Another common problem is the emphasis placed upon co-operation with the law enforcement authorities in return for additional protection. As stated previously, this approach is not desirable from a human rights perspective and should be reconsidered by the United Kingdom and Ireland. Further, it has been pointed out that decisions on the victim's status should be made by people who are not directly involved in immigration affairs, in order to enhance the perception of independence and impartiality.[143] In summary, it is evident that there is scope for improvement in relation to protection of trafficked victims in both jurisdictions.

3. Prevention of Trafficking

It is fair to state that both jurisdictions have been fulfilling this obligation to some extent through legislative and other means. In relation to legislative measures, the Coroners and Justice Act 2009 of the United Kingdom prohibits slavery and forced labour, with a maximum of 14 years' imprisonment. The aforementioned Modern Slavery Bill has increased the punishment to life imprisonment in line with the changes made to trafficking offences. The Gangmasters (Licensing) Act 2004 additionally prevents gangmasters from operating without a license[144] and proscribes the act of using workers supplied by unlicensed gangmasters.[145] Furthermore, the Immigration, Asylum and Nationality Act 2006 imposes a civil penalty for employing illegal migrants (up to £20,000 per migrant) and a criminal penalty of up to 2 years' imprisonment. While these provisions have the potential of preventing the exploitation of trafficked victims, whether the punishment regimes serve as strong deterrence is debatable. Between 2011 and 2012, 15 prosecutions were brought under the 2009 Act, and only 2 of them resulted in

136 *Ibid*, 8.
137 *Ibid*, 10.
138 *Ibid*, 8.
139 See GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking of Human Beings by United Kingdom,* September 2012, 87; and Irish Report, supra n 99, 63.
140 See Part 3.
141 See Clause 37. This was a concession made by the UK government after the Parliamentary Joint Committee on the Draft Modern Slavery Bill argued for the expansion of the role of the Commissioner to include victim protection. See *The Government's Response to the Report from the Joint Committee on the Draft Modern Slavery Bill,* June 2014, CM 8889, 13-14.
142 See Clause 139.
143 See British–Irish Parliamentary Assembly, supra n 104, 11.
144 See Section 12.
145 See Section 13.

convictions.[146] Given the number of people in slavery and forced labour, as well as of exploiters in the United Kingdom, this figure casts some doubts on the efficacy of these legislative frameworks. In addition, gangmasters licencing is limited to the agricultural, horticultural and shellfish industries and a sufficient level of scrutiny is not present in relation to employers in other sectors.

In Ireland, there is no stand-alone offence of slavery or forced labour. However, it has been argued that the definition of trafficking under the 2008 Act, particularly "providing employment and accommodation" could be used to prosecute and punish forced labour.[147] There are some risks associated with this reasoning. For instance, it can affect the principle of legality and create a danger of judicial discretion going beyond the original legislative intention. In order to avoid these then, it is desirable to establish separate offences of slavery and forced labour similar to the United Kingdom. In addition, the Employment Permits Act 2003 prohibits hiring migrants without proper employment permits, with a maximum fine of €250,000 and/or 10 years' imprisonment upon conviction on indictment.[148] While the punishment regime is substantially more stringent than in the United Kingdom, various concerns were expressed by lawyers and NGOs that this legislation simultaneously denies the victims' access to remedies because of the illegal nature of such employment.[149]

As the United Kingdom and Ireland are major destination States, one of the most important measures which must be implemented is the demand reduction. In looking at State practice, both governments have taken some steps to address the demand for sexual exploitation. Under the Policing and Crime Act 2009, anyone who purchases sexual services from trafficked victims in the United Kingdom is liable to a fine of up to £1,000.[150] One point to note here is that this is an offence of strict liability, meaning that one can be convicted even if he did not have prior knowledge that the person providing sexual services had been trafficked. While this may raise an issue of fairness, offences of this type[151] have existed in this jurisdiction to address issues of social concern, and it has been held in the past that strict liability offences do not necessarily infringe the presumption of innocence under the ECHR.[152] Similarly, the 2008 Act of Ireland prohibits soliciting or importuning for the purpose of prostitution of trafficked victims.[153]

Unlike the United Kingdom, the punishment regime is tougher in Ireland, as the Act provides for up to 5 years' imprisonment. Interestingly, these acts are not regarded as strict liability offences as the legislation provides for a defence of no knowledge or reasonable belief. This difference in turn is reflected in the severity of the punishment. In any event, whether punishing clients will actually reduce the demand for sexual exploitation is open to question, as arguably such a measure can drive the practice further underground, making it more difficult for the authorities to detect and take action. It has been argued in this regard that the Swedish legislation, which criminalises the purchase of sexual services generally, has actually driven prostitution indoors and online[154] although others have simultaneously argued that it has

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146 See HM Government Second Report, supra n 119, 26.

147 See for instance, an opinion of Ellis Barry presented in a seminar organised by the Migrant Rights Council and the Irish Congress of Trade Unions in June 2010; and Department of Justice and Equality, *Examination of the Adequacy of Current Irish Legislation in Relation to the Criminalisation of Forced Labour* (2011), 14.

148 See Section 2.

149 See *Hussein v The Labour Court & Anor* [2012] IEHC 364; and GRETA's Irish Report, supra n 108, 13.

150 See Sections 14 and 15.

151 These also include road traffic offences and possession of prohibited items such as weapons and drugs.

152 See *Lambert* [2001] UKHL 37; and *G* [2008] UKHL 37.

153 See Section 5.

154 See Global Alliance against Traffic in Women, *Moving Beyond 'Supply and Demand' Catchphrases: Assessing the Uses and Limitations of Demand Based Approaches in Anti Trafficking* (GAATW, 2011), 29-30.

achieved a goal of preventing clients from purchasing sexual services.[155] A careful consideration by all stakeholders is therefore needed in measuring the effectiveness of punishing clients.

Aside from sexual exploitation, there are no statutes targeting clients who purchase goods provided by trafficked victims as a result of labour exploitation. This may be understandable; as such legislation would be unrealistic and unworkable in practice. What is necessary, then, is effective education/awareness raising measures targeting the general public, and both jurisdictions have been making good efforts in this regard. In the devolved region of Northern Ireland in the United Kingdom, for example, the Minister of Justice launched a Crimestoppers campaign on human trafficking and exploitation, which included the dissemination of a YouTube clip entitled 'Read the Signs.'[156] According to the Northern Ireland government, the clip attracted over 62,100 hits within 3 months of its launch across the UK.[157] The use of modern technology such as this can allow the authorities to educate young people in particular. In Ireland, the government has paid close attention to its National Action Plan 2009-2012 in facilitating prevention measures. An example in this regard is the Blue Blindfold campaign.[158] This campaign aims to educate the general public about the nature and extent of human trafficking in the hope that they will be able to identify cases of human trafficking and assist the law enforcement authorities to tackle it. The same campaign was launched in the United Kingdom previously. As part of this campaign, the Anti-Trafficking Unit of the Department of Justice and Equality created a page on Facebook, among other activities.[159]

Although these efforts by the United Kingdom and Ireland should be recognised, their effectiveness in reducing demand needs to be analysed carefully. In relation to the aforementioned Crimestopper campaign through YouTube, the total number of hits as of July 2014 was around 65,000, not a significant increase since the launch. The Facebook site of the Irish government had 755 "Likes" around the same time and whether this can be regarded as successful is debatable. Finally, the Blue Blindfold campaign in the UK was acknowledged as largely ineffective by governmental and non-governmental stakeholders,[160] and therefore its effectiveness in Ireland is also uncertain. Various shortcomings in the current prevention measures have been recognised by the British-Irish Parliamentary Assembly, which stressed the need to put more effort into engaging non-governmental and educational sectors, for instance.[161] In summary, it cannot be concluded with any certainty that awareness-raising/education measures have contributed to the reduction of demand on the part of the general public. This can be supported by the fact that a number of people are still trafficked into the United Kingdom and Ireland annually, and this unfortunately demonstrates the existence of strong demand in sexual and labour exploitation. The need to address the demand more effectively was also highlighted by the GRETA in relation to the two jurisdictions.[162] To conclude, although both the United Kingdom and Ireland have been fulfilling basic obligations under international law on human trafficking, it is also evident that they need to do more in all areas of prohibition/prosecution, protection and prevention.

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[155] See Committee on Equality and Non-Discrimination (Parliamentary Assembly of the Council of Europe), *Prostitution, Trafficking and Modern Slavery in Europe* (March 2014), 17.
[156] The Clip is available at <http://www.youtube.com/watch?v=3C9VwiCP2bQ> (Last accessed on 20 July 2014).
[157] See Irish Organised Crime Report, supra 99, 71.
[158] See details at <http://www.blueblindfold.gov.ie/> (Last accessed on 20 July 2014).
[159] The page is available at <https://www.facebook.com/pages/Anti-Human-Trafficking-Unit-Ireland/305656599447325> (Last accessed 20 July 2014).
[160] See Irish Organised Crime Report, supra n 99, 71.
[161] See British-Irish Parliamentary Assembly, supra n 104, 6.
[162] See GRETA's Irish Report, 33 -34; and UK Report, 45.

Observations

This article examined the nature and extent of the obligations imposed by international law on human trafficking and their implementation at the national level. It is fair to state that since their adoption in 2000, both the Trafficking Protocol and the Organised Crime Convention have enhanced our understanding of this crime and strengthened the obligation to prohibit and prosecute human trafficking individually and collectively through international co-operation. However, the major shortcoming of these instruments is the weak nature of the obligations to protect victims and prevent human trafficking, leaving a wide margin of appreciation on the part of State Parties. Some examples of State practice, as well as the case studies of the United Kingdom and Ireland have demonstrated a great degree of divergence in approach taken at the national level. This is further undermined by the principle of State sovereignty.

It is also evident that the core instruments on human trafficking on their own are not sufficient in promoting effective suppression and prevention. A more holistic approach, which is capable of addressing wider issues such as the causes and consequences of trafficking, must be sought at the international level, and it has been shown that international human rights law is particularly useful in this regard. The established human rights norms and principles such as the prohibition on slavery and forced labour are equally applicable to human trafficking, and they can alleviate the current weaknesses evident in international law on human trafficking. Other branches of law such as international criminal law[163] and international law of the sea[164] may also have a role to play in putting additional moral and legal pressure on States to act. What is needed, however, is a clear recognition by States that trafficking of human beings is not simply a matter of domestic concern, and that successful suppression and prevention will require consolidated efforts at various levels of governance. The role of the civil society sector and international organisations will continue to be essential in this regard. To conclude, although there is much to be done to maintain its legitimacy, in considering the number of positive changes also achieved to date, it is still premature to altogether dismiss the value of international law on human trafficking.

[163] See for instance, Article 7 (Crimes against Humanity) of the Rome Statute of the International Criminal Court 1988, 2187 UNTS 90; Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54 *International & Comparative Law Quarterly* 445.
[164] See Article 99 (Prohibition of the Transport of Slaves) of the United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3; and the International Convention on Maritime Search and Rescue 1979, 1405 UNTS 97.

'Territorial integrity and Russia's annexation of Crimea under International Law'

*Josephat Ezenwajiaku**

Abstract

This article examines Russia's 2014 Annexation of Crime under the light of applicable doctrines of international law. It shows that Russia's proactiveness following Ukraine's political crisis may qualify as use of force against the territorial integrity of a sovereign state. Further, any Russian claims over any part of Ukraine appear difficult to justify under the traditionally recognized modes of acquisition of territory under international law. Cession of part of a territory based solely on the will of the people may result in no title or an inchoate title, especially if the doctrine of uti possidetis is applied. Therefore, the transfer of Crimea to Russia based on the plebiscite so-conducted, in disregard of the refusal of the interim government of Ukraine and its rejection by the international community appears difficult to justify under international law.

Keywords: Territorial integrity, self-determination, *uti possidetis*, secession, non-intervention, occupation.

Introduction

Russia's annexation of Crimea after a plebiscite conducted on 16th March, 2014, has raised some important issues regarding state practice on self-determination, territorial acquisition and the principle of non-intervention. Signing a pact that formally annexed Crimea to the Russian Federation, President Vladimir Putin (hereinafter President Putin) said the move was necessary since Crimeans could not be reconciled with "outrageous historical injustice."[1] By this he meant the legitimacy[2] of the initial transfer of Crimea along with Sevastopol to Ukraine by the former Soviet Premier, Nikita Khrushchev in 1954. He stated that this decision was unconstitutional even at the material time.[3] Another important aspect of his speech was the emphasis on oneness or the historic-tie argument, which places a moral responsibility on Russia to intervene.[4] This raises the question whether state practice allows a third state to facilitate the creation of a new state.

This article examines the key legal issues encountered when self-determination clashes with the requirement under customary international law to respect the territorial integrity of States. As stated by the International Court of Justice in the Lotus Case "[t]he first and

*Fr. Rev. Josephat Ezenwajiaku, Associate Research Fellow, Centre for International and Public Law, Brunel University London, United kingdom.

[1] 'Address by President of the Russian Federation' (The Kremlin Moscow, 18 March 2014) [hereinafter President Putin's Address] available at: <http://eng.kremlin.ru/news/6889>accessed 5 May 2014.
[2] Doris Wydra, 'The Crimea Conundrum: The Tug of War Between Russia and Ukraine on the Questions of Autonomy and Self-Determination' (2003) 10 *International Journal on Minority and Group Rights* 111, 115.
[3]President Putin's Address (n 1).
[4]ibid.

foremost restriction imposed by international law upon a State is that – failing a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State."[5] This article has three main objectives. The first is to establish how external self-determination could be lawfully achieved under current international law. The second is to analyse the acceptable means of acquiring sovereign territory of another State. The third is to evaluate States' obligations under Articles 2(4) and 2(7) of the United Nations Charter. The article is divided into four parts. The first part will assess the relevant legal issues regarding the status of Crimea from a historical perspective. The aim is to evaluate whether Crimeans qualify, and at what point, for external self-determination. The second part will examine how territorial title is transferred and who in law, could lawfully do that. In this regard, the applicability of *uti possidetis* beyond the context of decolonization will be examined. In the light of the historical analysis, part three will examine the issue of external self-determination drawing upon analogy from state practice to assess the veracity of the claims surrounding Crimea. The fourth part will evaluate whether Russia's actions in Crimea were in breach of its international obligations under Article 2(4) of the U.N. Charter.

Part One

From the outset, it is worth noting that the crux of President Putin's was essentially that "in people's minds, Crimea has always been an inseparable part of Russia." Justifiably, the referendum conducted in Crimea, and by which the Crimean people clearly and convincingly expressed their will to be part of Russia imposes moral, if not legal obligation on Russia to acquire the legal title over Crimea. Thus, the formal signing of the Russia-Crimea Treaty[6] is presumed to have legally transferred title to Russia. Two issues come into focus here: (1) Were Crimeans empowered by international or domestic law to transfer title to Russia through cession without the consent of the parent state?[7] (2) Did Russia have a legitimate claim to title over any part of Ukraine's sovereignty territory simply because it was "ceded" to it out of the will of the majority of the people in Crimea? These questions involve the usual impasse often encountered in cases of unilateral secession. In the case of Crimea, however, Russia's involvement facilitated the process in favour of self-determination. It is, therefore, important to examine the extent to which the norms on territorial integrity are either respected or ignored by international subjects. But before that, the history of Crimea would be discussed to highlight the *conditio sine qua non* for effective implementation of self-determination under international law.

Crimean's natural right of possession by occupation

Crimea used to be part of Russia but was formally transferred to Ukraine by the then Premier of the Soviet Union, Nikita Khrushchev, on the 300th anniversary of Russian-Ukrainian unification in 1954.[8] With reference to aboriginality, which was a prerequisite for claiming self-determination for indigenous populations before and during the

[5] *The Case of the SS Lotus* (France v Turkey) Judgment PCIJ (Series A) No 10 [1927] 18 [hereinafter Lotus Case]; Ben Chigara, 'Short-Circuiting International Law' (2006) 8(2) *Oregon Review of International Law* 191,192.

[6] See 'Crimea has always been an inseparable part of Russia' (2014) 38(1) *Military Technology* 200.

[7] This option seems available for Non-Self-Governing Territories within the framework of the U.N. Charter Chapters XI and XII. See U.N.G.A. Res. 1541 (XV) (1960) [Principle VI(c)]; Steven Weimer, 'Autonomy-based accounts of the right to secede' 2013 39(4) *Social Theory and Practice* 625, 633.

[8] Spencer Kimball, 'Bound by treaty: Russia, Ukraine and Crimea' (3 March 2014) available at: <http://www.dw.de/bound-by-treaty-russia-ukraine-and-crimea/a-17487632> accessed 9 May 2014.

decolonization era, it has been argued that neither Russia nor Ukraine has a convincing claim over the geographical boundaries known as Crimea today.[9] For want of space, the nitty-gritty debate as to what constitutes "indigenous"[10] is beyond the scope of this article. However, it will suffice to say that "aboriginality" seems correlative with the notion of "natives".[11] In one sense, "native" is used as a claim of prior occupancy.[12] Prior occupancy arguments are commonly found in doctrinal justifications of Aboriginal rights with respect to land. This view is supported and heavily influenced by the common law idea that "aboriginal people" occupied the land from "time immemorial."[13] Equity and fairness demand that, *ceteris paribus*, a prior occupant of a piece of land possesses a stronger claim to that land than subsequent arrivals. Although this sort of reasoning may apply to "peoples", "passive occupation" devoid of "effective authority" and intention and will to act as sovereign do not confer a good title under the doctrine of occupation.[14]

The Permanent Court of International Justice has enumerated conditions that must be considered when adjudicating a claim to sovereignty over a particular territory. The Court has held that "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist – namely, the intention and will to act as sovereign, and some actual exercise or display of such authority."[15] The generic term "possession" branches out into various species but of relevance here is its legal connotation. A "person is properly said to *possess* a thing who both actually and corporally retains it, and who desires and intends at the same time to make it his own."[16] However, legal title may also be acquired under the doctrine of *ad usucapionem possidet* if the possessor possesses in error.[17] This may be effective in conjunction with possession by operation of time (*civilis possessio*). Therefore, aside from natural possession, legal possession must be by act and intention (*animo et facto, de droit et de fait possessio proprie sic dicta*).[18] It seems generally agreed that effective occupation is whether the occupying sovereign has established a sufficient governmental control to afford security to life and property over the occupied territory.[19] While this consideration bears no direct relevance to the Crimean situation since neither the doctrine of discovery of *terra nullius* nor occupation apply, it is highlighted with respect to assessing whether Crimeans could by natural right of possession determine to integrate with Russia.[20]

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[9] Wydra (n 2) 112.
[10] See generally, Russel Lawrence Barsh, 'Current Development: Indigenous Peoples – An Emerging Object of International Law' (1986) 80(2) *The American Journal of International Law* 369.
[11] Irene Watson, 'Aboriginal(ising) International Law and Other Centres of Power' (2011) 20(3) *Griffith Law Review* 619, 623-624.
[12] Patrick Macklem, 'Normative Dimensions of an Aboriginal Right of Self-Government' (1995) 21(1) *Queen's Law Journal* 173, 180.
[13] ibid 180.
[14] John C. Duncan, 'Following a Sigmoid Progression: Some Jurisprudential and Pragmatic Considerations regarding Territorial Acquisition among Nation-States' (2012) 35(1) *Boston College International and Comparative Law Review* 1, 15-16; *Legal Status of Eastern Greenland* (Denmark v Norway) Judgment PCIJ (Series A/B) No 53 [1933] 45-46 [hereinafter *Greenland Case*].
[15] *Greenland Case* (n 14) 45-46; M F Lindley, *The Acquisition and Government of Backward Territory in International Law* (London, Longmans Green and Co Ltd 1926) 156.
[16] Robert Phillimore, *Commentaries Upon International Law* (Vol. 1, Third Edition, London, Butterworths 1879) 325 (emphasis added).
[17] Phillimore (n 16) 326; Lindley (n 15) 139.
[18] Phillimore (n 16) 326.
[19] Lindley (n 15) 141.
[20] This provision seems restricted to decolonization era, see U.N.G.A. Res. 1541 (XV) (n 7).

In addition to establishing "effective occupation", it is also important to take into account "the extent to which the sovereignty is also claimed by some other Power."[21] These conditions, which were established in *Greenland case*, actually refer to States and may not apply to peoples as such.[22] In his *De Indis* treatise, Vitoria argued that the unbelief of non-Christians could not in itself preclude them from owning public or private property.[23] This offers "peoples" the right to determine even their political future. With reference to Crimea, the original inhabitants have natural right of possession and could lawfully cede their territory if they are socially and politically organised. It is yet to be seen to what extent such a right could lead to integration with Russia via plebiscite, and/or whether the Russia-Crimea Treaty created a valid cession that would be enough for the conditions set out in the *Greenland Case* to be met. To start with, the status of Russians in Crimea is yet to be determined. However, the Indigenous and Tribal Populations Convention, 1957 (No. 107)[24], recognizes not only the right of members of the populations over the lands which they traditionally occupy, but also their customary laws regarding land use and inheritance.[25] Nonetheless, caution must to be taken since there is no one fixed image of the 'Aboriginal' within legal or other discourse.[26]

Crimea within the Soviet Union

The administrative boundaries of the Soviet Union have had a chequered past reflecting a history of redrawing by many Soviet leaders.[27] Crimea is an Eastern Ukrainian Peninsula located on the Black Sea, which is connected to the rest of the country by a small strip of land.[28] For the most part, the history of Crimea was not Ukrainian history. The peninsula has always been a homeland for numerous peoples, such as the Scythians, the Greeks and the Tatars.[29] The name *krym* is of Tatar origin, and means 'rock fortress'.[30] So it was the Tatars who dominated the history of Crimea for centuries. If "aboriginality" as examined above makes logical sense, then "Tatars" qualify as aboriginal owners of Crimea. Under the 1977 Soviet Union Constitution, Tatar was an Autonomous Republic within the Russian Soviet Federative Socialist Republic.[31] As an Autonomous Republic, Tatar's territory may not be altered without its consent.[32] However, the Soviet Union Constitution does not grant Tatars the right to discharge its

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[21] *Greenland case* (n 14) 46.

[22] Martti Koskenniemi, 'Colonization of the 'Indies' – The Origin of International Law?' (Talk at the University of Zaragoza, December 2009) available at: <http://www.helsinki.fi/eci/Publications/Koskenniemi/Zaragoza-10final.pdf> accesses 23 October 2014.

[23] Kim Benita Vera, 'From Papal Bull to Racial Rule: Indians of the Americas, Race, and the Foundations of International Law' (2012) 42(2) *California Western International Law Journal* 453, 456.

[24] Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entry into force: 02 Jun 1959) [hereinafter ILO Convention 107].

[25] ibid [arts 11-13].

[26] Jennifer Nielsen, 'Images of the Aboriginal: Echoes from the Past' (1998) 11 *Australian Feminist Law Journal* 83, 87.

[27] Steven R Ratner, 'Drawing a better line: Uti possidetis and the borders of new states' (1996) 90(4) *American Journal of International Law* 590, 597.

[28] Julie Kliegman, 'Historical claim shows why Crimea matters to Russia' (2 March 2014) available at: <http://www.politifact.com/punditfact/statements/2014/mar/02/david-ignatius/historical-claim-shows-why-crimea-matters-russia/> accessed 9 May 2014.

[29] Wydra (n 2) 112.

[30] ibid 112.

[31] Constitution (Fundamental Law) of the Union of Soviet Socialist Republic, Adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation on 7 October 1977 [art 85] [hereinafter 1977 Soviet Union Constitution].

[32] ibid [art 84].

territory or engage in foreign policy.[33] This should be contrasted with Yugoslavia, which expressly provided for such a right to its former autonomous regions.[34]

In the 13th century, the Golden Horde[35] established the khanate of Crimea and it enjoyed reasonable autonomy as a settled district and one of the old centres of trade and industry. Similarly, Crimea enjoyed a lot of privileges and freedom as a vassal of the Ottoman Empire. While its history was evolving, Crimea became of interest to the Russian Empire because of its strategic position on the Black Sea Coast.[36] Russia's interest materialized following the Ottoman defeat at the Battle of Kozludzha, which ended the Russo-Turkish War of 1768–74. This was marked by signing of the Treaty of Küçük Kaynarca 21st July, 1774,[37] which recognised the loss of Crimea and other territories that had previously been held by the Khanate under the occupation of the Ottoman Empire. The territory of Crimea was formally was annexed by the Russian Empire in April 1783. While the region was, on the one hand, historically the home of the homeland of the Crimean Tatars, it became, on the other hand, a symbol of the power of the Russian Empire.[38]

In 1917, Crimea briefly became a sovereign state[39] but was quickly dismantled, as a result of the dissolution of the Parliament of the Crimean Tatars (*Kurultaj*) during the Bolshevik regime. Crimea regained its "independence" in 1921 and resisted being classified as "subject" of the Russian Federation; instead the peninsula was recognized as the Crimean Autonomous Soviet Socialist Republic with the right to adopt its own constitution, national anthem and flag.[40] Although, it has been argued that "autonomy" in the Constitution of the Soviet Union 1977[41] was merely formal for reasons that autonomous Republics lacked legislative powers[42], Republics within the Soviet Union were still privileged and had an edge over their foreign counterparts. For instance, Article 84 of the Soviet Union Constitution prohibited alteration of an Autonomous Republic's territory without its consent.[43]

The situation changed for Tatars after Germany took control of Crimea in 1942. In 1944, the then leader of the Soviet Union, Joseph Stalin, ordered the deportation of all Muslim Tatars numbering about 300,000, due to their averred cooperation with Germany during the World War II.[44] Many returned in the 1980s and 1990s, but by this time ethnic Russians had populated Crimea, making integration difficult if not impossible. In addition, the dissolution of its status as Autonomous Soviet Republic after World War II reduced Crimea to a province of the Soviet Union, which was later called the Crimean

[33] ibid [art 83].
[34] Farhad Mirzayev, 'Abkhazia' in Christian Walter and others (eds), *Self-determination and Secession in International Law* (United Kingdom, Oxford University Press 2014) 203.
[35]Leonard F. Nedashkovsky, 'Golden Horde Antiquities: the Development of Research Ideas' (2012) 83(1) *Acta Archaeologica* 225, 225.
[36]Wydra (n 2) 112.
[37] The Treaty of *Kainarji* which secured Russian control over the Crimean peninsula, was a peace treaty signed in 1774 at the end of the first of the Russo-Turkish wars (1768-74) undertaken by Catherine II of Russia against Sultan Mustafa III of the Ottoman Empire (Turkey).
[38] Wydra (n 2) 112.
[39]Kliegman (n 28).
[40] Serge Schmemann, 'Constitutional Conference Backs Draft of a New Charter for Russia' (*New York Times*, 13 July 1993).
[41]1977 Soviet Union Constitution (n 31) [art 85].
[42] Wydra (n 2) 123.
[43]1977 Soviet Union Constitution (n 31) [art 84].
[44] Kliegman (n 28).

Oblast (region). The Crimean Oblast was transferred to the Ukrainian Soviet Socialist Republic in 1954 by Soviet Premier, Nikita Khrushchev – a move that has been described as "a gesture of goodwill."[45] It is submitted that during the dissolution of the USSR, the international community did not recognize the right of autonomous Oblasts and Republics to external self-determination.[46] The term "Autonomous Republic" had a unique meaning within the 1977 Soviet Constitutional Law. There were "Union Republics" and "Autonomous Republics." The Union Republics collectively formed the Soviet Socialist Republics. Article 72 granted each "Union Republic" the right to freely secede from the USSR. When the USSR disintegrated, it was easier for the "Union Republics" to gain independence; retaining all their territories. This was not the case with autonomous Republics which were regarded as integral parts of their respective Union Republics. Unlike the Soviet Union, Yugoslavia's Constitution expressly granted the right of secession to the "nations of Yugoslavia" despite inbuilt claw-back constitutional provisions.[47]

Legality of the initial ceding of Crimea to Ukraine in 1954

It has been argued that Khrushchev transferred Crimea to Ukraine in 1954 when 90 percent of the Crimean population were Russians and against their consent.[48] The real issue at stake is the legitimacy of such a transfer. Although Crimea at this time was no longer densely populated by "Tatars" due to deportation, could Russians who were later arrivals claim stronger affinity to the land? If they could, could they invoke their strong connection to the land and its uses to debar government from transferring their territory to another sovereign? In other words, whose consent is required, that of the state or the peoples? For example, there is a strong view that non-intervention in the internal affairs of a state does not apply in three instances: when self-determination is involved; when there are fragrant violations of human rights; and when there is need to maintain peace and security. [49] So it is uncontroversial in international law discourse that self-determination has *erga omnes* status. As the ICJ put it in the *East Timor Case*: "… that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable." [50] Scholars and commentators have applauded this judgment.[51] Besides, the *jus cogens* dimension of self-determination flourishes in conjunction with human rights;[52] possibly because of the

[45]Kliegman (n 28).

[46] *EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* [1991] 31 ILM 1487 [hereinafter *EC Declaration on States Recognition*]; Walter and others (eds), (n 34) 203.

[47] Richard F Iglar, 'The Constitutional Crisis in Yugoslavia and the International Law on Self-determination: Slovenia's and Croatia's right to secede' (1992) 15(1) *Boston College International and Comparative Law Review* 213, 219.

[48]Wydra (n 2) 113.

[49] George Nolte, 'Secession and external Intervention' in Marcelo G Kohen (ed), *Secession International Law Perspective* (Cambridge, Cambridge University Press 2006) 72-73.

[50] *East Timor* (Portugal v Australia) Judgment ICJ Reports [1995] p. 90 para 29 [hereinafter *East Timor case*]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion ICJ Reports [1971] p. 16 paras 52-53 [hereinafter *Namibia case*]; *Western Sahara* Advisory Opinion ICJ Reports [1975] p. 12 paras 54-59 [hereinafter *Western Sahara Case*]; Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' 2011 11(4) *Human Rights Law Review* 609, 632; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion ICJ Reports [2004] p. 136 para 156 [hereinafter Occupied Palestinian Wall Case].

[51] Antonio Cassese, *Self-determination of Peoples A Legal Reappraisal* (Cambridge, Cambridge University Press 1995) 134.

[52] ibid 174; Kohen (ed) (n 49) 73.

latter's ability to blend its *jus cogenness* with its customary nature.[53] Therefore, the initial cession of Crimea to Ukraine without due consultations to ascertain the "will of the people" would be unlawful, if Crimeans surmount definitional hurdle within the meaning of "peoples"[54], taking into account the intertemporal law[55] operative at the material time. But it does seem not so considering the fact that external self-determination gained ascendency during decolonization era, especially with the adoption of the U.N.G.A. Resolutions 1514 and 1541. Perhaps, that the recent U.N.S.C. Resolution 1244 avoided the use of the term "self-determination" was a carefully attempt to safeguard the territorial integrity of Yugoslavia.[56] Although the Declaration of Independence of Kosovo referred to the "will of our people"[57], the U.N. Security Council's rejection of Martti Ahtisaari's recommendation of independence speaks volumes in respect of the State practice in this regard. For instance, in the face of massive exodus from the Commonwealth of Independent States, the European Community has upheld the sanctity of States territoriality.[58]

With due respect to the U.N.G.A. Resolution 289 (IV) authorizing the United Nations Commission for Eritrea[59] to decide the fate of Eritrea, the analysis conducted so far does not negate the validity of questioning whether the will of the people must be sought through plebiscite prior to cession. As earlier said, the territorial integrity of the Crimean Autonomous Soviet Socialist Republic was protected from alteration without the people's consent under the provisions of Article 84 of the 1977 Soviet Union Constitution. Although the concept "alteration" is polysemous, and may be deemed to refer to internal delimitation for administrative convenience, cession of such a territory to another sovereign could equally be accommodated.[60] As shown by *Eritrea Case*, prior occupation (evidenced by effective control), followed by cession may not in the long run deprive a "people" of their right to determine their political future. Nevertheless, there is a view in favour of the legitimacy of the said transfer whereby it is suggested that the decision to transfer the peninsula to Ukraine was ratified by a decree ('ukaz') of the

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[53] Customary in a manner the two 1960 Declarations were adopted. See 'Repertory of Practice of the United Nations Organs' (Vol. 1, Supplement No 10, Separate Study 2000-2009) para 20; Repertory of Practice of the United Nations Organs' (Vol. 1, Supplement No 2, Separate Study 1955-1959) para 86.

[54] See Joshua Castellino, "International Law and Self-determination: Peoples, Indigenous Peoples, and Minorities" in Walter and others (eds) (n 34) 32-33.

[55] *Island of Palmas Case* (Netherlands v USA) 2 RIAA 829, 846; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Ninth edition, Vol. 1, Peace, Parts 2 - 4, London and New York, Longman 1996) 710 [hereinafter Oppenheim]; James Crawford, *Brownlie's Principles of Public International Law* (Eight edition, United Kingdom, Oxford University Press 2012) 218.

[56] Peter Hilpold, 'The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question' (2013) 14 *Austrian Review of International and European Law* 259, 273.

[57] Republic of Kosovo Assembly, 'Kosovo Declaration of Independence' (17 February 2014) available at: <http://www.assembly-kosova.org/?cid=2,128,1635> accessed 23 October 2014.

[58] For a detailed analysis of cases of secession in the Commonwealth of Independent States, see generally Walter and others (eds) (n 34); Bjorn Arp, 'The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities' (2010) 11(8) *German Law Journal* 847, 854.

[59] U.N.G.A. Res. 289 (IV) (1949) part c, para 1.

[60] See in particular UNGA Res. 68/262 (2014) para 6 [hereinafter UN Resolution on Crimea], calling upon all 'States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status'; Opinion of the Badinter Arbitration Committee refers to second and fourth paragraphs of Article 5 of the Constitution of the SFRY which stipulated that the Republics' territories and boundaries could not be altered without their consent. See Alain Pellet, 'The Opinions of the Badinter Arbitration Committee a Second Breath for the Self-Determination of Peoples' (1992) 3(1) *European Journal of International Law* 178, 185.

Supreme Soviet issued on 26th April, 1954.[61]

Whatever the motivation for the transfer was, the end result was that Ukraine received a territory that was mainly inhabited by a largely Russian population that massively resisted the immigration of ethnic Ukrainians into Crimea.[62] Be that as it may, Russia acquiesced to this and had entered into a series of treaties to respect Ukraine's sovereignty. It has strongly been suggested that the collapse of the Soviet Union in 1991 availed President Boris Yeltsin the legal framework to redress the 1954 legal anomaly but he chose not to bring the matter up during negotiations with Ukraine.[63] Perhaps, President Viktor Yushchenko's move to cancel the disposition of black sea fleet agreement[64] resonated with the legal tussle regarding the historic title of Crimea; and led to Russia's awakening to what it feels is its legal responsibilities to redress what it considers to be a historical anomaly or injustice. With that in mind, the next section will examine how part of a sovereign may lawfully be ceded to another sovereign in international law.

Part Two

Acquisition of territory under international law

Prior to formal annexation of Crimea, a treaty was signed between the parties concerned. As we shall see, people have in history been able to legally transfer title of their inhabited territory to a foreign power in return for protection. It is crucial to examine whether that practice is still tenable in light of the principle of *uti possidetis*. This section will analyse the legality of the Russia-Crimea Treaty which purportedly transferred legal title of the disputed region to Russia. Attention must be drawn to how the principle of *uti possidetis* freezes international borders. Most importantly, this part will discuss the ongoing debate on whether *uti possidetis* could impair self-determination. With that settled, part three will take on the Crimeans' right to self-determination, and the role another sovereign state could play in its actualization.

1. *Russia's acquisition of Crimea on the basis of historic theory*

Russia justified its "reunification"[65] with Crimea on the outcome of a referendum alleged to have been conducted in "full compliance with democratic procedures and international norms." This trivializes the traditionally accepted modes of territorial acquisition under international law. Russia equally argued that "Crimea has always been an inseparable part of Russia." Does that suggest that a "people" resident in, or inhabiting part of a state could on account of having historic-ties with another sovereign state, lawfully conduct referendum to reunite with its preferred state without regard to the doctrine of *uti possidetis*? Or, has the doctrine of *dereliction* taken its course in Crimea such that Russia could lawfully rely on the "will of the people" to assume effective control.[66] If *dereliction* is not the basis for the "reunification" thesis, then the aim of *uti*

[61] Wydra (n 2) 113.
[62] ibid 113.
[63] Kliegman (n 28).
[64] Andrei Malgin, 'Forget Kiev the real fight will be for Crimea' *The Moscow Times* (Moscow, 25 February 2014) available at: <http://www.themoscowtimes.com/opinion/article/forget-kiev-the-real-fight-will-be-for-crimea/495145.html> accessed 25 June 2014.
[65] Term used by President Putin in his address, see President Putin Address (n 1).
[66] Oppenheim (n 55) 716; Crawford, *Brownlie's Principles of Public International Law* (n 55) 228; Geoffrey Marston, 'The British Acquisition of the Nicobar Islands, 1869: A Possible Example of Abandonment of

possidetis must be revisited. In theory of Statehood, a colonial or dependent territory is one thing, the case of a people as such, by some plebiscite or act of self-determination choosing independence is another.[67] Sadly, there is no yardstick for measuring modes of acquiring territory for none exists on the part of the members of the international community.[68] It seems right therefore to begin this part by first examining acquisition of territory under international law. This seems cogent since part of Russia's reasons for annexing Crimea is based on Russia-Crimea Treaty, consequent on the expressed "will of the people." Later in this section, the doctrine of *uti possidetis* will be analysed. In doing that, attention will focus on the recent view that *uti possidetis* is compatible with endogenous secession but repulsive to exogenous secession[69]; thus, delineating Russia's action in Crimea as a potential case of intervention/annexation.

2. Acquisition of territorial title

Traditionally, there are five modes of acquiring territory: namely, cession, occupation, accretion, subjugation, and prescription.[70] For our purpose, this article will concentrate on cession. The reason being that the signing of the Russia-Crimea Treaty between the parties might suggest that a valid transfer of title had occurred, although two or more modes of acquisition may conflate.[71]

3. Cession of state territory

Cession of state territory is the transfer of sovereignty over a state territory by the owner-state to another state.[72] Etymologically, "cession" is derived from two Latin concepts: (1) *cessionem* which is a declension of accusative singular *cessio* meaning "a giving up, surrendering," or (2) from a noun of action from past participle stem of *cedere* "to go away, yield."[73] For title to pass under cession, both the transferor and the transferee must be legally capable. Otherwise, the maxim: *nemo plus juris ad alium transferre potest quam ipse habet*[74] would render such a transaction ineffectual. It was held that the transferor must not be a state but any deputed body[75] in law. However, the Privy Council appeared to have departed from that view in *Steven Raymond Christian case*,[76] by observing that cession contemplates a transfer of sovereignty by one sovereign power to another. By and large, the transferor must be legally empowered; either internationally or domestically. It has equally been suggested that "the doctrine of cession is the only mode of acquisition that requires the enunciated intentions of at least two States. The receiving State must manifestly intend to receive the land and subsequently establish sovereignty. Likewise, the ceding State must manifestly intend to transfer the land and relinquish all claims of

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Territorial Sovereignty' (1998) 69(1) *British Yearbook of International Law* 245, 263.

[67] J. G. Starke, 'The Acquisition of Title to Territory by Newly Emerged States' (1965-1966) 41 *British Yearbook of International Law* 411.

[68] Oppenheim (n 55) 678.

[69] Glen Anderson, 'Secession in international law and relation: what are we talking about?' (2013) 35(1) *Loyola of Loss Angeles International and Comparative Law Review* 343, 345-347; Anne Peters, 'The Principle of *Uti Possidetis Juris* How Relevant is it for Issues of Secession?' in Walter and others (eds) (n 34) 107.

[70] Oppenheim (n 55) 679.

[71] Duncan (n 14) 10.

[72] Oppenheim (n 55) 679; *Reparation Commission v. German Government* in Annual Digest of International Law Cases (1923-24), Case No. 199.

[73]Douglas Harper, 'The Definition of Cession' (Online Etymology Dictionary 2001-2014) available at: <http://www.etymonline.com/index.php?allowed_in_frame=0&search=Cession&searchmode=none> accessed 24 October 2014.

[74] *Island of Palmas Case* (n 55) 842.

[75] *Sammut and Another Appellants v Strickland Respondent* [1938] Privy Council AC 678, para 701.

[76] *Steven Raymond Christian, Len Calvin Davis Brown, Len Carlisle Brown, Dennis Ray Christian, Carlisle Terry Young, Randall Kay Christian v The Queen* [2006] Privy Council WL 3102440, para 11.

sovereignty."[77]

Cession creates "the formal transfer from one state to another of the sovereignty over a definite area of territory."[78] It takes the form of a treaty encapsulating the conditions under which the transfer of a title takes place. In other words, cession is contractual in nature but does not necessarily require *quid pro quo* to be binding. The treaty may be voluntary, that is, the result of peaceful negotiations as in the case of a sale, gift or exchange.[79] In the past, there were cases of compulsory treaties leading to cession of part of a state territory[80] but that has been revoked by Article 52 of the Vienna Convention on the Law of Treaties 1969.[81] The ICJ in *Fisheries Jurisdiction Case* has confirmed that as a matter of contemporary international law any agreement concluded under threat or use of force is void.[82] Whether political inducement falls within the Convention meaning of threat or use of force is unclear. As shall be shown, attempt by states to coerce another state with intention to maximize national interests may be prohibited. However, it is certain that "motive" does not obviate title from passing from the transferor to the transferee. [83] Territories in history have been ceded in marriage contract or by testamentary disposition.[84] It cannot be ignored that duress may be implicit in this kind of cession.

Obviously, cession without a *quid pro quo* has been by far the largest group of transfer of territory because most cessions were imposed upon a vanquished State by its victor or upon an unwilling State by an international Congress.[85] For instance, Russia ceded to Japan the southern portion of Sakhahun and all islands adjacent thereto as a result of the Russian-Japanese War of 1905. In compliance with the Versailles Treaty, Germany ceded various parts of her territory to Belgium, France, Poland and Lithuania. Similarly, Italy hearkened to the Paris Agreement of February 10, 1947 and ceded certain parts of its territory to France, Greece and Yugoslavia. In obedience to the San Francisco Agreement of September 8, 1851, Japan ceded a number of islands including Formosa, the Pescadores, the Kurile Islands and the southern half of Sakhalin.[86]

The legitimacy of Russia-Crimea Treaty under International Law

At the time of writing, the author could not access the official English version of the Russia-Crimea Treaty so this article relied upon an unofficial version.[87] However the full

[77] Duncan (n 14) 24.
[78] ibid 24.
[79]P. K. Menon, 'The acquisition of territory in international law: a traditional perspective' (1994) 22 *Korean Journal of Comparative Law* 125, 150.
[80] Sharon Korman, *The right of Conquest: the acquisition of territory by force in international Law and practice* (Oxford, Clarendon Press 1996) 7.
[81] Vienna Convention on the Law of Treaties 1155 UNTS 331 (*entered into force* January 27 1980) [art 52] [hereinafter Vienna Convention on the Law of Treaties].
[82] *Fisheries Jurisdiction* (United Kingdom v Iceland) Jurisdiction of the Court, Judgment ICJ Reports [1973] p. 3 para 24 [hereinafter Fisheries Jurisdiction case].
[83] Oppenheim (n 55) 682.
[84] ibid 682.
[85]Menon (n 79) 151.
[86] ibid 151.
[87] Anatoliy Pronin, 'A Treaty on Accession of the Republic of Crimea and Sebastopol to the Russian Federation – Unofficial English translation with little commentary' available at: <http://www.academia.edu/6481091/A_treaty_on_accession_of_the_Republic_of_Crimea_and_Sebasto

text is available on the Kremlin website.[88] The Treaty started by affirming "the acceptance of the Republic of Crimea into the Russian Federation and on creation of new federative entities within the Russian Federation."[89] The preambular paragraphs went ahead to assert that the union was borne out the "historical sympathy of their nations" with a view to recognising and confirming the principle of equal rights and self-determination of peoples as provided for, in the United Nations Charter, principles and norms of international law and other regional legal instruments. Article 4 adopted the existing Crimean borders as belonging to the Russian Federation, although Article 3(2) retained Russian, Ukrainian and Crimean Tatar as the official languages in the Republic of Crimea.[90]

The Russia-Crimea Treaty is, *prima facie*, based on fundamental principles of International Law, particularly that on self-determination of peoples but scholars have doubted whether it qualifies as a treaty at all.[91] Equally noted is that it applied the principle of *uti possidetis* by adopting the existing boundaries of Crimea. As already seen, a treaty is an agreement between two sovereigns. For title to pass, the two sovereigns must clearly manifest its intention to "transfer" and/or to "receive" the said title, unless it is a case of an abandoned territory.[92] Where territorial abandonment is in issue, the *burden of proof* is on the Claimant.[93] To proof abandonment for instance, Russia must establish the physical withdrawal and the intention to abandon (*animus derelinquendi*).[94] This cannot be made out in Crimea. To circumvent this, it seems Russia had applied universal jurisdiction in defense of its civilians. Note however that the "actual abandonment alone does not imply dereliction as long as an iota of presumption that the owner has the will and ability to retake possession of the territory exists."[95] It is obvious that Ukraine never consented to Russia's activities on its territory.

Apart from Bangladesh, treated by the United Nations as a *fait accompli* instead of a case of self-determination, the relevant parent States in all other cases which might otherwise be classified as unilateral secession - Senegal, Singapore, the Baltic States and Eritrea; had given its consent before independence was externally recognized as accomplished.[96] If Russia premises its action on the rationale that underpinned the international community's recognition of the Baltic States, namely, the recovery of independence forcibly suppressed – that would require further analysis of the series of agreements it had signed, recognizing the territorial integrity of Ukraine. But taking that approach

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pol_to_the_Russian_Federation._Unofficial_English_translation_with_little_commentary> accessed 24 October 2014.

[88] Available at: <http://www.kremlin.ru/news/20605> last visited 24 October 2014.

[89]Pronin (n 87).

[90]Pronin (n 87).

[91] Gregory H Fox, 'Guest Post: The Russia-Crimea Treaty' (*Opinio Juris,* 20 March 2014) available at: <http://opiniojuris.org/2014/03/20/guest-post-russia-crimea-treaty/> accessed 27 October 2014; Steven Lee and Ellen Barry, 'Putin Reclaims Crimea for Russia and Bitterly Denounces the West' (*International New York Times*, 18 March 2014).

[92]Marston (n 66) 262.

[93] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore) Judgment ICJ Reports [2008] p. 12 para 45*; Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) Judgment ICJ Reports [2007] p. 43 para 204 citing *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Judgment ICJ Reports [1984] p. 392 para 101.

[94]Marston (n 66) 262; Oppenheim (n 55) 717.

[95] Oppenheim (n 55) 717.

[96] James Crawford, 'State Practice and International Law in Relation to Secession' (1998) 69(1) *British Yearbook of International Law* 85, 115.

would expose Russia's involvement in the conquest of the Baltic States. Another option is that Russia may have applied universal jurisdiction to protect "endangered Russians" in Crimea, the issue is whether universal jurisdiction permits States to acquire part of a sovereign territory inhabited by its citizens. Of course, state practice does not support that because it would sabotage the spirit of U.N. Charter as encoded in Articles 2(4) and 2(7). Crimea is not a case of abandonment since Ukraine was in "effective control" when that treaty was signed. Therefore, it could be said that Russia interfered in internal affairs of Ukraine.

At the time of the signing, Crimea had only been recognized by Russia. It is highly questionable whether it qualifies as a State to legally transfer title to Russia. Article 2 of the Vienna Convention limits the definition of 'Treaty" to an international agreement concluded between States[97] unlike the expanded version as contained in a provisional International Labour Convention (ILC) draft, which accommodated "other subjects of international law."[98] However, Article 3 of the Vienna Convention provides that the fact that the convention is limited to states shall not affect the legal force of agreements between states and other subjects of international law or between such other subjects.[99] On this basis, Crimea may have the *locus standi* to contract with Russia, if and only if other factors, such as, they qualify as a "people" entitled to the right of external self-determination, and/or the right of remedial secession[100], apply. In addition, state practice shows that rebel groups may be elevated to same status with the parent state in the case of negotiated peace agreements.[101] Even when a rebel group is exerting its right to external self-determination, a third party/state may not effrontery assist such a group covertly or overtly without breaching its international obligations. Therefore, the Russia-Crimea Treaty would seem to have violated the peremptory norm against Ukrainian territorial integrity and consequently void *ab initio* under Article 53 of the Vienna Convention on the Law of Treaties. Part four would elaborate on how Russia's military presence in Ukraine could amount to intervention and/or threat or use of force.

1. *Russia's right to reclaim its lost territory?*

One may wish to use Baltic States as a comparator when evaluating Russia's claim of "oneness" with Crimeans. With regard to the Baltic States, there is a strong view that they regained their independence forcibly suppressed. It could be recalled that the international community almost uniformly refused to grant *de jure* recognition to the 1940 Soviet annexation of the Baltic States. In fact, it was described as "an act of unprovoked aggression."[102] Prior to the annexation, the Baltic States were considered "peoples"

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[97] Vienna Convention on the Law of Treaties (n 81) [art 2].

[98] Crawford, *Brownlie's Principles of Public International Law* (n 55) 369.

[99] ibid 369; Vienna Convention on the Law of Treaties (n 81) [art 3].

[100] *Supreme Court of Canada, Reference Re Secession of Quebec* [1998] 2 SCR 217 para 154 [hereinafter *Reference re Secession of Quebec*]; Andreas Zimmermann, Carsten Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo' (2001) 70 *Nordic Journal of International Law* 423, 455; see also "safeguard clause" in U.N.G.A. Res. 2625 (XXV) (1970); Vienna Declaration and Programme of Action (1993) 32 *International Legal Materials* 1661, 1665 [hereinafter Vienna Declaration and Programme of Action].

[101] Fox (n 91).

[102] See 'Report of the Select Committee to Investigate Communist Aggression and the Forced Incorporation of the Baltic States into the USSR, Third Interim Report of the Select Committee on Communist Aggression House of Representatives Eighty-Third Congress Second Session Under Authority of H. Res. 346 and H. Res. 438' (United States, Government Printing Office Washington 1954) 7 available at: <https://archive.org/details/reportofselectco1954unit> accessed 17 October 2014; William J. H

because neither of the states was purely made up of one ethnic group.[103] The fate of Baltic's Independence was sealed with the conclusion of the Molotov-Ribbentrop Pact on 23 August 1939 between Nazi Germany and the Soviet Union.[104] The Pact contains secret "additional protocol" which assigned Estonia and Latvia to the Soviet sphere of influence, while Lithuania was left to Germany. It was later modified consequent on the collapse of Poland and Lithuania was placed in the Soviet sphere as well. With the Baltic States completely cut off Britain and France, Stalin started the process of annexation. But prior to that, each has entered into peace treaties with USSR, which in turn has unconditionally recognized the complete independence of these countries.[105] In fact, by 1922, the three Baltic States were members of the League of Nations and had been vested with full regalia of legitimacy.[106] In other words, each of the Baltic States retained equal right as a subject and this was not negotiable when, in 1940 their territories were acquired by the Soviet Union. Until they regain their territorial independence in 1990 – fifty years afterwards, the Soviet Union's forceful acquisition of the Baltic States has been a case of an illegal occupation in violation of *jus cogens* norms – prohibition of the use of force to acquire territory.[107] Against this backdrop, the next section would examine whether Crimea could possibly fall within such category such that Russia can fall back on *irredentism* to claim it back.

2. Crimea has always been an inseparable part of Russia?

The assertion that "Crimea has always been an inseparable part of Russia" was prominent in President Putin's address. History has it that Russia's first move to annex Crimea occurred before 1700.[108] After the demise of the Golden Horde, Russia and the Ottoman Empire strove to conquer and annex the resulting four Khanates of Kazan, Astrakhan, the Great Horde, and the Crimea. The Ottomans had gained the Crimeans as vassals and so it was difficult for the Russians.[109] Russia's subsequent successful attacks on Ottoman Empire set Crimea at alert of Russia's imminent possible attack. Instead of attacking, Russia attempted to establish peaceful relations with Tatars. Firstly, Russia established commercial ties with the Khanate but the Crimeans did not consider the decisions of the person appointed to mediate commercial disputes binding. It was not until the reign of Catherine II that a Russian resident was accepted in Bahcesaray in 1763.[110] Subsequently, Russia made further inroad into Crimea's territory and in January 1771, a plan for a swift military campaign to occupy the Crimea was issued.[111] The campaign was a success, yielding bilateral and multilateral treaties that regulated the status

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Hough, 'The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory' (1985) 6(2) *New York Law School Journal of International and Comparative Law* 301, 390-95; Susan E. Himmer, 'The Achievement of Independence in the Baltic States and Its Justifications' (1992) 6(1) *Emory International Law Review* 253, 266.

[103]Himmer (n 102) 255-256.

[104] Romuald J. Misiunas and Rein Taagepera, *The Baltic States Years of Dependence 1940-1980* (United Kingdom, C. Hurst & Company 1983) 15.

[105] Treaty of Non-Aggression (Lithuania-USSR) [1926] 60 LNTS 145; Latvia and Estonia entered into similar agreements with the Soviet Union. See Treaty of Non-Aggression (Estonia-USSR) [1932] 131 LNTS 297; Treaty of Non-Aggression Latvia-USSR) [1932] 148 LNTS 113; Himmer (n 102) 261.

[106]Hough (n 102) 358.

[107] Himmer (n 102) 253-54.

[108] Alan W. Fisher, *The Russian annexation of the Crimea 1772-1783* (Great Britain, Cambridge University Press 1970) 19.

[109] ibid 19

[110] ibid 27.

[111] ibid 40.

of Crimea. With the signing of the Treaty of Kucuk Kaynarca, Crimea became an independent state.[112]

After the Russian Revolution, Crimea was independent from 1917 to 1918 and then was incorporated into the Soviet Union as an autonomous republic of the Russian Federation in 1921.[113] In 1945, The Crimean Autonomous Soviet Socialist Republic was abolished and transformed into the Crimean Oblast of the Russian Federation; a status it retained until it was transferred to the Ukrainian republic in 1954. In 1992, Crimea proclaimed self-government but later agreed to remain within Ukraine as an Autonomous Republic.[114] This chequered history shows a great deal of Crimea's unsystematized demography, of course, occasioned by migration. There were suggestions that political process towards revocation of the said donation had being in progress. Firstly, as noted above, the transfer of Crimea to Ukraine in 1954 was done against the "will of people." In fact, in Crimea, only 54 percent of voters supported Ukrainian independence in a December 1991 referendum.[115] This was by far rated the lowest figure anywhere in Ukraine. Secondly, it could be recalled that power tussle started between Crimean and Ukrainian authorities in 1992; not even a year after it gained its independence. Question about the legitimacy of that donation was on the agenda of the Russian Duma. The then Foreign Minister, Kozyrev alleged the donation was illegal on the basis it was only a decision by the communist elite[116] and that Russians living in Crimea were not consulted. Although Ukrainian Parliament responded by terming Russia's action an infringement on November 1990 treaty between both parties, Alexander Ruzkoj, the then Vice-President of the Russian Federation did openly favoured the secession of Crimea back to Russia.[117]

Again, some Russian political elites had always refused to accept Ukraine independence and the 'loss' of Crimea. In 1992, Vladimir Zhirinovsky, a Russian politician and political activist, compared the situation of Crimea with Kuwait. He argued that both should be returned to their 'legal owners.' Also in 1993 Sergej Stankevich advised Western diplomats not to set up embassies in Kiev, as they would soon be degraded to mere consulates.[118] For some time in the past, the Russian borders with Ukraine were not regarded as State borders[119] and the disposition of the Black Sea Fleet,[120] the question of double citizenship; the division of international property and obligations of the USSR remained controversial topics. In fact, a nationalistic sentiment of "oneness" which Russians' had over Ukrainians was evident from a nationwide poll conducted in Russia in the fall of 1997 by the Center for the Study of Public Opinion. The opinion poll suggested that 56 percent of respondents felt that Ukrainians and Russians were "one people."[121] President Yeltsin echoed the same sentiment in an address to his countrymen and countrywomen in November of that year thus: "[i]t is impossible to tear from our

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[112] ibid 56.
[113] Karina V. Korostelina, 'Identity, autonomy and conflict in republics of Russia and Ukraine' (2008) 41(1) *Communist and Post-Communist Studies* 79, 82.
[114] ibid 82.
[115] Jeffrey Mankoff, 'Russia's Latest Land Grab – How Putin won Crimea and lost Ukraine' (2014) 93 *Foreign Affairs* 60, 62.
[116] Wydra (n 2) 115.
[117] ibid 115.
[118] ibid 115.
[119] Roman Solchanyk, 'Ukraine, Russia, and the CIS' (1996) 20 *Harvard Ukrainian Studies* 19, 20.
[120] Discussions on this were postponed for twenty years by the Ukrainian-Russian agreements concluded on 28 May 1997. *See* Solchanyk (n 119) 19-20.
[121] ibid 20.

hearts that Ukrainians are our own people. That is our destiny – our common destiny."[122] These nationalistic feelings contributed to why it took two years to ratify the 'big friendship-treaty' between Ukraine and Russia. Russia especially regarded this treaty as treason towards Russia's interests.[123] President Putin's statement that the ceding of Crimea was unconstitutional and that Russia acquiesced to it in order to maintain good neighbourliness with Ukraine unpacked existing political tensions[124] which climaxed with the removal of President Janukovich from office in February 2014. Whether these expressions of nationalist ideologies from political elites are proof of Russia's "persistent objection" to the illegal ceding of Crimea to Ukraine in 1954 is left for Publicists to decode. But one could equally ask: was Russia genuinely objecting to ceding of Crimea while entering into series of agreement to respect its territorial integrity? The answer is probably yes and no. Yes, if the ICJ "non-documented evidence"[125] as stated in *El Salvador/Honduras case* would be taken into account. It may be argued that given the strong nationalist feeling of "oneness", Russia acquiesced possibly to prevent tensed political situation from degenerating to humanitarian crisis, provided other non-documented agreements are complied with.

However, Shaw argues that the essential difference between internal borders and international boundaries lies in the fact that the latter are established in order to mark the limits of sovereignty and territorial jurisdiction as between different international persons. In this regard, international boundaries fix permanent lines, both geographically and legally, with full effect within the international system, and can only be changed through the consent of the relevant states.[126] The ICJ was unequivocal on this while adjudicating territorial dispute in Libya/Chad case,[127] which was concluded under Franco-Libyan Treaty of 1955. The Court held: "the establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands …."[128] In other words, treaty binds contracting parties irrespective of the nature and status of the treaty itself. The Court further emphasized: "a boundary established by a treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary."[129]

On that basis, it would be unconscionable for Russia to invoke change in factual situation to renege from its treaty obligations.[130] It is equally difficult for Russia to navigate away from its treaty obligations based on the principle of *rebus sic stantibus* for such is prohibited where the treaty establishes a boundary.[131] However, much depends on

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[122] ibid 21.
[123] Wydra (n 2) 115.
[124] Mary Elise Sarotte, 'A Broken Promise? What the West Really Told Moscow about NATO Expansion' (2014) 93 *Foreign Affairs* 90; Anders Aslund, 'Crimea and Punishment' (2010) 177 *Foreign Policy* 69.
[125] *Land, Island and Maritime Frontier Dispute* (El Salvador v Honduras: Nicaragua Intervening) Judgment ICJ Reports [1992] p. 351 para 45 [hereinafter *El Salvador/Honduras case*].
[126] Malcolm N Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8(3) *European Journal of International Law* 478, 490.
[127] *Territorial Dispute* (Libyan Arab Jamahiriya/Chad) Judgment ICJ Report [1994] p.6.
[128] ibid para 72.
[129] ibid para 73.
[130] Andrew D Sorokowski, 'Treaty between the Ukrainian Soviet Socialist Republic and the Russian Soviet Federative Socialist Republic' 1996 20 *Harvard Ukrainian Studies* 291 [art 6] [hereinafter Ukraine-Russia Treaty 1990]; Andrew D Sorokowski, 'Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation' (1996) 20 *Harvard Ukrainian Studies* 319 [art 3] [hereinafter Ukraine-Russia Friendship Treaty 1997].
[131] *Vienna Convention on the Law of Treaties* (n 81) [art 62].

how one evaluates the status of Ukraine *vis-à-vis* the critical date.[132] In Jennings' view: "the classical modes of acquisition of territory assume some activity upon the part of an existing international person, that is to say a State."[133] Considering that Ukraine was not a subject at the material time, to attribute subject status to it, *de jure* is improper. Whatever internal arrangement Russia made with Ukraine is purely domestic and for administrative convenience. This might sound persuasive but some scholars argue that "an entity not yet recognized in law can nevertheless possess a right, although that right is unenforceable and, therefore, imperfect."[134] The fact remains that until a new State is actually created, there is in law no international subject as such capable of taking title.[135] Be that as it may, Article 11 of the Vienna Convention on Succession of States in Respect of Treaties 1978 provides that a succession of states does not as such affect a boundary established by a treaty.[136] Suffice that Ukraine's claim over Crimea may not be located at the "gentlemen agreement" of 1954 concluded over a cup of coffee but on a substantive treaty following its independence. Moreover, Article 72 of the 1977 USSR Constitution allows "Union Republics" the right to freely secede from USSR. The principle of *uti possidetis* must have validated the constitutional arrangement at independence.

The doctrine of uti possidetis in international law

Stated simply, *uti possidetis* provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence.[137] In its Roman law origin, *uti possidetis* "designated an interdict of the Praetor, by which the disturbance of the existing state of possession of immovables, as between two individuals was forbidden."[138] Niebuhr, whose view is widely accepted, traces the origin further in the measures resorted to, for protecting the occupants of public lands, who, although could not show an original title and therefore could not maintain an action founded on ownership, received in their occupancy the recognition and sanction of the State.[139] This aligns more with the prescriptive mode of acquisition of title in which the possessor, having manifested effective control, acquired *dominium*. *Dominium* (dominion) is acquired by the combination of the elements of facts and intention.[140] Hence, the law preserves the *status quo* of an existing situation, irrespective of how it arose – *Uti possidetis, ita possideatis* (as you possess, so may you possess).[141] However, the principle does not apply when the possessor obtained by force, or clandestinely, or by permission.[142]

The importation of the concept in the international arena is not without some difficulty.

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[132] For example, ICJ observes that the critical date could be either from adjudication or from a boundary treaty. See *El Salvador/Honduras case* (n 125) para 67; *Minquiers and Ecrehos* (France/United Kingdom) ICJ Pleadings Oral Arguments Documents 69 (18 IX 53) 61 [per Fitzmaurice]; L F E Goldie, 'The Critical Date' (1963) 12(4) *International and Comparative Law Quarterly* 1251.
[133] Starke (n 67) 413.
[134] Nathaniel Berman, 'Sovereignty in Abeyance: Self-Determination and International Law' (1989) 7(1) *Wisconsin International Law Journal* 51, 82.
[135] Starke (n 67) 413.
[136] Shaw 1977 (n 126) 490.
[137] Ratner (n 27) 590.
[138] John Bassett Moore, *Costa Rica-Panama Arbitration Memorandum on Uti Possidetis*, (Rosslyn, VA., U.S.A, 1913) 5.
[139] ibid 5-6.
[140] Phillimore (16) 327.
[141] Moore (n 138) 8; Shaw 1997 (n 126) 492.
[142] Moore (n 138) 8.

As Bluntschli observed, it was lifted not only from possession under private law to territorial sovereignty but was also moved from mere recognition of possession to a definitive status.[143] During colonization, it was deployed to denote actual possession in the context of resolving disputes between expanding powers. Ultimately, it emerged in Latin America as a concept reinforcing the control of the local authorities as against claimants on the basis of constructive, rather than actual, possession. When the principle was invoked in Latin America, it was meant to forestall any renewal of European colonization on the basis that parts of the continent constituted *terra nullius* and were open to acquisition by effective occupation. As mutation progressed, *uti possidetis* became a shield to prevent boundary conflicts as between the successor states of the Spanish Empire.[144] As Shaw says, "it is beyond question that the principle of *uti possidetis* became established as a binding norm of international law with regard to Latin America … *as evident* in many national constitutions."[145]

Uti possidetis was adopted in Africa during the decolonization period to maintain existing borders, no matter how artificially calibrated by the colonial masters.[146] Both the ICJ Chamber and the Badinter Commission have called *uti possidetis* a "general principle."[147] Anne Peters has observed that *uti possidetis* cannot be applied as a "general principle" in the sense enshrined in Article 38 (1)(c) of the ICJ Statute because it has not been transferred from domestic to international law.[148] Its normative force can be explicit or implicit; explicit when it is treaty based[149] or implicit if it could be deciphered from the simple act of applying the principle.[150] Aside from these, the parties/States concerned could adopt other principles such as equity[151] as the basis of a settlement of border dispute.[152] In some boundary disputes where the treaty referred to *uti possidetis*, the issue was whether it meant *uti possidetis juris* or *uti possidetis de facto.*[153]

Hence, there is no general applicability of the principle if not expressly agreed upon. It seems a subversion of justice to apply it across-the-board simply because the deed is done; otherwise, needlessly investigating the legality of Russia's annexation of Crimea. Chigara argues that violators of human rights should be made to account for their

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143 ibid 8.
144 Shaw 1997 (n 126) 492.
145 ibid 493 (emphasis added).
146 See *Resolutions adopted by the first ordinary session of the Assembly of Heads of State and Government held in Cairo, UAR from 17 to 21July 1964* 'Border disputes among African States', AHG/Res. 16(1) available at: <http://www.au.int/en/sites/default/files/ASSEMBLY_EN_17_21_JULY_1964_ASSEMBLY_HEADS_STATE_GOVERNMENT_FIRST_ORDINARY_SESSION.pdf> accessed 20 November 2014; Charter of the Organization of African Unity, 479 U.N.T.S. 39 (*entered into force* Sept. 13, 1963) principle 3, para 3.
147 *Frontier Dispute (BurkinaFaso/Mali)* Judgment, I.C.J. Reports 1986, p. 554, para 20 [hereinafter *BurkinaFaso/Mali case*]; Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3(1) *European Journal of International Law* 178 (opinion No. 3 para 3, third principle).
148 Anne Peters, 'The Principle of *Uti Possidetis Juris* How Relevant is it for Issues of Secession?' in Walter and others (eds) (n 34) 99; Peter Radan, 'The Borders of a Future Independent Quebec: Does the Principle of Uti Possidetis Juris Apply?' (1997) 1997 *Australian International Law Journal* 200, 203.
149Radan (n 148) 203.
150 Walter and others (eds) (n 34) 100.
151 *Bolivia-Paraguay Treaty of Peace, Friendship and Boundaries, signed at Buenos Aires, July 21, 1938, ratification exchanged August 29, 1938*, Article 2.
152 *See* Pellet (n 147) opinion No. 2 para 1; Crawford, *Brownlie's Principles of Public International Law* (n 55) 239.
153*El Salvador/Honduras case* (n 125) para 310; Radan (n 148) 203.

misdeeds.[154] Human rights that are proprietary have enduring legal consequence. "Positive international human rights law ascribes inalienability to these rights because they inhere to the status of being human."[155] For instance, individuals are entitled to maintain ontological links with their ancestral heritage which arbitral application of *uti possidetis* might sever. Superficial partitioning/appropriation of a people's proprietary right is non-concomitant with Article 5 of the *Vienna Declaration*.[156] Besides, some basic rights "cannot be appropriated, obliterated or expunged by government or anyone else."[157]

1. Uti possidetis as a safeguard to Ukrainian Sovereignty

The contemporary relevance of *uti possidetis* is evidenced by the states' practice during the dissolution of the former Soviet Union, Yugoslavia and Czechoslovakia.[158] A similar language was used in the drafting of Article 6 of the Ukraine-Russian Federation Treaty 1990,[159] and Article 5 of the Agreement on the Creation of the Commonwealth of Independent States.[160] In the latter document, acknowledgement was made that the Republic of Belarus, the Russian Federation (RSFSR), and Ukraine were founding states of the Union of Soviet Socialist Republics by virtue of the Treaty of Union signed in 1922.[161] In other words, the territorial sovereignty of Ukraine was never in issue. To better safeguard its territory, Ukraine made some reservations while signing the CIS Agreement.[162]

Ukraine declared its independence on 24 August 1991 and conducted a successful nationwide referendum on 1 December 1991. The outcome of that referendum was recognized by Poland on 2 December 1991. Other Western countries followed as well. By December 1996 Ukraine had delimited its frontiers with four of her six neighbours: namely, Belarus, Poland, Hungary, and Slovakia.[163] This was not so with Romania, Russia and Moldova, the first two refusing for a long time even to negotiate the issue of demarcation and delimitation of common borders.[164]

A new leaf in Ukrainian-Russian relations was turned with the "Declaration of the Principles of Inter-State Relations between Ukraine and the RSFSR based on the Declarations of State Sovereignty."[165] This document was signed by the representatives of the Ukrainian parliamentary opposition group called the People's Council (Narodna Rada) and their Russian counterparts from the Democratic Russia's bloc. Among others,

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[154] Ben Chigara, *Amnesty in International Law: the legality under international law of National Amnesty Laws.* (UK, Pearson Education Limited 2002) 163.

[155] ibid 163; *Vienna Declaration and Programme of Action* (n 100) section 1.2; *Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994) para 2.

[156] *Vienna Declaration of and Programme of Action* (n 100) [art 5].

[157] Chigara 2002 (n 154) 163.

[158] *Charter of the Commonwealth of Independent States* 34 ILM 1279, 1283 (1995) [art 3]; see also U.N.S.C. Res. 713 (1991) preambular paragraph 8; Ratner (n 27) 590.

[159] Ukraine-Russia Treaty 1990 (n 130) [art 6].

[160] *Agreement Establishing the Commonwealth of Independent States,* Signed by the heads of state of Belarus, the Russian Federation, and Ukraine on December 8, 1991 [art 5] [hereinafter CIS Agreement].

[161] ibid, opening statement.

[162] Ukraine made some reservations to protect its sovereignty, see Borys Tarasyuk, 'Ukraine in the World' in 'Ukraine in the world: Studies in the International Relations and Security Structure of a Newly Independent State' (1996) 20 *Harvard Ukrainian Studies* 9, 13-14.

[163] ibid 12.

[164] ibid 12

[165] Solchanyk (n 119) 24.

the document affirmed: (1) the unconditional recognition of Ukraine and Russia as subjects of international law; (2) the "sovereign equality" of the two republics; (3) the principle of noninterference in each other's internal affairs and renunciation of force in their dealings; (4) the inviolability of existing state borders between the two republics and the renunciation of any and all territorial claims.[166] Article 6 of Ukraine-Russia Friendship Treaty obliges the Contracting Parties to desist from participation in, or support of, any actions whatsoever directed against the other High Contracting Party, and obligates itself not to enter into any agreements with third countries directed against the other Party.[167] Article 3 protects territorial integrity and prohibits violation of borders.[168] The presumption is that *uti possidetis* has confirmed the existing territorial borders.

In the *Burkina Faso v Mali case*, *uti possidetis* was confirmed "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs."[169] This tends to universalize its applicability, although the ICJ's judgment is polarized. On the one hand, it contains sentences which seem to narrow the application of *uti possidetis* solely to decolonization; on the other hand, it expands the scope beyond the context of decolonization.[170] The Badinter Arbitration Committee tamed the inherent ambiguity by observing that *uti possidetis* applies beyond the context of decolonization. The Committee held: "the right to self-determination must not involve changes to existing frontiers."[171] *Uti possidetis* freezes the borders, prior independence and territorial integrity steps in to protect the borders once independence is secured.[172] This one-mode-file-jacketing approach fails to take into consideration the possibility of multiple internal borders contingent on historical transformation. The case of Abyei in South Sudan is a good example. The reason offered by the ICJ in favour of *uti possidetis* is to "prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power."[173] It must, at least be conceded that the mere presence of *uti possidetis* in constitutions, bilateral treaties (including arbitration *compromis*) or Resolution 1514[174] may not be sufficient to demonstrate *opinio juris*. *Uti possidetis* may not even apply in all factual cases of decolonization.[175]

To sum up, it could be said that Article 5 of the CIS Agreement, the Alma Ata Declaration of 21 December 1991, which provides that states should recognise and respect each other's territorial integrity and the inviolability of the existing borders, and Article 6 of Ukraine-Russia Treaty 1990 are intended to assert and reinforce *uti possidetis* doctrines. It could be inferred that the borders to be protected evolved as international borders from the former Republics of the USSR. Besides, the European Guidelines on States' Recognition[176], which provided for a common policy on recognition, requires, *inter alia,* "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement."[177]

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[166] ibid 24.
[167] Ukraine-Russia Friendship Treaty 1997 (n 130) [art 6].
[168] ibid [art 3].
[169] *BurkinaFaso/Mali case* (n 146) 20.
[170] ibid paras 20 and 23.
[171] Pellet (n 147) 180.
[172] Shaw 1997 (n 126) 495.
[173] *BurkinaFaso/Mali case* (n 146) 20.
[174] UNGA Res. 1514 (XV) (1960) [art 6].
[175] Shaw 1997 (n 126) 496.
[176] See generally EC Declaration on States Recognition (n 46).
[177] ibid para 7; Shaw 1997 (n 126) 499.

2. Does uti possidetis subvert Crimeans' right to self-determination?

As a matter of principle, *uti possidetis* does not preclude endogenous disintegration and is totally unhindered by article 2(4)[178] of the UN Charter. This was the situation with the dissolution of Yugoslavia and Czechoslovakia; although it was termed *consensual* because of the unilateral declarations by all interested sides.[179] During the period of dissolution, the seceding republics sought maintenance of their federal borders, but Serbia contested these claims, asserting that Yugoslavia's internal borders were merely administrative and never drawn with the possibility in mind that they could become international borders.

Santiago Torres Bernardez described its consensual nature as "contracting-in" by consent of the parties, which effectuates correlatively with the principle of self-determination.[180] Another held view was that *uti possidetis* as applied in Yugoslavia was purely a political device, beyond the jurisdiction of international law. Whether as consensual or as a political device, there is a strong opinion that *uti possidetis* may not interdict a right to self-determination. However, the Badinter's approximation of the ICJ's position in *Frontier Dispute Case* and its application to the dissolution of Yugoslavia is hugely criticized. The Badinter Commission was accused of explicitly deleting references to the context of decolonization when it quoted from the *Frontier Dispute Case* in support of its position that *uti possidetis juris* applies to cases of secession.[181] This may not be the whole truth for even in the said case, the ICJ seems to conflate colonization with decolonization in paragraphs 20 and 23 of its judgment; although Anne Peters disagrees that such amounts to an unequivocal answer.[182] The guiding principle is Pellet's observation that though states are prohibited from acquiring a territory by force, they might freely decide to a modification of their frontiers by agreement.[183]

The application of *uti possidetis* is subject to factual situations [184] and since it is not a peremptory norm, can be derogated from.[185] In fact, it is no more than a mere policy decision adopted to avoid conflicts during decolonization;[186] its deployment in the context of decolonization notwithstanding.[187] Its applicability beyond the colonial context has equally been tested in the *Kosovo Advisory Opinion*. Although the ICJ never considered the principle of *uti possidetis* per se, 8 states out of the 37 states that filed written statements commented on it. Of the eight states that mentioned it, only five (Ireland,[188] Romania[189], Cyprus[190], Serbia[191], and the Netherlands) explicitly or implicitly

[178] A teleological view is that Article 2(4) is aimed at prohibiting war in its classical sense, meaning use of force for the purpose of territorial acquisition. See Martha Brenfors and Malene Maxe Petersen 'The Legality of Unilateral Humanitarian Intervention – A Defence' (2000) 69 *Nordic Journal of International Law* 449, 471.

[179] Anne Peters, 'The Principle of *Uti Possidetis Juris* How Relevant is it for Issues of Secession?' in Walter and others (eds) (n 34) 105.

[180] ibid 105.

[181]Radan (n 148) 203.

[182] Anne Peters, 'The Principle of *Uti Possidetis Juris* How Relevant is it for Issues of Secession?' in Walter and others (eds) (n 34) 111.

[183]Pellet (n 171) 180.

[184]Kohen (n 49) 4.

[185]Crawford, *Brownlie's Principles of Public International Law* (n 55) 239.

[186]Ratner (n 27) 598.

[187] El Salvador/Honduras case (n 125) para 41.

[188] Written Statement of the Government of Ireland (17 April 2009) para 20 available at: <http://www.icj-cij.org/docket/files/141/15662.pdf> accessed 1 November 2014.

[189] Written Statement of Romania (14 April 2009) para 87 available at: <http://www.icj-cij.org/docket/files/141/15616.pdf> accessed 1 November 2014.

considered *uti possidetis* to be applicable to the Kosovo case. The Netherlands noted that *uti possidetis* and secession are not mutually exclusive.[192] The United States and Finland agreed with the findings of the *ICJ Advisory Opinion* in Kosovo. The United States maintained that as a general rule, international law governs the relations between States and does not apply to non-state actors, except those found in international humanitarian law.[193] Events leading to the creation of a new state reside within domestic jurisdiction. Finland noted a caveat which must be prioritized when analyzing issues bordering on territorial integrity and self-determination vis-à-vis the applicability of *uti possidetis*; namely, normal and abnormal situations. In abnormal situations, such as rupture, situations of revolution, war, alien subjugation or the absence of meaningful prospects for the functioning of internal self-determination, "possession" becomes extinct. The principle of *uti possidetis* ceases to function since the basic contention of "who possesses" or "which boundary" forms part of *ratione materiae* of the controversy.[194]

As seen, apart from Serbia, the chief mourner in the funeral, only Cyprus found Kosovo's unilateral secession a violation of *uti possidetis*. *Opinio juris* weighs in favors of secession as suggested by the states' attitude. Although 37 out of the 193[195] current members of the UN are not impressive, it merely alludes to its customary evolutionary trend. Therefore, the written statements by states in the Kosovo Advisory Proceedings may not evidence state practice and *opinio juris* for the following reasons: (1) state practice should be uniform, widespread and continuous. This threshold is not met;[196] unless silence or inaction by other affected member states is construed as acquiescence to that practice as noted by the ICJ in the *Fisheries Case*.[197] However, the criterion of widespreadness could be overlooked if "specially affected"[198] states' conditions are met. In the Kosovo scenario, that criterion rests with states that have experienced secessionist movements or other challenges to their territorial integrity. Unfortunately Canada and Nigeria did not make submissions.[199] Equally difficult to establish is that the time lag, 2008-2011 is enough to prove the required degree of continuity.[200] Suffice it to say that *uti possidetis* may not preclude Crimeans' legitimate secession bid if it is totally endogenous; provided they qualify as a "people" and/or *Reference re Secession of Quebec*'s conditions[201] are present and without prejudice to *sui generis*[202] observations made in the

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190 Written Statement of the Republic of Cyprus (3 April 2009) A.G. File No. 37/1969/Y.4/8, paras 86, 118, 156 available at: <http://www.icj-cij.org/docket/files/141/15609.pdf> accessed 1 November 2014.

191 Written Statement of the Republic of Serbia (17 April 2009) paras 499, 575, 577, available at: <http://www.icj-cij.org/docket/files/141/15642.pdf> accessed 1 November 2014.

192 Written Statement of the Kingdom of the Netherlands (17 April 2009) para 3.8 available at: <http://www.icj-cij.org/docket/files/141/15642.pdf> accessed 1 November 2014.

193 Written Statements of the United States of America (17 April 2009) p. 51 available at: <http://www.icj-cij.org/docket/files/141/15640.pdf> accessed 1 November 2014.

194 Written Statement of Finland (16 April 2009) para. 9 available at: <http://www.icj-cij.org/docket/files/141/15630.pdf> accessed 1 November 2014.

195 As at the time of writing in November 2014.

196 Daniel H. Meester, 'The International Court of Justice's Kosovo Case: Assessing the Current State of International Legal Opinion on Remedial Secession' (2010) 48 *Canadian Yearbook of International Law* 215, 246.

197 *Fisheries Case (United Kingdom v Norway)* Judgment I.C.J. Reports [1951] p. 116 at 139.

198 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* Judgment I.C.J. Reports [1969] p. 3, paras 73-74.

199Meester (n 196) 248.

200 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Judgment I.C.J. Reports [1986] p. 14, para 186 [hereinafter Nicaragua v United States of America]; Meester (n 196) 247.

201Meester (n 196) 243; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion* 2010 [hereinafter *ICJ Advisory Opinion on Kosovo*]. See in particular, Judge Yusuf

Kosovo Advisory Opinion or its attributive legitimacy premised on the Rambouillet Accord.[203] As already observed, international law governs relations between states. Therefore, the principle of *uti possidetis* prohibits only exogenous disintegration.

Part Three

Despite an outcry among the member states that the "reunification"[204] of Russia with Crimea violates international law,[205] Russia premises its actions on self-determination and the protection of civilians.[206] Equally, President Putin asserted that the referendum conducted was in "full compliance with democratic procedures and international norms." Two issues will be looked at: (1) the Russians/Crimeans' right to remedial external self-determination under international and domestic laws; (2) state practice towards a third party/state's role (intervention) towards facilitation of a people's quest for secession on humanitarian grounds. This part will focus attention on external self-determination as a remedial right. The following issues considered important will not be discussed in this paper for the simple reason that they have been extensively discussed elsewhere: the evolution of the principle of self-determination,[207] controversy regarding its meaning and content,[208] and the addressee of this right.[209] In our discussions, external self-determination is used synonymously with secession[210]

The scope of the application of the right to self-determination as a remedial right

The right to self-determination is vigorously promoted and widely accepted as a contemporary norm of international law.[211] The U.N. Charter[212] and human rights

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Separate Opinion para 11; see also, Judge Cancado Trinidade Separate Opinion para 175; Written Statement of Germany (15 April 2009) available at: <http://www.icj-cij.org/docket/files/141/15624.pdf> accessed 2 November 2014.

[202] See generally *ICJ Advisory Opinion on Kosovo* (n 200) Written Statements of: France, the Republic of Latvia, the Grand Duchy of Luxembourg, and Maldives, available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&code=kos&p3=1> accessed 11 November 2014.

[203] Written Statement of the United States of America (n 193) 64.

[204] Term used by President Putin in his address, see President Putin's Address (n 1).

[205] *UN Resolution on Crimea* (n 60).

[206] Christian Walter, 'Postscript: Self-determination, Secession, and the Crimean Crisis 2014' in Walter and others (eds) (n 34) 293.

[207] Daniel Thurer and Thomas Burri, 'Self-determination' in *Max Planck Encyclopedia of Public International Law,* available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873> accessed 3 November 2014.

[208] Mitchell A. Hill, 'What the principle of self-determination means today' (1995) 1 *ILSA Journal International and Comparative Law* 119, 120.

[209] Joshua Castellino, 'International Law and Self-determination: Peoples, Indigenous Peoples, and Minorities' in Walter and others (eds) (n 34) 32-44; Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43(2) *International and Comparative Law Quarterly* 241, 241-42; See also 'The Right to Self Determination: Implementation of United Nations Resolutions' Study prepared by Hector Gros Espiell, Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities. U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) para 43 [hereinafter Gros Espiell Study].

[210] There is, at present no legal definition of secession. Secession is derived from the Latin terms "*se*" meaning "apart" and "*cedere*" meaning "to go". For our purposes, it will be defined as the withdrawal of territory and sovereignty from part of an existing state to create a new state. See Glen Anderson (n 69) 346.

[211] Hurst Hannum, *Autonomy, Sovereignty, and Self-determination*, (Revised Edition, Philadelphia, University of Pennsylvania Press 1990) 27.

treaty[213] regime strongly protect the right to self-determination.[214] Most importantly, self-determination became "a legal norm with its expression as the first human right in the Covenant of Human Rights of 1966." [215] Although Castellino observed that the proprietary element of self-determination was not made explicit in the two 1966 Covenants[216], it is much easier to imply that into those instruments, judging from the spirit behind the 1960 U.N.G.A. Resolution 1514 (XV). Paragraph 1 denounced "[t]he subjection of peoples to alien subjugation, domination and exploitation" and noted that it "constitutes a denial of fundamental human rights, contrary to the Charter of the United Nations…."[217] This view must be examined in conjunction with Article 5 of the *Vienna Declaration and Programme of Action*.[218] Within this frame of reference, the obligation to transmit information under Article 73(e) of the Charter, once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, makes better sense.[219] In addition, the U.N.G.A. Res. 1541 (XV) has three options available for a non-self-governing territory, one of which is "integration with an independent state."[220] This provision is however limited to the decolonization context.

The most widely accepted position on remedial secession can be found in the Canadian Supreme Court's decision on the possible secession of Quebec. The Court observed that secession is feasible in the face of colonial and oppressed peoples. [221] Before this judgment, the Commission of Rapporteurs in the *Aaland Islands case* found that secession may be available as a "last resort when the State lacks either the will or the power to enact and apply just and effective guarantees"[222] of minority rights. This "last resort" paradigm may have informed the inclusion of a "safeguard clause" in later instruments thus:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour*.[223]

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[212] U.N. Charter [arts 1(2), 55, 73 and 76(b)].

[213] International Covenant on Civil and Political Rights, 23 March 1976 [art 1] [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, 3 January 1976 [art 1] [hereinafter ICESCR]; U.N.G.A. Res. 1514 (XV) 14 December 1960; The Final Act of the Conference on Security and Cooperation in Europe, August 1, 1975, 14 I.L.M. 1292 [art IV] part VIII [hereinafter Helsinki Final Act]; U.N. General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly* 2 October 2007, U.N. Doc. A/RES/61/295 [art 3] available at: <http://www.refworld.org/docid/471355a82.html> accessed 16 May 2014.

[214] For an in-depth analysis of the development of law on self-determination, see Edward A. Laing, 'The Norm of Self-Determination, 1941-1991' (1992) 22(2) *California Western International Law Journal* 209.

[215]Walter and others (eds) (n 34) 30.

[216]Walter and others (eds) (n 34) 30.

[217] U.N.G.A. Res. 1514 (XV) (1960) para 1.

[218] *Vienna Declaration and Programme of Action* (n 100) [art 5].

[219] U.N.G.A. Res. 1541 (n 6) Principle V.

[220] U.N.G.A. Res. 1541 (n 6) Principle VI(c).

[221] *Reference re Secession of Quebec* (n 100) para 131 et seq.

[222] *League of Nations, The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, Doc.B7.21/68/106 (1921) [hereinafter 1921 Aaland Islands Report] available at: <http://www.ilsa.org/jessup/jessup10/basicmats/aaland2.pdf> accessed 16 May 2014.

[223]U.N.G.A. Res. 2625 (n 100) para 7 (emphasis added); A similar provision was made in Vienna Convention in the following manner "without distinction of any kind", see *Vienna Declaration and Programme of Action* (n 100) paragraph I(2).

Theorists have located the rationale for remedial secession in group autonomy. A group political autonomy comes as a response to a state's failure to discharge its requisite political functions.[224] This is implied in the Court's observation in *Reference re Secession of Quebec* thus: "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession."[225] Although the Court's statement that "it remains unclear whether this ... proposition actually reflects an established international law standard"[226] left the issue of remedial secession unresolved, the recent written statements submitted by states in the Kosovo Advisory Opinion confirmed incremental development of international law in this regard. As shall be seen, state practice is repugnant in accepting "putative states" into the membership of the United Nations without, at least, the tacit consent of the parent state. Scholars are of the view that since 1945 no state has been created unilaterally through the mere wishes of the people.[227] This does not rule out its possible future occurrence considering that the Security Council in the past has authorized humanitarian interventions.[228]

Self-determination offers a people the right to pilot its affairs without external interference.[229] Cassese calls this the right to authentic self-government.[230] Despite initial attempts to limit "self-government" to internal self-determination,[231] or the previously canvassed idea that self-determination was not part of positive international law,[232] it is becoming settled law that, at least, self-determination does not exclude secession.[233] External self-determination, once restricted to the context of decolonization is gradually becoming available to "peoples" wherever they are found. Crawford noted that international law accepts political realities once the independence of the seceding entity was firmly established and in relation to the territory effectively controlled by it.[234] To elucidate, attention needs to be drawn to some non-colonial recent secession cases such as the case of South Sudan.

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[224]Weimer (n 7) 637.

[225] *Reference re Secession of Quebec* (n 100) para 134.

[226] *Reference re Secession of Quebec* (n 100) para 135.

[227] James Crawford, *The Creation of States in International Law* (Second edition, Oxford: Clarendon Press, 2006) 390; Cassese 1995 (n 51) 122; Meester (n 196) 220.

[228] See the following U.N.S.C. Resolutions: 83 (27 June 1950), 84 (7 July 1950); 678 (29 November 1990; NATO air campaign against Serbia leading to Resolution 1244 (10 June 1999).

[229] Stephen May, Tariq Modood, Judith Squires (eds.), *Ethnicity, Nationality and Minority Rights,* (United Kingdom, Cambridge University Press 2004), p.181.

[230]Cassese 1995 (n 51) 101.

[231] Cassese 1995 (n 51) 42; Hannum (n 211) 33; Robert T. Coulter, 'The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples' (2010) 15(1) *UCLA Journal of International Law and Foreign Affairs* 1, 19; UN Economic & Social Council [ECOSOC], 'Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32', U.N. Doc. E/CN.4/2001/85 (February 6, 2001) paras 62-109; ECOSOC, 'Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32', U.N. Doc. E/CN.4/2002/98 (March 6, 2002) para 20.

[232]*League of Nations Official Journal*, Supplement No. 3, October 1920, at 5 [hereinafter 1920 Aaland Island Report]; Philip Marshall Brown, 'Self-Determination in Central Europe' (1920) 14 *American Journal of International Law* 235-239.

[233] Patrick Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38(4) *International and Comparative Law Quarterly* 867, 872; U.N.G.A. Res. 1541 (n 6) Principle VI.

[234]Crawford 1998 (n 96) 87.

Drawing inference from South Sudan?

The situation that led to the secession of South Sudan finds expression in Brilmayer's proposition that a "historical grievance"[235] is the "most intuitively appealing and direct"[236] way to establish a territorial claim. This falls within Buchanan's classification of right to secession based on the argument from rectificatory justice and the argument from discriminatory redistribution.[237] Rectificatory justice theory posits: "a region has a right to secede if it was unjustly incorporated into the larger unit from which its members wish to secede."[238] On this ground, the secession of the Baltic States could be justified.[239] Thus, in the absence of existing injustice, secession that will benefit the seceding group may be retributive injustice.[240] Discriminatory redistribution theory is on course when the state strategically "implements taxation schemes or regulatory policies or economic programs that systematically work to the disadvantage of some groups, while benefitting others, in morally arbitrary ways." [241] In fact, solidity of the state's territorial wall becomes exceedingly porous at the instance of systematic violations of fundamental human rights. The incremental development of custom optimizes human rights as a *primus inter pares* among *jus cogens* norms.

Prior the Turko-Egyptian invasion of Sudan in 1821, its' territorial boundaries (before secession of South Sudan)[242] were non-existent. Sudan consisted of Kingdoms and tribal communities without modern forms of government as we have today.[243] The Turko-Egyptian occupation lasted for a period of sixty years. The Mahdist Administration took over in 1883 till 1898. But from 1892, the Belgians captured Western Equatoria up to Mongalla and the Lado Enclave. At the same time, France occupied large parts of South Sudan (Bahr el Ghazal, Western Upper Nile up to Fashoda) and by 1896 they had established effective control in these areas. The French attempt to annex South Sudan to the French territories in West Africa resulted in international conflict between Britain and France over South Sudan commonly known as the Fashoda Incident.[244] Sudan was re-captured by joint British and Egyptian forces in 1898, resulting in the signing of the Condominium Agreement between the British and the Egyptian governments to administer the Sudan in its present boundaries. In 1896 and in 1899, Belgium and France respectively, ceded the parts of South Sudan under their control to Britain. During this time, Britain created separate administrative policies for South and North Sudan. These policies treated North and South Sudan as two separate entities.[245] It was said that the

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[235] Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16(1) *Yale Journal of International Law* 177, 189.
[236] Daniel Philpott, 'In Defense of Self-Determination' (1995) 105(2) *Ethics* 352, 376.
[237] Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview 1991) 40; Allen Buchanan, 'Toward a Theory of Secession' (1991) 101(2) *Ethics* 322, 330.
[238]Buchanan 'Toward a Theory of Secession' (n 237) 329.
[239] Buchanan Allen, 'Theories of Secession' (1997) 26(1) *Philosophy and Public Affairs* 31, 37.
[240] Gauthier David, 'Breaking Up: An Essay on Secession' (1994) 24(3) *Canadian Journal of Philosophy* 357, 366.
[241]Buchanan 'Toward a Theory of Secession' (n 237) 330.
[242] The deadlock over the permanent status of the Abyei boundaries notwithstanding. See Report of the Secretary-General on the situation in Abyei, U.N. Doc. S/2014/709, 30 September 2014.
[243] Riek Machar Teny-Dhurgon, 'South Sudan: A History of Political Domination - A Case of Self-Determination' (1995) *University Of Pennsylvania - African Studies Center*, available at: <http://www.africa.upenn.edu/Hornet/sd_machar.html> accessed 5 November 2014.
[244]Teny-Dhurgon (n 243).
[245]Teny-Dhurgon (n 243); Salman M. A. Salman, 'South Sudan Road to Independence: Broken Promises and Lost Opportunities' (2013) 26(2) *Pacific McGeorge Global Business & Development Law Journal* 343, 347.

incongruity in ethnicity and religious beliefs made *raison d'etre* for implementing such a measure cogent. Presumptively both groups are inherently distinct groups.[246]

On January 1, 1956, Sudan gained independence from the joint British and Egyptian governments that administered Sudan.[247] Prior to its independence, the Colonial Masters organized the *Juba Conference* in 1947[248] with a view to uniting the two colonies. The *Juba* outcome was criticized as an arbitrary handover of the South, perceived as politically immature, to its northern counterpart.[249] From then henceforward, the South Sudanese were strategically marginalized in all spheres of life.[250] Underpinning the historical gross discrimination against the South Sudanese was a civil war that lasted till January 9, 2011, when they exercised their right to self-determination.[251] A referendum came as a last resort after failed negotiations and agreements [252] and South Sudan was promptly recognized.[253] On 14 July 2011, South Sudan became a member of the United Nations.[254] Of particular interest is that the July 20, 2002 *Machakos Protocol*, which served as the flagship of the *Comprehensive Peace Agreement*, signed on January 9, 2005[255] (CPA), was explicit in recognizing South Sudan's right to self-determination to be determined through referendum.[256] The referendum was contingent upon CPA that ended more than 20 years of war; at the cost of more than 2 million Southern Sudanese lives.[257] South Sudan independence therefore, falls within the practice of non-colonial state creations.[258]

The legal framework in CPA that effectuated South Sudan Secession

South Sudan's path to independence followed from the legal regime established under the CPA signed on January 9, 2005, between the central government of Sudan and the

[246] R. K. Badal, 'The rise and fall of separatism in Southern Sudan' (1976) 95(301) *African Affairs* 465, 464-468.
[247] Lina Sapienza, 'Classifying the Killings in Sudan as Genocide' (2003) 19(3) *New York Law School Journal of Human Rights* 889, 889; Mollie Zapata, 'Sudan: Independence through Civil Wars, 1956-2005' available at: <http://www.enoughproject.org/blogs/sudan-brief-history-1956> accessed 5 November 2014.
[248] See *Juba Conference*, available at: <http://www.gurtong.net/LinkClick.aspx?fileticket=OBZ%2B7v1SXis%3D&tabid=124> accessed 5 November 2014.
[249]Teny-Dhurgon (n 243).
[250] For a detailed report on this, see Salman M. A. Salman (n 245) 343-414.
[251] See *Results for the Referendum of Southern Sudan*, Southern Sudan Referendum 2011, available at: <http://southernsudan2011.com> accessed 6 November 2014.
[252] For comprehensive negotiations and agreements entered into by the warring parties in an attempt to resolve the Sudan conflict, see 'Key texts and agreements' available at: <http://www.c-r.org/sites/default/files/Accord18_26Keytextsandagreements_2006_ENG.pdf> accessed 6 November 2014.
[253] *South Sudan: World Leaders Welcome New Nation*, BBC NEWS (9 July 2011) available at: <http://www.bbc.co.uk/news/world-africa-14095681> accessed 6 November 2014.
[254] U.N.G.A. Res. 65/308, U.N. Doc. A/RES/65/308 (July 14, 2011).
[255] See *Comprehensive Peace Agreement Between the Government of the Republic of Sudan and the Sudan People's Liberation Army*, January 9, 2005 [hereinafter Comprehensive Peace Agreement] available at: <https://peaceaccords.nd.edu/site_media/media/accords/SudanCPA.pdf> accessed 6 November 2014.
[256] *Machakos Protocol 20 July 2002* [art 1.3] available at: <http://www1.chr.up.ac.za/chr_old/indigenous/documents/Sudan/Legislation/Machakos%20Protocol%202002.pdf> accessed 6 November 2014.
[257]Salman (n 245) 411; Sapienza (n 247) 889; see also the preambular paragraph of *Comprehensive Peace Agreement of 2005* (n 255).
[258] Jure Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (2012) 47(3) *Texas International Law Journal* 541, 543.

Sudan People's Liberation Movement/Sudan People's Liberation Army.[259] The CPA is a summation of six different agreements of regional peace initiatives to end the civil war.[260] The *Machakos Protocol* specified, "… the people of South Sudan have the right to self-determination, *inter alia,* through a referendum to determine their future status."[261] It went further to legislate the procedure, establishing a six-year interim period at the conclusion of which the internationally monitored referendum would take place.[262] To ensure implementation, the parties regulated technical details pertaining to South Sudan's departure from the common state in the case of a yes result.[263] Having done with CPA, Sudan promulgated a new interim constitution that granted substantive autonomy to Southern Sudan.[264] The Constitution further specified that a referendum on the future status of Southern Sudan would be held six months before the end of the six-year interim period under the supervision of an international body.[265] In other words, the secession of South Sudan is purely a domestic affair and consensual. It could be recalled that Pakistan consented to the independence of Bangladesh;[266] the Soviet Union consented to the independence of the Baltic States;[267] Ethiopia consented to the independence of Eritrea;[268] and Indonesia consented to the independence of East Timor.[269]

Whether states should still maintain their territory as immutable, by refusing to grant consent, in the face of terrific human rights violations seems not so. The case of South Sudan has shown that *Reference re Secession of Quebec*'s conditions could be met outside decolonization. And yet the apathy and restraint often exhibited by member states in recognizing emerging states, in deference to Article 2(4) of the UN Charter, in the face of flagrant human rights violations needs to be revisited. One question that may guide further deliberations is: is it not possible to have a legal framework that could trigger "automatic" recognition to legitimize secession once the threshold is reached? The complexities in determining the threshold notwithstanding, it could be advanced that

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259 *Comprehensive Peace Agreement* (n 255).

260 United Nations Mission in Sudan, 'Background to Sudan's Comprehensive Peace Agreement' available at: <http://unmis.unmissions.org/Default.aspx?tabid=515> accessed 6 November 2014.

261 *Machakos Protocol* [art 1.3] in *Comprehensive Peace Agreement* (n 255).

262 ibid [art 2.5];Vidmar (n 258) 551.

263 *Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities*, G.O.S.-S.P.L.M/S.P.L.A., December 31, 2004, in *Comprehensive Peace Agreement* (n 255) [arts 17.8, 20.1, 20.2, 21.2].

264 *Interim National Constitution of the Republic of the Sudan, 2005* [art 2] 6 July 2005, available at: <http://www.refworld.org/docid/4ba749762.html> accessed 6 November 2014.

265 ibid [art 222(1)].

266 Despite recognition by some member states, Bangladesh was not admitted into the membership of the United Nations until Pakistan recognized it on February 22, 1974. Bangladesh was admitted to the United Nations on September 17, 1974, see U.N.G.A. Res. 3203 (XXIX), U.N. Doc. A/RES/3203 (Sept. 17, 1974).

267 Although as argued earlier, the case of the three Baltic States was that of an illegal occupation which does not extinguish territoriality, yet it was after they had been recognized by the Soviet Union on September 6, 1991 that the Security Council considered their applications for membership of the United Nations on September 12, 1991.

268 Although the Eritrean case is complex, given its initial ceding to Italy and a lengthy war that followed afterwards, some scholars had suggested that the Transitional Government of Ethiopia gave its consent which effectuated Eritrea's secession. Eritrea was admitted to the membership of the United Nations on May 28, 1993. See U.N.G.A. Res. 47/230, U.N. Doc. A/RES/47/230 (May 28, 1993); Vidmar (n 258) 546.

269 It was suggested that the case of East Timor was that of decolonization. Nevertheless, the real issue was not independence from Portugal but from Indonesia. By and large, Indonesia consented to East Timor holding a referendum and accepted the results in favor of independence. See, The Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, Articles 1-6, in U.N. Secretary-General's Report on the 'Question of East Timor', U.N. Doc. A/53/951 (May 5, 1999).

non-state actors that have met *Montevideo Convention*[270] criteria and other conditions set out by the regional institutions[271] should be allowed a safe landing in the United Nations. Views expressed by scholars,[272] state practice and *opinio juris* are in concordant with this.[273] The recent written statements submitted by states on the Kosovo Advisory Opinion are evidentiary.[274] The ICJ has reiterated that the right to self-determination was an essential principle of contemporary international law that had *erga omnes* character in the East Timor case.[275]

Application of the right to self-determination to the Crimeans' scenario?

Before examining the remedial aspect of Crimea's claim to secession, let us have a word on the Declaration of Independence of the Autonomous Republic of Crimea. The Crimean parliament adopted a "conditional" Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol by 78 votes to 81 on March 11, 2014.[276] Paragraph 1 of this declaration premised its functionality on "if a decision to become part of Russia is made at the referendum of the 16 March 2014." Although Slovenia and Croatia had based their independence on the clause: "if confederation could not be established in Yugoslavia,"[277] the factual conditions are not the same. As already said, Yugoslavia was classified as a case of dissolution of the Federal Republic.[278] Besides, the 1963 Yugoslav Constitution allows secession, at least in principle. No such provision is made in the Constitution of Ukraine. The Constitution of Ukraine maintains that its borders are indivisible and inviolable.[279] Article 73 states: "[e]xceptionally an all Ukrainian referendum decides questions about a change of territory of Ukraine."[280] Section X of the

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[270] *Montevideo Convention on Rights and Duties of States* [art 1] available at: <http://www.oas.org/juridico/english/treaties/a-40.html> accessed 7 November 2014.

[271] *EC Declaration on States' Recognition* (n 46).

[272] Oppenheim allows intervention when atrocities are committed in such a way that it shocks the conscience of mankind. See Oppenheim (n 55) 442; Antonio Cassese argues that the issues bordering on human rights are of international concern. See Antonio Cassese, '*Ex iniuria ius oritur*: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?' (1999) 10(1) *European Journal of International Law* 23, 26; Thomas M. Franck allows force to be used in "extreme necessity". See Thomas M. Franck, 'The use of force in international law' (2003) 11 *Tulane Journal of International and Comparative Law* 7, 17; Bruno Simma permits the use of force to end massive violations of human rights. See Bruno Simma, 'NATO, the UN and the use of force: legal aspects' (1999) 10(1) *European Journal of International Law* 1, 5; Ben Chigara argues that intervening state should not use weaponry that would dehumanize victims meant to be rescued. See Ben Chigara, 'Humanitarian intervention missions, elementary considerations, humanity and the Good Samaritans' (2001) *Australian International Law Journal* 66, 72; Laing *(*n 214) 243.

[273]Brenfors (n 178) 457.

[274] See generally the written statements of: Albania, Estonia, Finland, Germany, Netherlands, Switzerland, Ireland, Poland, Latvia, Luxembourg, Maldives, Slovenia, Russia, France, Japan, and United Kingdom in ICJ Advisory Opinion on Kosovo (n 200) available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&code=kos&p3=1> accessed 7 November 2014.

[275] *East Timor Case* (n 50) para 29; *Namibia Case* (n 50) para 52; *Western Sahara Case* (n 50) 12; *Occupied Palestinian Territory Case* (n 50) 136.

[276] Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, available at: <http://www.voltairenet.org/article182723.html> accessed 30 October 2014.

[277]Iglar (n 47) 218.

[278] Pellet (n 147) opinion No. 1, para 3; James Crawford, *The Creation of States in International Law* (Second edition, New York, Oxford University Press 2006) 396.

[279] *Constitution of Ukraine*, Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996 Amended by the Law 2952-VI dated 01.02.2011, and the Law 586-VII dated 19.09.2013, [art 2] [hereinafter *Ukraine Constitution*].

[280] *Ukraine Constitution* (n 279) [art 73].

Ukrainian Constitution, dedicated to the Autonomous Republic of Crimea, made no mention of secession by act of regional parliament or by local referendum. In addition, the Constitution of the Autonomous Republic of Crimea submits to the supreme authority of the Ukrainian Constitution and pledges to handle its matters in accordance with powers delegated unto it.[281]

Since secession has been treated, generally, as a domestic affair, Crimeans are not empowered by law to secede. In that case, this paper agrees with the view that the referendum conducted in Crimea is illegal. [282] It is needless to investigate the legality of a referendum so conducted. It is of no use equally to investigate dereliction since Ukraine was in effective control when the Russia-Ukraine Treaty was signed. The only available option is whether the case of remedial secession as witnessed in recent secession struggles is present. As already noted, even where remedial secession was invoked, the parent state's consent was ultimately given; although the author does not subscribe to that.

Crimea's right to secession on remedial grounds

With respect to Crimea, the three criteria articulated by the Supreme Court of Canada were not met: colonial and oppressed people or the deprivation of a people of their right to exercise internal self-determination. In the Kosovo Advisory Proceedings, Russia submitted that "remedial secession" should be "limited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the parent state and the ethnic community concerned within the framework of the existing state." [283] It is difficult to put *in-pari-passu* the internal political unrest witnessed in Crimea with that of South Sudan or to classify it as armed attack as submitted by Russia. For armed attack to be established, two elements must be present: (1) the existence of organized armed groups, and (2) engagement in fighting of some intensity.[284] Moreover, states are not permitted to be actively involved in the internal political affairs of other states.[285] Secession of Crimea is not about autonomy since Crimeans enjoyed constitutional autonomy with no claims of substantive violations ever made,[286] unlike the situation in South Sudan or the necessity argument[287] advanced by Eritrea as a result of anti-insurgency by Ethiopian forces that produced egregious human rights abuses. This is not to say it is easy to determine when the right to secession arose; since it would be a matter of competing claims about the existence of an exceptional

[281] *Constitution of the Autonomous Republic of Crimea*, Adopted at the second session of the Supreme Rada of the Autonomous Republic of Crimea on 21 October 1998, [art 1].
[282] See, UN Resolution on Crimea (n 60); 'Ukraine Crisis: 'illegal' Crimean referendum condemned' BBC NEWS, 6 March 2014, available at: <http://www.bbc.co.uk/news/world-europe-26475508> accessed 10 November 2014; 'Is Crimea's referendum legal?' BBC NEWS, 13 March 2014, available at: <http://www.bbc.co.uk/news/world-europe-26546133> accessed 10 November 2014; Lea Brilmayer, 'Why the Crimean referendum is illegal' The Guardian, 14 March 2014, available at: <http://www.theguardian.com/commentisfree/2014/mar/14/crimean-referendum-illegal-international-law> accessed 10 November 2014.
[283]ICJ Advisory Opinion on Kosovo (n 201): Written Statement of the Russian Federation, 16 April 2009, para 88 available at: <http://www.icj-cij.org/docket/files/141/15628.pdf> accessed 8 November 2014.
[284] Mary Ellen O'Connell, 'Defining Armed Conflict' (2008) 13(3) *Journal of Conflict & Security Law* 393, 398.
[285] James Crawford, *The Creation of States in International Law* (Oxford, Clarendon Press 1979) 405.
[286] Christian Walter, 'Postscript: Self-determination, secession, and the Crimean Crisis 2014' in Walter and others (eds) (n 34) 307.
[287] Gregory Fox, 'Eritrea' in Walter and others (n 34) 288.

situation.[288] This is evidenced by observations made by states in the Kosovo Advisory Proceedings on what should trigger remedial secession. Based on Russia's submission, Crimea was not a case of remedial secession.

Part four

The preceding parts have examined relevant laws on the territorial integrity of a state and self-determination. This part will analyse Russian activities in Ukraine territory leading to the annexation of Crimea.

Russia's intervention in the Ukraine

A succession of a state occurs when one or more international subjects takes the place of another international subject due to some changes in the latter's condition.[289] Succession could be universal or partial. The former obtains when one international subject is completely absorbed by another, voluntarily or involuntarily. The latter takes place when, *inter alia*, one international subject has acquired a part of a territory of another through cession.[290] Russian annexation of Crimea could be classified as partial succession.

In his address, often referred to, President Putin noted that the referendum held in Crimea was in full compliance with democratic procedures and international norms. The referendum was also alleged to be the first of its kind where the residents of Crimea were able to "peacefully express their free will regarding their own future."[291] To help Crimeans actualize that dream, Russia did enhance their forces in Crimea, in line with due process of law[292] and without exceeding the set 25, 000 armed personnel.[293] However, the timing of this enhancement is odd since President Putin applauded the Crimean local self-defence units for controlling the situation in the manner they did, such that there was no record of causalities.[294] Russia falls prey to *tu quoque* by re-enacting its indictment of the Western Powers who violate international law. In President Putin's words: "they act as they please: here and there, they use force against states, … To make this aggression look legitimate, they force the necessary resolutions from international organizations, and if for some reason this does not work, they simply ignore the UN Security Council and the UN overall."[295] The seriousness of this allegation from a permanent member of the Security Council, authorized to making laws of universal binding effect, is worth noting. One deduction to be made therefrom is that "World Powers" bend laws to suit their national interests.

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[288] Thomas Burri, 'Secession in the CIS: Causes, Consequences, and Emerging Principles' in Walter and others (eds) (n 34) 144.
[289] Oppenheim (n 55) 208.
[290] ibid 209.
[291] President Putin's Address (n 1); Kourosh Ziabari, 'The Crimean crisis and US hypocrisy. "War of words" to justify outright aggression', 31 March 2014 available at: <http://www.globalresearch.ca/the-crimean-crisis-and-us-hypocrisy-war-of-words-to-justify-outright-aggressions/5375928> accessed 27 May 2014.
[292] Partition Treaty on the Status and Conditions of the Black Sea Fleet signed between Russia and Ukraine on May 28, 1997, permits Russia to lawfully maintain up to 25, 000 troops, 24 artillery systems, 132 armored vehicles and 22 military planes on the Crimean Peninsula.
[293] President Putin's Address (n 1).
[294] ibid.
[295] ibid.

According to Kourosh Ziabari, "Russia's intervention in Crimea took place after it felt that its national interests were being seriously endangered on its borders … under the leadership of a new government in Ukraine which has neo-fascist backgrounds."[296] One wonders the basis on which such intervention could be deemed necessary. Is it lawful for Russia to intervene in another's sovereign territory without, at least, a Security Council Resolution? Such unilateral action is in sharp contrast with President Putin's earlier comment on Syria thus:

> We need to use the United Nations Security Council and believe that preserving law and order in today's complex and turbulent world is one of the few ways to keep international relations from sliding into chaos. The law is still the law, and we must follow it whether we like it or not. Under current international law, force is permitted only in self-defense or by the decision of the Security Council. Anything else is unacceptable under the United Nations Charter and would constitute an act of aggression.[297]

Having such credible insight about the rule of law and taken a contrary approach in matters relating to Ukraine is absurd. As a rule, intervention is prohibited as the corollary of every state's right to sovereignty, territorial integrity and political independence.[298] Where a State's conduct challenges norms of *jus cogens* to the benefit of the local population, that conduct remains illegal and unacceptable under international law.[299] Although "non-intervention" is not clearly spelt out in the UN Charter and statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, the ICJ considers non-intervention part and parcel of customary international law.[300] In the Court's wisdom, "…respect for territorial sovereignty is an essential foundation of international relations … and international law requires political integrity also to be respected."[301]

Besides, *opinio juris* on its customary nature abound.[302] In addition, the General Assembly's Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States provides, *inter alia*, that "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[303] Although non-intervention is entrenched in treaty regime, Chigara rightly noted that state practice favours intervention. A possible explanation being that the rule against intervention in the internal affairs of States as a peremptory norm of international law is premature, or that the right to humanitarian intervention is itself a later peremptory norm of international law.[304]

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[296]Ziabari (n 291).

[297] Vladimir V. Putin, 'A Plea for Caution From Russia: What Putin Has to Say to Americans About Syria' (*The New York Times*, September 11, 2013).

[298] Oppenheim (n 55) 428; *Nicaragua v United States of America*, *supra* note 199, paras 201-203.

[299]Chigara 2002 (n 154) 151.

[300] *Nicaragua v United States of America* (n 200) para 202.

[301] ibid para 202.

[302] ibid para 202.

[303]Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, U.N. Doc. A/RES/20/2131 (1965) para 1 [hereinafter Declaration on non-intervention].

[304]Chigara 2001 (n 272) 71.

The argument has been made that the gravity of a situation which calls for humanitarian intervention overrides the provisions of articles on non-intervention; that a higher law permits the use of force for humanitarian purposes.[305] Whether this is so or not, there are grave practical and political problems in a state arrogating to itself the right to use force contrary to the provisions of the Charter. Moreover, the facts on the ground in Crimea could not justify such intervention. As shall be discussed later, intervention involving the use of armed force, if not sanctioned by the Security Council, would most likely violate Article 2(4) of the UN Charter.

Are States under a legal obligation to intervene?

The purpose of Article 2(7) of the Charter is to protect the sovereignty of member states.[306] The phrase "to intervene" in Article 2(7) has both broad and narrow meanings. Broadly speaking, it includes discussions and recommendations with regard to domestic matters.[307] Under the classical international law definition, intervention means "dictatorial interference", embracing the use of force or a similar form of "imperative pressure."[308] The narrow interpretation of "intervention" means the application of naked force, and this construction would undermine the spirit and letter of the Charter.[309] According to the *Declaration on Friendly Relations*, intervention, encapsulates "… armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements."[310] Within this context, political or economic pressure suffices.

The ICJ in *Nicaragua* confirmed this with slight modifications by introducing "coercion" as an essential ingredient.[311] The 1965 Resolution on Non-Intervention speaks of conduct designed "to obtain from [the affected State] the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."[312] Although this provision has been critiqued as normatively vague,[313] the Draft Articles on State Responsibility have proffered some explanation as contained in Article 18.[314] Yet coercion was not defined and was confined to state actors; although no clue was given to insinuate non-state actors were beyond its grip. Interestingly, the definition offered by Roberto Ago was considered by the International Law Commission. Roberto Ago saw coercion as a state forcing another state to commit an internationally wrongful act where there is no standing relationship of control or dominance between the two states, but where control is manifest only at the time of the wrongful act in question.[315] According

[305]J.W. Samuels, 'Humanitarian Relief in Man-Made Disasters: International Law, Government Policy and the Nigerian Experience' (1972) 10 *Canadian Yearbook of International Law* 3, 9.
[306] Georg Nolte, 'Secession and external intervention' in Kohen (ed) (n 49) 69.
[307] ibid 70.
[308] ibid 70-71.
[309] U.N.G.A. Res. 2131, 20 U.N. GAOR, Supplement 14, U.N. Doc. A/6014 (1965) p. 11 para 4.
[310] U.N.G.A. Res. 2625 (n 100); U.N.G.A. Res. 3281, 29 U.N. GAOR, Supplement 31, U.N. Doc. A/9631 (1974) pp. 50, 55.
[311] *Nicaragua v United States of America* (n 200) para 205.
[312] U.N.G.A. Res. 2131 (n 309) para 2.
[313] Derek W. Bowett, 'International Law and Economic Coercion' (1976) 16(2) *Virginia Journal of International Law* 245, 248.
[314] U.N.G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supplement No. 10, U.N. Doc. A/RES/56/10 (Dec.12, 2001) [art 18] [hereinafter Draft Articles on State Responsibility].
[315] Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, U.N. Doc. A/CN.4/318, (1979) 2(1) Yearbook of the International Law Commission 2(1) paras 4-6 [hereinafter

to ILC's report for the First Reading of Roberto's draft, coercive conduct is "purely occasional and not permanent."[316] Hence, a temporary relationship during the time of the coercion is enough.

Again, it has been noted that coercion does not include "direct responsibility."[317] This is to say that coercion could be proven without the presence of coercion in the territory of the person being coerced; provided its conduct or omissions, instigated the state coerced to achieve a set goal. The Commentary to the ILC's Second Reading further explained that coercion is conduct that forces the will of the coerced state (or non-state actors), giving it no effective choice but to comply with the wishes of the coercing state.[318] In the context of the inter-American system, the Convention on the Rights and Duties of States in the Event of Civil Strife, Article 1(1), was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States at its eleventh plenary session held on April 21, 1972. It reaffirmed the obligation on states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.[319] The right of self-determination and independence of peoples and nations must be freely exercised without any foreign pressure.[320]

Customarily, States are allowed to non-forcibly intervene in another state's territory if its rights or those of its citizens are violated. In such circumstances, coercion is permitted to encourage termination of the violation or prevent future violations.[321] But intervention must be proportionate to the harm suffered. Russia claimed "Russians, just as other citizens of Ukraine are suffering from constant political and state crisis that has been rocking the country for over 20 years."[322] One deduction from this is that the civil unrest in Ukraine is a general problem. Russians are not particularly discriminated against. Even if Russians in Crimea want to exercise their right to self-determination, it is debatable if Russia could intervene to facilitate that without violating its obligations under Article 2(7) of the Charter.

It is obvious that the right to self-determination does not of itself give rise to a legal right for a state to intervene in the territory of another state, whether directly or through private actors. At most and where a people are being oppressed and force is being used against them by their own state, it is possible for them to seek and obtain military assistance of a defensive kind from another states.[323] Such a request could be applied for, and legitimately obtained through a resolution of the U.N., as a collective action by a

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Eighth Report]; James D. Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007) 40(3) *Vanderbilt Journal of Transnational Law* 611, 618.

316 Report of the International Law Commission on the work of its Thirty-first Session, U.N. Doc. A/34/10, Supplement No. 10, (1979) 2(2) *Yearbook of the International law Commission* 102, para 26 [hereinafter Thirty-first Session Report).

317Fry (n 315) 618.

318 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, text and Commentaries*, (Cambridge, Cambridge University Press, 2002) 156.

319 AG/Res.78 (II-0/72), 1972, p. 45.

320 ibid. 44.

321 Oppenheim (n 55) 440; Sarah H. Cleveland, 'Norm Internalization and U.S. Economic Sanctions' (2001) 26(1) *Yale Journal of International Law* 1, 55.

322 President Putin's Address (n 1).

323 Robert McCorquodale, 'Ukraine Insta-Symposium: Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law' available at: <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-crimea-ukraine-russia-self-determination-intervention-international-law/> accessed 27 May 2014.

number of states or as part of a self-defence agreement. Therefore, Russia's unilateral military action in the absence of visible oppression or force is unlawful.[324] In fact, the Independent Fact-finding Commission in their report on the military intervention by Russia in South Ossetia and Abkhazia in Georgia in 2008 has this to say: "Acts of foreign states that violate the territorial sovereignty of another state are prohibited by international law."[325] The violation occurs when law enacted, or policy action taken specifically aims at deploying its effects on foreign citizens in a foreign country abroad.[326]

States' duty to protect its nationals in a foreign territory – emerging state practice

States are legally bound to protect its nationals abroad.[327] This right imposes reciprocal obligations on member states to treat aliens on their territory according to legal rules and principles.[328] For practical purposes, the principle of non-intervention is not a shield for states violating fundamental rights of aliens domiciled within its territory. A couple of states have ignored the inviolability of states' border to protect its nationals.[329] This principle was handy for French and Belgian operations in the Central African Republic in 1996 and 2003; in Rwanda in 1990, 1993, and 1994; in Chad in 1992 and 2006; and in the Ivory Coast in 2002/2003.[330] Oppenheim observed that despite the ICJ's skepticism as to the unlawfulness of intervention in its general language in the *Corfu Channel Case*, and in its decision in *Nicaragua*, "the practice of states does not yet permit the conclusion that intervention is strictly limited to cases and in a manner inconsistent with the Charter of the United Nations is necessarily excluded."[331] The United States intervened to help the Vietnamese create conditions of self-determination and political freedom in which they can choose their own government freely and without being subject to terror.[332] In Hungary, Soviet tanks crushed the popular socialist regime with the intention of "helping to put an end to counter-revolutionary intervention and riots."[333] Relying on the intervention made in Congo by the United States, cooperating with Belgium and Britain (authorized by legitimate Leopoldville Government),[334] Indian militarily invaded East Pakistan. One probative argument advanced by India was the failure of East Bengali elections. In fact, the "Soviet Ambassador Malik even, in part, sought to justify the

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[324] ibid.

[325] Independent International Fact-Finding Mission on the Conflict in Georgia Report, Vol. II, at 172 [hereinafter Independent Fact-finding Mission].

[326] *Corfu Channel Case (United Kingdom v. Albania)*, Merits, ICJ Reports [1949] p. 4, at 35 [hereinafter *Corfu Channel Case*].

[327] Vienna Convention on Diplomatic Relations, done at Vienna, 18 April 1961, [art 3(b)].

[328] Oppenheim (n 55) 934.

[329] United States against Panama in 1989: see Ved P. Nanda, 'The Validity of United States Intervention in Panama under International Law' (1990) 84 *American Journal of International Law* 494-503; Tom J. Farer, 'Panama: Beyond the Charter Paradigm' (1990) 84 *American Journal of International Law* 503-515; Anthony D'Amato, 'The invasion of Panama was a lawful response to tyranny' (1990) 84 *American Journal of International Law* 516-524. Although it was a disputed zone, after Kashmir's accession to Pakistan, the latter committed troops to Kashmir on May 8, 1948, defending its actions on grounds of anticipatory self-defense. See James D. Howley, 'Alive and Kicking: The Kashmir Dispute Forty Years Later' (1991) 9(1) *Dickinson Journal of International Law* 87-120. Russia applied self-defence principle against Georgia, see Crawford, *Brownlie's Principles of Public International Law* (n 55) 755.

[330]Walter and others (eds) (n 34) 308.

[331] Oppenheim (n 55) 439.

[332] Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67(2) *American Journal of International Law* 275, 286.

[333] ibid 286.

[334] See Letter from Congolese Prime Minister Tshombe to the UN Secretary-General, U.N. Doc. S/6060 (Nov. 24, 1964), in 19 U.N. SCOR Supplement Oct.-Dec., 1964, at 69.

Indian invasion on grounds of Pakistan's electoral irregularity."[335] In the 1990s, against the backdrop of the secession conflict in Moldova over Transnistria, Russia was indicted for maintaining a military presence and at some point against the forces of the central government;[336] an allegation Russia denies because "Russia has never openly supported the claim of Transnistria for independence and has engaged in credible negotiations over troop withdrawal and reconciliation."[337] Again, Russia was accused of influencing the secession conflict in Georgia over Abkhazia in favour of the Abkhaz side; it denies any official involvement.[338]

It has been observed that at the beginning of the Crimean crisis, official Russian statements indicated that military intervention was necessary in order to protect Russians in the Crimea, endangered by the growing Ukrainian nationalism.[339] The major problem in some cases of intervention is that there is no objectivity as to the content of a triggering event. Although there are authors who consider intervention as a clear violation of Article 2(4) of the U.N. Charter,[340] D'Amato rightly argues that dead letters of law must give way to "the reality of human beings struggling to achieve basic freedoms."[341] A state may be morally compelled to rescue its vulnerable nationals whose rights are severely violated. To incapacitate states with territorial norms would mean annihilation of aliens for whose interests, the state should in the first instance, exist.

However, the conditions under which a state is obliged to intervene should be objectively clear and accessible to other contenders. Although, James Howley argues that "a purely legalistic approach never solves large political problems"[342], there should be an objective standard to counterbalance a claim on which the intended intervenor relies. At least, a mere procedural warning to the offending state, via U.N. Organs or the Security Council would create some degree of objectivity. For instance, Walter questions Russia's intervention claim on the ground that the so-called *nationals* were of Russian origin but Ukrainian nationals.[343] Nevertheless, states intervene to interdict the ongoing violations and effect safe evacuation of its nationals and not to annex part of a sovereign state. Russia was internationally criticized for establishing a military presence in South Ossetia in 2008; protecting its nationals in their country of residence instead of evacuating them to their home state.[344] While this paper argues that human rights protection should take utmost priority over territorial integrity in extreme circumstances, caution must be applied in any hasty alliance with secession groups. As the ICJ put it: "Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a state, were also to be allowed at the request of the opposition."[345]

Threat or use of Force could be explicit or implicit

[335]Franck and Rodley (n 332) 294.
[336] Georg Nolte, 'Secession and external intervention' in Kohen (ed) (n 49) 91.
[337] ibid 91; Andrew Williams, 'Conflict resolution after the Cold War: the case of Moldova' (1999) 25(1) *Review of International Studies* 71, 83.
[338] Georg Nolte, 'Secession and external intervention' in Kohen (ed) (n 49) 91-92.
[339] Walter and others (eds) (n 34) 307.
[340]Farer (n 329); Ian Brownlie, *International Law and the Use of Force by States,* (Oxford Clarendon Press 1963).
[341] D'Amato (n 329) 516.
[342] Howley (n 329) 87.
[343] Walter and others (eds) (n 34) 308.
[344] Walter and others (eds) (n 34) 309.
[345] *Nicaragua v United States Case* (n 200) para 246.

Threat or use of force as already exposed is not interdicted to confrontational or armed conflict scenarios but could also be implied as stated by the ICJ. In 1949, the ICJ in the *Corfu Channel case* evaluated whether actions of the British Navy had amounted to "a demonstration of force for the purpose of exercising political pressure." Although the Court's finding is in the negative, it upheld that such action violated Albanian sovereignty.[346] In 1986, the ICJ opined that US military exercises staged near the borders of Nicaragua "in the circumstances in which they were held" did constitute a threat of force.[347] In 1996, the ICJ declared that the possession of nuclear weapons itself could "indeed justify an inference of preparedness to use them" and that the lawfulness of such preparedness depended on whether it was "directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations."[348] In these cases, the ICJ looked at the context in which pieces of evidence were adduced in favour of the facts in issue.

The Independent Fact-finding Mission on the Conflict in Georgia equally observed that state practice since 1945 reinforces this interpretation that a threat may be conveyed implicitly, through demonstrations of force, where credibility for the use of force is established through the physical presence of military authority.[349] Deductively, the context, (political instability in Ukraine), on which Russia reinforced her military presence in Crimea is indicative of her readiness to apply force, if and when needed. This is confirmed by broad authorization by the Russian Federation Council.[350] This is in line with a treaty regime that prohibits violation of a sovereign territory even during unstable moments. Russia took advantage of political instability in Ukraine to reinforce its military presence and annexed Crimea. Although the Partition Treaty on the Status and Conditions of the Black Sea Fleet signed between Russia and Ukraine on May 1997, permits Russia to lawfully maintain up to 25 000 troops, 24 artillery systems, 132 armored vehicles and 22 military planes on the Crimean peninsula,[351] the timing of the re-enforcement is crucial. This treaty provision is advanced as logical justification of Russia's military action in Crimea. In a similar token, India justified its invasion of Portuguese Goa by characterizing it as mere return of territory to its rightful owner.[352]

Again not all militarised acts amount to demonstration of force for the purposes of Article 2(4) of the UN Charter (such as, many routine missions devoid of any hostile intent and are meaningless in the absence of a sizeable dispute). The intent for threat or use of force is inferred if such action is non-routine, suspiciously timed, scaled up, intensified, geographically proximate, and staged in the exact mode of a potential military clash.[353] It would be difficult to establish *prima facie* whether Russia's reinforcement of its military troops at a time Ukraine is experiencing political instability meets these criteria. A lot depends on an analysis of various variables from the threshold of non-interference

[346] *Corfu Channel Case* (n 326) 35.
[347] *Nicaragua v United States of America* (n 200) para 227.
[348] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports [1996] p. 226, para 48.
[349] Independent Fact-finding Mission (n 325) 232.
[350] See 'Vladimir Putin submitted appeal to the Federation Council', 1 March 2014, available at: <http://eng.kremlin.ru/news/6751> accessed 12 November 2014; for the approval see 'Russian Parliament Approves Troop Deployment in Ukraine', 1 March 2014, available at: <http://www.bbc.co.uk/news/world-europe-26400035> accessed 12 November 2014.
[351] Ziabari (n 291).
[352] For this debate, see generally 16 U.N. SCOR (987th mtg.), UN Doc. S/PV987 (1961).
[353] Independent Fact-finding Mission (n 325) 232.

and ill-timely reinforcement. However, such reinforcement at the time Ukraine is experiencing political instability and without the consent of Ukraine is suggestive of intent to apply force.

Historically, state practice regards the term war to apply only when the parties had a hostile intent (*animus belligerendi*), and this normally requires a declaration of war.[354] But the prerequisite implicit intent for threat or use of force could be ascertained if there is some specificity in formulating demands and in clarifying what happens if these demands are not met.[355] The Independent International Fact-Finding Mission on the Conflict in Georgia observed that

> A threat is credible when it appears rational that it may be implemented, when there is a sufficient commitment to run the risk of armed encounter. It is enough to create a calculated expectation that an unnamed challenge might incur the penalty of military force within a dispute, without which – as the International Court of Justice agrees – a threat is neither present nor perceived. There is no requirement that certainty exists as to whether force really will be used, or under what conditions it will be triggered, or that there is an urgent and imminent danger of its deployment. There is also no requirement that a threat has to be styled in terms of an ultimatum, tied to specific demands and a deadline for a reply. All that matters is that the use of force is sufficiently alluded to and that it is made clear that it may be put to use.[356]

If we further apply a reasonable man test, it could be made out that Russia's fortification of its military troops in Ukraine is indicative of its readiness to apply force if its interests are not met. Such intervention could amount to use of force in violation of Ukraine territory. It also contravenes GA Resolution 2131 (XX).[357] Paragraphs 1 and 2 of this Resolution proscribed not only direct and indirect intervention in internal and external affairs of any other state, but such actions aimed at securing from it advantages of any kind.[358]

In addition, Article 10 of the Covenant of the League of Nations mandates League Members to "… respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League…."[359] It has been suggested that "aggression" as used should be interpreted in its simple and original meaning; that is, initiative in war-making, or deliberate violation of the territory of another State.[360] The *new Article 8 bis* (Crime of Aggression) in the Rome Statute distinguishes between a "crime of aggression" in *Article 8 bis* (1) and an "act of aggression" in Article 8 is (2).[361] The definition of aggression in the Rome Statute replicates the list of acts contained in Article 3 of Resolution 3314 (XXIV). It recognises "as acts of aggression" "[t]he invasion or attack by the armed forces of a State of the

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354 ibid. 229.
355 ibid. 232.
356 ibid. 232-233.
357 *Declaration on non-intervention* (n 303) para 4.
358 ibid. paras 1 and 2.
359 *The Covenant of the League of Nations* (Including Amendments adopted to December, 1924) [art 10] available at: <http://avalon.law.yale.edu/20th_century/leagcov.asp> accessed 20 May 2015.
360 Clyde Eagleton, 'The Attempt to Define Aggression' (1930) 13 *International Conciliation* 581, 590.
361 *Rome Statute of the International Criminal Court* [art 8]; David Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2011) 43(1) *Studies in Transnational Legal Policy* 173, 174.

territory of another State, or *any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.*"[362]

The operational detail of the law on aggression is beyond our scope but it is proper to highlight that the deployment of troops or military occupation of the territory of another state in disregard of conditions previously agreed upon might qualify as acts of aggression. It is true that Russia is entitled to maintain certain number of military personnel on Ukraine territory, but the timely reinforcement in support of an illegal referendum without the consent, or at least approval of Ukraine's interim government is in breach of its international obligations. A possible defence would be that there is no legitimate government to dialogue with. This paper is not devoted to analysing the legality of ousting a democratically elected government undemocratically. However, there is no gainsaying the fact that had the Ukraine militarily responded confrontationally, in defence of its territory, the situation might have resulted in war. This would have proven Russia's intent to use force.

Observations

A couple of issues were looked at in this paper. First, the paper delineates the importance of territorial integrity as a principle that guides international relations. It is a principle that must be respected to foster international peace and security. Under international law, States remain equals and should be respected and treated as such. Again, international boundaries outlive treaties that brought them into existence. This is further confirmed through the operation of the principle of *uti possidetis*, no longer confined to decolonization. Nevertheless, self-determination remains a fundamental norm in international law. It allows peoples the right to determine their political future. Sadly, the ICJ did not clarify whether remedial secession could oust territorial integrity in the Kosovo Advisory Opinion; hence, self-determination is still imprisoned within territorial integrity. The only option available for secessionist groups is the consent of the parent state, whether explicit or tacit. However, there is need for international law to develop a legislative framework that would allow States to intervene in favour of external self-determination at the instance of grave violations of human rights. Until then, the case of Crimea seems not to fit into the current international law jacket. States are prohibited from direct or indirect interference in another state's internal affairs. Since Crimea was lawfully transferred to Ukraine, it would have been better to follow the same procedure in taking it back. It is difficult to justify Russia's action on Crimea as not a threat or use of force against the sovereignty of Ukraine.

[362]U.N.G.A. Res. 3314 (XXIX) [art 3(a)] (emphasis added); Stefan Barriga and Leena Grover, 'A Historic Breakthrough on the Crime of Aggression' (2011) 105(3) *American Journal of International Law* 517, 521.

'The Implementation of Ratified ILO Fundamental Conventions in Vietnam: Successes and Challenges'

*Trong Nghia Pham**

Abstract

Vietnam rejoined the International Labour Organisation (ILO) in 1992 and has ratified 21 Conventions of the ILO, of which there are five of eight fundamental Conventions, namely: Convention Nos. 29, 100, 111, 138, 182. Obligations of ratified Member States of the ILO include reporting and most importantly incorporation into domestic legal system and implement provisions of ratified Convention in practice. Vietnam has a monist legal system in which ratified international treaties prevail over domestic law. According to Vietnam law, if the ratified international treaty is not specific enough to apply directly, transformation into domestic law is carried out usually by a legislative provision. This Article examines the incorporation into the legal system and implementation in practice of ILO fundamental Conventions on forced labour, child labour and discrimination at work that Vietnam has ratified. The successes and challenges of incorporating the ratified ILO fundamental Conventions in Vietnam's context explored and analysed in this Article provide the basis for proposals and recommendations not only for the ILO in monitoring, supervising its standards but also for Vietnam in implementing its obligations from ratification of these ILO fundamental Conventions.

Key words: Vietnam's Law on Conclusion, Accession to, and Implementation of International Treaties (2005); Vienna Convention on the Law of Treaties (1969); Forced labour Convention No.29, Transformation of Treaties into Domestic Law, Vietnam's strategies for complying with ILO Conventions

1. Vietnam's Law on Conclusion, Accession to, and Implementation of International Treaties 2005

Vietnam ratified the Vienna Convention on the Law of Treaties (1969)[1] – (VCLT) on 10 October 2001.[2] *Pacta sunt servanda*[3] is a key obligation resulting from that treaty. However, before 2005, Vietnam law was silent or inexplicit on the relationship between international treaties and domestic legal documents.[4] Before the final decision made by the ratification of the VCLT, there had been many debates and opinions among Vietnam's legal scholars about the relationship between international treaties and domestic law.[5]

* Deputy Director-General, Legal Department, National Assembly Office, Vietnam; Fellow of the Oxford-Princeton Global Leaders Programme (2015-2017)

[1] Adopted on 23/5/1969, came into effort on 27/01/1980, text available at <http://www.unrol.org/doc.aspx?d=2221> (Last accessed on 2 October 2014).

[2] Source: Ministry of Foreign Affairs. See also <http://treaties.un.org> (Last accessed on 2 October 2014).

[3] See Article 26, the *Vienne Convention on the Law of Treaty,* 1969, text available at <http://treaties.un.org> (Last accessed on 6 September 2014).

[4] The 1992 Constitution, Ordinance dated 20/8/1998 of the Standing Committee of the National Assembly on Conclusion, Accession to and Implementation of International Treaties as well as the Law on the Promulgation of Legal Documents 1997 does not mention this issue.

[5] Some disagree with the view that treaties should be directly applied in Vietnam and the issue of incorporation of treaties should not be raised. Others insisted that "the position of treaties in the Vietnamese legal system should be enshrined in the Constitution, or general provisions on incorporation (of international treaties) should be added to the Law on Promulgation of Legal Documents. Some argued that Vietnam lacks a complete and clear mechanism for enforcement of treaties and an appropriate and dynamic environment should be created for enforcement of treaties. See Le Mai Anh, Giao *Trinh Luat Quoc Te* (Cong An Nhan Dan Publishing House, 2006).

The Law on Conclusion, Accession to, and Implementation of International Treaties 2005[6] clarifies the relationship between international treaties, to which Vietnam is a party, and domestic law. This law provides that where there is a conflict between domestic law and an international treaty, where Vietnam is a member State party, the international treaty will prevail. On the one hand, where the international treaty concerned contains detailed regulations and it is feasible to implement them, they will be applied directly. On the other hand, if it is not possible to directly apply such regulations, their transformation into domestic law must occur in order to implement those treaty provisions.[7]

Vietnam's new Constitution[8] requires the National Assembly's prior approval for the ratification of any international treaties on human rights, citizen's fundamental rights and duties, and other international treaties that may be inconsistent with statutes and resolutions shall be approved by the National Assembly.[9] Furthermore, Vietnam law requires that the promulgation of any new law cannot obstruct the implementation of any international treaties where Vietnam is a member State party.[10]

Under Vietnam law, ratified ILO Conventions are a part of Vietnam's legal system and provisions of ratified Conventions are direct sources of law which are regarded of higher substantive value than domestic regulations. However, in practice, from my experiences in the field of labour issues, the court in Vietnam has never applied directly any ILO conventions. Therefore, transformation of international treaties into Vietnam's domestic law is a very important step for the conventions concerned to be applied in practice in Vietnam.

2. The Implementation of Convention No. 29 on Forced Labour in Vietnam

1. Transformation of Convention No. 29 on Forced Labour into the Legal Framework

Vietnam ratified Convention No. 29 on 05 March 2007 but has not ratified Convention No. 105.[11] The basic obligation undertaken by a Member State which ratifies Convention No. 29 is "to suppress the use of forced or compulsory labour in all its forms within the shortest possible period".[12] This obligation to suppress the use of forced or compulsory labour, as defined in the Convention, includes for the Member State Parties both an obligation to abstain and an obligation to act. The Member State Parties must neither exact forced or compulsory labour nor tolerate its exaction and they must repeal any laws and statutory or administrative instruments that provide or

[6] Passed by the National Assembly on 14/6/2005, took effect on 01/01/2006, consists of 9 Chapters and 107 Articles, text available at <www.na.gov.vn> (Last accessed 2 October 2014).

[7] See Article 6, the Law on Conclusion, Accession to and Implementation of International Treaties, 2005, text available at <www.na.gov.vn> ((Last accessed on 2 October 2014).

[8] Adopted by the National Assembly on 28th November 2013, taking effect since 1st January 2014, text available <www.na.gov.vn> (Last accessed on 2 October 2014) – (hereinafter Constitution 2013).

[9] See Sec. 14, Article 71, Constitution 2013.

[10] See Article 3(5), the Law on the Promulgation of Legal Documents, 2008 text available at <www.na.gov.vn> ((Last accessed on 2 October 2014).

[11] Both Conventions Nos. 29 and 105 were studied with a view to ratification from 2005 by MOLISA. The ILO has provided technical support to an Inter-Ministerial Task Force on forced labour, established to review forced labour concerns in law and practice, and to oversee a comprehensive review of forced labour in the country. Ratification of both Conventions was submitted to the President for approval but only Convention No. 29 was ratified. The reason explaining why Vietnam has not ratified Convention No. 105 was that, at that time, it was concerned that some of Vietnamese practice (particularly the issue of prison labour) was not in conformity with the requirements of Convention No. 105. The ratification of this Convention is still under consideration at the time of writing [9/2014].

[12] See Article 1 of the Convention No. 29.

allow for the exaction of forced or compulsory labour, so that any such exaction, be it by private persons or public servants, becomes illegal under their national laws. [13]

a) The Concept of Forced Labour – the lack of a clear definition

Forced labour is a legal term as well as an economic phenomenon. It will not be possible to "respect, promote and realise" the principle of the elimination of all forms of forced or compulsory labour without knowing what the phrase means.[14] Article 1 of Convention No. 29 defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[15] There are three aspects of this definition that need to be considered to ascertain the general scope of the Convention, namely, the notion of "work or service"; the "menace of any penalty"; and lastly the criteria for not having "offered oneself voluntarily".[16] Convention No. 29 refers to five forms of compulsory work or service, which have fallen under the general definition of "forced labour" as explained above.[17]

Based on these three aspects, the Convention creates room for domestic law to regulate specific activities characterized as forced labour as well as to define cases of forced labour in domestic law. The definition of forced labour and its characteristics are stated in Convention No. 29, which Vietnam has ratified. However, in Vietnam, domestic law, while providing (in principle) a punishment for forced labour, is still silent on the definition of forced labour. The previous Labour Code (1994)[18] contains only one provision that generally prohibits both the ill-treatment of workers and the use of forced labour.[19] The current Labour Code[20] still keeps the same provision of the Labour Code 1994 relating to forced labour and does not contain any provision defining forced labour in Vietnam. In the context that the court rarely applies conventions directly, as explained above, the absence of a clear definition in domestic law appears to obstruct the implementation of Convention No. 29 in Vietnam.

Under Vietnam law, ill-treatment or forced labour involves cases when workers are beaten, insulted or forced to do work that is not suitable to their gender, affects their health, dignity or honour.[21] This definition expresses the involuntary characteristic of forced labour. However, it does not reveal the menace of any penalty against the workers - which is one of the three elements in the received definition of forced labour under Convention No. 29. It shows that there is no definition of forced labour in the Labour Code and, it also shows the prevalence of lower-level legal documents, which is one of the main challenges to implementation of law in Vietnam, as mentioned previously.

The Labour Code divides regulation on forced labour into two separate sections. Article 8 of this Code sets out the prohibited activities relating to labour relations. Article 8(2) provides for the prohibition of maltreatment of workers, and sexual harassment of workers. The prohibition of forced labour is regulated separately by Article 8(3) as prohibiting compulsion to work but not prohibiting forced labour in ILO terms. This Code also allows workers who are victims of

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[13] See Forced Labour (Indirect Compulsion) Recommendation No. 35, 1930, text available at <www.ilo.org> (Last accessed on 2 October 2014).
[14] See ILO,) Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, 2001, 9.
[15] See Article 1 of the Convention No. 29.
[16] See ILO Eradication of Forced Labour, 2007, 20-22.
[17] See Para 2, Article 2 of the Convention No. 29.
[18] Adopted on June 23rd 1994, taking effect on January 1st 1995, replaced by the Labour Code 2012.
[19] See Article 5 of the Labour Code 1994.
[20] Adopted on 18th June 2012, taking effect from May 1st 2013.
[21] See Article 11 of the Decree No. 44/2003/ND-CP dated 9/5/2003 of the Government, text available at <www.chinhphu.vn> (Last accessed on 2 October 2014).

maltreatment and forced labour to terminate the labour relationship unilaterally with full compensation.[22]

Due to the lack of a comprehensive definition, it is impossible to determine which activities fall under the prohibition against forced labour and must therefore be sanctioned by the law. It is also difficult to identify victims of forced labour. Consequently, there is no particular mechanism to protect and support victims of forced labour in Vietnam.

b) Human Trafficking

Despite the lack of a clear definition of forced labour, Vietnam law focuses more on human trafficking. Trafficking in human beings is a significant issue in Vietnam. Vietnam is both a source country for trafficking and a transit country, with people from China and the Middle East being taken through Vietnam to destinations including Australia, Canada and Europe.[23] Vietnam has made many efforts to deal with human trafficking.

Legislatively, important legal documents have been promulgated and revised to combat trafficking in human beings. Trafficking in human beings is a criminal offence and punishable by the Penal Code. The punishment ranges from two years to twenty years imprisonment.[24]

Before 2009, the law covered trafficking only in women and children. However, the new amendment to the Penal Code (2009) provides that trafficking in human beings (including men) is a criminal offence and must receive the same sentence of imprisonment.[25] Recently, the National Assembly passed the Law on Anti human trafficking which clearly prohibits the transfer or receiving of human beings for the purpose of forced labour.[26]

In terms of international cooperation, Vietnam commits to the consideration of withdrawal of its reservations to Article 5 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.[27] Vietnam is considering accession to the Convention against Torture, the Convention against Transnational Organised Crime, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.[28]

c) The Repeal of the Law on Compulsory Community Work

In 1999, the Standing Committee of the National Assembly issued the Ordinance on Community Work,[29] which provided that all Vietnamese citizens aged from eighteen to forty-five (for men) and from eighteen to thirty-five (for women) are obliged to do community work[30] for ten days a year.[31] Community work is carried out on building projects and in upgrading the local infrastructure such

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[22] See Article 37(1c) of the Labour Code (revised 2012).
[23] See Colin Fenwick and Thomas Kring, Rights at Work: An Assessment of the Declaration's Technical Cooperation in Select Countries, 2007, available at http://www.carnegieendowment.org/files/Declaration_report.pdf (Last accessed on 15 January 2009).
[24] See Article 119, 120, 275 of the Penal Code, text available at www.na.gov.vn (last visited 2nd October 2014).
[25] See Law on the Amendment to the Penal Code, 2009, text available at <www.na.gov.vn> (Last accessed on 2 October 2014).
[26] See Sec 3 (2) Law No. 66/2011/QH 12 dated 29/3/2011 taking effect from 1/1/2012.
[27] Adopted on 25/5/2000. Text available at <http://www2.ohchr.org/english/law/crc-sale.htm (last visited 6 September 2014)>. (Last accessed on 2 October 2014).
[28] Source: National Report of the Socialist Republic of Vietnam under the Universal Periodic Review of the United Nations Human Rights Council 2009.
[29] See Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services took effect from 01/01/2000, text available at <www.na.gov.vn> (Last accessed on 2 October 2014).
[30] See Article 7 of the Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services.
[31] See Article 8 of the Ordinance Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services.

as roads, watering systems, hospitals, schools, military cemeteries, etc.[32] Individuals recruited to do community work who cannot attend can pay by cash, or ask others to do the work on their behalf.[33] This requirement that citizens of a certain age ought to commit ten days a year to community work was challenged and found not to conform to Convention No. 29, as the scope of the community work envisaged did not meet the characteristics of "minor community" permitted under Convention No. 29. Therefore, the Ministry of Labour, Invalids and Social Affairs (MOLISA) proposed to repeal this Convention and to make way for Vietnam's ratification of Convention No. 29 of the ILO. The proposal was approved in 2006 and the Standing Committees of the National Assembly adopted Resolution No. 1014/2006[34] to repeal the Ordinance on Community Work to make way for the ratification of Convention No. 29.

d) Amendment to the Regulations on Prison Labour

Convention No. 29 provides that forced or compulsory labour shall not include any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to, or placed at the disposal of private individuals, companies or associations.[35] In Vietnam, before Convention No. 29 was ratified, a study found that most of the provisions of domestic law on prison labour were in conformity with the requirements of the exceptions allowed under Convention No. 29, such as that the prisoner must be convicted by a court of law,[36] and that the work must be undertaken under the supervision of prison staff.[37] However, the placement of prison labour at the disposal of private individuals, companies or associations had been unregulated.

Immediately after Convention No. 29 was ratified, regulations on prison labour were revised to comply with the provisions of this Convention. On November 2nd 2007, the Standing Committee of the National Assembly adopted Ordinance No. 01/2007[38] to revise the Ordinance on Implementation of Criminal Sentences (1993). On June 7th 2010 the National Assembly adopted the Law on Implementation of Criminal Sentences,[39] which provides more specific regulations on prison labour, particularly on the distribution of income of prisoners, to make domestic law more suitable to the requirements of Convention No, 29.

The new Law requires that the use of prison labour must be supervised by State authorities and does not allow prison labour to be used on private property. Prisoners have to work eight hours a day but the time spent on educational activities and for vocational training should be deducted from the working hours. In cases where prisoners are required to work overtime, the limitation is that it should be for no more than two hours extra per day and that the prisoners should have time off or should receive rewards for the overtime work that they have done.

The new Law also bans the use of female prisoners and child prisoners in heavy and hazardous work.[40] It also makes it clear that all income from prison labour must be set out in the financial records of the prison, as required by the law on audit and statistics. Income from prison labour is now used for different purposes, firstly for the prison workers, then for buying more food for

[32] See Article 9 of the Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services.
[33] See Article 15 of Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services.
[34] Adopted on 5/4/2006 and took effect from 1/1/2007, text available at <www.na.gov.vn> (Last accessed on 15 September 2014).
[35] See Sec. 2(c) Article 2 Convention No. 29.
[36] See Article 1 of the Ordinance on Implementation of Criminal Sentences, 1993.
[37] See Article 22 of the Ordinance on Implementation of Criminal Sentences, 1993.
[38] See Taking effect from 01/01/2008, text available at <www.na.gov.vn> (Last accessed on 15 September 2014).
[39] Taking effect from 01/01/2011, text available at <www.na.gov.vn> (Last accessed on 15 September 2014).
[40] See Article 29 of the Law on Implementation of Criminal Sentences.

prisoners, and for increasing the welfare fund of the prison, for rewarding hard-working prisoners, or investing in infrastructure of the prison.[41]

e) Guarantees for Cases Excluded from the Scope of Convention No. 29

Convention No. 29 excludes some particular forms of compulsory work or service from its scope, namely, compulsory military service; normal civic obligation; prison labour; force majeure; and minor communal service. The regulations on civic obligation and prison labour in Vietnam as analysed above, have been repealed and revised.

In terms of military service, the work undertaken by Vietnamese citizens for the armed forces is of a purely military character (soldier, commanding officers, military technicians and specialists, etc.). In the course of rendering the service, in addition to State officials, these people shall also be entitled to other preferential policies by the Government. Only under special circumstances prescribed by law, can these people prematurely leave the army or police. The Government has issued incentive policies for people who used to work for the army or police. Besides economic units of the army, the national defence sector can recruit workers on a contract basis according to the Labour Code to undertake work which is not purely of a military character and a national defence purpose may be involved.[42]

In Vietnam, work exacted in cases of emergency (force majeure) shall cease as soon as the circumstances that endanger the population or its normal living conditions no longer exist. The mobilisation of labour for compulsory works or services in emergency cases such as natural disasters, storms, floods, etc. is regulated by law.[43] After the work is completed, participants will be paid at the rate provided for by the Provincial People's Committee. Provincial People's Committees shall define specific rates for remuneration to suit local circumstances according to instructions issued by competent ministries and Government agencies. [44] People who are injured or relatives of those who have lost their lives while participating in dyke protection activities shall be considered for compensation and benefits similar to those offered to the armed forces when they participate in dyke protection activities and in accordance to laws and regulations in force at the time.[45]

In terms of minor communal service, the commune authority can mobilise local people to perform minor services in the direct interest of the community, (for example, constructing or repairing minor community infrastructure work of local hamlets, communes, or towns).[46] The local People's Council shall have the right and responsibility to develop and adopt a plan on mobilisation of human resources to provide communal services at the request of the People's Committee of the same level under the principle of participation: "people know, people discuss, people execute and people supervise".

2. Implementation and Challenges of Regulations on Elimination of Forced Labour in Vietnam

a) Lack of Penal Sanctions on Forced Labour

[41] See Article 30 of the Law on Implementation of Criminal Sentences.
[42] SeeLaw on Military Service (adopted in 1981, revised in 1990, 1994 and in 2005); Law on officers of the People's Armed Forced of Vietnam (revised in 2008); Law on People's Police (2005), texts available at <www.na.gov.vn> (Last accessed on 15 September 2014).
[43] See Law on Dams and Dykes, 2008; Ordinance No. 09L/CTN dated 20/03/1993 on Prevention and Mitigation of Storms and Floods (amended in 2000), texts available at <www.na.gov.vn> (Last accessed on 15 September 2014).
[44] See Article 24, 37 of the Law on Dams and Dykes 2008.
[45] See Article 35 of the Law on Dams and Dykes 2008.
[46] See Article 111, 112, 113, 114, 115 and 124 of the Law on Organisation of People's Council and People's Committee 2003.

Convention No. 29 requires that Member State Parties must ensure that "the illegal exaction of forced or compulsory labour shall be punishable as a penal offence" and "that the penalties imposed by law are adequate and are strictly enforced".[47]

Previous regulations on the prohibition of forced labour provided by the Labour Code could result in an administrative penalty of between VND 15 million to 20 million [$750 to $1,000].[48] From 25th June 2010, the fine for such violations is reduced to between VND 5 million and 15 million.[49] However, on 22nd August 2013, the Government issued Decree No. 95/2013/ND-CP effective from October 10th 2013 repealing regulations on fines for forced labour provided by Decree Nos. 47/2010/ND-CP and 113/2004/ND-CP.[50]

Some activities related to forced labour are illegal and punished by criminal punishment such as maltreatment of other persons,[51] forcing workers to leave the work place,[52] and trafficking in human beings.[53] Because the Penal Code is the only source of criminal law in Vietnam, only offences prescribed in the Penal Code are criminal offences and incur a sentence.[54] Therefore, some other types of activities that qualify as forced labour under the Convention, including psychological or financial menace are neither regarded as criminal offences nor sentence carrying penalties in Vietnam. Thus, the penalty for the offence of forced labour as required by Convention No. 29 may not have been sufficiently transformed into Vietnam's domestic law.

b) Lack of Official Statistics on Forced Labour

According to the law, MOLISA is responsible to the Government for carrying out administration of labour.[55] However, at the time of writing (10/2014) there were neither official statistics on forced labour nor a channel for reporting cases of forced labour in Vietnam. There are only statistics for human trafficking cases, which is the responsibility of the Ministry of Public Security. Most information about forced labour cases comes from the media.

c) Enforcement

While the criminal punishment for forced labour is still insufficient, administrative fines are used to punish persons who use forced labour. Labour inspectors (under the management of MOLISA) are in charge of imposing administrative fines in these cases. However, from my personal experiences as a legal official and labour inspector (for two years 2003-2005) at MOLISA, no administrative fine in cases of forced labour had been imposed since the Labour Code's inauguration on 1 January 1995. This fact also contributes to explaining why there are no official statistics on forced labour in Vietnam. Furthermore, according to Convention No. 29, it is a violation if employers keep identity documents of workers. However in Vietnam, a current survey has shown that 24.28 percent of workers had to hand over their identity documents to the employers in order to take up employment.[56]

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[47] See Forced Labour (Indirect Compulsion) Recommendation No. 35, 1930, text available at <www.ilo.org> (Last accessed on 15 September 2014).
[48] See Sec. 4 Article 10 of the Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government, text available at <www.chinhphu.vn> (Last accessed on 10 September 2014).
[49] See Sec. 2 Article 17 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government, text available at <www.chinhphu.vn> (Last accessed on 10 September 2014).
[50] Text available at <www.chinhphu.vn> (Last accessed on 15 September 2014).
[51] See Article 110 of the Penal Code.
[52] See Article 128 of the Penal Code.
[53] See Article 119 of the Penal Code.
[54] See Article 2 of the Penal Code which provides that "Chỉ người nào phạm một tội đã được Bộ luật hình sự quy định mới phải chịu trách nhiệm hình sự" [trans: Only those who commits an offence provided by the Penal Code is liable to criminal sentence].
[55] See Sec. 1 Article 181 of the Labour Code.
[56] See Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

d) The Use of Different Offences to Punish Forced Labour

Another issue arising from the lack of penal punishment for forced labour is that offenders are prosecuted under different offences. As in Vietnam, only the Penal Code can define offences and punishment. Therefore, the omission of a prohibited activity as an offence under the Penal Code means that it cannot be dealt with by criminal punishment. Because the Penal Code is mute in relation to forced labour prohibitions under Convention No.29, the Vietnam government had to use other offences [Illegal arrest, custody or detention of people; extortion of property] to prosecute the employers who had used forced labour in the most recent outstanding forced labour case – the Tan Hoang Phat case.

e) Information Communication and Disseminate of Law on Elimination of Forced Labour

Sine the ratification of Convention No. 29, some activities have been carried out to disseminate the content of this Convention to Government officials, workers, and employers. A Questions and Answers handbook on Convention No. 29 of the ILO was published in Vietnam in 2007. In the same year, training for labour inspectors throughout the country was organised (one in the North and one in the South) with an expert trainer from the ILO.[57] However, communication activities to disseminate information and improve knowledge about labour legislation in general and the Convention No. 29 in particular are often compromised by limitations in certain types of activities and resources.[58]

3. The Implementation of Convention Nos. 138 and 182 on Abolition of Child Labour in Vietnam

Vietnam was the first country in Asia and only the second in the world to ratify the Convention on the Rights of the Child (CRC), on 20 February 1990.[59] Vietnam ratified both ILO core Conventions on elimination of child labour: Conventions No. 138 on June 24th 2003[60] and, Convention No. 182 on 19 December 2000.[61] Since then, the State of Vietnam has made great efforts to transform the Conventions on abolition of child labour into its domestic legal system[62] together with awareness raising activities on child rights, enhancement of State management over children's issues, and provision of increased resources for child development.

1. Incorporation of Conventions Nos. 138 & 182 on Effective Abolition of Child Labour into the Legal Framework

Member State Parties to Convention No. 138 are obliged to pursue a national policy designed to ensure effective abolition of child labour; and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.[63] All necessary measures, including the provision of appropriate penalties against offenders, have to be taken by the competent authority to ensure the effective enforcement of Convention No. 138. National laws or regulations or the competent authority must define the persons responsible for compliance with the provisions giving effect to the Convention, and they

[57] The author was one of the organisers and interpreters of these activities.
[58] Source: MOLISA Survey on the Dissemination and Communication of Labour Law 2009.
[59] Source: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&Chapter=4&lang=en> (Last accessed on 24 March 2010).
[60] This ratification denounced the ratification of the Convention No. 5 on Minimum Age (Industry) on 3/19, which was ratified on 3/10/1994.
[61] Source: <www.ilo.org> (Last accessed on 24 March 2010).
[62] Some of the main documents are the Labour Code, 1994; the Law on Child Protection, Care and Education, 2004; Law on Education, 2005, texts available at <ww.na.gov.vn> (Last accessed on 15 September 2014).
[63] See Article 1 of the Convention No. 138.

must prescribe the registers or other documents, which have to be kept and made available by employers.[64]

The rights of young people and the protection of children are central to Vietnam's policies and are recognised in the Constitution. In Vietnam, children enjoy protection, care and education by the family, the State and society; and are allowed to participate in children's affairs. Infringement, maltreatment, abandonment, abuse, and exploitation of labour and other forms of violating children's rights are strictly prohibited. [65] The State, society and the family are responsible for the protection, care and education of children.[66] The State, society and family create favourable conditions for the studies and recreation of young people and for the development of their intellectual faculties and physical fitness; to inculcate in young people the national tradition and ethics, the sense of civic responsibility and the socialist ideal; to encourage them to be in the vanguard of creative labour and of defence of the Homeland.[67]

a) Minimum Working Age - 15

Before ratifying Convention No. 5, Vietnam law had already set the minimum working age at 15.[68] Immediately after this ratification, the requirement of a minimum working age had been incorporated into the Labour Code. While Convention No. 5 established the minimum working age at 14,[69] the Labour Code reconfirms the regulation of previous legislation and provides that: "An employee shall be a person of at least 15 years of age who is able to work and has entered into a labour contract."[70] This minimum working age is still in effect after several revisions of the Labour Code.

By defining that children are persons under the age of 16, [71] the Law on Child Protection, Care and Education provides better protection for children from working while also prohibiting "Abusive child labour, employing children for heavy or dangerous jobs, jobs with exposure to noxious substances or other jobs in contravention of the provisions of labour legislation".[72]

All children in Vietnam have the right to study.[73] Primary education is compulsory and free of charge.[74] Primary education consists of five years of schooling, from the first to the fifth grade and, the age of commencement to the first class is six. Therefore, compulsory school age in Vietnam is 11.[75] Thus, the minimum working age is higher than the compulsory school age.

b) Minimum Age for Hazardous Work is 18

In Vietnam, workers between the age of 15 and 18 are junior workers.[76] The Labour Code has a separate section that deals with junior workers.[77] An employer can only employ the under-age employee in jobs appropriate to his health, to ensure his physical, intellectual and personality development. The employer is also responsible for paying attention and taking care of the underage employee in terms of labor, salary, health and education within the labor process. When employing an underage employee, the employer must create a separate monitoring book, recording the full

64 See Article 9 of the Convention No. 138.
65 See Sec. 1 Article 37 of the Constitution 2013.
66 See Article 67 of the Constitution 2013.
67 See Sec. 2 Article 37 of the Constitution 2013.
68 See Article 12 of the Ordinance on Labour Contracts, 1990, texts available at <ww.na.gov.vn> (Last accessed on 10 September 2014).
69 See Article 2 of the Convention No. 5.
70 See Article 6 of the Labour Code.
71 See Article 1 of the Law on Child Protection, Care, and Education.
72 See Sec. 7 Article 7 of the Law on Child Protection, Care, and Education.
73 See Article 15 of the Law on Child Protection, Care, and Education.
74 See Article 61 of the Constitution 2013.
75 See Article 26 of the Law on Education.
76 See Article 161 of the Labour Code.
77 See From Article 161 to Article 164 of the Labour Code.

name, birth date, current job, along with the results of the periodical health examination and produce it upon the requirement of the competent state agency.[78]

In addition, the law also prohibits the use of junior workers in hazardous work;[79] furthermore, the law provides a list of occupations that are not permitted to recruit junior workers.[80] Therefore, by prohibiting the use of workers under the age of 18 for hazardous work the law establishes the minimum age for hazardous work in Vietnam as 18.

c) Minimum Age for Artistic Work

In Vietnam, the minimum working age is 15, and there is no general lower minimum age for light work as provided by Convention No. 138. However, the law allows the employment of persons under 15 years to carry out certain types of work.[81] When employing the person from full 13 years and under 15 years, the employer must comply with the following provisions:[82]

- Must sign the labor contracts in writing with the legal representative which must be agreed by the full 13 year and under 15 year old person.
- To arrange the working hours in order not to affect the class hours of the children.
- To ensure the working conditions, labor safety and hygiene appropriate with the age of the underage employee.

d) Conditions of Work for Workers under 18

Workers under the age of 18 are junior workers in Vietnam. They are entitled to the same rights as adult workers in terms of the right to organise, collective bargaining, salary, social security, etc. However, due to their special characteristics, the law provides higher protection for workers under the age of 18 in wages and working hours and also imposes more obligations on employers who employ workers under the age of 18. The working hours of the underage employee from full 15 years of age to less than 18 years must not exceed 08 hours in 01 days and 40 hours in 01 week. The working hours of persons under 15 years must not exceed 4 hours in 01 day and 20 hours in 01 week without working overtime or at night. The person from full 15 years of age and under 18 years is entitled to work overtime and at night in some occupations and jobs in accordance with the MOLISA.[83]

e) The Worst Forms of Child Labour are Prohibited

A Member State Party toConvention No. 182 has to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.[84] In Vietnam, the law provides a relatively adequate mechanism for abolishing the worst forms of child labour recognised by the Convention, relating to: forced labour, prostitution, illicit activities and hazardous work. The law imposes criminal sentences on those who employ children to perform jobs which are heavy, dangerous or which puts them in contact with hazardous substances.[85]

Vietnam law prohibits all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and, serfdom and forced or compulsory labour, including

[78] See Article 162 of the Labour Code.
[79] See Article 163 of the Labour Code. The list of hazardous work is issued by the MOLISA in Circular No. 10/2013/TT-BLDTBXH dated 10 June 2013 provides 91 occupations that prohibit junior workers, texts available at <www.MOLISA.gov.vn> (Last accessed on 15 September 2014).
[80] See Joint Circular no. 21/2004/TTLT- BLĐTBXH-BYT dated 9/12/2004 of Ministry of Labour- Invalids and Social Affairs and the Ministry of Health, texts available at <www.MOLISA.gov.vn> (Last accessed on 15 September 2014).
[81] The list of work is issued by the Ministry of Labour, Invalids and Social Affairs in Circular No. 11/2013/TT-BLDTBXH dated 11 June 2013 provides 91 occupations that prohibit junior workers. Texts available at <www.MOLISA.gov.vn> (Last accessed on 15 September 2014).
[82] See Article 161 of the Labour Code.
[83] See Article 163 of the Labour Code.
[84] See Article 1 of Convention No. 182.
[85] See Article 228 of the Penal Code.

forced or compulsory recruitment of human beings, including children for use in armed conflict. Sentences of imprisonment are imposed on those who trade in, fraudulently exchange or appropriate children in any form;[86] or those who ill-treat children.[87] Victims of human trafficking are protected and supported to rehabilitate them into society. The law provides a legal framework on the sequence, procedures, policies and mechanisms, responsibilities of competent agencies and arrangements for receiving and supporting social integration of trafficked women and children returning home from abroad.[88]

Vietnam law strictly prohibits the use, procuring or offering of a child for prostitution, for the production of pornography or violent products, producing, copying, transporting, circulating and storing child pornography and producing toys and games harmful to the healthy development of children. These regulations are enforced by criminal punishment.[89] Prostitution is illegal in Vietnam.[90] Therefore, Vietnam has created a strong legal framework to prevent and punish prostitution.[91] More severe sentences are applied in cases against persons under the age of 18. Terms of imprisonment are imposed on those who harbour prostitutes,[92] those who entice or procure prostitutes,[93] and those who have paid for sexual intercourse with a person under the age of 18.[94] The law provides more protection for children by sentencing any adults having sexual intercourse (paid or not) with children aged from between 13 and 16 to between one and five years of imprisonment.[95] In addition, all cases of sexual intercourse with children under 13 years old are considered as rape against a child and offenders are sentenced to between twelve and twenty years of imprisonment, life imprisonment or capital punishment.[96] Sexually abused children are assisted by their families, the State and society through consultancy measures, physical and psychological rehabilitation, and provided with conditions to stabilise their lives. Agencies, organisations, and individuals have the responsibility to undertake measures to educate about prevent, stop and denounce acts of sexual abuse of children.[97]

In terms of illicit activities, the use, production, and trafficking of drugs is illegal in Vietnam[98] and prosecuted under the Penal Code.[99] Therefore it is not only the procuring or offering of a child for the production and trafficking of drugs that is illegal in Vietnam but also the organising or harbouring of children to use drugs. The penal Code imposes very severe sentences for these offences.

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[86] See Article 120 of the Penal Code.
[87] See Article 110 of the Penal Code.
[88] See Decision No. 17/2007/QĐ-TTg dated 29/1/2007 of the Prime Minister, texts available at <ww.chinhphu.vn> (Last accessed on 15 September 2014).
[89] See Sec. 2, Article 253 of the Penal Code.
[90] See the Ordinance on Prevention of Prostitution, 2003, text available at <ww.na.gov.vn> (Last accessed on 15 September 2014).
[91] In addition to domestic legislation, Vietnam has signed on 8/12/2000 and ratified on 20/12/2001 the Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Source: <http://treaties.un.org> (Last accessed on 10 September 2014).
[92] See Article 254 of the Penal Code, which sets a sentence between five and fifteen years of imprisonment on those who have paid sexual intercourse with person from 16 to 18 years old and, a sentence between twelve years and twenty years of imprisonment if against children from 13 to 16 years old.
[93] See Article 255 of the Penal Code, which sets a sentence between three and ten years of imprisonment on those who entice or procure prostitutes of person from 16 to 18 years old and, a sentence between seven and fifteen years of imprisonment if against children from 13 to 16 years old.
[94] See Article 256 of the Penal Code, which sets a sentence between one and five years of imprisonment if against person from 16 to 18 years old and, a sentence between three and eight years of imprisonment if against children from 13 to 16 years old.
[95] See Article 115 of the Penal Code.
[96] See Sec. 4, Article 112 of the Penal Code.
[97] See Article 56 of the Law on Child Protection, Care and Education.
[98] See Law on Prevention and Fight against Drugs, 2000(revised in 2008), text available at <ww.na.gov.vn> (Last accessed on 15 September 2014).
[99] See Chapter 18 of the Penal Code.

In regard to hazardous work, Vietnam law prohibits the use of junior workers in heavy or dangerous work, or work requiring contact with toxic substances, or work or workplaces which have adverse effects on their personality.[100] Violation of these prohibitions can result in a fine of between VND 20 million and 25 million.[101] The law does not only provide a list of hazardous occupations,[102] but furthermore creates a list of occupations where it is not permitted to recruit junior workers.[103] In Vietnam, children who have to do hazardous work are regarded as vulnerable children. The People's Committees at all levels have responsibility for detecting and resolving in a timely manner the state of children doing heavy or dangerous jobs, or jobs with exposure to toxic chemicals. They are tasked with creating conditions for those children to learn or do jobs suited to children's health and age group in their respective localities.[104]

2. *Implementation and Challenges of Regulations on Abolition of Child Labour in Vietnam*

a) Governmentmental initiatives

A Member State Party to Convention No. 182 is obligated under that treaty to design and implement, in consultation with relevant Government institutions and employers' and workers' organisations, programmes of action to eliminate as a priority the worst forms of child labour.[105] In addition to incorporating the Conventions on effective abolition of child labour into domestic law, the Vietnam Government has made many efforts to implement and to enforce domestic regulations. Many action plans have been adopted to contribute to the abolition of child labour as required by Convention Nos. 138, 182. They include the National Action Plan for Children (NAPC) for the period 2001-2010;[106] the National Action Plan for Preventing and addressing street children, children who are victims of sexual exploitation and children working in toxic, hazardous and dangerous conditions for the period 2004-2010;[107] the National action plan on prevention and fighting against trafficking in women and children for the period 2004-2010;[108] the National Targeted Programme for the Prevention and fighting against prostitution for the period 2006-2010.[109] The National Plan of Action for the Protection of Children for 2011-2015.[110]

Implementation of these action programmes has brought about some important achievements in protecting children and abolition of child labour in Vietnam. Development and consolidation of legislation on protection of children and elimination of child labour are the most important goals that they have achieved. The second goal aims at increasing the quality and quantity of supportive services to victims of child labour, such as creating models for supporting children in poor households at risk of early entry into the labour market and for monitoring and evaluating the

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[100] See Article 163 of the Labour Code.
[101] See Sec.3, Article 19 of the Decree No. 95/2013/ND-CP dated 22nd August 2013 of the Government, text available at <www.chinhphu.vn> (Last accessed on 10 September 2014).
[102] See Circular No. 10/2013/TT-BLDTBXH dated 10 June 2013, which provides 91 occupations that prohibit junior workers, text available at <www.MOLISA.gov.vn> (Last accessed on 15 September 2014).
[103] See Joint Circular No. 21/2004/TTLT- BLĐTBXH-BYT dated 9/12/2004 of Ministry of Labour- Invalids and Social Affairs and the Ministry of Health, texts available at <www.MOLISA.gov.vn> (Last accessed on 15 September 2014).
[104] See Article 54 of the Law on Child Protection, Care and Education.
[105] See Article 6 of the Convention No. 182.
[106] See Decision No. 23/2001/QD-TTg dated 13/3/2001 of the Prime Minister, texts available at <ww.chinhphu.vn> (Last accessed on 10 September 2014).
[107] See Decision No. 19/2004/QD-TTg dated 12/2/2004 of the Prime Minister, text available at <ww.chinhphu.vn> (Last accessed on 10 September 2014).
[108] See Decision No. 130/2004/QĐ-TTg dated 14/7/2004 of the Prime Minister, text available at< www.chinhphu.vn> (Last accessed on 10 September 2014).
[109] See Decision No. 52/2006/QĐ-TTg dated 8/3/2006 of the Prime Minister, texts available at <ww.chinhphu.vn> (Last accessed on 10 September 2014).
[110] See Decision No.267/QD-TTg dated 22/02/2011 of the Prime Minister, texts available at <www.chinhphu.vn> (Last accessed on 10 September 2014).

current situation of activities preventing and resolving the issue of children working in highly hazardous occupations and environments.

b) Child Labour is still common due to Poverty

According to the ILO, most child labour is rooted in poverty. Studies have proved that child labour is common in countries with low per capita GDP because per capita GDP explains 80 percent of world wide variation of child labour,[111] and increases in per capita expenditure contribute to decreases in child labour.[112] Per capita GDP in Vietnam is low; in 2013, it was just around $1,700.[113] A 2009 survey on child labour in eight provinces confirms that poverty is the main reason for child labour in Vietnam. In poor households, parents are unable to ensure the minimum survival subsistence of their children; income from parents' and other adult family members is not enough to cover children's needs. Therefore, children in one way or another have to work to contribute to the survival of the family and themselves.[114] This demonstrates that the implementation of the Conventions on child labour should not be limited to the transformation into domestic law of ILO Conventions but also requires the social and economic stability that comes from economic development.

The first Survey of Child Labour in 2012 has shown that child labour is common in all provinces, in both rural and urban areas, in both informal and formal sectors of Vietnam. The Survey indicates that about 1754 thousand children aged 5-17 in Viet Nam are considered child labourers - accounting for 62 per cent of working children and 9.6 per cent of the child population. In urban areas, child labourers account for 66.3 per cent of working children against 61.2 per cent in rural areas, child labourers account for 5 per cent of the total child population in urban area, but more than double 11.4 per cent in rural areas.[115]

Table 3.1. Vietnam Child Labour Overview

Children	Total	Residency	
		Urban	Rural
1. Child population (aged 5-17)	**18 349 629**	**5 290 712**	**13 058 917**
Number of working children	***2 832 117***	***399 980***	***2 432 137***
Male	1 626 692	211 722	1 414 970
Female	2 832 117	399 980	2 432 137
Number of child labourers	***1 754 782***	***265 225***	***1 489 558***
Male	1 048 973	146 485	902 487
Female	1 754 782	265 225	1 489 558
2. Proportion (%)			
Child labourers/child population	9.6	5.0	11.4
Child labourers/working children	62.0	66.3	61.2

[111] See Alan Krueger, 'Observation on International Labour Standards and Trade' (1996) NBER Working paper No. T0254, available at http://www.nber.org/papers/w5632 (Last accessed on 4 October 2014).
[112] See Eric Edmonds, Does Chid Labour Decline with Improving Economic Status?, 2003, available at <www.nber.org/papers/w10134> (Last accessed on 4 October 2014).
[113] Source: http://data.worldbank.org/country/vietnam (Last accessed on 4 October 2014).
[114] In Vietnam, Working children are often from disadvantaged households, such as:
(i) poor households;
(ii) households with absence of father or mother as the result of divorce, separation, death; and,
(iii) households with member involved in social problems such as drug addiction, or person with HIV/AIDS).
Source: MOLISA Survey of Working Children in 8 Provinces 2009.
[115] Source: Vietnam National Child Labour Survey 2012.

Source: Vietnam National Child Labour Survey 2012

c) Enforcement

The law, as mentioned above, limits the working hours of children to no more than 7 hours per day. However, the 2009 Survey found out that in some special cases, in production establishments such as garment factories and food processing plants, especially during high season, children worked up to 8-9 hours, even 10-12 hours per day. Furthermore, working children suffered from psychological pressure such as low pay, delay of payment, insults from employers, or were forced to live far from their families and exposed to adult behavior,[116] while the 2012 Survey showed that 569 thousand out of 1.75 million child labourers worked more than 42 hours in the reference week.[117]

The law prohibits use of children in hazardous work. On the contrary, the 2009 survey shows about 50 percent of the working children surveyed were working in a bad and hazardous environment that might have serious consequences for both their physical and psychological development. These factors include humidity, light, dust, hazardous substance, noise, and narrow working space.[118] The 2012 Survey indicates that 1315 thousand children (75per cent of child labourers) do work verging on that banned for junior workers and/or in environments negatively affecting children's development.[119] This shows that the majority of child labour in Vietnam is among the worst forms of child labour as defined by ILO Convention No. 105.

d) Awareness and Knowledge of Child Labour

Studies in Vietnam have shown that public awareness is critical to reducing child labour practices.[120] A large proportion of people do not know that employment of children in work, especially small children, is against Vietnam law.[121] Many people are not aware of the need to reduce working hours of children. According to the *Survey on Implementation of Labour Law at Enterprises*, which was conducted in 1500 enterprises in Vietnam in 2009, 27.02 percent of employers, 31.58 percent of workers and 27.02 percent of trade union leaders said that it was not necessary to reduce the working hours of junior workers to a lower level than that of adult workers.[122]

4. The Implementation of Convention Nos 100 and 111 on Elimination of Discrimination at Work in Vietnam

Vietnam ratified both Conventions Nos. 100 and No. 111 of the ILO on 7 October 1997. Since then, Vietnam has made efforts to transform these Conventions into its legal system.

1. Incorporation of the Convention Nos. 100 & 111 on Elimination of Discrimination at Work into the Legal Framework

Convention No. 111 requires that each Member State, which ratifies this Convention, undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination.[123]

[116] Source: MOLISA Survey of Working Children in 8 Provinces 2009.
[117] Source: Vietnam National Child Labour Survey 2012.
[118] Source: Ibid.
[119] Source: Ibid.
[120] See Furio Camillo Rosati and Zafiris Tzannatos, (2006) 'Child Labour in Vietnam' (2006) 11 Pacific Economic Review 1-31.
[121] Source: MOLISA Survey of Working Children in 8 Provinces 2009.
[122] See Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.
[123] See Article 2 of the Convention No. 111.

Equality between citizens is recognised in the first Constitution of Vietnam adopted in 1946[124] and the current 2013 Constitution, which provides that: "All individuals are equal before the law" and "No one shall be discriminated in his or her political, civic, economic, cultural, and social life."[125] However, in terms of equality, Vietnam law focuses more on prohibiting discrimination based on gender, between men and women, than other grounds of discrimination. The reason for this might be that historically family and society in Vietnam were strongly influenced by the feudal traditions, which gave absolute power over family and society to the male and created an imbalance in power, as well as protection for men and women's roles in society.

In addition, the Penal Code imposes a warning, by way of a non-custodial sentence of up to one year or a prison term of between three months and one year, on those who use violence or commit serious acts to prevent women from participating in political, economic, scientific, cultural and social activities.[126]

a) Prohibition of Discrimination at Work

The Labour Code 1994, which was adopted before ratifying Convention Nos. 100 and 111 provides the principle of anti-discrimination at work thus: All people have the right to work, choose their profession, learn a trade, and improve their skills without discrimination based on sex, ethnic origin, social class, or religious belief.[127]

After ratification of Convention No. 111, detailed regulations to eliminate discrimination based on the grounds of ethnicity and religion were promulgated. According to these regulations, ethnic minority groups are enabled to access land and water, and they are entitled to receive free primary education and vocational training.[128] Discrimination based on religion is strictly prohibited in Vietnam. Workers are protected against religious discrimination in employment, including workers whose religion does not correspond to any of the religious organisations recognised by the Government.[129] The current Labour Code prohibits discrimination on grounds of sex, race, social class, marital status, belief, religion, discrimination against HIV sufferers, disabled people or against the reasons for establishing, joining and participating in Union activities.[130] Violation of this regulation may result in an administrative fine of between VND 5 million and 10 million.[131]

However, there are two grounds of discrimination recognised by the ratified core Conventions but not enshrined in Vietnam law, namely, political opinion and national extraction. Discrimination at work is prohibited in principle but there is no guidance or documents detailing their implementation except for discrimination based on sex but even here the law does not cover some aspects of discrimination based on sex. According to Convention No. 100, "sexual harassment" or "unsolicited sexual attention" are particular forms of discrimination on the basis of sex. However, in Vietnam, there is no provision defining these terms or providing any punishment in the cases of "sexual harassment" or "unsolicited sexual attention" in employment relations. In addition, Vietnam law is silent on indirect discrimination in employment.

b) Protection of Female Workers

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[124] See Article 7, 8, 9 of the 1946 Constitution.
[125] See Article 16 of the 1992 Constitution.
[126] See Article 130 of the Penal Code.
[127] See Sec. 1, Article 5 of the Labour Code 1994.
[128] See Decision No. 267/2005/QD-TTg dated 31/10/2005 of the Prime Minister regarding to vocational training for Ethnic minority groups, text available at <www.chinhphu.vn> (Last accessed on 13 September 2014).
[129] See Ordinance No. 21/2004/PL-UBTVQH dated 18/6/2004 of the Standing Committee of the National Assembly on Religions, text available at <www.na,gov.vn> (Last accessed on 12 September 2014).
[130] See Sec. 1, Article 8 of the Labour Code.
[131] See Sec.2, Article 25 of the Decree No. 95/2013/ND-CP dated 22nd August 2013 of the Government, text available at <www.chinhphu.vn> (Last accessed on 10 September 2014).

As noted previously, Vietnam law focuses more on the elimination of discrimination based on sex. According to the Labour Code, female workers are defined as a special category of workers who are provided special protection in recruitment, during the time of employment and when terminating employment relations.[132] According to the Labour Code, the right to work of female workers is recognised and they are protected against any discrimination.[133] Violation of these provisions may lead to an administrative fine of between VND 10 million and 20 million.[134]

In recruiting workers, an employer must give preference to a female who satisfies all recruitment criteria for a vacant position which is suitable for both males and females in an enterprise.[135] The State applies some preferential policies in order to encourage hiring of female workers by giving tax reductions to enterprises employing many female workers.[136]

In the course of employment, employers are strictly prohibited from conduct which is discriminatory towards a female employee or conduct which degrades the dignity and honour of a female employee.[137] Use of female workers in mines or in deep water is strictly prohibited irrespective of their age.[138] Moreover, employers are not allowed to use female workers in hazardous work.[139]

An employer is prohibited from dismissing a female employee or unilaterally terminating the labour contract of a female employee for reason of marriage, pregnancy, taking maternity leave, or raising a child under twelve months old, except where the enterprise ceases its operation.[140] Indeed, during pregnancy, maternity leave, or raising a child under twelve months old, a female employee shall be entitled to postponement of unilateral termination of her labour contract or to extension of the period of consideration for labour discipline, except where the enterprise ceases its operation.[141]
One of the most important achievements of Vietnam in incorporating the ratified Conventions on elimination of discrimination at work into its legal system is the adoption of the Law on Gender Equality in 2006. This law requires equality of treatment between men and women in many fields, such as politics,[142] the economy,[143] employment, [144] education and training,[145] science and technology,[146] culture, information,[147] physical exercises and sports,[148] public health,[149] and in the family.[150] However, in the process of drafting this law, it has been argued that its implementation might in some cases, create discrimination against men. But most of the law makers agreed that it is not discrimination against men if the law provides better protection to women unless this protection creates barriers to women.

c) Equal Remuneration

[132] See Chapter X of the Labour Code.
[133] See Article 153 of the Labour Code.
[134] See Sec. 2 Article 18 of the Decree No. 95/2013/ND-CP dated 22nd August 2013 of the Government, text available at <www.chinhphu.vn> (Last accessed on 10 September 2014).
[135] See Sec. 2 Article 111 of the Labour Code.
[136] See Sec. 2 Article 110 of the Labour Code.
[137] See Sec. 1 Article 111 of the Labour Code.
[138] See Sec. 2 Article 113 of the Labour Code.
[139] See Sec. 1 Article 113 of the Labour Code.
[140] See Sec. 3 Article 111 of the Labour Code.
[141] See Article 112 of the Labour Code.
[142] See Article 11 of the Law on Gender Equality, 2007.
[143] See Article 12 of the Law on Gender Equality, 2007.
[144] See Article 13 of the Law on Gender Equality, 2007.
[145] See Article 14 of the Law on Gender Equality, 2007.
[146] See Article 15 of the Law on Gender Equality, 2007.
[147] See Article 16 of the Law on Gender Equality, 2007.
[148] See Article 17 of the Law on Gender Equality, 2007.
[149] See Article 18 of the Law on Gender Equality, 2007.
[150] See Article 19 of the Law on Gender Equality, 2007.

Each Member State which ratifies Convention No. 100 has to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.[151] According to Convention No. 100, the principle of equal remuneration for men and women workers for work of equal value may be applied by means of:[152] (i) national laws or regulations; ; (ii) legally established or recognised machinery for wage determination; (iii) collective agreements between employers and workers; or (iv) a combination of these various means.

Equality in remuneration between men and women is recognised in Vietnam law. The Labour Code requires: "The employer must guarantee to pay equally without gender discrimination for the employee performing work of the same value".[153] The Law on Gender Equality states that man and woman are treated equally in the workplace regarding work, payment, bonuses and social insurance.[154] However, from my personal experiences of MOLISA it is still difficult to define what is "same value" and how to measure it in making regulations on wages. This raises the issues of interpretation of ILO standards in domestic legislation.

Each Member State, which ratifies Convention No. 100 has to ensure equal remuneration for men and women workers for work of equal value by means appropriate to the methods in operation for determining rates of remuneration.[155] In determining wages, the measures that Vietnam applies do not involve gender stereotypes and whether the work is undertaken by men or women. [156] Therefore, regulations on determining wages in Vietnam do not involve the issue of gender equality.

2. Implementation of Regulations on Elimination of Discrimination at Work in Vietnam

a) Government Action Programs

Many action programmes have been adopted by the Vietnamese Government to implement the regulations on elimination of discrimination at work, including the National Strategy on the Advancement of Women until 2010;[157] and the National Program on Providing Land, Houses and Water for Ethnic Minority Groups.[158] The National Strategy on Gender Equality for the period of 2011-2020 was adopted on December 12nd 2010.[159]

Institutional capacity has also been enhanced to deal with equality. In 2008, the Department for Gender Equality was established under MOLISA. This department has these duties: to draft law and policies on gender equality; supervising and inspecting the implementation of law on gender equality; collecting data and statistics on gender issues, etc.[160]

b) Gender Equality in Practice

Along with the overall socioeconomic achievements since the reforms of *Doi Moi*, women's status and gender equality in Vietnam have also been improved significantly. Vietnam has recorded encouraging achievements in ensuring women's rights. Women account for 25.76 percent of all

[151] See Sec 1, Article 2 Convention No. 100.
[152] See Sec 2, Article 2 Convention No. 100.
[153] See Sec. 3, Article 90 of the Labour Code.
[154] See Article 13 of the Law on Gender Equality, 2007.
[155] See Sec 1 Article 2 Convention No. 100.
[156] See Article 55 of the Labour Code.
[157] See Decision No. 19/2002/QD-TTg dated 21/1/2002 of the Prime Minister, text available at <www.chinhphu.vn> (Last accessed on 12 September 2014).
[158] See Decision No. 134/QD-TTg dated 20/7/2004 of the Prime Minister, text available at <www.chinhphu.vn> (Last accessed on 12 September 2014).
[159] See Decision No. 2351/QĐ-TTg dated 24/12/2010 of the Prime Minister.
[160] See Decision No. 363/QD-LDTBXH dated 18/3/2008 of the Minister of MOLISA on organisational structure and functions of the Department of Gender Equality, text available at <www.chinhphu.vn> (Last accessed on 12 September 2014).

members of the National Assembly in the 2007-2011 terms, ranking fourth in the Asia Pacific Region.[161]

In terms of employment, 83 percent of working-age women are employed. Women are represented in almost every State administrative agency and State Owned Enterprises where 68.7 percent of the public servants and 30 percent of employers are female. They also participate in numerous political and social organisations, accounting for 3 percent of these organisations' executive members at different levels.[162] Women's urban unemployment rate decreased from 6.98 percent to 6.14 percent, compared to a decrease in the overall urban unemployment rate from 6.28 percent in 2003 to 5.31 percent in 2008. During the same period, some 5,326 persons received vocational training, 33 percent of whom were women.[163] However, women are not always competing on a level playing field. Among other things, they lack access to the same opportunities for skills training, and face discrimination in recruitment, particularly women with disabilities.[164] Furthermore, ethnic minority[165] women and girls lag behind ethnic minority men and Kinh women in accessing health and education services and economic opportunities.[166]

c) Enforcement of Provisions on Enterprises that Use More Female Workers

Vietnam law provides preferential treatment on financial and tax issues to enterprises using a high volume of female workers. According to the law, an enterprise is considered to be using a high number of female workers if more than 50 percent [where it has from 10 to 100 workers] or more than 30 percent [where it has more than 100 workers] of the total workers are female workers.[167] These type of enterprises can obtain low interest rate loans or support from the job creation fund; they are also entitled to benefits tax[168] reduction and can use this money to support female workers.[169] In addition, if these enterprises do not make a profit, expenses incurred from using a high volume of female workers are calculated as legal expenditure of the enterprises.[170]

In practice, there are about 300 enterprises meeting the requirements of using a high volume of female workers. However, all have not received any special treatment or privilege from the Government. It has been alleged that the procedure to claim this special treatment is very complex and difficult to follow.[171]

d) Gap in Remuneration between Male and Female Workers

The law requires equality in payment between men and women for jobs of equal value. In practice, survey data have shown a big gap in income between men and women in different types of enterprises as well as in different economic sectors. The Surveys on Household Living Standards in 2006 demonstrates that men's income is about 1.5 times that of women.

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[161] Source: National Assembly Office.

[162] Source: National Report of the Socialist Republic of Vietnam under the Universal Periodic Review of the United Nations Human Rights Council 2009.

[163] Source: MOLISA.

[164] See Vietnam Women Academy "Difficulties in Vocational Training Access for Women", available at <http://www.hvpnvn.edu.vn/Tintuc.aspx?tid=503> (Last accessed on 12 September 2014).

[165] Vietnam is a country of diverse nationalities with 54 ethnic groups. The Viet (Kinh) people account for 87% of the country's population and mainly inhabit the Red River Delta, the central coastal delta, the Mekong Delta and major cities. The other 53 ethnic minority groups, totalling over 8 million people, are scattered over mountain areas (covering two-thirds of the country's territory) spreading from the North to the South. Source: www.chinhphu.vn (last visited 15 September 2014).

[166] See The World Bank, ADB, DFID and CIDA, Viet Nam Country Gender Assessment, 2006.

[167] See Article 5 Decree No. 23/CP dated 18/4/1996 of the Government, text available at <www.chinhphu.vn> (Last accessed on 14 September 2014).

[168] See Sec. 2, Article 7 Decree No. 23/CP dated 18/4/1996 of the Government.

[169] See Sec. 3, Article 7 Decree No. 23/CP dated 18/4/1996 of the Government.

[170] See Sec. 4, Article 7 Decree No. 23/CP dated 18/4/1996 of the Government.

[171] Source: Comments on the Implementation of the Labour Code, prepared by MOLISA 2009.

Table 4.1. Gap in Pay between Men and Women in Vietnam (in thousand VND)

	Overall	**Men**	**Women**	**Differentials (times)**
1. By types of ownership				
Individual household	861	958	694	1.44
State owned sector	1417	1466	1353	1.10
Collective sector	963	967	956	1.01
Private sector	1312	1454	1102	1.32
Foreign invested sector	1512	1908	1250	1.53
2. By economic sector				
Agriculture, forestry, and fisheries	744	802	644	1.25
Minerals industry (exclude mines)	1740	1843	1292	1.43
Processing industry	1091	1250	937	1.33
Other services	1386	1653	1159	1.43

Source: Surveys on Household Living Standards 2006

The most challenging issue for Vietnam is that the gender pay gap has been widening while the gap has declined in most nations. In the 2008-11 period compared to 1999-2007 a 2 percent increase in the gap was recorded in Viet Nam in the period.[172] The 2011 General Statistical Office data showed that women earn 13 percent less than men.[173] The 2012 survey on workers' salaries carried out by the Vietnam General Confederation of Labour (VGCL) in enterprises nationwide revealed that female workers' salaries are only 70-80 per cent of their male colleagues.[174]

e) Awareness and Knowledge of Regulation on Remuneration

Knowledge of their rights is an important tool for workers to protect themselves from being discriminated against at work, particularly discrimination in remuneration. However, a recent survey has shown that there was still 7.96 percent of workers who are not aware of the regulations on minimum wages. Furthermore, while the law imposes on employers an obligation to set up regulations on bonuses in enterprises, which provides detailed information on the bonuses of workers, this survey has shown that about 17.8 percent of the workers do not know about the regulations on bonuses in their enterprises.[175]

f) *Communication and Dissemination of Legal Information*

Communication and dissemination of information on regulations of eliminating discrimination at work are weak. A current survey has shown that fewer than 40 percent of workers are provided with information about gender equality and the rights of female workers in employment.[176]

[172] See ILO, Global Wages Report 2012/2013, 2013, 5-6.
[173] Source: General Statistical Office.
[174] Source: Vietnam General Confederation of Labour
[175] See Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.
[176] Source: MOLISA Survey on the Dissemination and Communication of Labour Law 2009.

Table 4.2. Workers Provided Information on Gender Issues in Vietnam (%)

Types of Ownership	Percentage
State-owned enterprises	37.98
Private enterprises	36.54
Foreigner invested enterprises	34.32
Cooperatives	29.06

Source: MOLISA Survey on the Dissemination and Communication of Labour Law 2009

Observations

Vietnam has ratified five core Conventions of the ILO relating to three fundamental principles and rights at work: elimination of forced labour (Convention No. 29), abolition of child labour (Convention No. 138 and No. 182), and elimination of discrimination in employment (Conventions No. 100 and No. 111). Experiences of Vietnam in ratification of core ILO Conventions reveal that conformity with domestic law must be taken into consideration before ratification, and ratification usually happens after domestic law is mostly compatible with substantive provisions of the Conventions concerned.

This fact raises two issues. The first issue is the real impact of the ratified core fundamental Conventions on domestic law. It can be seen from Vietnam's experiences that ratification provided momentum to national action to implement domestic law rather than putting pressure on adopting and revising domestic law to make domestic law conform with the Conventions. It indicates that the opportunity of ratifying other fundamental Conventions such as Conventions No. 87 and No. 98 is mostly based on current domestic law on freedom of association and collective bargaining. More conformity between domestic law and the Conventions provides more chance for ratification. The second issue is the impact of ratification of ILO core Conventions on Vietnam. Although domestic law had been in conformity with substantive provisions, ratification encourages Vietnam to implement and to enforce domestic law by fulfilling obligations provided by the implementation and supervision mechanism of the ILO.

Since ratification, active efforts have been made to incorporate into legislation, and to implement in practice, the ratified core Conventions in Vietnam. In terms of legislation, new laws and regulations have been adopted; several irrelevant provisions have been repealed or revised. Legislation in Vietnam shows incorporation of the ratified fundamental Conventions into the domestic legal system is not balanced in all three areas. Standards on elimination of child labour have been incorporated adequately into domestic law. However, on other subjects, some provisions of the ratified Conventions have not been incorporated properly into the legal system; for example, the definition of forced labour; discrimination based on political opinion or national extraction, etc. In addition, domestic law in some cases focuses on only certain aspects of the Conventions; for example, the law focuses more on human trafficking than on other issues related to forced labour, and in terms of discrimination at work, the law concentrates more on the ground of sex than other grounds provided by the Conventions. In terms of equal remuneration, after ratification, Vietnam's practice show the difficulty in the interpretation of the Conventions concerned when regulating equal pay between men and women for work of equal value.

In terms of implementation, even though the provisions of ratified fundamental Conventions are recognised and incorporated into domestic law, their implementation is still challenging. Some key issues in implementation of core ILO Conventions can be listed as: weakness of law enforcement, lack of statistics, low awareness of workers, employers and Government officials, limited communication and dissemination of legal information, limited resources etc. This fact confirms the

challenges of international labour standards as well as the challenges of law enforcement in Vietnam. It calls for more technique assistance in the field of implementation by the ILO to Member States in order for the ratified Conventions to be implemented properly in Member States' practice. Together with technique supports, measures to improve economic development should be carried out to lay the economic foundation for the implementation of the ratified Conventions. Furthermore, it suggests that issues of implementation should be treated with caution in order to achieve success in incorporating the Conventions on Freedom of Association and Collective Bargaining into Vietnam.

Ratification, incorporation, and implementation of the ratified fundamental Conventions in Vietnam have been taking place in parallel with great socio economic developments over the past two decades. This emphasizes the role of ILO Conventions in general and the role of the fundamental Conventions in particular, that ratification, incorporation, and implementation of them have positive effects on economic development.

'Reflections on the Collapse of the Kenyatta case at the International Criminal Court'

Akalemwa wa Mubiana ni Munalula Ngenda[*]

Abstract

This article examines the impact of the fallout of the International Criminal Court's intervention in the aftermath of the 2007/8 post-election violence in Kenya. Through analysis of the collapse of the Court's most high profile case to date, it highlights how the challenges of adjudication of conflicts may undermine the ICC's ability to execute its mandate in enforcing international criminal justice.

Keywords: International criminal justice, ICC intervention, post conflict politics, legitimacy, non-cooperation and States practice.

1. Introduction

On 5th December, 2014, the Prosecutor of the International Criminal Court (ICC) withdrew the case against Kenyan President, Uhuru Muigai Kenyatta.[1] Mr Kenyatta was facing charges for crimes against humanity in relation to the violence which erupted in the aftermath of Kenya's presidential election of 27th December, 2007. The case effectively collapsed following the Trial Chamber's refusal of the Prosecution's application for a further adjournment of the trial in order to improve the state of the evidence.[2] The Prosecutor's observation that this was "a dark day for international criminal justice"[3] highlights the significance of the ICC's intervention in Kenya. This was the most high profile case on the Court's docket as it involved the first ever prosecution of an incumbent Head of State. Thus, the collapse of the trial has been described as the "biggest setback" suffered by the ICC since its inception.[4] There is now speculation that this outcome may further "roil politics in Kenya".[5] Most importantly, the victims understandably now feel "totally abandoned by the ICC" in their quest for justice.[6]

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[*] Lecturer in Law, Brunel University London, UK.

[1] *The Prosecutor v. Uhuru Muigai Kenyatta*, Notice of Withdrawal of Charges, No. ICC-01/09-02/11 (5th December, 2014) <http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf> accessed 30 December 2014.

[2] *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution's Application for Further Adjournment, No. ICC-01/09-02/11-981 (3rd December, 2014) <http://www.icc-cpi.int/iccdocs/doc/doc1878156.pdf> accessed 30 December 2014.

[3] F. Bensouda, "Statement of the Prosecutor of the International Criminal Court on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta" (5th December, 2014) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx> accessed 30 December 2014.

[4] E. Kontorovich, "A Court's Collapse", *National Review Online* (15th September, 2014) <http://www.nationalreview.com/article/387935/courts-collapse-eugene-kontorovich> accessed 30 December 2014.

[5] "Kenya and the International Court: One Gone, Another to Go" (*The Economist*, 9th December, 2014) <http://www.economist.com/news/middle-east-and-africa/21635804-dropping-charges-against-kenyas-president-may-roil-politics-home-one-gone-another> accessed 30 December 2014. It is important to remember that the case of Mr Kenyatta's political ally and Deputy President, William Ruto, is still awaiting trial on similar charges for crimes against humanity in respect of the 2007/8 post-election violence in Kenya. *See The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* ICC-01/09-01/11. After the charges against him were dropped, Mr Kenyatta said on Twitter: "As they say, one case down, two more to go." *See* "ICC drops Uhuru Kenyatta Charges for Kenya Ethnic Violence" (*BBC News*, 5th December, 2014) <http://www.bbc.co.uk/news/world-africa-30347019> accessed 30 January 2015; *Cf.* T. Markussen and K. Mbuvi, "When Does Ethnic Diversity Lead to Violence? Evidence from the 2007 Elections in Kenya", University of Copenhagen Department of Economics Discussion Paper No. 11-19 (July 2011) <http://www.econ.ku.dk/english/research/publications/wp/dp_2011/1119.pdf/> accessed 20 January 2015

The intervention of the ICC in Kenya has had both domestic and international consequences. These include the impact of investigations and prosecutions on legal proceedings in Kenya, and increase in engagement between the ICC and Kenya and the African Union (AU).[7] At the beginning of the process, there were also expectations that the indictment of members of Kenya's political elite would "help to tackle a culture of impunity and contribute to a sense of reform both in the short and long term."[8] Instead, the ICC's involvement became, and some would argue, continues to be a politically contentious issue. Two of the 2007 losing presidential hopefuls, Uhuru Kenyatta and William Ruto – the protagonists accused of organising violence against each other's supporters – later joined forces to win the March 2013 elections on a campaign platform that utilised a lot of anti-ICC rhetoric.[9] In the wake of their inauguration as President and Deputy President of Kenya respectively, suspicions have been raised about government interference with witnesses and procurement of evidence.[10]

It is against this backdrop that the role of the ICC has been mired in controversy largely fuelled by accusations of bias and misconceptions about its operations. The Court has faced numerous challenges that threaten to undermine its ability to execute its mandate due to the actions of recalcitrant States. Thus, the legitimacy of the ICC has become a popular topic of debate. This was brought into sharp focus when Kenya sought the support of the African Union to lobby other African countries to withdraw en masse from the Rome Statute.[11] The AU has since formulated a draft Protocol which proposes to confer international criminal jurisdiction on the African Court of Justice and Human Rights. Apparently, this was done as retaliation to the ICC's issuance of arrest warrants against incumbent African Heads of State and senior government officials.[12] In January 2011, an AU summit endorsed Kenya's efforts to have the ICC proceedings deferred.[13] This was followed by a declaration of support by an extraordinary summit of the AU in October 2013 for deferral of all cases against incumbent leaders on the

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(positing that there is little evidence to indicate that political competition was the cause of the ethnic-driven clashes in Kenya; and arguing instead that the main triggers of the post-election violence were poverty, youth unemployment and poor public services).

[6] *The Prosecutor v. Uhuru Muigai Kenyatta*, Victims' Response to the 'Prosecution's Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta', No. ICC-01/09-02/11-984 (9th December, 2014) para. 7 <http://www.icc-cpi.int/iccdocs/doc/doc1881780.pdf> accessed 30 January 2015.

[7] M. Ssenyonjo, "Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya's Serving Senior State Officials" (2014) *State Practice & International Law Journal* 1(1), 17–44. *Cf.* ASIL, "The Impact of International Criminal Proceedings on National Prosecutions in Mass Atrocity Cases", Proceedings of the Annual Meeting (American Society of International Law) Vol. 103, (March 25-28, 2009) 203– 26.

[8] G. Lynch and M. Zgonec-Rožej, "The ICC Intervention in Kenya", Chatham House Programme Paper AFP/ILP 2013/01 (Chatham House, London, 2013), 12 <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0213pp_icc_kenya.pdf> accessed 30 January 2015; International Crisis Group, "Kenya: Impact of the ICC Proceedings" *Africa Briefing* No. 84 (9th January, 2012) <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/b084-kenya-impact-of-the-icc-proceedings.aspx> accessed 30 January 2015.

[9] *Cf.* N. *Ropers,* "Peaceful Intervention: Structures, Processes, and Strategies for the Constructive Regulation of Ethnopolitical Conflicts", Berghof Report No. 1/1995 (Berghof Research Center for Constructive Conflict Management, Berlin, October 1995) 7–14 <http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Papers/Reports/br1e.pdf> accessed 20 January 2015 (discussing "how political influence and collective experience foster the notion of a 'common destiny'.").

[10] *Op. cit.*, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-984, para. 11 ("Victims' Response to Prosecution's Notice of Withdrawal").

[11] G. Lynch, "Non-Judicial Battles: Kenyan Politics and the International Criminal Court" (January 2014) *African Policy Brief* No. 8, 4 <http://www.egmontinstitute.com/papers/13/afr/APB8.pdf> accessed 30 January 2015.

[12] A. Abass, "The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects" (2013) *Netherlands International Law Review* 60, 27–50, 28.

[13] S. Brown and C. L. Sriram, "The Big Fish won't fry themselves: Criminal Accountability for Post-Election Violence in Kenya" (2012) *African Affairs* 111(442), 244–60, 256.

premise that the same were a threat to peace and stability.[14] Barely a week after the charges against Uhuru Kenyatta were dropped, the ICC suffered another setback when the Prosecutor announced suspension of investigations into allegations of war crimes in the Darfur region of Sudan.[15] This is a significant development considering that the ICC has issued warrants of arrest for President Omar al-Bashir and some senior government officials from Sudan.[16]

One of the implications of these developments has been to embolden claims that the ICC is suffering from a deficit of legitimacy.[17] This perception of the ICC could have a deleterious effect to the extent that non-compliance and non-cooperation by member States may have a negative impact on the Court's ability to carry out its mandate. Therefore, the Court will have to work with all stakeholders to ensure that such a perception does not become a reality on the back of a self-fulfilling prophecy. There can be no doubt that the ICC investigations and prosecutions have varying impacts on the Prosecutor's approach to cases and the relations with member States. The impact of investigations and prosecutions on cooperation between the Court, and Kenya and the AU is a significant case in point.[18] The case clearly demonstrates that the future of international criminal justice, especially in Africa, depends on the commitment of States and the ICC's willingness to foster trust and confidence among member States with regard to its *modus operandi*.[19]

2. Background to the Kenyatta Case

On 31st March, 2010, Pre-Trial Chamber II of the ICC authorised investigations into the 2007-2008 post-election violence in Kenya. This was the first time in the history of the ICC that the

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[14] Lynch, *op. cit.*, 4 ("Kenyan Politics and the ICC").

[15] "Sudan President Bashir hails 'victory' over ICC charges" (*BBC News*, 13th December, 2014) <http://www.bbc.co.uk/news/world-africa-30467167> accessed 3 February 2015.

[16] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest Issued by Pre-Trial Chamber (12th July, 2010), No. ICC-02/05-01/09; *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Warrants of Arrest Issued by Pre-Trial Chamber I (27th April, 2007), No. ICC-02/05-01/07; *The Prosecutor v. Abdel Raheem Muhammad Hussein*, Warrant of Arrest Issued by Pre-Trial Chamber I (1st March, 2012), No. ICC-02/05-01/12.

[17] *See generally* H. Takemura, "Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court" (2012) *Amsterdam Law Forum* 4(2), 4–15; B. N. Schiff, "The ICC and R2P: Problems of Individual Culpability and State Responsibility" in H. F. Carey and S. M. Mitchell (eds.), *Trials and Tribulations of International Prosecution* (Plymouth: Lexington Books, 2013) 149–63, 158; M. J. Struet, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York and Basingstoke: Palgrave Macmillan, 2008) 151–78; S. C. Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law* (Plymouth: Rowman & Littlefield, 2006) 3–4; Y. Shany, "The Legitimacy Deficit of Exceptional International Criminal Jurisdiction" in F. Ni Aoláin and O. Gross (eds.), *Guantánamo and Beyond Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge: Cambridge University Press, 2013) 361–78; Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford: Oxford U. P., 2014) 137–60; C. Cohen, "Measuring the Legitimacy of the International Criminal Court" Paper presented at the annual meeting of the Northeastern Political Science Association, Omni Parker House, Boston, MA, 15th November, 2012; A. Fichtelberg, "Democratic Legitimacy and the International Criminal Court: A Liberal Defence" (2006) *Journal of International Criminal Justice* 4, 765–85; M. Morris, "The Democratic Dilemma of the International Criminal Court" (2002) *Buffalo Criminal Law Review* 5, 591–96; L. Wylie, "The United States, the International Criminal Court, and Bilateral Immunity Agreements: Explaining the Resistance of Weak States and Consequences for American Foreign Policy", Paper presented at the Annual meeting of the International Studies Association, Hilton Hawaiian Village, Honolulu, Hawaii, 5th March, 2005; B. Ponder, "The United States and the Jurisdiction of International Courts: A Comparative Case Study of United States Senate Committee on Foreign Relations Hearings from 1924, 1931, 1946, and 2000", Paper presented at the Annual meeting of the The Midwest Political Science Association, Palmer House Hilton, Chicago, Illinois, 15th April, 2004; M. Glasius, "Do International Criminal Courts Require Democratic Legitimacy?" (2012) *European Journal of International Law* 23(1), 43–66.

[18] Ssenyonjo, *op. cit.*, 33; J. I. Turner, "Nationalizing International Criminal Law" (2004) *Stanford Journal of International Law* 4(1), 1–53; V. O. Nmehielle (ed.), *Africa and the Future of International Criminal Justice* (The Hague: Eleven International Publishing, 2012).

[19] Abass, *op. cit.*, ("Proposed International Criminal Jurisdiction").

Prosecutor investigated a situation *proprio motu* (on the Prosecutor's own initiative) in accordance with Article 15 of the Rome Statute.[20] The aftermath of the general elections held in Kenya on 27th December, 2007, witnessed widespread violence which erupted around the country in December 2007 and January 2008. The presidential election results, which confirmed the re-election of President Mwai Kibaki, were announced after lengthy delays and vociferous accusations of vote rigging.

Subsequently, an independent Commission of Inquiry made several recommendations including the establishment of a special tribunal, in lieu of which a sealed envelope containing the names of suspects would be handed over to the ICC Prosecutor to conduct further investigations.[21] Prominent among those alleged to have been responsible for perpetrating the violence were Uhuru Kenyatta and William Ruto, both losing candidates in the 2007 presidential election, who are now President and Deputy President of Kenya respectively. The two would later form the Jubilee Alliance, a political alliance which carried them to victory in the March 2013 elections as President and Deputy President of Kenya respectively. Since being indicted by the ICC, they had craftily weaved their predicament into their campaign narrative and depicted the Court as a neo-colonial threat to national peace and stability.[22]

Mr Kenyatta was charged with five counts of crimes against humanity consisting of murder, deportation or forcible transfer, rape, persecution and other inhumane acts allegedly committed during the 2007/8 post-election violence. The charges were confirmed on 23rd January, 2012, and his case was accordingly committed for trial before Trial Chamber V(b). The initial trial commencement date set for 5th February, 2014 was vacated by the Chamber on 23rd January, 2014 to address a number of issues raised in relation to the Prosecution's request for an adjournment. The matter was adjourned to allow further investigations to obtain relevant evidence to support the charges.[23] Almost a year later, the Prosecution made another request for a further adjournment as the evidentiary position had not improved significantly. The request for a further adjournment was refused as "it had [not] been established that there [wa]s a realistic prospect of sufficient, concrete evidence being secured."[24] The Chamber instead directed the Prosecution to either withdraw the charges or indicate that there was enough evidence to proceed to trial. The Prosecutor responded two days later by withdrawing the charges against Mr Kenyatta.[25]

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[20] Rome Statute of the International Criminal Court (adopted 17th July, 1998; entered into force 1st July, 2002) 2187 UNTS 90.

[21] CIPEV, "Report of the Commission of Inquiry into Post-election Violence" (Nairobi, 2008) 18, 472–5, <https://www.ictj.org/publication/kenyan-commission-inquiry-post-election-violence> accessed 30 December 2014.

[22] G. Lynch, "Electing the 'alliance of the accused': the success of the Jubilee Alliance in Kenya's Rift Valley" (2014) *Journal of Eastern African Studies* 8(1), 93–114 <http://www.tandfonline.com/doi/pdf/10.1080/17531055.2013.844438> accessed 30 January 2015; Lynch, "The Politics of the Theatrics around the International Criminal Court's intervention in Kenya" *Politics Reconsidered* (15th October, 2014) <http://politicsreconsidered.net/2014/10/15/the-politics-of-the-theatrics-around-the-international-criminal-courts-intervention-in-kenya/> accessed 30 January 2015.

[23] *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution's Application for Further Adjournment (31st March, 2014), No. ICC-01/09-02/11-908, para. 51, 98 <http://www.icc-cpi.int/iccdocs/doc/doc1878156.pdf> accessed 30 December 2014 (the Chamber found that there had been a "substantial unexplained delay" by the Kenyan Government in handing over requested records, and also that the Prosecution's access to relevant evidentiary material had been "unjustifiably frustrated").

[24] *ibid*, para. 53.

[25] *The Prosecutor v. Uhuru Muigai Kenyatta*, Notice of Withdrawal of Charges, No. ICC-01/09-02/11-983 (5th December, 2014) <http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf> accessed 30 December 2014.

The reaction in Kenya was euphoric, with mass public demonstrations of anti-ICC sentiment by people who took to the streets across the country in support of Mr Kenyatta. The Kenyan President, who has persistently been critical of the ICC, stated that he was "excited" and "relieved" that the charges, which as he put it, were "rushed without proper investigation", had been dropped.[26] Speaking recently at an AU summit in January 2015, Mr Kenyatta repeated his fierce criticism of the Court, and intimated that a similar trial against his deputy would also collapse.[27] On the other hand, the ICC Prosecutor has accused the Kenyan Government of being in breach of its treaty obligations under the Rome Statute for failure to cooperate with investigations.[28]

3. Non-Cooperation or Lack of Evidence?

The ICC Prosecutor, Fatou Bensouda, stipulated during the proceedings that the reason for withdrawing the charges against the Kenyan President was because "the evidence ha[d] not improved to such an extent that Mr Kenyatta's alleged criminal responsibility can be proven beyond reasonable doubt."[29] She contended, however, that the totality of the circumstances that led to the collapse of the case was caused by failure of "the Government of Kenya [to] compl[y] with its co-operation obligations under the Rome Statute."[30] In essence, the Court had been prevented from executing its mandate because of machinations on the part of the Kenyan Government which undermined the ability of the Prosecutor to conduct proper investigations. It was alleged that persistent efforts to secure government cooperation to obtain crucial evidence, which could only be found in Kenya and only accessible through the government's assistance, were ultimately frustrated and impeded at the behest of the Government of Kenya.[31]

Other factors which are said to have adversely impacted the case included allegations of "[c]oncerted and wide-ranging efforts to harass, intimidate and threaten" potential witnesses.[32] Indeed, the issue of failure to cooperate was duly raised and adjudicated upon. An official statement by the Prosecutor surmised the matter as follows:

> On the 3rd of December 2014, the Judges of Trial Chamber V(B) of the International Criminal Court (ICC) found that the Government of Kenya had failed to adequately cooperate with my investigations in the case against Mr. Uhuru Muigai Kenyatta. The Chamber stated, "[it] finds that, cumulatively, the approach of the Kenyan Government […] falls short of the standard of good faith cooperation" and "that this failure has reached the threshold of non-compliance" required under the Rome Statute. In its ruling, the Chamber, therefore, found, "[…] that the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article

[26] "ICC drops Uhuru Kenyatta Charges for Kenya Ethnic Violence" (*BBC News*, 5th December, 2014) <http://www.bbc.co.uk/news/world-africa-30347019> accessed 30 January 2015 (stating that the "Kenyan Foreign Minister Amina Mohamed said her government would try to have two other similar cases thrown out including one involving Deputy President William Ruto.").

[27] AFP, "Kenyan President says ICC Case against Deputy will fail" (*Daily Mail*, 31st January, 2015) <http://www.dailymail.co.uk/wires/afp/article-2934657/Kenyan-president-says-ICC-case-against-deputy-fail.html> accessed 30 January 2015.

[28] F. Bensouda, "Statement of the Prosecutor of the International Criminal Court on the status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta case" (5th December, 2014) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-04-12-2014.aspx> accessed 30 January 2015.

[29] *Op. cit.*, *Prosecutor v. Kenyatta*, ICC-01/09-02/11, para. 2 ("Notice of Withdrawal of Charges").

[30] *ibid.*

[31] *ibid.*

[32] *ibid.*

64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute." This is a significant finding. The Judges have thus determined the status of the Kenyan Government's cooperation in the case against Mr. Kenyatta.[33]

In its application for a finding of non-compliance, the Prosecution had pressed for referral of the matter to the Assembly of States Parties under Article 87(7) of the Rome Statute as a "sanction" or "disciplinary measure" against the Kenyan Government.[34] However, it was held that the requisite burden had not been met to warrant such a finding.[35] In this regard, the Chamber took into account "the Prosecution's concession that the evidence fell below the standard required for trial and that the possibility of obtaining the necessary evidence ... [was] still nothing more than speculative."[36] Indeed, the Chamber also raised "serious concerns" about the lack of diligence on the part of the prosecution authority in meaningfully following up requests and the conduct of investigations.[37]

These observations which were contained in the decision on the application for non-compliance were largely repeated in relation to the application for a further adjournment.[38] The Prosecution again sought to make the case that the state of the evidence in the case had not improved due to lack of cooperation by the Kenyan Government. It was essentially suggested that this was the result of deliberate interference by Mr Kenyatta, and/or his political influence and actions as Head of State. While there was no substantiation of the former, it was considered that the latter "might be a valid factor worthy of serious consideration in circumstances where it had been established that there is a realistic prospect of sufficient, concrete evidence being secured."[39] However, this was clearly not the situation in this case.

4. Whither International Criminal Justice?

The ICC has often been accused of being biased against African States.[40] Interventions targeted at incumbent heads of State have caused particular strife.[41] The investigations and subsequent

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[33] Bensouda, *op. cit.*, ("Statement of Prosecutor on Kenya's Cooperation in Kenyatta case").

[34] ICC-01/09-02/11-T-32-ENG, Transcript of Hearing dated 8th October, 2014, page 5 <http://www.icc-cpi.int/iccdocs/doc/doc1846715.pdf> accessed 30 December 2014. Article 87(7) of the Statute provides as follows: "Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

[35] *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution's Application for Non-Compliance under Article 87(7) of the Statute, No. ICC-01/09-02/11-982 (3rd December, 2014) <http://www.icc-cpi.int/iccdocs/doc/doc1878157.pdf> accessed 30 December 2014 ("The Chamber considers that the burden is on the Prosecution to demonstrate that the conduct of the Kenyan Government warrants a finding and referral under Article 87(7) of the Statute." *id*, para. 80).

[36] *ibid*, para. 82 (stating further that: "the Chamber has determined it appropriate to take a decision on the Article 87(7) Application at this stage as it considers that allowing a further adjournment would be contrary to the interests of justice under the circumstances, rather than because the Chamber finds there to be no possibility of further cooperation." *id*, paras. 88–9).

[37] *ibid*, 86.

[38] *Op. cit.*, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-981 ("Decision on Prosecution's Application for Further Adjournment").

[39] *ibid*, para. 51 (stating that: "the Chamber also recalls its findings regarding the failure on the part of the Prosecution to take appropriate steps to verify the credibility and reliability of evidence on which it intended to rely at trial, being, in the Chamber's view, the 'direct reason' for the Prosecution's evidence falling below the required standard at such a late stage." *id*, para. 52).

[40] D. Bosco, "Why is the International Criminal Court Picking only on Africa?" (*Washington Post*, 29th March, 2013) <http://articles.washingtonpost.com/2013-03-29/opinions/38117212_1_international-criminal-court-african-union-centralafrican-republic> accessed 30 December 2014; C. S. Igwe, "The ICC's Favourite Customer: Africa and International Criminal Law" (2008) *Comparative and International Law Journal of Southern Africa* 40, 294–323.

indictments over the Kenya situation spawned a number of diplomatic supplications to the AU and United Nations Security Council. In October 2013, an extraordinary summit of the AU declared support for deferral of all cases against presiding Heads of State.[42] Backed by the AU, Kenya made an unsuccessful request for deferral of proceedings through the UNSC, which has power to defer ICC cases for up to 12 months (and the deferral can successively be renewed indefinitely). A particularly worrisome development involved the lobbying of other African countries through the AU for support to organise a mass withdrawal from the Rome Statute.[43]

The AU has since drafted a Protocol to confer international criminal jurisdiction on the African Court of Justice and Human Rights.[44] This has been perceived to be in retaliation for the ICC's interventions in Africa against incumbent Heads of State and senior government officials.[45] The said proposal to create an African regional criminal court explicitly gives immunity to incumbent leaders and senior government officials. Also, it is quite remarkable that the draft Protocol makes no mention of the ICC.[46] Against this backdrop of diplomatic tension, the relationship between the AU and ICC "has become increasingly troubled"[47] to the point where going forward, the same is said to be "uncertain".[48] The worsening relationship has, and will continue to have significant implications for international criminal justice. A concerted effort of non-cooperation, such as that adopted by the AU can only negatively affect the ability of the ICC to execute its mandate under the Rome Statute.[49]

The accusations of selective enforcement of international criminal justice are obviously bolstered by the fact that to date, all the official investigations and subsequent indictments instituted by the ICC Prosecutor have been in relation to situations and individuals in Africa. Be that as it may, the relationship between the ICC and African countries is a complex one, and as such cannot simply be reduced to singular certitudes. The active participation and contribution of African

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41 "African Union accuses ICC of 'hunting' Africans" (*BBC News*, 27th May, 2013) <http://www.bbc.co.uk/news/world-africa-22681894> accessed 30 January 2015.

42 Lynch, *op. cit.*, 4 ("Kenyan Politics and the ICC").

43 *ibid.* Although another unsuccessful attempt was made to get the Assembly of States Parties to stop cases against all sitting presidents, these efforts built enough momentum to procure the amendment of ICC procedures at the ASP.

44 AU, "Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights", Exp/Min/IV/Rev.7, Adis Ababa, Ethiopia (Revised up to 15th May, 2012) <https://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf> accessed 30 December 2014.

45 Abass, *op. cit.*, 28 ("Proposed International Criminal Jurisdiction"). *See also* A. Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges" (2013) *European Journal of International Law* 24 (3), 933–46.

46 M. du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes", Institute for Security Studies Paper No. 235 (June 2012), 10 <http://www.issafrica.org/uploads/Paper235-AfricaCourt.pdf> accessed 30 January 2015.

47 O. A. Maunganidze, "The Conflation of Politics and Law: Africa and International Criminal Justice", *Arguendo* (21st November, 2014) <http://www.international-criminal-justice-today.org/arguendo/article/The-Conflation-of-Politics-and-Law:-Africa-and-International-Criminal-Justice/> accessed 30 December 2014.

48 M. du Plessis, T. Maluwa and A. O'Reilly, "Africa and the International Criminal Court", Chatham House International Law Paper 2013/01 (July 2013) <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf> accessed 30 December 2014.

49 AU, "Decision on the Report of the Commission on the Progress of the Implementation of the Previous Decisions Concerning the International Criminal Court (ICC)", Doc.Assembly/AU/18(XXIV); "Decision on the Implementation of the Decisions on the International Criminal Court (ICC)", Doc. EX.CL/639(XVIII) [Assembly/AU/Dec.334(XVI)]
<http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf> accessed 30 December 2014.

States to the establishment of the Court is well documented.[50] In this regard, it is important to note that Africa constitutes the largest regional bloc of membership, with 34 States having ratified or signed the Rome Statute. At least six of those countries have adopted domestic legislation to give effect to their obligations to the ICC. Senegal was the first State Party to ratify the Rome Statute in February 1999; and the first review conference of the ICC was held in Uganda. It is also true that the majority of the current cases on the Court's docket were referred to it by African governments themselves. Most importantly, the AU's commitment to the ideals of international criminal justice is enshrined in its Constitutive Act, which provides for the right of the organisation to intervene in the event of war crimes, genocide and crimes against humanity in a member State.[51]

The ICC was established to promote international peace and stability through action to combat impunity by bringing to justice and holding accountable those responsible for committing the gravest of crimes. The cardinal pillars on which the framework under the Rome Statute is built are complementarity and cooperation. The first of these principles arguably seeks to invite the exercise of some level of caution on the part of the investigating or prosecution authority, while the latter is meant to foster favourable engagement between stakeholders in the execution of international criminal justice. However, over the course of its existence, the ICC has distinguished itself from its 'ad hoc' predecessors, such as the criminal tribunals for Nuremberg and Yugoslavia, by "claiming jurisdiction over *sitting heads of state* and ongoing conflicts."[52] This is said to be yet another example of how the ICC has "overextended its jurisdictional reach".[53] The peculiarity of 'ad hoc' criminal tribunals is that they essentially deal with accused persons on the losing side of conflict.[54] To this effect, and until recently, the prescription of international criminal justice has been akin to the notion that history is written by the victors.[55] True to form, all the cases that the ICC has concluded so far have involved defendants who no longer held any position of power.

Going after the presiding leaders of countries has presented numerous hurdles in attempting to secure the necessary cooperation required for investigation and gathering of evidence. The concerned country has control over the "crime scene", evidence and witnesses.[56] Where the leader of such a country is the target of an intervention, it may not be unlikely for its State machinery to "cleverly slow-walk its cooperation with the international community" while also

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[50] P. Mochochoko, "Africa and the International Criminal Court" in E. Ankumah and E. Kwakwa (eds.), *African Perspectives on International Criminal Justice* (Accra, Maastricht, and Pretoria: Africa Legal Aid, 2005), 243 (stating that "the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.").

[51] Article 4(h) of Constitutive Act of the AU (2001); established in 2001 to replace the OAU <http://www.au.int/en/sites/default/files/Constitutive_ Act_en_0.htm> accessed 30 December 2014.

[52] Kontorovich, *op. cit*.

[53] R. Bowman, "Lubanga, the DRC and the African Court: Lessons learned from the first International Criminal Court case" (2007) *African Human Rights Law Journal* 7(2), 412–45, 442.

[54] Kontorovich, *op. cit*.

[55] *ibid*, (positing that "[u]ntil now, international justice was always a kind of victor's justice, because it depended on the defeat of the accused" and that "[t]he Kenyatta case reminds us that the alternative to victor's justice is not super-neutral international justice, but rather no justice."). *Compare* Y. Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) *European Journal of International Law* 20(1), 73–91 (discussing changes in international adjudication whereby the jurisdictional powers of international courts has expanded beyond mere "conflict resolution" to include "international norm-advancement and the maintenance of co-operative international arrangements"; and positing that: "The expansion of international courts and international jurisdiction without seriously addressing their perceived legitimacy may thus result in a political and legal backlash that would, over time, complicate the mission of international courts." *id*, 90).

[56] *ibid.*

perhaps exerting undue pressure on potential witnesses.[57] This of course may not be so easy to substantiate before a court of law, as was highlighted in the Kenyatta case. The situation is exacerbated by the fact that there is no meaningful recourse against recalcitrant States. Indeed, the examples of Kenya and Sudan have only worked to galvanise the collective outrage of the AU against the ICC, notwithstanding the explicit language of the Rome Statute on the contentious issue of immunity for Heads of State.

5. Conclusion

The impact of the ICC's intervention in countries such as Kenya and Sudan has had several domestic and international political and legal implications. Not only has the ICC been accused of bias for pursuing cases exclusively in Africa, it has especially come in for sharper criticism in recent years for its efforts to go after incumbent high ranking government officials. In this respect, the AU's open resentment has since coincided with the formulation of a proposal to expand the jurisdiction of a merged African Court to include international crimes. While some have considered the possibility of using regional courts as a desirable alternative to address international crimes,[58] such an idea has attracted a fair share of scepticism from others.[59] According to another view, the future of international criminal justice in Africa ought mainly to be approached from two angles.[60] Firstly, it is argued that the solution does not lie in the duplication of jurisdiction over international crimes but rather in ensuring that AU member States implement domestic measures to tackle impunity.[61] Secondly, it has been suggested that the ICC needs to improve its *modus operandi* in order to promote good relations with State parties.[62]

Clearly, the decision of the ICC to intervene in cases where alleged perpetrators of international crimes are still firmly in power seems to have backfired. As the Kenyatta and Al-Bashir cases have demonstrated, this approach has resulted in increased diplomatic tension(s), and ultimately delays and frustration of the course of justice for the victims of international crime. Unfortunately, the Court has had to bear the brunt of the criticism for pursuing cases that have resulted in withdrawal of charges or suspension of investigations. The outcome of these cases is perhaps a cautionary tale that "the ICC should show restraint in accepting cases and ... also reduce its acceptance of self-referrals ... as its primary source of cases."[63] It is important to always remember that the ICC was created as a judicial body meant to end impunity and hold accountable those who have committed serious international crimes, rather than a political body to mediate peace processes. In the face of intense diplomatic hostility fuelled by allegations of politically-motivated selectivity by the ICC, all stakeholders in the international criminal justice system, as envisaged under the Rome Statute, can least afford to allow the Court's perceived

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[57] *ibid.*

[58] M. K. Clarke, "Accountability and the Expansion of the Criminal Jurisdiction of the African Court", *Arguendo* (21st November, 2014) <http://www.international-criminal-justice-today.org/arguendo/article/Accountability-and-the-Expansion-of-the-Criminal-Jurisdiction-of-the-African-Court/> accessed 30 December 2014 (stating that: "The reality is that an African regional court has the potential to address both political and legal solutions to deeply historical and political drivers of violence on the African continent.").

[59] Du Plessis, *op. cit.*, 1 (arguing that "[t]he process of expanding the African Court's jurisdiction is fraught with many legal and practical complexities.").

[60] Abass, *op. cit.*, ("Proposed International Criminal Jurisdiction"). *See also* D. Bosco, "Time for the African Union to Choose a Path", *Arguendo* (21st November, 2014) <http://www.international-criminal-justice-today.org/arguendo/article/Time-for-the-African-Union-to-Choose-a-Path/> accessed 30 December 2014.

[61] *ibid.*

[62] *ibid.*

[63] Bowman, *op. cit.*, 444 (arguing at the time when the ICC concluded its first case, that the main lesson to be drawn from the Lubanga case, was that the Court "should be encouraged to withdraw its over-extensive jurisdictional efforts" and that its "power must be scaled back." *id*, 442, 445). Syntax changed.

legitimacy deficit to become a reality. Most importantly, the Court needs to re-establish confidence primarily by conducting proper investigations in order to facilitate thorough preparation of cases.

Robert Kolb, *The International Court of Justice*: (Hart Publishing, United States of America 2013, liii +1307 pp, £145.00 (pb), ISBN: 9781849462631)

As the title suggests, the book reflects on the idea and practice of the International Court of Justice. It is a significant contribution that would complement any law library's book list. The International Court of Justice (ICJ) also known as the World Court is the most distinguished and the oldest permanent international jurisdiction Court to which States turn for resolution of inter-State legal disputes. It is the main judicial organ of the United Nations. Its jurisdiction within the sphere of public international law is general because it extends to all disputes amongst states rather than most other international tribunals confined to specific jurisdiction, thus a crucial tool in strengthening, understanding, and the peaceful resolution of stormy international relations amongst States.

The United Nations Charter (1945) established the Court; based in the Peace Palace at The Hague, with the primary function of delivering judgments in disputes brought before it; to provide authoritative, advisory and influential opinions on matters including those referred to it by a range of other international organisations, agencies, and the United Nations General Assembly. The book focuses on the Court and the crucial role it plays through its ability to interpret and apply relevant rules of international law to disputes between States thereby enhancing peace, stability and mutual confidence within the international community an issue of collective interest and responsibility.

The book further examines in-depth, the Statute of the Court, its procedures, conventions and practices and provides exceptionally useful assistance to all lawyers. It also covers fundamental issues of the Court such as: its composition and elections. The text is divided into 12 parts/chapters; chapter 1 evaluates the Initial Observation on the Peaceful Resolution of International Disputes. This part elaborates on the Importance and Context of the legal architecture of the Court and on 'chapter VI' of the United Nations Charter. Chapter two of the book looks at the Origins and Environment of the International Court of Justice. This part is divided into four sections, section one examines arbitrations and original justice: the Creation of the Permanent Court of International Justice (PCIJ) in 1920. Section two is on the Transition in 1945 from the Permanent Court of International Justice to the International Court of Justice, section three deals with the International Court of Justice as the Principal Judicial Organ of the United Nations and of Public International Law, section four reflects on the Main international jurisdictions based at The Hague. Chapter three covers the Texts governing the Court's activities and is divided into three, the first is on Constitutive Texts of the Statute and the Charter, the second is on the Rules: Derivative Provisions and the third is on Subordinate Texts: Practice Directions.

Chapter four elaborates on the Courts Composition, such as the Bench, Electing Judges, Chambers of the Court and the Registry. Chapter five explores the Contentious Procedures: Inter-state disputes with an elaborate twenty seven sections, starting with the First steps in a case, Discontinuing a case, Validity of Seising the Court, Jurisdiction of the Court and

Admissibility of an Application, Preliminary Objections, *Ratione Personae* who can appear before the Court as a party (Personal Jurisdiction), *Ratione Materiae* which cases can come before the Court (Subject Matter Jurisdiction), *Ratione Consensus* when the Court decides a case (Consensual Jurisdiction). The freedom to use other modes of 'dispute resolution' even where there is 'Compulsory Jurisdiction', Limitation of the Court's jurisdiction if the subject of the dispute affects the Rights and Obligations of third States which have not Consented to it, Concurrent Titles of Jurisdiction, Transitional Jurisdiction under Article 36, paragraph 5, and Article 37 of the Statute, Jurisdiction as to Jurisdiction, *Perpetuatio Fori* the Principle of Forum Perpetuum, Provisional Measures of Protection, Counterclaims, Default Procedure, Intervention by third States, the Power to Pronounce a *non liguet*, Judgments and Orders by Consent, Declaratory Judgments, Effects of Decisions, Interpretation of the Judgment, Revision of a Judgment, Implementation of the Judgment, The Courts Competence as an Appellate Body (Supervisory Jurisdiction), Jurisdiction to Review the Legality of Acts of Other United Nations Organs particularly that of the Security Council and lastly, the Competence of the Security Council to order a party not to Seise the Court.

Chapter six evaluates the general principles applicable to continuous proceedings, analysed from three perspectives, first on the Principle *'ne eat judex ultra petita partium'* second on Questions concerned with Establishing the Facts in particular the Burden of Proof, and the third on The Parties' Duty of Loyalty' *inter se*. Chapter seven considers Procedural Aspects of Contentious Cases. Chapter eight examines Advisory Opinion Procedure: Opinions given to certain Organs of or Affiliated to the United Nations this is done under eight headings: first, what is an Advisory Opinion? Second, Seising the Court: Who can request an Advisory Opinion? Third, The Court's Jurisdiction: When can the Court give an Advisory Opinion? Fourth, Admissibility of the Request: what condition must it satisfy? Fifth, the Non-Existent Discretionary Character of the Opinion: Is the Court Bound to Render One? Sixth, legal and Political Effects of Advisory Opinions, seventh, Procedure for Advisory Opinions, and lastly, Overall Assessment. Chapter nine deals with general principles governing the Court's Contentions and Advisory Procedures and considers this in two ways, firstly, through the Fundamental Principles of Equality as between the Parties and secondly, through the Maxim concerning the 'Proper Administration of Justice'. Chapter ten discusses the Court's Jurisprudence and its Current Trends, this is dealt with under four headings one: The Court's Contribution: the Development of Jurisprudence, two: General Overview: Jurisprudential Phases and Major Decisions, three, the Handling of Precedents and the Technique of Distinguishing them and lastly, the Technique of Judicial Activism and Judicial Restraint. Chapter eleven discusses Miscellaneous Questions such as: the Court's Finances, Publication, Diplomatic Privileges and immunities of Members of the Court, the Court's Extra-judicial Activities, the Court and the Wider Public, Relations between the Court and other International Courts and Tribunals and the Question of reforming the Court. The book concludes with chapter twelve on the Future of the International Court of Justice.

The book, originally published in French; and translated into English examines the legal framework of the ICJ comprehensively, current international law transcends and the original conception of sovereignty, the text contributes immensely to improve understanding and operation of the Court by all particularly the legal constituency. Although, the book is a product of three other works of the author who also made reference to other relevant authors/works on the topic, but maintains that: 'In light of the forgoing, it seems appropriate to try to bring together the laws on the Court in a single up to date study'. The Author's analyses of the interpretive functions in public international law and by the ICJ dates back to the Permanent Court of International Justice and as was noted by the late legend of international law (Anthony Cassese) that: 'the law cannot be well understood as a still picture'.

The book is specifically written for a targeted audience, professionals with legal reasoning knack, covering primarily contemporary issue of debate and practice of international law and a few topics not often discussed. The book covers the Jurisprudence of the Court up to pronouncements shortly after 2010, providing international lawyers with a readable, comprehensive, and authoritative work of reference which will greatly enhance understanding and knowledge of the idea and practice of the ICJ. The book won the American Society of International Law's 2014 Certificate of Merit for High Technical Craftsmanship and Utility to Practicing Lawyers and Scholars.

Charles Olubokun

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Focus:

SPILJ 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.

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(ii) Be presented in a 'Word document' attached to an email with the subject heading of "SUBMISSION" and addressed to The Editor, SPILJ. Email: SPILJ@brunel.ac.uk

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