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**ARTICLES:**



**DIGEST OF INTERNATIONAL LAW:**

'Challenges and Prospects of the new Law of the Sea'

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**Introduction**

The Third United Nations Conference on the Law of the Sea (UNCLOS) held unprecedented talks. Nations gathered to define the maritime spaces among different categories of States.[1] The UNCLOS opened on the 10th of December 1982[2] at Montego Bay, Jamaica. Along with the final Act – approved and signed by the participants – was as an official explanation of the talks that had led to the adoption of the Convention (1973 – 1982) as well as the adoption by the Conference of four Resolutions.

This was a result of 14 years of hard work, with the participation of more than 150 representatives from all over the world, representing diverse judicial systems, rich nations and not so rich ones, coastal States, archipelagic States, the island State, the landlocked States and those known as geographically disadvantaged in terms of oceanic space. These States gathered to draw out and establish a complete juridical system for the regulation of all aspects of the law of the sea, stressing that the problems that face maritime boundaries are closely related to one another and should be contemplated as a whole.[3] This process started in 1967, when the concept of Common Heritage of Mankind was discussed in the General Assembly of the UN regarding the preservation of the seabed and its pacific use.[4]

As René Jean Dupuy[5] explains, although it is not always easy to draw the general rules regarding a social area characterized by conflicting interests. The difficulties are and all the more complex when it comes to issues around heritage sharing. The discussions are more about spaces, and limits than principles. Perversions emerge from attempting to hide interests or to justify appropriations. The freedom of the sea, like a wounded cetacean, is bound to wander at large.

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1) R.J. Dupuy, *L'Océan partagé*, Pedone (1979) pp.1.
2) UN Convention on the Law of the Sea, Entry into force: 16 November 1994
3) Ibid. Preamble.
4) B. Zuleta, *UN Convention on the Law of the Sea*, United Nations (1983), pp. XX-XXIV.
5) R.J. Dupuy, *L'Océan Partagé*, p.1.

States-Parties to the Convention have pointed out that new facts, have emerged since the UNCLOS held in Geneva in 1958 and 1960 that stress the need for a new generally acceptable Convention on the law of the sea.[6] Decolonization and the emergence of new independent nations strengthened the wind of upheaval regarding ownership and management of the seas. The Convention, which deals with all aspects of the law of the sea, acts as a "Constitution of the oceans ".[7] It came into force over two decades ago[8] and has 168 Member-States parties. The very few States, like the United States of America, that have yet to adhere to the Convention view it nevertheless as the backbone of applicable law.

As Ambassador Tommy KOH, President of the third United Nations Conference on the Law of the Sea, put it, UNCLOS is like a dream come true.

> My dream that the Convention will become the "Constitution" of the world's oceans has come to pass. It is the constitution of the oceans because it treats the oceans in a holistic manner. It seeks to govern all aspects of the resources and uses of the oceans. In its 320 articles, and 9 annexes, as supplemented by the 1994 General Assembly Resolution 48/362 relating to Part XI of the Convention and the 1995 Agreement relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, the Convention is both comprehensive and authoritative.[9]

UNCLOS sits at the core of the regulation of matters relating to the sea. It obliges Member States parties' cooperation and its institutions, including the Regional Fisheries Management Organisations (RFMOs), are diverse and their roles very assertive. The Convention has also placed the law of the sea under the jurisdiction of international tribunals, defining an unprecedented system of dispute settlement, including the delimitation of maritime boundaries between States.[10]

The treaty law that gradually evolved, thanks to the codification conferences and delimitation bilateral agreements is an important source of the law on delimitation of sea boundaries. The work of the United Nations International Law Commission has led to the 1958 Geneva Convention, relating to the delimitation of the territorial sea and the Continental shelf. The Third United Nations Conference on the Law of the Sea led to UNCLOS.

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6) UN Convention on the Law of the Sea.
7) In the words of Ambassador Tommy Koh, who said in his speech that: "the question is whether or not we have the right to a fair trial. My answer is in the affirmative", See T. Koh, "A constitution for the Oceans", President of the Third United Nations Conference on the Law of the Sea, Closing Session of the Montego Bay Conference on 11 December 1982, pp. XXXIII-XXXVII.
8) Ibid.
9) T. Koh, 'UNCLOS at 30: Some Reflections ', in L. del Castillo (ed.), *Law of the Sea, From the Grove to the International Tribunal for the Law of the Sea, Liber Amicorum Judge Hugo Caminos* , Brill / Nijhoff (2015) pp.105-109 at pp. 107.
10) T.M. Ndiaye, 'The Judge, Maritime Delimitation and the Gray Areas', *Indian Journal of International Law* (2016): 1-41, at pp.2.

UNCLOS contains provisions relating to the delimitation of the territorial sea, the continental shelf and the exclusive economic zone.[11] Nevertheless, delimitation disputes show that these provisions are not as strong for the purpose that they were intended to serve.[12] Furthermore, delimitation bilateral agreements previous to UNCLOS have generated indigent activity that manifests itself through customary handlings. Nonetheless, the fundamental role of implementing rules and principles on maritime delimitation lies with international tribunals.[13]

The oceans are a human working space of great importance as well as a pool of biological and non-biological resources. For this reason UNCLOS gives a major role to individual actors formally subject of international law,[14] as in cases of prompt release procedures. While UNCLOS sits at the core of the normative structure of the law of the sea, are other numerous texts[15] on the law of the sea. That is to say, the sources of the law of the sea are prolific.[16]

First, there are international treaties within the meaning of the 1969 Vienna Convention. Since the conclusion of the four Geneva Conventions, the law of the sea has been marked by multilateral treaties that evidence both codification and progressive developments of the law.[17] The UNCLOS is supplemented by a series of multilateral treaties which - sometimes - fill in its gaps. We also have "Agreements relating to the implementation of the UNCLOS" whose title is enough to understand their purpose.

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**11)** Ibid.

**12)** It should be recalled that in the North Sea Continental Shelf cases the International Court of Justice had refused to consider in Article 6 of the 1958 Geneva Convention on the Continental Shelf a rule of customary character. It had then to endeavor to define the legal principles which should govern the delimitation of the continental shelf between two States; See the North Sea Continental Shelf Case (Republic of Federal Republic of Germany v. Denmark) and (Federal Republic of Germany v. The Netherlands), judgment of 20 February 1969, ICJ 1969, p.x In the case of the Maritime Delimitation in the region between Greenland and Jan Mayen, the Court will have a more decided attitude: "Thus, for the delimitation of the continental shelf ... even if it were Article 6 of the 1958 Convention, but the customary law of the continental shelf as developed in the jurisprudence ... ", Maritime delimitation case in the area between Greenland and Jan Mayen ( Denmark v. Norway), judgment of 14 June 1993, ICJ 1993, 38, paragraph 51; There is a perception that conventional law was thus thrown out of the law of maritime delimitation.

**13)** Indeed, the delimitation has generated more cases than any other subject of international law, whether at The Hague Court, the Arbitral Courts or the UNCLOS Annex VII tribunals.

**14)** The International Tribunal for the Law of the Sea has experienced nine cases of prompt release under article 292 of UNCLOS. These are the Business: Case No. 2 "Saiga" (No. 2); Case No. 5 "Camouco"; Case N) 6 "Monteconfurco"; Case No. 8 "Grand Prince"; Case No. 11 "Volga"; Case No. 13 "Juno Trader"; Case No. 14 "Hoshinmaru"; Case 15 "Tomimaru" and Case No. 19 "Virginia G"; See the Tribunal's website www.itlos.org. Similarly, the Seabed Disputes Chamber has received a request for an advisory opinion, Case No. 17 "Responsibilities and obligations of States sponsoring persons and entities in the framework of activities in the Area".

**15)** A.V. Lowe and S.A.G. Talmon, *Basic documents on the Law of the Sea*, Hart Publishing (2009), pp. 1012 The authors explain that: "One of the most striking characteristics of the Law of the Sea is the richness of its documentary sources. Its framework treaty, the monumental 1982 UN Convention on the Law of the Sea, is truly a framework (and one with many significant gaps) which holds together an extensive network of treaties, standards and other measures. Fertile mulch of state practice and case-law. By no means all of this material is readily available ... " Editor's Preface, p. XIII.

**16)** On historical aspects, see L. del Castillo (ed.), supra note 9, pp. 106; B. Zuleta *supra* note 4, pp. XX; D.R. Rotherwell and T. Stephens, *International Law of the Sea*, Hart Publishing (2010), pp. 1-29. G. Gidel, *The International Public Law of the Sea*, Chateauroux, Mellotée (1932).

**17)** In his closing address to the Third United Nations Conference on the Law of the Sea, Ambassador Tommy Koh explained the argument that, "except for Part XI, the Convention is unacceptable and legally insupportable. The regime of transit through the straits used for international navigation and the regime of archipelagic sea lanes are two examples of the many new concepts in the Convention. Even in the case of article 76 on the continental shelf, the article contains new law in which it has expanded the concept of continental shelf to include the continental slope and the continental rise. (...)," T. Koh, *supra* note 4, pp. xxxvv; The fact remains that UNCLOS is a Codification Convention on Conventional Questions of the Law of the Sea, in which it incorporates the Geneva Conventions. Indeed, UNCLOS "n'efface pas nombre de règles coutumières classiques dont elle précise les modalités d'application, et qui subsistent parallèlement; L. Savadogo, 'Ships flying the flag of an international organisation', 53 *AFDI* (2007): 640-671 at pp. 646.

On the one hand, there is the Agreement on the application of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted on 28 July 1994 and on the other hand, the Agreement on the application of the provisions of the United Nations Convention of 10 December 1982 on the conservation and management of fish stocks moving both within and beyond exclusive economic zones (Straddling Stocks) and highly migratory fish stocks, adopted on 4 August 1995. The 1994 agreement amends UNCLOS and becomes an integral part of. It provides that:

> The provisions of this Agreement and of Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail.[18]

With regard to the Agreement on Straddling Stocks, the mandate of the Plenipotentiaries was to supplement UNCLOS in order to ensure the conservation and management of these stocks under better conditions and to avoid their overexploitation within the meaning of the Agreement.[19] UNCLOS provisions on stocks have proved to be incomplete and have failed to ensure their sustainable use. They, rather represent a general framework.[20] They impose upon States "the obligation ... to take, with respect to their nationals, measures to conserve the living resources of the high seas"[21] and the obligation to cooperate in the conservation and management of such resources.[22] These obligations appear rather soft and recall obligations of behavior.[23] Therefore, when assessing the status of the UNCLOS and its impact in the contemporary law of the sea, account should be taken of those other agreements and State practice in the implementation of the Convention.[24]

In addition to these instruments, there are other specialized multilateral conventions dealing with various maritime activities within the framework of the International Maritime Organization (IMO), fisheries (FAO) and underwater resources (UNESCO).[25] Moreover, there are other agreements that deal with the most diverse matters on the law of the sea. They include The United Nations Convention on the Conditions of Registration of Ships of 7 February 1986;[26] The Convention for the Suppression of Unlawful Acts Against Maritime Navigation of 10 March 1988; The United Nations Convention on the Arrest of Ships of 12 February 1999; The Abidjan Convention on Environmental Protection of 23 March 1981; the Oslo Operations Convention of 15 February 1992 and the Barcelona Convention on the Protection of the Marine Mediterranean Agreement of 10 June 1995.[27]Alongside these multilateral conventions, we have numerous bilateral conventions giving effect to the provisions of the UNCLOS, in particular in the field of maritime delimitation.

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18) Agreement relating to the application of Part XI of the UNCLOS of 10 December 1982, Article 2 (1).
19) Article 2 of the Agreement on straddling stocks of 4 August 1995.
20) See document of DOALOS of the United Nations A.Conf.164 / INF5.
21) Article 117 of UNCLOS.
22) Article 118 of UNCLOS.
23) R. Casado Raigon, 'Implementation of the Provisions on High Seas Fisheries of the United Nations Conservation on the Law of the Sea', 8, *Maritime Spaces and Resources* (1994): 214; M. Savini, 'The Regulation of Fishing on the High Seas by the General Assembly of the United Nations About Resolution 44/225 on Large Drift Gillnets', *AFDI* (1990): pp.777.
24) In particular national legislation giving effect to the provisions of UNCLOS as well as acts enacted by international and regional organizations.
25) Among the important conventions adopted within the framework of IMO are the SOLAS Convention and its amending protocols; The MARPOL Convention (1973/1978); The Inmarsat Convention (1976) and the SAR Convention of 1979. See, G. Librando, 'The IMO and the Law of the Sea', in D.J. Attard (ed.), *The IMLI Manual on International Maritime Law, Vol. I: The Law of the Sea*, Oxford University Press (2014), pp.577-605. For UNESCO, the Convention on the Underwater Cultural Heritage of 2001, see T. Scovazzi, 'Protection of underwater cultural heritage: the UNCLOS and 2001 UNESCO Convention', *IMLI Manual* (2014), p.443-461; As for FAO, let us recall the 1993 Compliance Agreement and the 2009 Port State Measures. See Basic Documents *supra* note 15, Nos. 54 and 65.
26) This Convention is not yet in force.
27) See Basic Documents cited above *supra* note 15.

By and large, many maritime boundaries in the world are not delimited. The total number of potential maritime boundaries is 420[28] and there are about 200 delimitation agreements in force. That is to say, the law of maritime delimitation has a bright future.[29]

Subsequently, the second important source of the new law of the sea is customary international law. By asserting that: "matters not regulated by the Convention will continue to be governed by the rules and principles of general international law",[30] the UNCLOS acknowledges the important role of customary international law. Indeed, the law of the sea was for a very long period comprised of customary international law. Initially, it was intended to secure international navigation. It gave rise to important notions that nowadays underpin the law of the sea, including: internal waters; territorial sea; high seas; freedom of the seas; exclusive jurisdiction of the flag State; Historic bay and universal jurisdiction in the fight against piracy. This customary international law was practiced until the middle of the twentieth century, when the codification of the law of the sea began. But customary law's importance is is still required: "especially with respect to those areas of conventional law which are not clearly articulated in the existing treaties or in areas where State practice may have extended the application of some of the treaty provisions."[32] The ICJ has recognized this phenomenon in several decisions[33] and in particular those relating to maritime delimitation.[34]

The importance of customary international law and of its relationship with the UNCLOS acknowledged in diverse legal instruments[35] - synchronizing the relationship of the two sources in a rapidly changing law. We also have judicial decisions/ jurisprudence and doctrine as other important sources of the law of the sea.[36] Jouannet writes:

> *Comment ne pas souligner…l'apport de la CIJ dans la consolidation des règles coutumières sur le droit de la mer, de même qu'inversement dans le rejet de certains principes du domaine de la coutume ? L'ensemble de ses arrêts consacrés à ces questions en est une parfaite illustration.*[37]

Consequently, it appears that the fundamental role in the formulation of the legal rules and principles governing the law of maritime delimitation, lies with international courts and tribunals which define and specify them, rather than with States that are bound by the law. With regard to doctrine, its role - although sometimes discussed - has never been clarified before in the field of the law of the sea. "There have been few other bodies of international law influenced by the views of publicists as the law of the sea and the ongoing influence of Grotius is evidence of this phenomenon."[38]

28) See, US Dept. Of State, Bureau of Oceans and International Environment and Scientific Affairs, Limits in the Seas, No. 108, 1st revision, Maritime Boundaries of the World, 1990, 2.
29) See the five volumes of J.L. Charney and LM Alexander, *International Maritime Boundaries, The American Society of International Law*, Nijhoff Publishers, 1993, 1998, 2002, 2007 and the three DOALOS volumes on "Maritime Delimitation Agreements"; G.H. Blake (ed.), *Maritime Boundaries: World Boundaries* Vol 5, Routledge (2002).
30) Preamble of UNCLOS dated 10 December 1982.
31) D.R. Rothwell and T. Stephens, *The International Law of the Sea*, p.22.
32) Ibid.
33) See, for example, the delimitation of the maritime boundary in the Gulf of Maine region (Canada / United States), Rec. ICJ 1984, p. 246, §§ 79-96; Case concerning the Continental Shelf Libya / Malta, Rec. ICJ. 1985, p. 13, §§ 26-34.
34) T. M. Ndiaye, 'The Judge, Maritime Delimitation and the Gray Areas'. See also, Continental Shelf Affairs in the North Sea, (FRG / Danmark) and (FRG / Netherlands), Rec. ICJ 1969, p.x See also, Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Gulf of Bengal (Bangladesh / Myanmar) before the International Tribunal for the Law of the Sea, Judgment of 14 March 2012, paragraph 183.
35) See, for example, the UNESCO Convention on the Underwater Cultural Heritage of 2001 (Article 3); The 1993 FAO Agreement on Compliance (Preamble); The FAO Code of Conduct for Responsible Fisheries of 1995 (Article 3.1), the International Plan of Action for 2001 IUU fishing (Article 10), or the FAO Port State against IUU fishing (Preamble).
36) T.M. Ndiaye, 'The Judge, Maritime Delimitation and the Gray Areas', p. 2.
37) E. Jouannet, 'Droit non écrit', in D. Alland (ed.) *Droit International Public*, PUF (2000) pp. 267-308 at pp. 289.
38) D.R. Rothwell and T. Stephens, *The International Law of the Sea,* p.24.

Finally, contemporary international law, and in particular the law of the sea, is influenced by non-binding legal instruments which are extremely important in their exhortations and recommendations to State practice. Resolutions of the plenary assemblies of international organizations play a leading role in that they draft what essentially become future laws.[39] Some of them can be seen as the founding acts. These include, the right of peoples to self-determination (Resolution 1514 (XV)); and the Peaceful use of the seabed and its subsoil (Resolution 2574 D (XXIV).[40] The Declaration of Principles Governing the Seabed and its Subsoil beyond the Limits of National Jurisdiction (Resolution 2749 (XXV), which proclaims the principle of common heritage of humanity that was later enshrined also in Part XI of UNCLOS;[41] and Agenda 21 adopted in 1992 with its chapter 17 on the protection of the oceans.[42]

At FAO, two non-binding instruments have become extremely significant. The Code of Conduct for Responsible Fisheries[43] and the International Plan of Action to Prevent, Combat and Eliminate IUU Fishing.[44] Additionally, the Code of Conduct for the Suppression of Piracy[45] has become increasingly significant in the evolution of IMO standards.

It should be noted from the foregoing that the normative system of the law of the sea is very rich and varied giving it the flexibility required to regulate a rapidly changing environment. UNCLOS determines, for each zone, its spacial limit and the regime applicable to it, i.e. the rights and obligations of different categories of States. The preference granted to the zonal approach is due to the importance given to the claims of coastal States and nuanced solutions necessary to reconcile the claims with the interest of other States. A weakness in the zonal approach lies in the divergence between nature and law. The extent of the coastal State's jurisdiction over maritime areas is, in essence, defined according to the criterion of distance without taking into account the intrinsic nature of the ocean and the biological or non-biological resources that lie therein - Articles 3, 33, 57, 76 para. 1. The main challenge here is the completion of the sharing (1). And since "only the change is constant"[46] new problems have arisen which were unknown at the time of drafting the Convention or which cannot be dealt with solely on the basis of the Convention. This creates new challenges (2) that can open up new prospects for the law of the sea.

39) J.P Pancracio, *Law of the Sea*, Précis Dalloz (2010), 1st edition, pp.54 where the author explains, "It will be observed that in those areas where the legal principles which constitute the framework of a right Future are still little fixed, unstable, discussed, the least restrictive forms or instruments will be chosen. Thus, the resolutions of the General Assembly of the United Nations, which have no binding legal force for States, are more likely to intervene in sectors where the international community is in the process of defining the essential concepts of the subject matter and Then its basic rules."
40) Basic Documents No. 16.
41) Basic Documents No. 17.
42) Basic Documents No. 48.
43) Basic Documents No. 58.
44) Basic Documents No. 67.
45) Basic Documents No. 90.
46) This maxim is given to Buddha.

## 1. Current Challenges: The Completion of the Sharing

The Convention shared the oceans by allocating maritime spaces among the various categories of States. However, its implementation reveals that the rough edges are stubborn. The fundamental task for States to undertake, under the Convention is therefore to complete and finalise the process of delimitation of maritime areas in such a way that an effective implementation of contemplated under the Convention - the so-called zonal approach, which seeks to reconcile the demands of some with the interests of others - and to enable good governance of the seas and oceans is realized. The zonal approach determines for each zone its spatial limits and the legal regime applicable to it, that is to say, the rights and obligations of the different categories of States. The areas in question are: the territorial sea; the contiguous zone; Archipelagic waters; the exclusive economic zone; the continental shelf; the high seas; the international seabed area; internal waters; the archaeological zone and the historic bays. Three different challenges are apparent from this configuration. The first erefers to the tasks to be undertaken in recognition of the UNCLOS regime. Secondly, outstanding tasks emanate from problems which were not apparent when the Convention was negotiated. Third, problems relating to fundamental change of circumstances abide.

Implementation of the zonal approach is not that straightforward, particularly in situations where the delimitation refers to maritime spaces between States with opposite or adjacent coasts and the determination of the outer limit of the continental shelf beyond 200 nautical miles. This generates four forms of delimitation: (1) unilateral delimitation; (2) conventional delimitation; (3) jurisdictional delimitation; and (4) the determination of the outer limit of the continental shelf beyond 200 nautical miles or delineation.

### 1.1 The Unilateral Delimitation

Unilateral delimitation concerns the separation of the national territory from an international space. It applies to areas under the jurisdiction of the coastal State, namely, internal waters, territorial sea, continental shelf and exclusive economic zone. The delimitation of such areas is the exclusive competence of the coastal State. However, it still has an international aspect.[47] The question of internal waters, which is absent from treaty law, deserves to be clarified. The same applies to criteria relating to the single dividing line.[48] In the maritime delimitation, coastline, baselines, islands, shoals and other geographic or geodetic factors play an important role.[49]

47) As the ICJ states, "while it is true that the act of delimitation is necessarily a unilateral act because the riparian State alone has the capacity to do so, on the other hand, the validity of the delimitation with regard to States Thirds is a matter of international law", Anglo-Norwegian Fisheries Affairs, Judgment of 18 December 1951, Rec.1951, p.132. This recalls the regime applicable to nationality. "It does not depend either on the law or on the decisions of a State to determine whether that State has the right to exercise its protection in the case in question", ICJ, Nottebohm second phase, 1955, p. 20, "because international law leaves it to each State to regulate the attribution of its own nationality." ICJ, Nottebohm second phase, 1955, pp.23, On the other hand, the internal validity of nationality is the first condition of its international validity. Indeed, insofar as international law recognizes the exclusive competence of States in the determination of nationality, it subordinates to its own requirements its effectiveness in the international order. That is why the challenge by a State of an act of nationality does not invalidate it but makes it unenforceable. As Brownlie remarks, "Nationality is a problem, interalia, of attribution, and regarded in this way resembles the law relating to territorial sovereignty. National law prescribes the extent of the territory of a state, but this prescription does not preclude a forum which is international law from deciding questions of title in its own way, using criteria of international law", I. Brownlie, *The Relations Of Nationality in Public International Law*, BYBIL (1963), pp.284-364 at pp. 290-291.

48) Like the Comment Y. Tanaka referring to the 1958 and 1982 Conventions on the Law of the Sea, "These treaties contain no provision with regard to the delimitation of internal waters, Case of a bay with several riparians. In addition to this, the single maritime boundary, which would delimit the continental shelf and the EEZ / fishery zone (FZ) by one line, is at issue. Considering that the factors to be taken into account may be different for the seabed and superjacent waters, it seems possible that the delimitation line of a continental and an EEZ / FZ would differ as well." Y Tanaka, *International Law of the Sea*, Second Edition, Cambridge University Press (2015), pp.198.

49) T.M. Ndiaye, 'The Judge and the Maritime Delimitation: Instructions for Use', in J.M. Van Dyke et al, *Governing Ocean Resources, New Challenges and Emerging Regimes, A tribute to judge Choon-Ho park*, Martinus Nijhoff Publishers (2013), pp. 139-161 at pp. P.145-147.

These various factual data make it possible for the State to determine the spatial basis for the exercise of its jurisdiction over maritime areas.[50] what this means is that:

> ... the legal link between the territorial sovereignty of the State and its rights in certain adjacent maritime areas is established through its coasts. The notion of adjacency as a function of distance rests entirely on that of the littoral and not on that of the land mass. [51]

It appears that the determination of the relevant coast and its configuration (length, shape, presence of islands, shoals, and other geographical factors) constitute a circumstance of particular importance in maritime delimitation. The entitlement of a State is based upon the areas to be delimited. As indicated by the ICJ, a State's claim to the continental and exclusive economic zone is based upon the principle that land dominates the sea because of the projection of coast or coastal facades.[52]

Land is the legal source of the power that a State can exercise in maritime extensions.[53] Besides, it is the coast of the territory of the State that determines the entitlement on the submarine areas bordering this coast.[54] The role of the relevant coast may have two distinct but closely related legal aspects in the context of the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coast in order to determine, in the specific context of a case, the overlapping claims in those areas since the object of each delimitation is to resolve the problem of overlapping claims by drawing a dividing line of separation between the maritime spaces concerned.

Secondly, the relevant coasts should be identified for verification of any disproportion between the ratios of the coast lengths of each State to that of the maritime spaces located on either side of the delimitation line.[55] Proportionality is the criterion for verifying the fairness of any delimitation. It looks at the length of the relevant coast or the composing elements of the area of the maritime zones to be allocated to each State.[56]

50) The ICJ states in the North Sea Continental Shelf case, para. 96: "... the principle that land dominates the sea is applied; It is therefore necessary to look closely at the geographical configuration of the coasts of the countries whose boundaries the Continental Shelf should be delimited."

51) ICJ, Libya v Malta, judgment of 3 June 1985, paragraph 119 states: "The rights which a State may claim to have over the sea relate not to the extent of its territory Behind its coasts, but with these coasts and with the way they border this territory. A State with a small area of land can claim to maritime territories much larger than a large State. It all depends on their respective sea frontages and how they present themselves."

52) See, case concerning the maritime delimitation in the Black Sea, (Romania v. Ukraine), Judgment of 3 February 2009, Rec. ICJ, 2009 para. 77. (53)

53) ICJ, case concerning the Continental Shelf in the North Sea, rec. 1969, judgment of 20 February 1969, paragraph 51. (54)

54) ICJ, Continental Shelf case (Tunisia C. Libya) Judgment of 24 February 1982, paragraph 73. (55)

55) See the case concerning delimitation in the Black Sea, *supra note* 50, paragraph 78, also T.M. Ndiaye, 'The Judge and the Maritime Delimitation: Instructions for Use', p. 149.

56) The International Court of Justice has sometimes found it difficult to determine the relevant coasts. In the case of Libya v. Malta states: "... in the opinion of the court, no principled reason precludes the use of the proportionality test in much the same way as in the case Tunisia / Libya, which consists of determining the "relevant coasts", calculating the arithmetic ratios between the lengths of coast and the allocated areas and finally comparing these ratios in order to ensure the fairness of a delimitation between coasts Facing each other as well as between adjacent ribs. But in this case, some practical difficulties may well make the test inappropriate in this form. These difficulties are particularly evident in the present case where, to begin with the geographical context, the margin of determination of relevant coasts and relevant areas is so wide that virtually any variant could be adopted, ; Then the area to which the judgment will in fact apply is limited by the existence of the claims of third States. It would be illusory to apply proportionality only to the areas within those limits; (...)." Aff. Of the Continental Shelf Libya / Malta, *supra note* 5, para. 74. On the other hand, the primacy of coastal geography in terms of delimitation is a constant jurisprudence: "it is necessary to take a close look at the geographical configuration of the coasts of the countries whose continental shelf must be delimited", Affi. Of the Continental Shelf in the North Sea, op.cit. Paragraph 96; "The method of delimitation to be adopted must be in relation to the coasts of the parties actually bordering the continental shelf", Case of the Delimitation of the Continental Shelf (United Kingdom, C. France) 1977, RSA, Vol. XVIII, 130, 240; "A line of delimitation to be drawn in a given area is a function of the configuration of the coasts", a case concerning the delimitation of the maritime boundary in the Gulf of Maine region (Canada C. United States of America) 1984, Rec. ICJ 1984, p.246, para. 205.

As to the baselines, they are established in the Convention and make it possible to measure the breadth of the areas under national jurisdiction: territorial sea, contiguous zone, exclusive economic zone and continental shelf. Their route obeys two methods; the so-called "normal" method and the "straight baselines" method.

Aarticle 5 of the Convention provides that:

> Unless otherwise provided for in the Convention, the normal base line from which the breadth of the territorial sea is measured, is the low-water mark along the coast, as shown on the large-scale charts officially recognized by the coastal State.[57]

In the case of straight baselines[58] their use implies the existence of a deeply indented and cut-away coast or the presence of a string of islands along the coast or in the immediate vicinity of the coast. The course of the lines must not deviate appreciably from the general direction of the coast, and the breadth of the sea below the straight lines must be sufficiently connected with the terrestrial domain to be subjected to the regime of internal waters.

These straight baselines may not be drawn to or from low-tide elevations unless lighthouses or similar facilities have been constructed or the alignment of such straight baselines has gained International recognition.

Moreover, these lines cannot be drawn in such a way that the territorial sea of another State is cut off from the high seas or from an exclusive economic zone. Under Article 14 of the UNCLOS, the coastal State may, depending on the situation, establish baselines in accordance with one or more of the methods provided for in the preceding articles. It should also be noted that there is a need for advertising measures, in particular for straight baselines, their legal status and regime. *The challenge facing States is the impact of sea-level rise on the baselines, given that between 2000 and 2009 this level rose more than the previous 5,000 years.*[59]

57) Articles 5, 7, 9-11, 13-14 and 16 lay down the rules for the drawing of baselines for measuring the breadth of the territorial sea. Nevertheless, the lines specified in these provisions also make it possible to measure the width of the other spaces under the jurisdiction of the coastal State. The contrary provision referred to in Article 5 concerns: reefs, straight baselines, mouths of rivers, bays, harbors and shallow shoals. ; See, R. 'Churchill, Coastal Waters', in D.J. Attard (ed.), *The IMLI Manual on International Maritime Law, Vol. I: The Law of the Sea*, Oxford University Press (2014), pp. 1-25.

58) Article 7 of the Convention

59) See J. Attenhoffer, 'Baselines and Base Points: How the Case Law Withstands Rising Sea Levels and Melting Ice.', 1 *Law of the Sea Reports* (2010); D. Freestone and J. Pethick, 'Sea Level Rise and Maritime Boundaries: International Implications of Impacts and Responses', in G.H. Blake (ed.), *Maritime Boundaries*, Rouledge (1994), pp. 73; In the case, "The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, award of 7 July 2014", the Tribunal said, paragraph 399: "The Tribunal will first address the instability of the coast Of the Raimangal and Haribhanga estuary. It notes that the coast of Bangladesh is unstable. In coming to this conclusion, the Court is guided by the documented changes in the form and form of some formations in the Raimangal estuary. South Talpatty / New Moore Island is one example. The Tribunal does not consider it necessary, however, to go into any detail on this issue, since it does not consider this instability to be a circumstance that would justify the adjustment of the provisional equidistance line in the delimitation of the exclusive economic zone and continental Shelf. This Decision of the International Court of Justice in the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, p. P.745, para. 281). That judgment considered the instability of a coast with respect to 116 whether the establishment of base points was feasible. Moreover, as this Tribunal has emphasized in respect of the territorial sea (see paragraphs 214-219, 248 above), only the present geophysical conditions are of relevance. Natural evolution, uncertainty and lack of predictability as to the impact of climate change on the marine environment, especially the coastal front of States, make all predictions concerning the amount of coastal erosion or accretion unpredictable. Future changes of the coast, including the consequences of climate change, cannot be taken into account in adjusting a provisional equidistance line.

**1.2 Conventional Delimitation: Bilateral Agreements**

The delimitation of maritime spaces between neighbors is of great importance in that it confers stability and permanence in their mutual relations. It happens that many maritime borders in our world are not delimited. The total number of borders Maritimes is 420[60] and there are only about 200 delimitation agreements to date, most of which have come into force.[61] This also means that the process has not been completed, especially since the existing delimitation agreements cover scarcely all maritime spaces. They relate mostly to the continental shelves and leave indeterminate the other spaces; hence the recent tendency to establish single division lines embracing all areas under national jurisdiction. *This will be a major challenge in the years to come*

The conventional delimitation derives from a prescription of the Convention, which provides that any delimitation of the exclusive economic zone and the continental shelf must be effected by agreement. Articles 15, 74 and 83 of the UNCLOS deal respectively with the delimitation of the territorial sea, the exclusive economic zone and the delimitation of the continental shelf. Article 15 of UNCLOS provides that:

> When the coasts of two States are adjacent or facing each other, neither of them shall be entitled, unless otherwise agreed between them, to extend its territorial sea beyond the median line, all bridges of which are equidistant from the points nearest to the baselines from which the breadth of the territorial sea of each of the two States is measured.

However, this provision shall not apply where, owing to the existence of historical titles or other special circumstances, it is necessary to delimit the territorial sea of the two States otherwise. Articles 74 and 83 of UNCLOS have identical wording and provide:

> 1. The delimitation of the economic zone [of the continental shelf] between States whose coasts are adjacent or facing each other shall be effected by agreement in accordance with international law as referred to in Article 38 of the Statute of the International Court of Justice in order to achieve at an equitable solution.
> 2. If they do not reach an agreement within a reasonable time, the States concerned shall have recourse to the procedures provided for in Part XV.
> 3. Pending the conclusion of the agreement referred to in paragraph 1, the interested States, in a spirit of understanding and cooperation, shall endeavor to conclude provisional arrangements of a practical nature and not to jeopardize or obstruct during this transitional period, the conclusion of the final agreement. The provisional arrangements shall be without prejudice to the final delimitation.
> 4. Where an agreement is in force between the interested States, questions relating to the delimitation of the exclusive economic zone [of the continental shelf] shall be settled in accordance with that agreement.[62]

60) See, US Dept. Of State, Bureau of Oceans and International Environment and Scientific Affairs, Limits in the Seas, No. 108; 1st revision, Maritime Boundaries of the World, 1990, 2.

61) The See the five volumes of J.L. Charney and LM Alexander, *International Maritime Boundaries, The American Society of International Law*, Nijhoff Publishers, 1993, 1998, 2002, 2007 and the three DOALOS volumes on "Maritime Delimitation Agreements"; G.H. Blake (ed.), *Maritime Boundaries: World Boundaries* Vol 5, Routledge (2002). These books provide an insight into the State of interstate practice.

62) With regard to the delimitation of the exclusive economic zone compared with that of the continental shelf, see: International Court of Justice: Continental Shelf case (Tunisia / Libya), Judgment of 24 February 1982; The case of maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993; Case concerning delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain) Judgment of 16 March 2001; Case concerning the land and sea boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Judgment of 10 October 2002; Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Gulf of Bengal (Bangladesh / Myanmar), International Tribunal for the Law of the Sea, Case No. 16, Judgment of 14 March 2012.

State practice relating to the delimitation of the EEZ and the continental shelf is disparate. The delimitation agreements provide very little information on the principles and methods adopted by States in their negotiations to establish the delimitation line adopted.[63] This practice could not be imposed on a customary basis. Indeed, the examination of the disputes over maritime delimitations shows that conventional requirements hardly occupy the central place that one was entitled to expect from them. One author writes that:

> In the drafting of these provisions, there was disagreement between the supporters of "equidistance" and the supporters of equitable principles. The confrontation between the two groups was also linked to another difficult issue concerning peaceful settlement of disputes. Whilst the supporters of "equidistance" were, as part of the package, in favour of establishing a compulsory, third-party system for the settlement of delimitation disputes, the supporters of "equitable principles" generally rejected the idea of compulsory judicial procedures.[64]

It was on this basis that Articles 74 and 83 were designed as an escape route that can never aspire to be a completeness. These provisions do not refer to a method of delimitation but merely states that delimitations must result in a fair result[65] and previous equivocations of the ICJ do not offer any clarity on the matter. It is nonetheless true that delimitation agreements are objective in nature, that is to say they are opposable *erga omnes* and in the case of State succession, they are binding upon the successor at the time of territorial transfer. Thus, the principle of *uti possidetis juris* was been prudently adopted by Latin American states as soon as their independence was proclaimed early in the 19th century. This principle has been received in Africa as the "intangibility of frontiers."[66]

It appears, however, that the fundamental role in the formulation of the legal rules and principles governing the law of maritime delimitation lies with the International Court of Justice and other arbitral tribunals. The latter apply the rules indicated by the Court, while at the same time bringing some innovations which are often absorbed up by the Court, enabling a mutual enrichment. International Courts and Tribunals have thus made it possible to develop the law of maritime delimitation.

63) See V. Leanza and M.C. Caracciolo, 'The Exclusive Economic Zone', in *the IMLI Manual* p. 177-216 at p.205; "Many of the international bilateral agreements do not deal specifically with the delimitation of this area, but they do delimit the seabed and subsoil marine and the water column. These agreements can be divided into three groups depending on their approach to the issue of delimitation: the first group, certainly the most numerous, uses the delimitation method of the median or equidistance; [...] the second group merely provides that the delimitation should be made in accordance with international law [...] another group establishes directly the geographical coordinates, without indicating which method was used in the delimitation, or resorts to methods other than that of the median or equidistance."

64) Y. Tanaka, *International Law of the Sea*, p. 200-201; See also, *Virginia Commentaries, Vol II*, Dordrecht, Nijhoff (1993), pp. 796 - 819. See also, M.D. Evans 'Maritime Boundary Delimitation', in D. Rothwell et al (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, (2015), pp. 254-279.

65) According to the International Court of Justice "... delimiting with concern for achieving an equitable result, as required by international law in force, does not amount to delimiting in equity [which] is not a method Delimitation but only an objective which should be borne in mind when carrying out that purpose." Case concerning land and sea boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Judgment of 10 October 2002, paragraph 294.

66) See the Cairo Declaration of 21 July 1964, see also ICJ, case of the border dispute between Burkina Faso and Mali, ICJ 1986, p. 566, para. 23.

**1.3 Delimitation by International Courts and Tribunals**

UNCLOS provides that if States cannot reach an agreement within a reasonable time, the interested States shall resort to the procedures provided for in Part XV.[67] Jurisdictional delimitation most often results from the failure of negotiations in the determination of the maritime boundary between two States.

Moreover, the existence of exclusive economic zones and the development of technologies for the exploration and exploitation of mineral resources have made the delimitation of maritime areas a major problem of modern times. In particular:

> The increasing recourse to ICJ in matters of maritime delimitation is an element of the general requirement for authoritative settlement of maritime boundaries, whether by agreement, arbitration or judicial award; and this is in turn is a function of the increased possibilities of extraction of the mineral resources of the seabed.[68]

One should note the tendency of States to prefer the bilateral approach to delimitation issues even if they are in a geographical situation with several States. Most of the delimitation agreements are bilateral agreements and most of the proceedings are instituted by the notification of a special agreement even in circumstances where the judge or the arbitrator must take due account of the right of third parties, like in the case of non-intervention.[69]

Delimitations presuppose knowledge of the entitlements of the two Parties in the interested area. Thus, the first issue to be considered by the judge is whether the parties have competing entitlements on the space to be delimited.[70] The problem of the dividing line in overlapping maritime areas has been the subject of a voluminous dispute with regard to the EEZ. Moreover, the continental shelf beyond 200 nautical miles has grown and has increased the interest of States with submissions made to the Commission on the limits of the continental shelf and the shift in jurisprudence observed over the last few decades.

Maritime delimitation has in fact produced more cases than any other subject of international law, whether at The Hague Court, before the arbitral tribunals and today before the International Tribunal for the Law of the Sea and The Tribunals, Annex VII of UNCLOS. In this way, it appears that the fundamental role in the formulation of rules and principles governing the law of maritime delimitation lies with International Courts and Tribunals rather than with inter-state practice.[71]

67) UNCLOS, arts. 74 (2) and 83 (2).

68) H. Thirlway, 'Recent Trends and Challenges of the ICJ Jurisprudence', 55 *Japanese Yearbook of International Law* (2012): 4-30, at pp. 8.

69) Ibid. p.9 in the case of intervention in the matter, rather an opposition of one or both parties was observed. This confirms the bilateral approach chosen by the States.

70) In the case of the territorial and maritime dispute [Nicaragua v. Colombia], judgment of 19 November 2012, Rec. ICJ, 2012, p.624, para. 141, the Court said: "The Court will therefore begin by defining the relevant coasts of the parties, namely those overlapping projections, the delimitation of resolving the question of overlapping claims by tracing A line of separation between the maritime spaces." It will point out in the case of the Continental Shelf Tunisia / Libya, Rec.1982, p.61, paragraph 73: "It is the coast of the territory of the State which is decisive for creating the title over the sub- Seas along this coast."

71) T.M. Ndiaye 'The Judge and the Maritime Delimitation: Instructions for Use', p.140.

After determining the competing titles of the interested States, the judge must consider the relationship between the Continental Shelf and the Exclusive Economic Zone on the resources of the seabed and subsoil. Rights on the continental shelf are inherent, due to the legal regime while the EEZ must be claimed and its creation proclaimed by the State.[72] Tanaka writes:

> Considering that the factors to be taken into account may be different for the seabed and superjacent waters, it seems possible that the delimitation line of a continental shelf and an EEZ/FZ would differ as well. A divergence of factors relevant to the seabed and superjacent waters may entail the risk of creating two competing lines dividing coincident areas and create a situation in which part of the EEZ belonging to one state may overlap part of another state's continental shelf. Such a situation would give rise to complex problems relating to jurisdiction.[73]

Another difficult problem relates to the title to the continental shelf comprising, according to the UNCLOS, the seabed and its subsoil beyond its territorial sea, throughout the natural prolongation of the land territory of that State to the outer edge of the Continental limit, or up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, when the outer edge of the continental margin is at a lower distance. In other words, the title to the continental shelf is based both on the criterion of the distance and on that of the natural prolongation. This, especially since the UNCLOS allows the coastal State to fix the outer limit of its continental shelf when it extends beyond 200 nautical miles.[74]

On the basis of the previous considerations, the judge determines the method of delimitation and constructs the provisional equidistance line. He examines, if necessary, the relevant circumstances before verifying the absence of disproportion in accordance with the three-step paradigm that now appears as the solution to the maritime delimitation dispute. In fact, since the Continental Shelf case in the North Sea, some twenty delimitation cases have been submitted to international jurisdiction and most of the judgments or orders have been rendered.

At the beginning, the jurisprudence concerned delimitations of continental shelves. Nowadays, jurisdictions are called upon to determine maritime boundaries with a single line dealing with all maritime spaces. Indeed, the very difficult legal issue that arises is whether or not the line of the continental shelf should be granted to the water column. *This is the challenge faced by International Courts and Tribunals*. In the case of maritime delimitation in the Black Sea, the ICJ stated that:

> Paragraphs 4 of articles 74 and 83 of the UNCLOS are relevant to assess Romania's position that the instruments of the year 1949 have established, around the Snake Island a boundary delimiting the exclusive economic zones and the continental shelf beyond of point I.( ...) it is clear from the practice of States that a new agreement is necessary for a chosen line to be used to delimit another. This is usually the case when States agree to use the line delimiting their continental shelf to mark the boundaries of their respective exclusive economic zones.[75]

72) D. Attard, *The Exclusive Economic Zone in International Law*, Oxford University Press (1987); F. O. Vincuna, *The Exclusive Economic Zone*, Cambridge University Press (1989).

73) Y. Tanaka *International Law of the Sea*, p.198. The author explains: "The institution of the EEZ includes seabed where the EEZ is established [LOSC, art.56 (1)]. Accordingly seabed is no longer the continental shelf, but the seabed of the EEZ. Thus, theorically, such a single maritime boundary becomes simply the boundary of the EEZ. Strictly speaking, the expression of "a single maritime boundary between the continental shelf and the EEZ might be questioned" *supra* note 4.

74) UNCLOS, s. 76 paras. 2-7, see Nicaragua v. Colombia *supra* note 24, para. 121.

75) Case concerning the maritime delimitation in the Black Sea (Romania v. Ukraine) Judgment, ICJ Reports 2009, p. 61, paragraph. 69.

It should also be noted that maritime delimitation proceedings have been introduced on the basis of compulsory jurisdiction, i.e. on the basis of compulsory procedures resulting in mandatory decisions, in accordance with Part XV of UNCLOS. Therefore, four cases have been submitted to the arbitral tribunals of Annex VII: Arbitral Tribunals: Barbados v. Trinity and Tobago; French Guiana v. Suriname; Bangladesh v. India and Philippines v. China.

**1.4 The Delineation**

The purpose here is to determine the outer limit of continental shelves extending beyond 200 nautical miles[76] - also called delineation. Under the UNCLOS[77] the continental shelf of a coastal State includes the seabed and its subsoil beyond its territorial sea, over the whole extent of the natural prolongation of the land territory of that State to the outer edge of the continental margin, or up to 200 nautical miles of the baselines from which the breadth of the territorial sea is measured, when the outer edge of the continental margin is at a lower distance.

There are three important elements in these provisions. First, the distance of 200 nautical miles of the baselines from which the breadth of the territorial sea is measured. Then, the concept of the natural prolongation of the territory of the coastal State; and finally the outer edge of the continental margin. Where the outer edge of the continental margin extends beyond 200 nautical miles, the outer limit of the continental shelf shall be determined on the basis of paragraph 4 of Article 76, which resorts to geomorphological criterion. On the basis of geological data and the shape and contour of the undersea topography, this geomorphological criterion arises logically from the notion of natural prolongation of the territory of the coastal State.[78] The geomorphological criterion gave rise to the Irish amendment which combines two methods allowing for the coastal State to have criteria for determining the edge of its continental margin. Two formulae have emerged: the Gardiner formula and the Hedberg Formula. In this way, article 76 of the UNCLOS uses geomorphological concepts - Gardiner and Hedberg formulas - to determine the outer edge of the continental shelf beyond 200 nautical miles.

The Gardiner formula refers to the thickness of sedimentary rocks. Aarticle 76, paragraph 4 (a) (i) provides that:

> (...) the coastal State defines the outer edge of the continental margin when it extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by:
>
> A line drawn in accordance with paragraph 7 with reference to the extreme fixed points where the thickness of the sedimentary rocks is at least one-hundredth of the distance between the point and the foot of the continental slope.

76) V. Marotta Rangel, 'The Continental Shelf in the 1982 Convention on the Law of the Sea', 194 *RCADI* (1985): pp. 342-364; L. Lucchini, "Article 76 of the United Nations Convention of 10 December 1982 on the Law of the Sea" in The Continental Shelf extended under the United Nations Convention on the Law of the Sea of 10 December 1982. Optimization of demand, INDEMER, Paris, Pédone, 2004, pp.9-29; R. Churchill and V. Lowe, *The Law of the Sea*, 3rd ed. Manchester University Press (1999); D.R. Rothwell and T. Stephens, *The International Law of the Sea*, Hart Publishing (2010), pp. 98-119.

77) Article 76 (1).

78) V. Marotta, 'The Continental Shelf in the 1982 Convention on the Law of the Sea', p.348; H. Hedberg, 'Relation of Political Boundaries on the Ocean Floor', *Virginia Journal of International Law* (1976): pp.57-75.

This formula has an intimate connection with the criterion used to assess the presence or absence of hydrocarbon resources.[79]

The Hedberg formula relates to the 60 nautical miles at the foot of the continental slope. For the purposes of the UNCLOS,

> The State shall define the outer edge of the continental margin when it extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by (ii) a line drawn in accordance with paragraph 7 with reference to fixed points not more than 60 nautical miles from the foot of the continental slope.[80]

In the absence of evidence to the contrary, the foot of the continental slope coincides with the most marked break at the base of the slope.[81]

Moreover, the coastal State determines the outer limit of its continental shelf by linking a length of lines, not exceeding 60 nautical miles from the fixed points defined by longitude and latitude coordinates.[82] The State may choose between the Irish and Hedberg formulas, the one which appears to it to be the most favorable. However,

> The fixed points that define the marked lines on seabeds, the outer limit of the continental shelf, drawn according to paragraph 4 (a) (i) and (ii), shall be located at a distance not exceeding 350 nautical miles of the baselines from which the breadth of the territorial sea is measured, or at a distance not exceeding 100 nautical miles from the 2,500 meter isobath which is the line connecting the points of 2500 meters of depth.[83]

On an underwater ridge, paragraph 6 of Article 76 provides that the outer limit of the continental shelf shall not exceed a line drawn 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to shoals that are natural features of the continental margin, such as *plateaux*, Thresholds, ridges, benches or spurs.

The UNCLOS has established the Commission on the Limits of the Continental Shelf, a scientific and technical body prescribed under Article 76, paragraph 8, and Annex II of the Convention.[84] Its task is to formulate recommendations on States' claims for the continental shelf beyond 200 nautical miles. The coastal State has sole competence to determine the outer limits of its continental shelf beyond 200 nautical miles. However, it must do so on the basis of the recommendations issued by the Commission. The Commission comprises 21 members, experts in geology, geophysics or hydrography, elected by States Parties from among their nationals.[85] The members of the Commission are elected for a term of five years.

79) Y. Tanaka, *International Law of the Sea*, p.135.
80) Article 76, paragraph 4 (a) (ii) of UNCLOS.
81) Article 76, paragraph 4 (b) of UNCLOS.
82) Article 76, paragraph 7 of UNCLOS.
83) Article 76, paragraph 5 of UNCLOS.
84) A. de Marfly-Mantuano, "The Work of the Continental Shelf Limits Commission" in The Extended Continental Shelf, p. 31-44; D. Roughton and C. Trehearne, "The Continental Shelf" in *The IMLI Manual on International Maritime Law, Vol. I, the Law of the Sea*, p.154-174. Article 76 para.8 states: "The Commission shall make recommendations to the coastal States on questions concerning the fixing of the outer limits of their continental shelf. The limits fixed by a coastal State on the basis of these recommendations shall be final and binding. "
85) UNCLOS, Annex II, Article 2, paragraph 1.

They are eligible for re-election.[86] They shall not be instructed by any government or any authority external to the Commission and shall refrain from any action likely to adversely affect their image as a member of the Commission.[87] The Commission has two essential functions. One is to examine data and other information submitted by the coastal States with regard to the outer limit of the continental shelf when that shelf extends beyond 200 nautical miles for the purpose of submitting recommendations in accordance with Article 76, and the Memorandum of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea. At the request of the interested coastal States, the Committee has competence to issue scientific and technical advice for the establishment of the datas.[88]

The Commission functions through subcommittees composed of seven members appointed in a balanced manner taking into account the specific elements of each request submitted by the coastal State. Members of the Commission who are nationals of the coastal State that has submitted an application may not be members of the sub-committee examining the application.[89] The sub-committee shall submit its recommendations to the committee, which shall approve them by a two-thirds majority of the members present and voting. These recommendations of the Commission are submitted to the coastal State which submitted the request and to the Secretary-General of the UN.[90]

Due to the technical complexity of determining the outer edge of the continental margin and the limit of the continental shelf, the Commission adopted on 13 May 1999, its Scientific and Technical Guidelines which represents an authorized exegesis of Article 76 of the UNCLOS.[91]

As of 26 April 2016, seventy-seven applications had been received at the Commission. The Commission issued 24 recommendations to the coastal States concerned. It should be noted that when considering the applications submitted to it, the Commission decides on the validity of the outer limit of the continental shelf beyond 200 nautical miles; and it does so on a scientific and technical level. It is not authorized to interfer with pending maritime delimitation disputes. In that case:

> The Commission shall not consider the request made by the State party to the dispute and shall not take a decision on the request, except with the prior agreement of all States Parties to the dispute. Dispute ... .[92]

The problem is whether international tribunals are sufficiently equipped to deal with a delimitation of a continental shelf beyond 200 nautical miles.

86) UNCLOS, Annex II, Article 2, paragraph 4.
87) Rules of Procedure of the Commission dated 17 April 2008, CLS / 40 / Rev.1, Rule 11 (CLCS Rules of Procedure).
88) UNCLOS, Annex II, Article 3 (1).
89) UNCLOS, Annex II, Article 5. The same shall apply to a member of the Commission who has assisted the coastal State by providing scientific and technical advice on the route.
90) UNCLOS, Annex II, Article 6.
91) See document CLCS / 11 (CLCS Scientific and Technical Guidelines) adopted by the Committee on 13 May 1999 at its fifth session. The deadline for submission of applications is 10 years from the entry into force of the Convention for the State concerned. This time limit was extended on 29 May 2001 (see SPLOS / 72) and the possibility of submitting preliminary information on the outer limit of the continental shelf beyond 200 nautical miles was offered to coastal States [SPLOS / 183]. 20 June 2008. Concerning the interpretation and application of UNCLOS in the examination of applications - the Commission lacking legal experts - consideration was given to the possibility of establishing a mechanism for requesting an advisory opinion on Questions of interpretation of provisions other than Article 76 and Annex II of the Convention. However, the proposal was withdrawn and the Commission decided to consider this matter. See document CLCS / 74 of 30 April 2012 on the state of play of the work of the Commission [Address by its President]. See also A. G. Oude Elferink 'The Establishment of Outer Limits of the Continental Shelf beyond 200 Nautical Miles by the Coastal State: The Possibilities of Other States to Impact on the Process', 24 *IJMCL* (2009): 535.
92) See CLCS / L / 3, annex 1.

Although the determination of the outer limit of the continental shelf and the delimitation of the Maritime boundary are two different concepts, they have an intimate connection and most of the applications submitted to the Commission are related to a maritime boundary.[93]

As noted by the ICJ, the procedure before the Commission aims at the delimitation of the outer limit of the continental shelf and, consequently, the determination of the extent of the seabed which is a matter for national legislation.

It is distinct from the delimitation of the continental shelf, which is governed by Article 83 of the UNCLOS. The latter shall be effected by agreement between the interested States or through recourse to dispute settlement procedures.[94] The Convention makes a clear distinction between the delimitation of the continental shelf and the delimitation of its outer limit beyond 200 nautical miles.

The fact that the outer limit of the continental shelf beyond 200 nautical miles has not been established has not prevented the International Tribunal for the Law of the Sea from determining the existence of title to the continental shelf between the interested States. However, the Tribunal has not set yet the outer limit of the continental shelf beyond 200 nautical miles. Rather, it has extended the dividing line sand in this regard, the International Tribunal for the Law of the Sea established a precedent by recognizing itself as competent to delineate - not to draw the outer limit - the continental shelf between two States beyond 200 nautical miles in the case of Bangladesh and Myanmar in the Gulf of Bengal. It stated that:

> *décide qu'au-delà de cette limite de 200 milles marins, la frontière maritime se poursuit le long de la ligne géodésique, visée au paragraphe 5, qui commence au point 11 en suivant un azimut de 215° ; jusqu'à ce qu'elle atteigne la zone où les droits des Etats tiers peuvent être affectés.*[95]

The outer limit of the continental shelf beyond 200 nautical miles is attracting increasing interest due to the advancement of technology in the exploration and exploitation of mineral resources. It should be noted that the distinction between the delimitation of the continental shelf and its delineation, that is to say, the delimitation of its outer limit beyond 200 nautical miles, may open the way to the creation of a grey area or the "Alta Mar"or the "Outer Triangle".[96]

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93) B. Kwiattkowska, 'Submission to the UN Commission on the Limits of the Continental Shelf: The Practice of Developing States in cases of Disputed and Unresolved Maritime Boundary Delimitation or Land Disputes Maritime other Gold, Part One' 28 *IJMCL* (2013): 230; see also B. M. Magnussson, 'Is there a Relationship between the temporal and the Delineation Delimitation of the continental shelf beyond 200 Nautical Miles', 28 *IJMCL* (2013): 465; B. Kunoy, 'Delimitation of the year Indicative Overlapping area of Entitlement to the outer Continental Shelf' *BYBIL* (2012): 61-81.

94) Question of the continental shelf delimitation between Nicaragua and Colombia beyond 200 nautical miles from the coast of Nicaragua (Nicaragua v. Colombia), Preliminary Objections, judgment of 17 March 2016, p.37, paragraph 112.

95) Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh / Myanmar), Judgment, ITLOS Reports 2012, p.4, paragraph 6; See also A. G. Oude Elferink, 'ITLOS approach to the delimitation of the continental shelf beyond 200 Nautical Miles in the Bangladesh / Myanmar Case: Theoritical and Practical Difficulties' in R. Wolfrum, M. Sersic, and T.M. Sosic (eds.), *Contemporary Developments in International Law, Essays in Honour of Budislav Vukas*, Brill Nijhoff (2015), pp. 230-249 at pp. 240 The author explains; "The Court's starting points to the delimitation of the continental shelf beyond 200 nautical miles - that Article 83 of UNCLOS Does not make a distinction entre areas Within and beyond That distance - might at first sight to be beyond sccm Reproach. The wording of the article is neutral in this respect. HOWEVER, Article 83 is silent on the content of the substantive rules to be Applied, aim only Refers to the result May require Applying different principles and rules within and beyond 200 nautical miles. Article 83 in so far not to provide the same delimitation methodology within and beyond 200 nautical miles"; See, in addition, B. Kunoy, 'The Admissibility of a Plea to an international Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf', 25 *IJMCL* (2010): 237; R.R. Churchill, 'The Bangladesh / Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation', 1 *CJICL* (2012): 137; B. Magnusson, 'Is there a Relationship between the temporal and the Delineation Delimitation of the continental shelf beyond 200 Nautical Miles', p.465.

96) T.M. Ndiaye, 'The Judge, Maritime Delimitation and the Gray Areas', 56 *Indian Journal of International Law* (2015): 493-533.

In that grey area it is possible to envisage that a State may have sovereign rights over the continental shelf while another State has sovereign rights over the superjacent waters of the EEZ. In other words, one benefits from the oil while the other has the fish; thus making it necessary for States to co-operate in order to prevent difficulties associated with the exercise of their sovereign rights.

The grey area [97] is:

> An area lying within 200 miles from the coast of one state, but beyond a maritime boundary with another state. One state is excluded from exercising jurisdiction in this area because is lies beyond the maritime boundary, and the other state is excluded from exercising 200-miles-zone jurisdiction because the grey area on its side of the boundary lies beyond 200 miles from its coast. The possibility of creating a grey area stems from the fact that there is a discrepancy between entitlement to the EEZ and the principle applicable to its delimitation. Entitlement to this zone is solely based on distance from the coast, but its delimitation between states can be affected on the basis of principles other than distance from the coast. This results in a line which reaches the outer limit of the EEZ at a point which is non-equidistant from the coast of the states concerned. If such a line is applied to limit the maritime zones of both states involved, a grey area is created. [98]

The expression "grey area" reveals the uncertainties of its legal status. The grey area refers to a geographical area that is the subject of claims or claims that overlap and cover the exclusive economic zone, continental shelf or extended continental shelf of two or more coastal States. As a result, the grey area poses numerous legal problems relating to the principles applicable to: (i) delimitation within and beyond 200 nautical miles; (ii) the relationship between the rights and titles of the Exclusive Economic Zone and those of the continental shelf; and (iii) whether or not to create such an area in the *ab initio* determination of the boundary or boundaries of the EEZ or the territorial sea.[100]

97) In the Rejoinder of the United States of America in the Gulf of Maine Case, Mr. Colson explains "The final preliminary outcome of geographical significance which we call deal - and then set aside - is the matter of the so-called gray Area.
(...) Let us turn now to the four reasons we give to suggest that the gray area is not a matter of the chamber in the case. First, the gray area has been known to have been used for a long time. Second, the three United Nations Law of the Sea Conferences have paid no heed to the gray area issue. Third, State practice has not been concerned with this issue. And, fourthly, the parties have provided a means of dealing with the issue in the Special Agreement.
(...) Figure 109 of our presentation shows two charts - one of the Chile-Peru maritime boundary and the other of the Peru-Ecuador maritime boundary. (...) in the case of the boundary between Chile and Peru, the gray area created by the boundary measure approximately 7,800 square nautical miles. In the case of the boundary between Peru and Ecuador it is smaller, measuring about 400 square nautical miles (...). Kenya-Tanzania, Colombia-Ecuador, the Gambia-Senegal, Guinea-Bissau-Senegal, the northern boundary between Portugal and Spain, and Brazil- Uruguay. Accordingly, the fact that the United States is not the only country in the world, [...] The case of the Gulf of Maine case (Canada / United States of America), vol.VII (ICJ, Plaidoiries, Gulf of Maine case), which would be created by the United State line, is approximately 5,700 square nautical miles, pp. 217-220. The judgment was delivered on 12 October 1984 by the Chamber constituted by an order of the Court of 20 January 1982. (Delimitation of the maritime boundary in the Gulf of Maine region, Judgment, ICJ Reports 1984 at 246).

98) A.G. Oude Elferink, 'Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Gray Area Issue', 13 *International Journal of Marine and Coastal Law*, 2, (1998): 143-192 at pp. 143.

99) S. Lin and C. Schofield, 'Lessons from the Bay of Bengal', 180 *The Geographical Journal*, 3, (2014): 260-264 at pp. 260, where the authors explain that "between the Bangladesh and Myanmar (Bay of Bengal Case), the ITLOS delimited a maritime boundary with respect to multiple distinct maritime jurisdictions (territorial sea, exclusive economic zone and continental shelf). ITLOS did not, however, resolve the issues of marine governance that the two states face in the Bay of Bengal, leaving a number of complex and potentially problematic issues outstanding, including the unique creation of what was termed a "Gray area", the governance arrangements for which are open to debate.

100) In the aforementioned Gulf of Maine case *supra* note 97, Canada suggests in its Counter-Memorial that the Gray Zone could be eliminated by allocating it to the State holding a title Uncontested on the said zone, with the consequence of three possible scenarios: "1) a boundary which intersects the 200 nautical miles limits in the vicinity of the equidistance line, eliminating or diminishing the gray area; 2) If the single maritime boundary principle is maintained, one party will have continental shelf jurisdiction in the gray area; And 3) If overlapping jurisdictions are accepted, one party will have continental shelf jurisdiction and the other jurisdiction over the water column " p.239. The latter case is that adopted in the jurisprudence of the Bay of Bengal.

The creation of a grey area in the determination of the boundary relating to the Exclusive Economic Zone or the territorial sea depends on the relationship between the title and the delimitation of maritime spaces. The title attached to these spaces is dependent on the criterion of distance measured from the coast with the notable exception of historical titles. However, the delimitation of the Exclusive Economic Zone or of the continental shelf between States whose coasts are adjacent or opposite may be effected on the basis of principles or criteria other than that of the distance measured from the coast.

In the case of the delimitation of the maritime boundary in the Gulf of Bengal,[101] the International Tribunal for the Law of the Sea applied the three-step paradigm.[102] It determined the method of delimitation and drew the provisional equidistance line before verifying the absence of disproportion. It decided that the method in this case to delimit the Exclusive Economic Zone and the continental shelf between Bangladesh and Myanmar is the equidistance / relevant circumstances method.[103]

As recalled by the Tribunal[104] the delimitation assumes the existence of an overlapping title area. Title and delimitation are two distinct but complementary concepts. The Parties also recognize the close relationship between title and delimitation. Bangladesh states that: "The Tribunal must, before delimiting, answer to the following question: does either Party have a title to the continental shelf beyond 200 miles?" Similarly, Myanmar pointed out that: "the determination of the rights of the two States on a continental shelf beyond 200 nautical miles and their respective extent is a prerequisite for any delimitation."

In this case, the parties issued competing claims on the continental shelf beyond 200 nautical miles. Part of this overlapping area is also claimed by India. Each party rejects the title claims of the other on the continental shelf beyond 200 nautical miles. In addition, Myanmar asserts that the question of the title of Bangladesh or Myanmar to the continental shelf beyond 200 nautical miles is not within the jurisdiction of the Tribunal as it is within the exclusive competence of the Commission on the Limits of the Continental Shelf and not the Tribunal.

The delimitation of the continental shelf beyond 200 nautical miles resulted in a grey area extending beyond 200 nautical miles from the coast of Bangladesh but within 200 nautical miles of the Myanmar coast, located within the delimitation line of Bangladesh. The parties opposed the status of the Grey Area and the manner in which it should be treated.

In any event, *the determination of the outer limit of the continental shelves beyond 200 nautical miles constitutes one of the greatest challenges for the generations to come* particularly regarding the possible completion of the sharing of the ocean initiated by the approach defined in the UNCLOS.

101) Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Gulf of Bengal, International Tribunal for the Law of the Sea, Case No. 16, Judgment of 14 March 2012, paras 177-340. Bay of Bengal Maritime Boundary Arbitration (Bangladesh / India), Arbitral Award of 7 July 2014; Maritime dispute between Peru and Chile, C.I.J. decision of 27 January 2014 available at: www.icj-cij.org/docket/files/137/17930.pdf; Territorial and maritime dispute between Nicaragua and Colombia, C.I.J. decision of 19 November 2012, Rec. 2012, pp. 624

102) Ibid. paragraphs 35- 60.

103) Ibid. paragraph 23.

104) Ibid. paragraphs 397-398.

## 2. New Challenges and Prospects

The new challenges and prospects relate to many problems that have arisen after the signing of the UNCLOS. These could not have been covered by UNCLOS even though its preamble states that States Parties to the Convention were:

> Animated by the desire to settle, in a spirit of mutual understanding and cooperation, all problems regarding the law of the sea (...) and aware that the problems of maritime spaces are closely linked and should be considered as a whole.

These problems are not taken into account by the Convention. To manage these challenges sustained multilateral cooperation coupled with a fairly fertile imagination will be required to achieve in the interim, interpretations favored by the majority. The current trend and subject of ongoing discussions on the law of the sea shows that today everything revolves around what is called the governance of the seas and oceans.[105] This is gaining momentum.

> Many contemporary oceans threats including overfishing, climate change and other pollution problems, and security concerns such as the trafficking in weapons of mass destruction and other illicit cargos, pose profound challenges to an issue-by-issue and zone-by-zone approach to oceans management.[106]

For the time being, the debate has to do with activities on the high seas and on good governance. For the most part, coastal states appear reluctant to engage in discussions which could jeopardize sovereign rights that were acquired after great struggles following the consecration of the concept of an exclusive economic zone.

It must be noted that, the new challenges facing the management of the oceans go beyond the EEZ and challenge the community of States as a whole. They include the management and conservation of the living resources of the high seas; the consequences of climate change and environmental degradation; seabed genetic resources depletion; increased piracy activities; challenges around effecting Article 82 of the UNCLOS; and the advisory function of the Tribunal. Lets examine these in that order.

### 2.1 Management and Conservation of the High Seas Biological Resources

The consecration of the concept of EEZ by UNCLOS, which was supposed to put an end to the conflict of interest between coastal States and flag States, only exasperated it. The enjoyment by the coastal State of sovereign rights for the purpose of exploration and exploitation, conservation and management of the natural, biological and non-biological resources of the superjacent waters in its EEZ has had the effect of shifting the fleet of what was considered the high seas to areas adjacent to the EEZ where the proportion of catches has increased.[107]

105) J.M. Van Dyke, D. Zaelke and G. Hewison (eds.), *Freedom for the Seas in the 21st century; Ocean Governance and Environmental Harmony*, Island Press (1993), M. Haward and J. Vince, *Oceans Governance in the Twenty First Century: Managing the Blue Planet*, Edward Elgar (2008).

106) D. Rothwell and T. Stephans, *The International Law of the Sea*, Hart Publishing (2010), pp. 461; D. R. Rothwell, D.L. Vander Zwaag (eds.), *Towards Principled Oceans Governance*, Rouledge (2006), pp.3.

107) See, FAO, State of the World Fisheries and Aquaculture, at www.fao.org/DOCREP/003/X8002E/8002e 04.htm # Po. O, 1 October 2004; D. Montaz "Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", AFDI, [vol. 41, 1995, p. 676-699]; The Director General of FAO indicated that "Consequently today there are too many vessels chasing too few fish" FAO Press Release 1 October 2001.

This is a result of the State subsidy policy which has facilitated the entry into service of many fishing vessels. Therefore, the official gross tonnage of the world fleet has increased exponentially, jeopardizing the sustainability of the resource.

The fishing capacity of fishing vessels has increased significantly due to the new fishing techniques used, all the more so as the technology is very well developed. Innovations are increasingly amazing, especially in the field of fish tracking: use of aircraft and sonar in seine fishing and guided trawling. Recent use of floating trawls, new net maneuvers, fish pumps, synthetic fibre equipment, and the application of new techniques for freezing and processing fish, nesting boats, factory ships accompanied by a number of vessels of lesser tonnage vessels for catching fish and reliance on an extensive network of ports of convenience or natural shelters where unloading repairs and other rotations of crews occurs[108] call combine to make fish harvesting both a lucrative endeavour for fishermen and also significant threat to oceanic life.

These techniques result in indiscriminate and incidental catches. At the same time it destroys the marine habitat and attacks the reproduction of fish.[109] The consequence is overfishing, overexploitation of stocks and, above all, the very disturbing presence of illegal, unreported and unregulated fishing,[110] which is disastrous and destructive to both the maritime economy and the global ecosystem. Illegal fishing is highly organized. Pirate ships have developed a labyrinth of activities with impunity. States do not always have the means to establish a true fisheries police system and the waters under their jurisdiction do not always have the necessary supervision. Baird writes that:

> Tactics such as sharing intelligence, reflagging to non-members of RFMO's challenging the vessel name and call sign, and creating elaborate corporate webs to conceal ownership are indicative of an emerging corporate element in IUU fishing. Furthermore, IUU fishers have exploited limitations in the international law of the sea which were not apparent when UNCLOS was negotiated.[111]

In order to ensure the sustainability of straddling and highly migratory stocks and other biological resources adjacent to their exclusive economic zones, coastal States have initiated diplomatic actions leading to the agreement on the conservation and management of straddling stocks and highly migratory species.[112]

108) See FAO, Collaboration between international institutions in the field of fisheries, document COFI / 71 / g (b), Annex III, p. 15; T.M. Ndiaye, 'Illegal, Unreported and Unregulated Fishing in West Africa', 10 *Chinese Journal of International Law* 2 (2011): 373-405; B. Rachel, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence', 5 *Melbourne Journal of International Law* 2 (2004): 299-335.

109) See M. Savini "The regulation of fishing on the high seas by the General Assembly of the United Nations. About Resolution 44/225 on large driftnets »AFDI 1990, p. 777.

110) R. Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence', p.300.

111) Ibid.

112) "Agreement for the Implementation of the UNCLOS Provisions of 10 December 1982 Relating to the Conservation and Management of Fish Stocks Traveled both Within and Beyond Economic Zones (Straddling stocks) and highly migratory fish stocks", Doc A / conf. 164/33, adopted by consensus on 4 August 1995, and entered into force in December 2001. See W. Lodge and N. Nandan, 'Some Suggestions for Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995', 20 *IJMCL* (2005): 345; R. Chruchill, 'Fisheries and Their Impact on the Marine Environment: UNCLOS and Beyond', in McRibeiro (ed.), *30 Years After the signing of UNCLOS: The Protection of the Environment and the Future of the Law of the Sea, in Proceedings Of the International Conference*, Faculty of Law, University of Porto, (15-17 November 2012): pp. 23-53 at pp. 35-36.

This agreement deals primarily with the management and conservation of the living resources of the high seas. It establishes principles for the conservation and management of fisheries and defines the flag State's enforcement obligations and powers.

Coastal States and flag States have an obligation to cooperate to ensure the sustainability of the stocks concerned by: making use of the most reliable scientific evidence; applying the precautionary approach; minimizing pollution, waste, catches of fish and other non-target species, and the protecting biological diversity in the marine environment; preventing and eliminating overexploitation and overcapacity and ensuring the sustainable exploitation of fisheries resources. They are also obliged to ake into account the interests of artisanal and subsistence fishing; collect and share complete data; encourage and carry out scientific research to improve the conservation and management of fisheries; and enforce conservation and management measures through effective monitoring, control and surveillance systems.[113]

The agreement establishes a mechanism for international cooperation on stock preservation. Coastal States and States fishing on the high seas should cooperate either directly or through appropriate sub-regional or regional fisheries management organizations or arrangements to establish management and conservation measures for fisheries. Only States that are members of these organizations or that agree to implement conservation measures have access to the fishery resources to which these measures apply.[114]

UNCLOS provides that the flag State[115] shall effectively exercise its jurisdiction and control in the administrative, technical and social aspects on vessels flying its flag. These general provisions are complemented by the Agreement on Straddling Stocks which establishes a system for the control of fishing vessels on the high seas by the flag State by subjecting their activities to licenses or authorizations to be issued by the flag State.[116] The flag State must open an "in-depth investigation" and must take legal action if it has sufficient evidence of allegations of contravention. Other States have a duty to cooperate to this end.[117] The agreement confers police powers on States other than the flag State. It sets out detailed rules for the inspections, boarding and investigations which may be exercised, if need be, to remedy any failures of the flag State.[118]

113) Agreement on Straddling Stocks Article 5.

114) Agreement on Straddling Stocks Article 8 (1). The essential contribution of the Agreement on straddling stocks in this respect 'is to define the desirable institutional characteristics of an effective Order to bring about the sustainable management of fisheries. These include, but are not limited to, measures to ensure the long-term sustainability, agreement on participatory rights. M. Lodge, et al (eds.), *Recommended Best Practices for Fisheries Management Organisations*, Chatham house (2007), pp. 4-5.

115) Article 94 Relating to Flag State Obligations.

116) See Article 18 of the Agreement, paragraph 3 of which provides 'a national register of fishing vessels authorized to fish on the high seas'. This Article 18 is a reminder of the agreement adopted on 23 November 1993 by the FAO Compliance Agreement.

117) Articles 19 and 20 of the Agreement.

118) Article 21 very detailed of the agreement; See also T.M. Ndiaye 'Illegal, Unreported and Unregulated Fishing in West Africa', p. 241-243.

Mandatory and non-mandatory fisheries instruments were developed under the auspices of FAO. Two treaties have been established. The Compliance Agreement (1993) and the Agreement on Port State Measures (2009). The original intent behind the compliance agreement was to address the issue of re-flagging.[119] In the absence of consensus on this issue, delegates focused on the concept of flag State responsibility and the "Free flow of information on deep-sea fishing operations."[120]

As regards the responsibility of the flag State, each party is required to take the necessary measures to ensure that fishing vessels entitled to its flag does not carry out any activity that could compromise the effectiveness of international conservation and management measures.[121] In granting fishing authorization, the party must ensure that it is able to effectively exercise its responsibilities upon that vessel. Moreover, the agreement requires the flag State to take coercive measures. Furthermore, the flag State is required to ensure that ships are marked and to provide the necessary information concerning fishing operations, their catches and their unloading.[122]

With regard to the Agreement on Port State Measures, it should be recalled that in the light of the International Plan of Action against unreported and unregulated illegal fishing and the 2005 FAO-like mechanism relating to Port State Measures, FAO organized a technical consultation in Rome to draft a legal instrument on measures relating to Port State measures.[123] Three sessions of technical consultation were held. This consultation led to the draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009).[124] On 16 May 2016[125]six States ratified the agreement, bringing the number of ratifications to 30, exceeding the 25 minimum ratifications required to bring the agreement into force. It entered into force on 5 June 2016.

Non-mandatory fisheries instruments have also been developed under the auspices of FAO. These include the Code of Conduct for Responsible Fisheries and four voluntary instruments developed under this Code on specific issues.

119) G. Moore, 'The FAO Compliance Agreement' in M. Nordquist and J. More (eds.), *Current Fisheries Issues and the Food and Agriculture Organisation of the United Nations*, Martinus Nijhoff Publishers, (2000), p.x

120) The official text of the agreement is "Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas", adopted on 23 November 1993. It entered into force on 24 April 2003.

121) Article 3 (2).

122) R. Rayfuse, 'To our Children's Children: From Promoting to Achieving Compliance in High Seas Fisheries', 20 *International Journal of Maritime and Coastal Law*, (2005): 514; See also Article 3, paragraphs 6, 7 and 8 of the Agreement.

123) 23-27 June 2008; From 26 to 30 January 2009 and from 4 to 8 May 2009.

124) See ftp://ftp.fao.org/FI/DOCUMENT/tc-psm/2009/PSM Agreement f. Pdf.

125) These are: Dominica, Guinea-Bissau, Sudan, Thailand, Tonga and Vanuatu. Adopted as an FAO Agreement in 2009, after several years of diplomatic efforts, this Agreement is the first binding international treaty that deals specifically with illegal fishing.

The Code, which is only exhortatory or recommendatory, must be interpreted and applied in accordance with the relevant rules of international law as reflected in UNCLOS[126] and in accordance with the Agreement on Straddling Fish Stocks and other applicable rules including those set out in Chapter 17 of Action 21. The Code details the main elements constituting responsible fisheries: general principles, fisheries management, fisheries operations, aquaculture, integration of fisheries and coastal zone management, post-harvest practices and trade fisheries research. Regarding the other instruments dealing with specific issues, are formulated in the form of action plans, particularly in the the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unreported Fishing Regulation. This plan was adopted by consensus at the twenty-fourth session of the Committee on Fisheries of the FAO Council at its one hundred and twentieth session on 23rd June 2001. This plan of action is an important instrument for States that are in the process of developing their national action plan against IUU fishing.[127]

While the coastal State enjoys considerable powers under Articles 56 and 62 of the UNCLOS, there are significant challeges relating to IUU fishing that are not covered by the Convention. Examples include activities relating to support vessels engaged in bunkering, transshipment, transportation of frozen fish by refrigerated transport vessels (Reefers) and the processing activities on trawlers, including filleting. When these different activities are carried out in the EEZ, it is possible that the UNCLOS will fall short of the practice of States, which, under the jurisprudence,[128] makes it possible to find elements of response to problems not dealt with by the Convention. *The fundamental challenge raised here is the nature of the obligations relating to the conservation and management of the living resources of the high seas.*

These obligations are couched in soft-law thais less reminiscent of the obligatory character required to create certainty in the law.[129] They essentially revolve around the obligation of States to negotiate with a view to taking conservation measures with regard to their nationals.[130] The UNCLOS contains few specific guidelines to implement this very general obligation or to assess the efficacy of its implementation. The exercise by the flag State of its jurisdiction and control over vessels flying its flag is very loose because of the weaknesses complained about regulation of flag States.

126) Code of Conduct for Responsible Fisheries, Article 3 (1).

127) The following States adopted their National Plan of Action against IUU fishing on the basis of the FAO Action Plan: Cambodia, Canada, Spain, the United States, Kuwait, Latvia, Mexico, Norway, New Zealand and Venezuela. See also document A / 63/128; Union 1005/2008 establishing a Community system to prevent, deter and eliminate IUU fishing, on 29 September 2008.

128) See, for example, the request for an advisory opinion of the SRFC to the International Tribunal for the Law of the Sea, Case No. 21, Opinion of 2 April 2015.

129) See, R. Baird 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence', p.308; UNDOALOS, The Law of the Sea: The Regime for High-Seas Fisheries, Status and Prospects, 1992, 26 pargraph 78; R. Chruchill, 'Fisheries and Their Impact on the Marine Environment: UNCLOS and Beyond'; Y. Tanaka, 'The Changing Approaches to Conservation of Marine Living Resources in International Law', 71 *ZaoRV* (2011): 291-330 at pp.297-301; G.L. Kesteven, 'MSY Revisited: A Realistic Approach to Fisheries Management and Administration', 21 *Mar. Pol'y* (1997): 73; S.A. Murawski, 'Ten Myths Concerning Ecosystem Approaches to Marine Resource Management', 31 *Mar. Pol'y* (2007): 681.

130) Articles 117 and 118 of UNCLOS, see also Articles 5, 8 and 10 of the Agreement on Straddling Stocks.

The practice of "re-flagging" and the manipulations relating to the consent of the States[131] as well as the question of "genuine link" are good examples. The adoption of new legal instruments is certainly not the solution[132] although the need to strengthen the mechanism of coercive measures is necessary. In this regard, it is to be welcomed that the Agreement on Port State Measures of 5 June 2016, entered into force with the six new ratifications registered on 16 May 2016. On the other hand, as Churchill points out:

> In any case, if past practice is anything to go by, any additional law/soft law measures would be likely to be centred exclusively or largely on high sea fishing, whereas non-sustainable fishing is a least as much a problem in fisheries within national jurisdiction. Instead of further legislation, the following types of action may prove more useful.[133]

If these proposals are paired with the objectives of the Code of Conduct for Responsible Fishery and, then implemented in a coordinated manner between the coastal States, the flag State and the port State, it could prove to be of a great profit for the community of States. The electronic registration of catches adopted by RFMOs, notably the ICCAT, should be welcomed, as well as the incorporation of the IMO numbering system and the Lloyd's Register into the public databases on fishing vessels, as it is done in The Western and Central Pacific Fisheries Commission (WCPFC). Cooperation among States should also be encouraged with regard to the listing of IUU fishing vessels and conducting joint stock assessments.

131) A relevant illustration of these manifestations is offered by the principle of the relative effect of treaties with regard to third parties, which is an instrument of legal limitation available to third States which may evade the measures laid down in the Regional fisheries Agreements. The established rule of customary law is laid down in the Vienna Conventions. One of its aspects states that a treaty does not create rights or obligations for a third party, enshrining respect for consent: *Pacta tertiis nec nocent nec prosunt, or res inter alios acta aliis neque necet neque prodest.*
The rights and obligations created by treaties can be distinguished on the basis of jurisprudence. For the rights, the arbitral award in the case of Clipperton Island (28 January 1931) and that of the Central Rhodope Forest case (29 March 1933). As regards obligations, one can cite the arbitral award in the Palmas case (4 April 1928), the judgment of the Permanent Court of International Justice in the case concerning the Territorial Jurisdiction of the International Commission of the Oder (10 September 1929) and the judgment of the PCIJ of 7 June 1932 in the case of the Zones franches in Haute Savoie and in the country of Gex.
In practical terms, large-scale fleet holders deliberately choose not to become parties to the Conventions establishing Regional Fisheries Management Organizations that govern the high seas to avoid resource management and conservation measures Biological resources of the high seas. In other words, "this means that the efforts to manage high seas fisheries can be undermined either by noncompliant third party states or by states who do sign to the Selected measures (...) In the context of identifying strategies for the elimination and deterrence of IUU fishing, the consent of flag states is required to impose tighter, more effective flag states controls. Flag state consent for the effective implementation of the Catch Documentation Scheme and the Vessel Monitoring System (VMS) in addition to limitations on the freedoms of high seas fishing states", R. Baird 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence', p.311; Erik Franckx, 'Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea', 8 *Tulane Journal of International and Comparative Law* (2000): 49-81; Vienna Convention on the Law of Treaties of 23 May 1969, Article 34. (Entered into force on 27 January 1980).

132) Indeed, what could be called an international charter of fisheries is very extensive: UNCLOS (1982), Compliance Agreement (1993), United Nations Agreement on Straddling Fish Stocks (1995); Agreement on Port State Measures (2009); As far as I am concerned, non-compulsory instruments: the Code of Conduct for Responsible Fisheries (1995) and the four international plans of action, in particular the FAO International Plan of Action to Combat IUU Fishing ); Guidelines for deep-sea fishing (29 August 2008).

133) The author makes eight proposals: "Financial and technical assistance to improve the capacity of poor states to manage their EEZ fisheries effectively; Tackling subsidies; Prohibiting imports of fishery products in IEU fishing as the EU and the USA have been doing for the past three or four years; The encouragement of ethical consumerism through development of better labeling and certification schemes; The establishment of more marine protected areas both within and beyond national jurisdiction"; R. Chruchill, 'Fisheries and Their Impact on the Marine Environment: UNCLOS and Beyond', p. 49-52.
These different proposals could be usefully supplemented by the translation into concrete measures of the very relevant principles in Article 2 of the FAO Code of Conduct for Responsible Fisheries on the objectives of the Code; See also Report of the Secretary-General of the United Nations, Oceans and the Law of the Sea of 1 September 2015, A / 70/74 / Abd.1, p. 21-24, paragraphs 74-83; OECD, Green Growth in Fisheries and Aquaculture, OECD Green Growth Studies, OECD Publishing, (2015).

### 2.2 The Consequences of Climate Change

The consequences of climate change on the oceans are expected to be on the agenda of the Law of the Sea for a long time and may well be the concern of a number of international institutions. The 2010 report of the United Nations Secretary-General on Oceans and the Law of the Sea highlights the various aspects of these consequences: "rising sea levels; the melting of ice in the Arctic Ocean; the issue of ocean acidification; the challenges of marine biodiversity; the increase in the frequency of extreme weather events and transfers in the distribution of biological species."[134] Therefore, the United Nations General Assembly keeps stressing the urgent need to address the effects of climate change and ocean acidification on the marine environment and marine biodiversity and recommends a number of measures.[135] One of the key measures is to raise public awareness about the negative effects of climate change on the oceans.[136]

As part of its revised mandate which was approved by the General Assembly, UN-Oceans, the inter-agency coordination mechanism for oceans and coastal issues, strives to develop an online database containing an inventory of mandates and activities.[137] In accordance with its mandate,[138] the UN-Oceans Coordinator held the sixteenth meeting of the Consultative Process on the works of this mechanism.[139] UN-Oceans also organized a briefing session on the activities of UN-Oceans members on issues relating to the Oceans, climate change and the acidification of Oceans, in the margins of the Conference of the Parties (COP 21) at the United Nations Framework Conference on Climate Change in Paris.[140]

The issue of climate change is an issue of global concern. It is multidimensional[141] in that it covers the most diverse and dissimilar fields.[142]

134) See United Nations document A / 65/69 / Add.2, para. 374.

135) United Nations GA, Resolution 69/245

136) See, Report of the Secretary-General of the United Nations "Oceans and the law of the sea" dated 1 September 2015, doc. A / 70/74 / Add.1, p. 40, para. 142.

137) Ibid.

138) See Resolution 68/70, annex.

139) See www.un.oceans.org.

140) See also, http: // unfccc.Int/files/meetings/ Bonn_jun_2015 / application / pdf / un_oceans_statement_long_final_draft_rev_ (3) pdf.

141) See United Nations document A / 65/69 / add.2, para. 374; R. Rayfuse and S.V. Scott (eds.), *International Law in the Era of Climate Change*, Edward Elgar Publishing (2012); J.S. Dryzek, R.B. Norgaard and D. Schlosberg (eds.), *Oxford Handbook of Climate Change and Society* Oxford University Press, (2011); A. Boyle, 'Climate Change and Ocean Governance', in M.C. Ribeiro (ed.), 30 years after the signature of the UNCLOS supra note 112, pp. 357-382 at p.358 where the author writes: "Rather, the important lesson is that climate change should be on the negotiating agenda of all international institutions. It is a human rights issue. It is a trade issue. It is also an outcome of the Convention for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ".

142) As stated in the 2014 Synthesis Report for Decision-Makers: "1) Human influence on the climate system is clear; 2) many of the changes are unprecedented; 3) the atmosphere and oceans have warmed, which amounts of snow and ice have diminished, and sea level has risen; 4) anthropogenic greenhouse gas emissions are very likely to have been the dominant cause of the observed warming since the mid-20th century; 5) Continued emissions ... will cause further warming and long-lasting changes ... increasing the likelihood of severe, pervasive and irreversible impacts; 6) Limiting climate change would require substantial and sustained reductions in greenhouse gas emissions; 7) It is very likely that heat waves will occur more often and last longer, and that extreme precipitation events will become more intense in frequent in many regions. The ocean will continue to warm and acidify, and global mean sea level to rise; 8) Many aspects of climate change and associated impacts will continue for centuries; 9) The risks of abrupt or Irreversible changes increase as the magnitude of the warming increases; 10) Without additional mitigation efforts ... warming by the end of the 21st century will lead to high, wide-spread and irreversible impacts globally and 11) there are multiple mitigation paths that are likely to limit 2 ° C relative to pre-industrial levels." The IPCC, Climate Change 2014 Synthesis Report, Summary for Policymakers, http: // www. .ipcc.ch / pdf / assessment. Report / ar5 / syr / AR5 SYR FINAL SPM.pdf.

Sands writes:

> It is plain that climate change poses significant challenges to international law. The subject transcends the classical structure of an international legal order that divides our planet into territorially defined areas over which states are said to have sovereignty. Issues associated with climate change permeate national boundaries: emissions or actions in one state will have adverse consequences in another, and in areas over which states have no jurisdiction or sovereignty. (…) there is no other issue like climate change, where the sources of the problem-according to the IPCC-are so many and so broad, requiring actions that touch upon virtually every aspect of human endeavor and action. Each of us contributes to climate change; each of us will be affected by climate change.[143]

Given the prolific nature of the problems posed by the changes and, above all, their differences in nature, several specialty criteria will have to be put in place to deal with the situation. Sea-level rise is likely to affect many of the islands and low-tide elevations that may disappear. The problem of rights on maritime areas that fell under the jurisdiction of those islands after their disappearance and the disappearance of the shoals will have consequences on the determination of the baselines.

Scientists have found that sea-level rise was faster between 2000 and 2009 than in the previous 5,000 years.[144] The *immediate challenge* to this situation is the protection of archipelagos likely to be threatened by sea-level rise and coastal populations. The various island formations of certain archipelagos are at a very low level above the present level of the sea.

The melting of continental glaciers and polar ice will impact on the law of the sea. It will create new exploitable continental shelves, new shipping routes and maybe a new piracy due to the unemployment of indigenous peoples as well as the migration of fish stocks to these new ice-free areas. This situation could potentially create new fishing activities, thus, a new hydrocarbon or gas industry, that is to say, a possible pollution. *This means that multiple stakes will emerge that will require a very close international cooperation* to keep these areas from becoming a prime source of geo-economic and geo-strategic conflict zone.

In the meantime, States may rely on UNCLOS for the protection and preservation of the marine environment. States have an obligation to protect and preserve the marine environment. They are, thus, required to take measures to prevent, reduce and control pollution of the marine environment.

143) P. Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law', Public Lecture, United Kingdom Supreme Court, 17 September 2015, pp. 1-21 at pp.6.

144) It is estimated that one third of the increase is due to the melting of continental glaciers and polar ice (winter mean temperature in Antarctica rose by 6 degrees in 50 years), another third to Dilation of sea water because of its warming, even minimal, the last third causal being still indeterminate. J.P. Pancracio, *Law of the Sea*, Précis Dalloz (2010), pp. 2.

145) This is the case for the archipelagos of Tuvalu (Pacific Ocean), the Maldives (Indian Ocean) and the Seychelles (Indian Ocean). These archipelagos are classified as Small Island Developing States, many of whose islands are only 1 or 2 meters above sea level; which exposes them singularly.

146) Article 192 of UNCLOS. Article 194 (5) states that "measures taken pursuant to this part shall include measures necessary to protect and preserve rare or delicate ecosystems and the habitat of threatened or threatened species and other marine organisms Of extinction." These obligations should be considered in tandem with those relating to the conservation and management of the living resources of the high seas as contained in articles 117 to 120 of UNCLOS.

In particular, States must take all necessary measures to ensure that activities under their jurisdiction or control are conducted in such a way as not to cause pollution damage to other States, as well as their own environment and to ensure that any pollution due to incidents or activities under their jurisdiction or control does not extend beyond the areas where they exercise sovereign rights.[147] This principle of non-injurious use of the environment[148] appears to be a due diligence obligation,[149] and therefore likely to involve the responsibility of a State.[150]

The *other major challenge is the acidification of the oceans,* of which the scientific knowledge is scarce, leading nation States to take note of the situation. As Tommy Koh points out:

> The nexus between climate change and the oceans is insufficiently understood. People generally do not know that the oceans serve as the blue lungs of the planet, absorbing Co2 for the atmosphere and returning oxygen to the atmosphere. The oceans also play a positive role in regulating the world's climate system. One impact of global warming on the oceans is that the oceans are getting warmer and more acidic. This will have a deleterious effect on our coral reefs. In view of the symbiotic relationship between land and sea, the world should pay more attention to the health of our oceans.[151]

147) Article 194 (2).

148) T.M. Ndiaye 'The international responsibility of States for damage to the marine environment', in B. Vukas and T Sosic (eds.), *International Law. New concepts, Continuing Dilemmas*, Martinus Nijhoff Publishers (2010), pp. 265-279, at pp. 267; See also the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes, 28 *International Legal Materials* (1989): 649.

149) See ITLOS, Case No. 17, Responsibilities and obligations of States sponsoring persons and entities in connection with activities in the area (an advisory opinion request to the House for the Settlement of Disputes funds Paragraphs 115-120.

150) On the justiciability of climate change, see A. Boyle, *supra* note 141, pp.378-380; P. Sands *supra* note 143, pp. 11-15.

151) See, T. Koh, in L. Del Castillo (ed.) *Law of the sea, from Grotius to the International Tribunal for the Law of the Sea*, Brill / Nijhoff (2015), pp.108 ; Indeed, in its resolution, the UN General Assembly said, I quote: "§81 Takes note of the Intergovernmental Panel on Climate Change, including its conclusions that if we do not yet know the consequences of ocean acidification on marine biology, the progressive acidification is expected to have a negative impact on marine shells and their dependent species and, in this regard, encourages States to continue urgently research on ocean acidification, especially programs of observation and measurement", A / RES / 62/215 of 14 March 2008, Resolution adopted by the UN General Assembly on 22 December 2007, pp . 16, para. 81.

**2.3 Marine Genetic Resources**

This issue is being considered by an *Ad-hoc* Open-ended Informal Working Group established by the United Nations General Assembly in 2004 to address issues relating to the conservation and sustainable use of the biodiversity in the areas beyond national jurisdiction "the Ad Hoc Working Group."[152]

This work is carried out within the Open-ended Informal Consultative Process on Oceans and the Law of the Sea (the Consultative Process), which focuses on marine genetic resources and agrees that the Working Group must address this issue.[153] Discussions were held on the legal regime to be applied to marine genetic resources in areas beyond national jurisdiction in accordance with UNCLOS also the General Assembly asked States to keep addressing this issue as part of the of the Ad Hoc Working Group mandate, to take the work forward.[154]

Nation States are mindful of the abundance and diversity of marine genetic resources and their value in terms of benefits, goods and services that can be derived from them. They are also conscious of the importance of research on marine genetic resources in order to better understand and better manage marine ecosystems and their potential uses and applications.[155] The first meetings of the Informal Working Group showed very little progress in discussions where there was persistent disagreement and divergence on the issue of the applicable legal regime for marine biodiversity, including marine genetic resources in areas, beyond national jurisdiction (BBNJ).

The particular nature of genetic resources, the knowledge of which must be enhanced, makes discussions very difficult. The question that arises is that of their place of attachment, namely, are they resources belonging to the seabed or to superjacent waters? The answer to this question reflects on the applicable rules of the law of the sea. Thus, two opposing and exclusive points of view clashed in the process. On the one hand, some States have argued that the fundamental principle to be applied in this area is that of the Common Heritage of Mankind, while other States have asserted the principle of freedom of the high seas.

152) See A / 61/65 and Corr. 1

153) As requested by the United Nations General Assembly in paragraph 91 of Resolution 61/222. The Working Group held several meetings from 2006 to 2015.

154) See document A / RES / 62/215 of 14 March 2008, p.24, para. 133.

155) Ibid. Paragraphs 134 and 135; See also J. Wehrli and T. Cottier 'Towards a Treaty Instrument on Marine Genetic Resources', in M. C. Ribeiro (ed.), 30 years after the signature of the UNCLOS, p. x where it is said "The law, and international law, finds itself in the classic constellation of ex post evaluation of the implications of rules not per se designed to deal with novel and impending challenges. [...] Even the deep sea, which belongs to the mammals and fish, including sea stars, sponges, jellyfish and bottom - dwelling fish, worms, molluscs, crustaceans, and a board range of single- That of organizations" , M. Allsopp et al, 'Oceans in Peril: Protecting Marine Biodiversity', World Watch Institute Report, Washington DC, September 2007; T. Heidar, 'Overview of the BBNJ Process and Main Issues', CIL International Workshop, Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction: Preparing for the PrepCom, Singapore, 3-4 February (2016).

Three types of arguments are expressed to support the different positions. First, the question of whether the regime applicable to the area refers to resources other than minerals. It is well established that UNCLOS understands by resource "all *in situ* solid, liquid or gaseous mineral resources" in the area that is on the seabed or subsoil thereof, including polymetallic nodules and other resources. Once extracted from the area, they are called "minerals."[156] The argument is sometimes developed by making an analogy with the status of sedentary species on the continental shelf.

Next is the question of whether Article 143 of UNCLOS can be invoked in support of the idea that the prospecting of genetic resources should be conducted exclusively for peaceful purposes and in the interests of mankind as a whole, in accordance with Part XIII.[157] Finally, the question is also about whether the International Seabed Authority is destined or not to play any role in this matter, since the Authority is the organization through which States Parties organize and control activities in the area, including the administration of its resources.[158]

In 2011, the Working Group was scheduled to recommend whether or not the legal framework for the conservation and sustainable use of marine biodiversity in areas not under national jurisdiction reflects the different point of views of States. In particular, "taken together and as a whole" issues relating to marine genetic resources - including those related to benefit-sharing and measures such as area management tools and marine protected areas, environment impact studies, capacity building and transfer of marine technology were to be considered in the recommendation.

The idea was to have the recommendation adopted by the United Nations General Assembly and presented as the "package deal" for negotiations in the development of an international legally binding instrument relating to UNCLOS on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction[159].

The Working Group continued to examine these issues in the context of the new process. It held two workshops in 2013 on marine genetic resources and on the conservation and sustainable use of marine biodiversity. The General Assembly was of the view that the Working Group should hold several meetings to prepare for the decision it was due to take at its 69th session and for which it sought recommendations on terms of reference,[160] application scope, the parameters, and the opportunities for drafting of an international instrument relating to the UNCLOS.

156) See UNCLOS, Article 133 (a) and (b).

157) The words of Article 143 (1) of UNCLOS relating to "Marine Scientific Research" in the Area, that is to say, the seabed and subsoil beyond the limits of The national court.

158) Article 157, paragraph 1, of the UNCLOS.

159) See United Nations document A / RES / 69/292 of 6 July 2015 on the Resolution adopted by the General Assembly on 19 June 2015 "Development of an international instrument relating to UNCLOS on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction", p. 2 para. (1).

160) See A / RES / 69/292 where the first recital states: "The General Assembly, Reaffirming the commitment made by the Heads of State and Government in paragraph 162 of the outcome document of the United Nations Conference on Sustainable Development In Rio de Janeiro, Brazil, from 20 to 22 June 2012, entitled "The future we want", which it endorsed in its resolution 66/288 of 27 July 2012, to address urgently the issue of conservation And sustainable use of marine biodiversity in areas beyond national jurisdiction, building on the work of the Ad Hoc Open-ended Informal Working Group on Conservation and Sustainable Sustainable use of marine biodiversity in areas beyond national jurisdiction, including a decision on the development of an international instrument relating to the United Nations Convention on the Law of the Sea The end of its sixty-ninth session."

Having considered the recommendations[161] of the Ad Hoc informal Working Group and welcoming the progress made by the Working Group in implementing its mandate,[162] the General Assembly decided to develop an international legally binding instrument on 19 June 2015.

It also decided to set up before the date of an Intergovernmental conference, a Preparatory Committee, open to all Members States of the United Nations, members of specialized agencies and parties to the UNCLOS.[163] The Committee shall submit substantive recommendations to the General Assembly on the elements of the international legally binding instrument draft relating to the Convention. The Committee shall take into account the various reports of the Co-Chairs on the work of the *Ad hoc* Informal Working Group on issues relating to the conservation and sustainable use of marine biodiversity. The committee began its work in 2016 and will hold two sessions of two weeks each. The first session was held from 28 March to 8 April and the second from 26 August to 9 September. The same will apply in 2017. The Preparatory Committee will report to the General Assembly on the progress of its work at the end 2017. The Preparatory Committee is chaired by Ambassador Eden Charles of Trinidad and Tobago.[164]

The General Assembly of the United Nations decided that before the end of its seventy-second session it would take a decision, taking into account the report of the Preparatory Committee, regarding the organization and date of the opening of an intergovernmental conference to be held under the auspices of the United Nations.

161) See doc. A / 69/780, annex, sect. I.
162) See Resolutions 66/321 of 24 December 2011 and 67/78 of 11 December 2012.
163) See A / RES / 69/292 op. Cit paragraph 1 (a).
164) Ibid. paragraph 1, subparagraphs (a) to (k).

**2.4 Piracy**

The origins of piracy[165] goe back to the birth of maritime navigation. That is to say, it has been practiced for millennia.[166] As a result, its repression is governed by customary law codified under UNCLOS.[167] Piracy occurs in the high seas, that is to say all parts of the sea, not included in the EEZ, the territorial sea where the internal waters of a State are located and not in the archipelagic waters of an archipelagos State.[168] The provisions of the UNCLOS relating to piracy, however, also apply to the exclusive economic zone.[169] In these two zones, the flag State exercises its jurisdiction given that the vessels sail under its flag and are subjected to its exclusive jurisdiction on high seas. It should be recalled that a vessel operating under the flags of several States, of which it makes use at their convenience, shall not be entitled, in respect of any third state, to any of these nationalities and shall be regarded as a vessel without nationality.[170]

To effectively combat piracy, exceptions to the rule of exclusive jurisdiction of the flag State had to be contemplated. For example, a warship that crosses a foreign ship on the high seas may board it if it has reasonable grounds to suspect that the ship is engaged in piracy.[171]

In addition, any State on the high seas or in any other place not under the jurisdiction of any State, may seize a pirate ship, or a vessel caught following an act of piracy and arrest the persons and seize the goods on board. The courts of the State which made the seizure may decide on the penalties to be imposed, as well as on the measures to be taken in respect of the ship or property.[172] Moreover, all States have an obligation to cooperate in the suppression of piracy on the high seas or, in any other place not under the jurisdiction of any State.[173] This is one of the few subjects in which universal jurisdiction is recognized and extensively promoted under customary international law,

165) A. Del Vecchio , 'Fight Against Piracy and the Enrica Lexie Case ', in Lilian Del Castillo (ed.), *Law of the Sea, From the Grotius to the International Tribunal for the Law of the Sea, Liber Americorum Judge Hugo Caminos*, Brill / Nijhoff (2015), pp. 397-422; Y. Dinstein, 'Piracy vs. International Armed Conflict', in L. Del Castillo (ed.), *Law of the Sea, From the Grotius to the International Tribunal for the Law of the Sea*, pp. 423-434; E. Gonzalez-Lapeyre, 'A new consideration on maritime piracy', in L. Del Castillo (ed.), *Law of the Sea, From the Grotius to the International Tribunal for the Law of the Sea* pp. 435-455; J.L. Kateka, 'Combining Piracy and Armed Robbery off the Somali Coast and the Gulf of Guinea', in L. Del Castillo (ed.), *Law of the Sea, From the Grotius to the International Tribunal for the Law of the Sea,* pp. 456-468; H. Tuerk, 'Combating Piracy: New Approaches to an Ancient Issue', in L. Del Castillo (ed.), *Law of the Sea, From the Grotius to the International Tribunal for the Law of the Sea,* pp. 469-492.

166) In the Odyssey, Homer refers to the fact that Ulysses, in his youth, had developed acts of piracy and Menelaus recognizes to his children that piracy had been the source of his wealth. Narrative reported by E. Gonzalez-Lapeyre op. Cit. [Note 165] p.435. The author explains that "at that time, sailing in the Mediterranean Sea and across the Aegean Sea, involved an enormous danger in view of the possible attacks of the pirate ships. During the Middle Ages, the so-called Vikings, who came from northern Europe, became a real whip not only for transport but immediately to the coastal populations, basically those of Scotland, England, Ireland and France, where they occupied Normandy at the beginning of the tenth century, a territory which, precisely, still retains the denomination of its conquerors" pp. 435-436; See also by the same author, 'Sea transport and port regime', 308 *RCADI* (2005): 263-264; J. Goodwin, 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part', 39 *V and. J. Transnat 'L* 973 (2006): 976. D. Konig, 'Maritime Security: Cooperative Means to Address New Challenges', 57 *GYBIL*, (2014): 209-223.

167) UNCLOS, Articles 100 to 107 and Article 110. Under Article 101 of the Convention, "Piracy means any of the following:
(A) Any unlawful act of violence or detention or depredation by the crew or passengers of a private ship or aircraft, for private purposes, and directed:
I. Against another ship or aircraft, or against persons or property on board, on the high seas;
Ii. Against another ship or aircraft, persons or property, in a place not under the jurisdiction of any State;
(B) Any act of voluntary participation in the use of a ship or aircraft where the perpetrator is aware of facts which result in the ship or aircraft being a pirate ship or aircraft;
(C) Any act intended to incite or to commit the acts defined in letters (a) and (b)."

168) Article 86 of UNCLOS.

169) Article 58 (2) provides that: "Articles 88 to 115, as well as other relevant rules of international law, shall apply to the exclusive economic zone in so far as they are not incompatible with This Part."

170) Article 92, paragraph 2, of UNCLOS.

171) Article 110, paragraph 1 (a) of UNCLOS

172) Article 105 UNCLOS.

173) Article 100 UNCLOS.

Nowadays, piracy is not only developed on the high seas. One can even say that it gradually leaves the open sea to get closer to the coastal areas. Today, pirates' favorite place of action is the Arabian Sea, the Gulf of Aden, the South China Sea, the Gulf of Guinea, the Indian Ocean, the Strait of Malacca, Latin America and the Caribbean. With the melting ice of the Arctic, leading to new shipping routes between Europe and Asia, the phenomenon of piracy is likely to emerge because the indigenous peoples in those parts of the world will gradually lose their traditional activity and will have to seek some occupations. As of 1 September 2013, 6727 acts of piracy against vessels had been reported to the IMO. The IMO began to generate relevant statics in 1984[174]

Piracy[175] requires a rather singular interpretation of the existing rules to deal with it. The resurgence[176] of the phenomenon has been attributed to a series of factors: poverty of coastal populations, who divert oil cargoes or demand ransoms to free boats; displacement of government; and often State bankruptcy. Economic decline/recession; IUU fishing and toxic waste discharge by foreign vessels; and failing police force[177] are additional promoters of piracy.

In West Africa - for instance - the practice of IUU fishing has disastrously impacted the region's maritime economy and ecosystem. Pirate ships develop their activities with impunity since they are persuaded to always escape control as States do not have the means to establish a real fishery police and the waters under their jurisdiction are not monitored. Trawlers catch all available fish, including protected species or safety standards. They destroy the nets of local artisanal fishermen, break their canoes and even physically threaten their lives. They use heavy nets that drag the ocean floor, destroying the marine habitat, especially the nurseries for the juveniles, This negatively impacts fish breeding. This has resulted in the closure of a number of fishing villages, putting fishing communities out of work.

The tackling of the root causes of piracy has led to a decline in the phenomenon. The international community is working on this and, since 2012, the downward trend has been confirming. It must be said that international cooperation to combat the phenomenon has proved to be very effective.

174) IMO-MSC, "Reports on Acts of Piracy and Armed Roberts against Ships", MSC. 4 / Wax. 199, 13 August 2013.
175) H. Tuerk, 'Combating Piracy: New Approaches to an Ancient Issue', pp. 475-476.
176) Ibid.
177) T. M. Ndiaye, 'Illegal, Unreported and Unregulated Fishing in West Africa', pp. 233; J.L. Kateka'Combining Piracy and Armed Robbery off the Somali Coast and the Gulf of Guinea', pp. 464-466.

Konig observes that:

> A comprehensive approach and cooperation are the only means to deal with maritime security phenomena. The center of coordination, cooperation, and progressive development has been the Contact Group on Piracy off the Coast of Somalia. Focused on interstate cooperation at the outset, it soon became a forum where States, UN entities, international and regional organisations, industry groups, and other stakeholders worked together efficiently and effectively.[178]

Perhaps it is time to establish an international institution mechaniseds pecifically to target piracy. Perhaps the issue *should be addressed pragmatically by tackling the root causes*. This is because the idea put forward in international gatherings to amend the statutes of existing international Courts and Tribunals to deal with piracy, seems very unrealistic. Ammending multilateral treaties takes a long time and the result is not guaranteed *ab initio*.[179]

**2.5 The Exploitation of the Extended Continental Shelf Payments and Contributions**

These are contributions in cash or in kind for the exploitation of the continental shelf beyond 200 nautical miles, which is the subject of Article 82 of the UNCLOS.[180] However, the implementation of these contributions presents real challenges for the International Seabed Authority (AIFM/ISA).[181] It is no coincidence that 35 years after the signing of UNCLOS its regime has not yet been determined. In July 2013 the members of the Assembly of the Authority devoted part of the Secretary-General's report[182] to the conclusions of the international workshop organized by the Authority on the review of the application of Article 82 of the United Nations Convention on the Law of the Sea.[183]

178) D. Konig, 'Maritime Security: Cooperative Means to Address New Challenges', p. 223; H. Tuerk'Combating Piracy: New Approaches to an Ancient Issue', p. 477.

179) View United Nations Contact Group on Piracy off the Coast of Somalia: Working Group 2 on Legal Issues, Discussion Paper on Prosecution of Pirates: An International Mechanism? 3 March 2009, pp. 2-3.

180) Article 82 of the UNCLOS provides that: "1-The coastal State shall pay contributions in cash or in kind for the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles On the basis of which the breadth of the territorial sea is measured. 2-Contributions are paid each year for the entire production of a given operating site, after the first five years of operation of this site. In the sixth year, the contribution rate is 1 per cent of the value or volume of production at an operating site. This rate then increases by one percentage point per year until the twelfth year, from which it remains 7p. Production does not include resources used in the operation. 3. Any developing State which is a net importer of a mineral extracted from its continental shelf shall be exempt from such contributions in respect of that mineral. 4-Contributions shall be made through the Authority, which shall distribute them among the States Parties on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, in particular the least developed developing States or Landlocked."

181) See C. Aldo, 'Operationalizing art. 82 of UNCLOS: A new role for ISA', 18 *Ocean Yearbook,* 18 (2004) 395-412; ISA, *International Seabed Authority Handbook* (2004), ISA 2004, pp. 89; DOALOS, ISA. *Marine Mineral Resources: Scientific Advances and Economic Prospects*, IJN (2004), pp. 125; M.C. Wood, International Seabed Authority (ISA*), Max Planck Encyclopedia of Public International Law*, Oxford University Press (2012); M. Lodge 'Current Legal Development / International Seabed Authority", 24 *IJMCL* (2009): 185; L.D..M Nelson, 'The New Deep Seabed Mining Regime', 10 *IJMCL* (1995): 189, 190-192; D. Leary, 'Moving the Marine Genetic Resources Debate Resources Debate Forward: Some Reflections', 27 *IJMCL* (2012): 435; P. Drankier and al. 'Marine Genetic Resources in Areas Beyond National Jurisdiction: Access and Benefit Sharing', 27 *IJMCL* (2012): 375-409; A.G. Oude Elferink and E.J. Molenaar (eds.), *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments*, Martinus Nijhoff, 2010; According to the International Seabed Authority Technical Study No. 5, 'Submissions made by coastal States until September 2008 with respect to the Continental shelf beyond 200 nm covered more than 23 million square kilometers, while the world's EEZs are estimated at approximately 260 million square kilometers, In ISA Technical Study No. 5: Non-living Resources of the Continental Shelf beyond 200 Nautical miles: Speculations on the implementation of Art. 82 of the United Nations Convention on the Law of the Sea.

182) See Press Release of the International Seabed Authority, Nineteenth Session, Kingston, 15-26 July 2013, FM / 19/2. 183).

183) See "Implementation of Article 82 of the United Nations Convention on the Law of the Sea: Report of an International Workshop International Seabed Authority in collaboration with the China Institute for Marine Affairs in Beijing, The People's Republic of China, 26-30 November 2012, ISA Technical Study: No. 12."

The purpose of this international workshop was to prepare preliminary drafts for consideration by States whose continental shelf extends beyond 200 nautical miles and by the competent organs of the International Seabed Authority.

The Working Group[184] discussed four major themes, namely, the relationship between the Authority and States with an extended continental shelf, under Article 82; the terminology of Article 82; the functions and tasks that derive from the Article and the possible options to facilitate implementation.

Article 82 establishes a relationship at two levels. Firstly, it creates reciprocal obligations between States Parties established under the UNCLOS that are the result of the intimate connection between Articles 76 and 82. The provisions of Article 82 appears to imply that the obligation to pay contributions in respect of exploitation is a debt of the OCS State to other States Parties. However, the implementation of Article 82 appears to place a State with an extended continental shelf under the jurisdiction of the International Seabed Authority. That is why "contributions are made through the Authority."[185]

In other words, the Convention requires a cooperative relationship between the State and the Authority, governed by good faith. The role of the Authority in this relationship must be interpreted under the light of its mandate under the Convention. The Authority is supposed to receive the contributions in the form of deposits until they are allocated among the beneficiaries in compliance with the Convention, although it does not have the powers expressly conferred by Article 82 on the control and compliance with the Convention.

It appears that transparency and good governance are essential in the implementation of the provisions of Article 82. In order to do so, administrative procedures must be established[186] to address the problems and flaws of Article 82, and in particular, notifications to States with extensive continental shelves, at the beginning, the suspension and the end of production.

The Working Group explored the advantages and drawbacks of a standardized approach compared to a case-by-case approach for the sake of consistency, predictability and efficiency. It turns out that the diversity of resources requires a certain flexibility in the procedures. The question of the flow of information between the State and the Authority was examined in detail. It emerged from the review that a format for the presentation of information should be established to accompany contributions. The Working Group also considered the question of the "in-kind contribution" to ensure access to the resource to beneficiary States Parties.[187]

Next, the Working Group addressed the issue of terminology. It appears that Article 82 does not define the following key terms "Resources", "all production", "value", "volume", "site", "Payments", "contributions in kind", and "each year".

184) This is the purpose of Annex 1 of the aforementioned Report: Report of Working Group on Implementation Guidelines and Model Article 82 Agreement Presented by Professor Chircop as facilitator, and Dr. Galo Carrera, Consulate of Mexico in Nova Scotia and New Brunswick , Canada, as Rapporteur.

185) Article 82, paragraph 4, of the UNCLOS.

186) See, in this regard, the working paper of the above-mentioned workshop "Development of Guidelines for the implementation of Article 82."

187) See Report of Working Group A, *supra* note 138, paragraphs 2-9.

It seems that these different words have been used to achieve the necessary compromise and that is why they are hardly any terms dedicated. And the working group attempted to define them in their context to facilitate common understanding.

> Therefore, reasonably consistent understanding among States Parties to facilitate implementation and avoid potential disputes regarding interpretation is an important consideration. The development of a guide to assist OCS States with the implementation of Article 82 would need to address this matter.[188]

Thus, the eight terms are used to provide the context and the spirit in which they were selected,[189] to establish a common understanding.

With regard to the third major theme, the functions and tasks were examined. The Convention does not define them. And the Working Group sought to establish them for both the States and the Authority. For States with extensive continental shelves, the following issues were identified: a particular site eligible under Article 82; the date of commencement of production; the suspension of the grace period; suspension of production that affects contributions; announcement of future payments; in-kind contributions; the announcement of the change of option; and the date of the end of production. Concerning notifications from the Authority to States, the following issues were considered: the acknowledgment of receipt of formal notification by the State; bank instructions for payments; receipt of payments; in-kind contributions; and the annual bank statement certifying payments and contributions received. In addition, the annual report of the Secretary-General of the Authority should inform Member States about the status of payments and contributions received and the related problems on the basis of information received from States with extensive continental shelves.[190]

Finally, the last theme regards the structure and the procedures required to facilitate the administrative relationship between States and the Authority. The Working Group, after having rejected the methods of UNCLOS Part XI and those of the Agreement on Straddling stocks, opted for "Memorandum of Understanding between OCS States and the ISA, but not discussed in depth."[191] Participants at the international workshop noted that many topics could not be addressed and further studies would be required. They stressed the importance of continuing to review, through the competent bodies of the Authority, the means of establishing a system for the pragmatic and functional application of Article 82.[192] It should be noted that the series of technical studies of the International Seabed Authority proved to be a wealth of important information.[193]

188) Ibid. Paragraph 10.
189) Ibid. Paragraphs 11-17.
190) Ibid. Paragraphs 19-22.
191) Ibid. Paragraph 23.
192) Press release of 15 July 2013 cited above. [Note 136].
193) See ISA Technical Study Series, 1: "Global Non-Living Resources on the Extended Continental Shelf: Prospects at the Year 2000"; Technical Study Series, 2: "Polymetallic Massive Sulphides and Cobalt-Rich Ferromanganese crusts: Status and Prospects"; Technical Study Series, 3: "Biodiversity, species Ranges and Gene Flow in the Abyssal Pacific Nodule Province: Predicting and Managing the impacts of Deep Seabed Mining"; Technical Study Series, 4: "Issues associated with the implementation of Article 82 of the UNCLOS; Technical Study Series, 5: "Non-living resources of the continental Shelf beyond 200 nautical miles: Speculation on the implementation of Article 82 of the UNCLOS"; Technical Study Series, 6: "A Geological Model of Polymetallic Nodule Deposits in the Clarion-Clipperton Fracture Zone"; Technical Study Series, 7: "Marine Benthic Nematode Molecular Protocol Handbook (Nematode Barcoding) "; Technical Study Series, 8: "Fauna and cobalt-Rich Ferromanganese Crust Seamounts"; Chemosynthetic Ecosystems: Justification of and considerations for a spatially-based Approach"; Technical Study Series, 10: " Environmental Management Needs for Exploration and Exploitation of Deep Sea Minerals"; Technical Study Series, 11: "Towards the Development of a Regulatory Framework for Polymetallic Nodules Exploitation in the Area"; Technical Study Series, 12: "Implementation Workshop convened by the International Seabed Authority, 26-30 November 2012. "

**2.6 The Advisory Function of The International Tribunal For The Law Of Sea**

Under UNCLOS[194] and under the statutes of the Tribunal, the advisory function is exercised by the Seabed Disputes Chamber. However, the Tribunal in plenary may give opinions based on other international agreements.[195] These two instruments hardly contemplate the advisory jurisdiction of the Tribunal as a full court. Nor is there any trace of it in the draft of the Preparatory Commission. This is a creation of the Tribunal in the drafting of its Rules of Procedure in 1996 when the possibility that the Tribunal could give advisory opinions was raised. For this reason, the jurisdiction clause is found in the Rules.[196] It is the subject of Article 138, which provides that the Tribunal may give an advisory opinion on a legal question insofar as an international agreement relating to the purposes of the Convention expressly provides that a request for such an opinion is submitted to it.

Normally, the advisory procedure is open to international organizations and to them alone. The mechanism does not include any claim or parties. This is why the application is the only way of referring cases to the Chamber and to the Tribunal by bodies authorized to request opinions in specified matters. The advisory opinion is a legal consultation devoid of binding force and which, as an individual statement, has no legal force. On the other hand, it is possible that a body with legal functions, such as the Tribunal, is requested, because its statute does not prohibit it, from giving legal advice. In some cases, an arbitral tribunal may have to deliver an advisory opinion.[197]

For the Full Tribunal, the consultative channel is available when an international agreement[198] relating to the Convention provides so. The purposes of the Convention are prolific. They include: biological resources of the sea; conservation and management of such resources; marine environment and ecosystems, marine scientific research, pollution, marine navigation, crime at sea and maritime safety; Maritime claims and liabilities; Maritime transport.

In these matters, many problems can usefully be the subject of requests for advisory opinions as revealed by the various workshops hosted by the Tribunal.[199] A recurrent issue relates to the role of regional fisheries management bodies and illegal fishing.

194) Article 159, paragraphs 10 and 191 of UNCLOS.
195) Rule 138 of the Rules of the Tribunal; T.M. Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea', in L. del Castillo (ed.), *Law of the Sea,* p. 622-653.
196) Ibid.
197) T.M. Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea', p.645.
198) This is a treaty within the meaning of Article 1 para. (A) of the Vienna Convention on the Law of Treaties of 23 May 1969.
199) T.M. Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea', p.645.

As Ambassador Koh noted:

> FAO has repeatedly called the world's attention to the crisis in fisheries. The crisis is being caused by over-fishing by illegal, unreported and unregulated fishing, by the ineffectiveness of the regional fishery management organizations and by the use of destructive and unsustainable methods of fishing, such as, bottom trawling and dredge fishing. Urgent action is needed to tackle these problems. The world can learn from the successful experiences of Iceland and New Zealand in the management of their fisheries. The IMO should consider requiring all commercial fishing boats to be licensed and to carry transponders. We should also consider eco-labelling for fish. Regional fishery management organizations should be established in all regions, and they should be allowed to make their decisions by majority votes rather than by consensus. Certain destructive methods of fishing should be banned.[200]

It is no coincidence that the first request for an advisory opinion submitted to the full Tribunal was made by an RFMO, and in this case, the Sub-Regional Fisheries Commission (SRFC).[201] Article 138 of the Rules of the Tribunal sets out a number of conditions that must be met for an application for an advisory opinion on a legal issue to be admissible. First, there must be an international agreement. Second, the agreement in question must relate to the purposes of the Convention. Further, the, the international agreement must expressly state that a request for such an opinion is to be submitted to the Tribunal and, finally, the advisory opinion must relate to a legal question. The preliminary legal question which has long occupied the Tribunal is that of its jurisdiction to render an advisory opinion[202] and because this was the first case in which it had to do so, it was held in plenary session. The Tribunal will begin by recalling Articles 16 and 21 of the statutes and Article 138 of its Rules of procedure before examining the various arguments put forward by the participants in the proceedings.[203]

The main arguments put forward against the Tribunal's advisory jurisdiction are that the Convention makes no explicit or implicit reference to advisory opinions of the Tribunal Full Court, and that if the Tribunal were to exercise advisory jurisdiction it would act *ultra vires* under the Convention.

Other participants expressed support for the Tribunal's advisory jurisdiction. They argued that Article 21 of the Statute constitutes in itself a sufficient legal basis for the jurisdiction of the full Court to give effect to a request for an advisory opinion if it is expressly provided for in a relevant international agreement. There is no reason to assume that the phrase "all matters" does not cover the request for an advisory opinion. They added that the argument that the phrase "whenever" refers to "all disputes" as well as "the Tribunal" is limited by Article 288 (2) of the Convention. cannot be upheld. They pointed out that article 288 was supplemented by the Statute, in particular by Article 21.[204]

200) T. Koh, 'UNCLOS at 30: Some Reflections ', p.108.

201) Application submitted on 28 March 2013; See ITLOS / Press 190 of 28 March 2013. The CSRP, which is based in Dakar, Senegal, consists of seven member states: Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone.

202) See ITLOS Opinion of 2 April 2015 in Case No. 21, paragraph 37-79.

203) See paragraphs 40 to 47 for the arguments put forward against the Advisory Jurisdiction of the Tribunal of the Whole.

204) See paragraphs 48 to 57 for the arguments in favor of the Tribunal's advisory jurisdiction.

After examining the various types of arguments, the Tribunal specified that the expression "whenever expressly provided for in any other agreement conferring jurisdiction on the tribunal" confers not an advisory jurisdiction on the Tribunal. It is rather the expression "other agreement" in article 21 of the statute which confers on it such competence. When the expression "other agreement" assigns an advisory power to the Tribunal, the Tribunal may exercise that jurisdiction "whenever" expressly provided in this "other agreement". Article 21 and the "other agreement" conferring jurisdiction on the Tribunal are related to each other and constitute the legal basis for the Tribunal's advisory jurisdiction.[205]

This decision establishes a precedent that could prove to be of great benefit to the States grouped within the RFMOs. This is all the more so since, in its opinion, the Tribunal indicated that the flag State is under an obligation to take the necessary measures, including enforcement measures, to ensure that vessels flying its flag comply with Laws and regulations of the member states of the CSRP.[206] This advisory opinion singularly gives teeth to the UNCLOS and lays the groundwork for future actions against flag States. It also opens up the prospect of submitting new questions to the Tribunal.

The Tribunal further held that the responsibility of the flag State resulted from a breach of its due diligence obligation for IUU fishing activities by vessels flying its flag in the EEZs of Member States of the CSRP.[207] This provides examples of significant advances that can significantly protect Member States from Regional Fisheries Management Bodies, which can now resort to the Tribunal to complain about the violation of measures taken in the management and conservation of the biological resources they administer.

The new challenge, which risks jeopardising the UNCLOS itself and its legitimacy, is the systematic violation of many of its provisions, thus, affecting not only the legal order of the seas, but also international relations. These include: drawing of straight baselines under conditions contrary to article 7; claiming the exercise of jurisdiction in contiguous zones for security reasons contrary to Article 33; the breadth of territorial seas exceeding 12 nautical miles, contrary to article 3; or the violation by flag States of Article 94 of the Convention. It will be necessary to consider implementing Part XV while there is still time. The reluctance of States towards legal adjudication is inherent in the very nature of the structure of international society which is shaped by political processes and where the individualistic interests of States are omnipresent. States must, however, act in accordance with the UNCLOS, which they spent a decade negotiating.

205) Paragraph 58 of the Advisory Opinion of 2 April 2015.

206) Reply to the first question of the CSRP.

207) See answer to the second question of a CSRP.

208) See R. Churchill, 'The Persisting Problem of Non-Compliance with the Law of the Sea Convention: Disorder in the Oceans', 27 *International Journal of Marine and Coastal Law* (2012): pp. 813-820; R. Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention ', in A.G. Oude Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Martinus Nijhoff (2005), p.91; J.A. Roach and R. W. Smith, *Excessive Maritime Claims*, 3rd edition, Marinus Nijhoff (2012); As Ambassador T. Koh reminds us: "I wish to express a serious concern about the tendency of some States to extend their jurisdiction in violation of the Convention. Some States have drawn straight baselines when they are not so entitled. Other states have enacted laws and regulations governing activities in the Exclusive Economic Zones. Some states have acted in contravention of the regime of transit passage. States have shown a little bit of integrity and fidelity to law when it comes to deciding whether a feature is a rock or an island. I think states should be less reluctant to protest against such actions by other states and be more willing to refer such disputes settlement" in L. del Castillo (ed.) *Law of the Sea*, p.108.

# 'The Optional Jurisdiction clause and the legitimacy of the African Court on Human and Peoples' Rights under the broader human rights mandate of the African Union'

*Annika Rudman**

## 1. Introduction

Access to justice for victims of human rights violations remains uncertain on the African continent. On the one hand access to a competent domestic court is often contended. The many complaints to the African Commission on Human and Peoples' Rights ('African Commission' or 'Commission'), the African Court of Human and Peoples' Rights ('African Court' or 'Court') and the East African Court of Justice ('EACJ') claiming the failure of states to afford such a right testify to this fact.[1] On the other hand, as 47 African states have not yet accepted the jurisdiction of the African Court to hear petitions by individuals and the role of the African Commission as a conduit to the African Court remains undefined, the power vested in the regional human rights system to remedy human rights violations is limited.

Furthermore, a systemic lack of access to justice arguably endangers the over-all protection of human rights. The idea that it is the potential violator that should effectively decide whether or not the victim will have access to justice seem to contradict the basic notion of international human rights law.[2] As poignantly described by the Former President of the Inter-American Court of Human Rights ('IACtHR') Trindade J, "[w]ithout the right of access to justice, there is in reality no true legal system" and "[w]ithout the *right to the Law*, there is no rule of law, ultimately no Law at all."[3]

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[1] See for example, the following decisions of the African Commission: *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) paras 61-70; *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) paras 61, 63 and 74; *Civil Liberties Organisation and Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) paras 25, 27-44; *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001) paras 38 and 40; *Law Office of Ghazi Suleiman v Sudan* (I) (2003) AHRLR 134 (ACHPR 2003) paras 52-53, 56 and 60-67; Swaziland: *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) paras 54, 65 and 58; DRC: *Wetsh'okonda Koso and Others v Democratic Republic of the Congo* (2008) AHRLR 93 (ACHPR 2008) paras 77-90; *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) paras 211-212. African Court: *Lohe Issa Konate v Burkina Faso* Application No 004/2013 paras 167-171; *Beneficiaries of Late Nobert Zongo and Others v Burkina Faso* Application No 013/2011 paras 114-170. EACJ: *Katabazi and Others v Secretary-General of the East African Community and Another* (2007) AHRLR 119 (EAC 2007) para 47-54.

[2] *Atabong Denis Atemnkeng v the African Union* App No 014/2011 (ACHPR, 15 March 2013) 3 (dissenting opinion by Ngoepe and Thompson JJ).

[3] AA Cançado Trindade, 'Jus Cogens: The Determination and the Gradual Expansion of its

My aim, as I continue to discuss access to justice of Africans continuously subjected to human rights violations, is to question the legitimacy of the current regional state practice not to accept the jurisdiction of the African Court to hear direct claims of the victims of human rights violations. In doing so I also aspire to highlight the principal effects of this practice on the over-all legitimacy of the African Court. Any obstacle to direct access to the African Court is arguably likely to have a negative effect on its legitimacy as well as the perception of the genuineness of the human rights mandate of the broader African Union ('AU'). Seen from the perspective of the African victims and the human rights defenders of this continent, "the African Union cannot afford to be viewed by Africans as an institution which adopts provisions preventing African citizens from obtaining justice or places human rights violators above the law."[4] In this regard it is important to view the legitimacy of the Court from a dual perspective. As a human rights institution capable of providing a remedy for human rights violations occurring on the continent to the broader African public; but also as an institution set up under a subsidiary-treaty negotiated by state parties and therefore to a large extent controlled by the same.

The African Court and the EACJ have been unable to accept any challenge to the optional jurisdiction *ratione personae* over individuals and NGOs, as is further discussed below. This however does not, in my opinion, lessen the relevance of some of the arguments and basic principles presented to contest the current state practice. The analysis provided in this article is therefore an attempt to ultimately encourage African states to be persuaded by the substantial arguments challenging the right of states to bar individuals from the African Court. And furthermore, not to be comforted by the fact that the Protocol Establishing the African Court on Human and Peoples' Rights ('Protocol') deceivingly created the ultimate excuse to avoid its jurisdiction.

It is a familiar fact that the greatest obstacle to access justice on the regional level is the optionality created by articles 34(6) and 5(3) of the Protocol.[5] Different authors have, since the Protocol's inception, discussed the impact of the OPJC.[6] As pointed out by Viljoen the use of "shall" in article 34(6) cannot be read to express compulsion "as the declaration is optional (…) shall expresses a discretionary competence".[7] To this end the EACJ has described article 34(6) as allowing, "an elastic margin of discretion within

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Material Content in Contemporary International Case-Law' (*Organisation of American States*) <https://www.oas.org/dil/esp/3%20-%20cancado.LR.CV.3-30.pdf> accessed 1 June 2016.

4 ibid para 19.

5 Hereinafter referred to as the Optional Jurisdictional Clause ('OPJC').

6 See M Mutua, 'The African Human Rights Court: A Two-legged Stool?' (1999) 21 Hmn Rts Q 342, 351; N Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Later Than Never' (2000) 3 Yale Hmn Rts and Development LJ 45, 87; B Pityana, 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 Afr J Hmn Rts L 121, 127-128; S Ebobrah, 'The Admissibility of Cases Before the African Court on Human and Peoples' Rights: Who Should do What?' (2009) 3 Malawi LJ 87, 100; S Ebobrah, 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations' (2011) 22 EJIL 663, 678-679; JG Naldi, 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 Afr J Hum Rts L 366, 375-376, 380.

7 F Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 429.

which State Parties may deposit their declarations".[8] This, as observed by Ssenyonjo, "has had a negative impact on the Court's exercise of its material jurisdiction over cases submitted directly by individuals and NGOs".[9]

As alluded to above, two cases have been submitted to the African Court contesting the validity of the OPJC. In *Femi Falana v the African Union* ('*Falana*')[10] and *Atabong Denis Atemnkeng v the African Union* ('*Atemnkeng*')[11] the applicants challenged the OPJC on the grounds that it (i) violated the rights set out in the African Charter on Human and Peoples' Rights[12] and per definition international human rights law; (ii) contradicted the hieratical structure of human rights law under the ambit of the AU; and (iii) negated the functions and mandate of the AU. A similar challenge was moreover submitted to the EACJ in 2012. In the *Democratic Party v the Secretary General of the East African community and four others*[13] (*'Democratic Party'*) the applicant challenged the failure of Uganda, Kenya, Rwanda[14] and Burundi to make declarations under the OPJC, arguing that this failure was an infringement of the East African Community Treaty[15] and the ACHPR.

## 2. Scope

It is clear that without any changes to the OPJC the potential of the African Court is curtailed. As it is only member states that have ratified the Protocol, the African Commission and African International Organisations ('AIOs') that have direct access to the Court, the flow of cases, set aside those coming from the eight[16] member states that have made optional declarations, is bound to be a trickle rather than a flood. Therefore, the question that begs for our attention is the rationality of the OPJC. It is not difficult

[8] *Democratic Party v the Secretary General of the East African Community and Four Others* (EACJ 2014) Appellate Division, Appeal No 1 para 74.

[9] M Ssenyonjo, 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non-Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008-2012', (2013) 2 Intl Hum Rts Rev 17, 31.

[10] App No 001/2011 (ACHPR, 26 June 2012).

[11] App No 014/2011 (ACHPR, 15 March 2013).

[12] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58

[13] *Democratic Party v the Secretary General of the East African Community and Four Others* (EACJ 2012) First Instance Division, No 2 2012.

[14] Later made a declaration under article 34(6) of the Protocol and was excluded from the appeal.

[15] East African Community (EAC) Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000, amended 14 December 2006 and 20 August 2007) EAC Treaty <https://www.wipo.int/wipolex/en/regeco_treaties/text.jsp?file_id=173330> accessed 1 June 2016.

[16] Burkina Faso, declaration deposited 28 July 1998; Malawi, declaration deposited 9 October 2008; Mali, declaration deposited 19 February 2010; Tanzania, declaration deposited 29 March 2010; Ghana, declaration deposited 10 of March 2011; Cote d'Ivoire, declaration deposited 23 July 2013; Benin, declaration deposited 8 February 2016 and Tunisia, signed 13 April 2017. Rwanda, deposited its declaration on 6 February 2013 and officially withdrew it on 24 February 2016.

to imagine why it found a home in the Protocol; it is aimed at protecting states against the jurisdiction of the African Court. However, it is feasible to ask whether such "protection" is rational considering the responsibilities of states under the ACHPR, seen as part of the over-arching human rights mandate of the AU.

My proposition is that a state practice that is solely based on state sovereignty and therefore the discretion of states to condone the jurisdiction of the Court as they please violates other principles of international law of similar standing as well as international human rights law. The approach to the OPJC as only a procedural aspect of the Protocol over which the state parties have full control is, in my opinion, a grave simplification of the matters at hand. This simplification is evident in *Democratic Party* where the EACJ concluded that the applicant's challenge of the OPJC "made a mountain out of an anthill".[17] The EACJ stipulated that "the facts cannot point to a violation where the sole discretion is left to the Partner state".[18] However, this approach turns on whether the method of creating such a choice is valid under the broader human rights system within which it exists. To mechanically conclude that it exists and therefore it should be applied, does not consider all the variables in this matter. Thus, any state practice resting on this assumption may arguably contravene some of the most fundamental principles of international law.

However, after three unsuccessful challenges to the validity of the OPJC it is logical to ask if there is more merit to this matter? In returning to the substantial claims that were made in *Falana*, *Atemnkeng* and *Democratic Party*, I suggest that two important arguments were introduced. The first challenge referred to the hierarchical structure within which the OPJC exists. This argument was partly presented in *Falana* with reference to article 66 of the ACHPR. The second challenge referred to the material norms and principles with which the OPJC must coexist. This challenge was launched in all three cases resting on different substantial rights in the ACHPR.

To provide an analysis of these arguments I firstly entertain a broader discussion about the OPJC to create a background to the same. This analysis refers to the interpretation of the OPJC in light of the preparatory work. Secondly, I provide an analysis of the relationship between the Protocol and the ACHPR, focusing mainly on the fact that the Protocol is subsidiary to the ACHPR. In this regard, it is pertinent to ask whether the OPJC offends the objectives and purposes of the ACHPR and equally whether the obligations of state parties under the ACHPR would be infringed by the OPJC. Lastly, I explore the material arguments set out in the cases referred to above. This contestation is twofold; firstly, as a specific challenge grounded in the various rights set out in the ACHPR such as the rights of access to justice and equality. Secondly, as a challenge turning on the *jus cogens* status of the right of access to justice and the implications thereof on the procedural aspects of the OPJC on the one hand and the nature and position of the right on the other.

To analyse the above-mentioned challenges this article is divided into a further four sub-

[17] *Democratic Party v Secretary-General of the East African Community and Four Others* (EACJ 2013) First Instance Division 29th November 2013 para 64.
[18] ibid para 63.

sections. Sub-section 3 provides an analysis of the preparatory work to the Protocol. Sub-sections 4 and 5 refer in turn to the hierarchal and material challenges. The last sub-section, sub-section 6, contains the concluding remarks.

## 3. The OPJC in the Draft Protocols

One way of approaching the validity of the OPJC is to analyse it from the perspective of the preparatory work of the Protocol. Article 32 of the Vienna Convention on the Law of Treaties ('VCLT')[19] establishes that recourse may be had to supplementary means of interpretation, such as the preparatory work of a treaty, to confirm the meaning resulting from the application of article 31 if this interpretation leaves the meaning ambiguous or leads to a result which is manifestly absurd or unreasonable. As I will further advocate in the following two sections, the OPJC seemingly contradicts the very purpose of the ACHPR; thus, a literal interpretation of the OPJC may arguably lead to an unreasonable result. The relevance of article 31 of the VCLT is further discussed under sub-section 5 below. This section is however devoted to an analysis of the four draft protocols that preceded the current Protocol. This analysis will allow me to draw some conclusions as to whether the preparatory work reveals any considerations of the hierarchical and material aspects of the relationship between the ACHPR and the Protocol with regard to the OPJC that could provide guidance in the interpretation process.

In reviewing the four draft protocols, established in the process of creating the African Court, it is evident, but not surprising, that direct access by individuals to the African Court was one of the most contentious issues. Even though the drafting of the Protocol took place during a period where the African continent saw many countries transition towards democracy, the introduction of unfettered direct access of individuals to the African Court would, as acknowledged by Ssenyonjo, have had the unwelcomed "potential to subject States to increased judicial accountability".[20]

The earliest draft was prepared by the experts assembled by the OAU General Secretariat in collaboration with the African Commission and the International Commission of Jurists ('IComJ'). In 1994, they concluded the first draft protocol.[21] This draft acted as a point of departure in the discussion of the framework for the African Court. Articles 18, 19(2) and 20 of the IComJ Draft Protocol set out the right of individuals to petition the African Court. This right was qualified from the outset, as article 18 pointed out that persons, NGOs or groups of individuals would only have the right to bring cases before the African Court subject to the provisions of articles 20(2) (admissibility) and 21(1) (public hearings) of the Protocol. Furthermore article 19(2) importantly spelled out that the African Court:

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[19] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[20] Ssenyonjo (n 9) 23.

[21] [ICJ] Draft Additional Protocol to the African Charter on Human and Peoples' Rights prepared by the experts assembled by the OAU General Secretariat in collaboration with the African Commission on Human and Peoples' Rights and the International Commission of Jurists, 26-28 January 1994, Geneva, Switzerland ('IComJ Draft Protocol').

> [M]ay not consider a case originating from other communications and submitted to the Commission in accordance with article 55 of the Charter [complaints from individuals and NGOs author's comm.] unless the Commission has considered the matter and made a determination. The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within three months of a determination having been made by the Commission.

It is clear that the relationship between the Commission and the Court was to be organised in such a way that the Commission's mandate to hear claims originating under article 55 of the ACHPR would not be superseded by the powers of the Court. The African Commission first had to consider and decide on an individual communication before the Court would gain jurisdiction. However, the IComJ Draft Protocol opened up one important (direct) avenue for individuals, groups and NGOs to petition the African Court. Under the IComJ Draft Protocol it was proposed that the Court notwithstanding article 19(2) could, "on exceptional grounds, authorise persons, non-governmental organisations and groups of individuals to bring cases before the Court, without first utilising the procedures of article 55 of the Charter".[22] In determining whether the Court would consider such a case the admissibility principles articulated in article 56 of the ACHPR would apply.[23] This mode of access did not find its way into the current Protocol. The role of bringing this type of claims to the African Court today rests on the Commission under rule 118(3) of the Rules of Procedure of the African Commission ('Rules of Procedure')[24] where direct access is not possible.

At the OAU meeting in Tunis held in June of 1994 the OAU Assembly entreated the Secretary of the OAU to convene a meeting to consider (against the background of the IComJ Draft) the possible establishment of an African Human Rights Court.[25] In 1995, a second draft was put forward.[26] Similar to the IComJ Draft, the Cape Town Draft Protocol established that the Commission could petition the Court and that under extraordinary circumstances, to be determined by the Court, individuals, groups and NGOs could petition the Court without having to go through the Commission. Article 5 confirmed that besides the African Commission a state party that had lodged a complaint to the Commission and a state party against which a complaint had been lodged at the Commission could also directly petition the Court. As in the IComJ Draft no declaration was required and the direct access by individuals was restricted by the reference to "exceptional grounds" in article 6. From these two drafts it is clear that the Commission would have the primary say in most individual petitions, except in extraordinary cases; and that the African Court could only entertain communications originating under article 55 of the ACHPR after the Commission had considered the matter and taken a decision

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[22] ibid art 20 (1).

[23] ibid art 20 (2).

[24] Approved by the African Commission on Human and Peoples' Rights during its 47th Ordinary Session held in Banjul (The Gambia) from 12-26 May 2010.

[25] AHG/Res 230 (XXX), 30th Ordinary Session of the Assembly of Heads of State and Government, Tunis, Tunisia, June 1994, as referred to in Ssenyonjo (n 9) n 35.

[26] Draft Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights OAU/LEG/EXP/AFCHPR/PRO(I) (1995) ('Cape Town Draft Protocol').

or completed a report. Hence, the Cape Town Draft Protocol opened up for an alternative to a comprehensive consideration by the African Commission.[27] Referring a communication to the African Court after considering the case in full would arguably engage the Court, under article 19(2), in a similar fashion as the Inter-American Commission ('IAComHR') engages the IACtHR.

In December 1995, the OAU General Secretariat submitted the Draft Protocol adopted by the Cape Town Experts Meeting to all member states to submit their views. At the end of the deadline no submissions had been made and subsequently the Secretariat reminded the member states of the request made.[28] At the end of March 1996 reactions had only been received from Mauritius, Lesotho and Burkina Faso; a clear indication of the very limited interest shown towards the establishment of the African Court at this stage.

The 64th Ordinary Session of the Council of Ministers of the OAU was held in Yaoundé in July 1996. During this meeting, the representatives again considered the report of the Secretary-General on the Cape Town Draft Protocol. At the end of the debate the Council decided to defer consideration of the Cape Town Draft Protocol to the 65th Ordinary Session to enable the General Secretariat to once again circulate the Draft Protocol to the member states and to request them to submit their observations. At this stage, another seven[29] states submitted comments confirming that all-in-all only ten states commented on the first negotiated draft. From the few comments made at this stage it is however evident that (limited) direct access was viewed as important. Nonetheless the main goal appeared to have been to limit this access even further. For example, Côte d'Ivoire suggested that the President of the Court be authorised to determine whether an interested party would benefit from the exceptional jurisdiction; and Tunisia suggested that the African Court should "assist" the parties to arrive at an amicable settlement before the African Court could apply its jurisdiction to hear a matter. States such as Burkina Faso and Madagascar expressed fear that the African Commission's mandate would be reduced if individuals gained direct access. The Burkinabe delegation suggested that the exceptional jurisdiction of the Court would reduce the importance and the effectiveness of the Commission. It proceeded to propose that "[n]o matter the circumstances, individuals, NGOs and individual groups should first refer their issues to the Commission instead of resorting directly to the Court".[30]

In April 1997, the year before the adoption of the current Protocol another drafting exercise was held in Nouakchott.[31] In article 5(1)(a) of the Nouakchott Draft Protocol the Commission retained the competence to petition the Court; and in article 6 the avenue for individuals and NGOs (with the added requirement of "observer status")

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[27] ibid art 8(2).
[28] By its *note verbale* CAB/LEG/66.5/116/Vol II.
[29] Senegal, Tunisia, Sierra Leone, Benin, Côte D'Ivoire, Madagascar and Ethiopia.
[30] OAU/LEG/EXP/AFCHPR/PRO (I) Rev 1 Annex III Comments from member states according to the dates received (c): Burkina Faso.
[31] Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights OAU/LEG/EXP/AFCHPR/PRO(II) (April 1997) ('Nouakchott Draft Protocol').

remained open in urgent cases or cases of serious, systematic or massive violations of human rights. In cases of this character the African Court was obligated to "requests the opinion of the Commission which must give it as soon as possible".[32] The Court was set to rule on the admissibility of individual, group and NGO instituted communications taking account of the provisions stated in article 56 of the ACHPR. The Court could furthermore consider the case or transfer it to the African Commission. However, the added article 6(5), importantly, introduced the structure that would later be transformed into the article 34(6) declaration and the *locus standi* requirement proclaimed in article 5(3) of the Protocol (that is, the OPJC).[33] In this regard it is interesting to note that the Court's prerogative to decide what constituted "exceptional grounds" had been coupled with a general right to accept jurisdiction bestowed upon the state parties. Article 6(5) spelled out that "[a]t any time after the ratification of this Protocol, the state must make a declaration accepting the competence of the Court to receive petitions under the first paragraph of this article [referring to urgent cases or serious, systematic or massive violations of human rights author's comm.]." The African Court was henceforth prevented from receiving any petition involving a state party that had not made such a declaration. A two-pronged hurdle had been created for individual complaints, the need for the Court's determination of "exceptional grounds" and the state's declaration for the petitioner to gain *locus standi*.

At this meeting article 6 unsurprisingly turned out to be very controversial and as such was subjected to prolonged and substantive discussions. Interestingly, most delegations represented at the meeting expressed the view that the African Court should be accessible to individuals and NGOs just like it was suggested to be open to the African Commission and states parties. Furthermore, it was pointed out that as no inter-state complaint had (at that time) been filed under article 49 of the ACHPR it was "individuals, NGOs and groups that had made the Commission functional".[34] And that without individual access the Court could never achieve this status. As a response, some delegations indicated that article 6 should be read in conjunction with a paragraph or freestanding article subjecting the jurisdiction of the African Court to hear all individual claims to a declaration accepting the exceptional competence of the African Court. However, Nigeria and Sudan expressed reservations about the formulation of article 6(5); and Nigeria suggested an optional clause for submission by member states to the over-all jurisdiction of the African Court. However, after prolonged consultation and debate article 6 was adopted by consensus.

The last push to establish the Protocol was undertaken in Addis Ababa in December 1997.[35] Before this meeting the member states were again asked to submit comments to

[32] ibid art 6(2).

[33] ibid art 6(5) reads:

> "At any time after the ratification of this Protocol, the state must make a declaration accepting the competence of the Court to receive petitions under the first paragraph of this article. The Court shall not receive any petition involving a State Party which has not made such a declaration".

[34] OAU/LEG/EXP/AFCHPR/RPT (2) VII, Consideration of articles, art 6.

[35] Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/EXP/AFCHPR/PROT (III) Rev

the Nouakchott Draft Protocol. Only seven states submitted comments to the OAU General Secretariat.[36] Namibia, Burkina Faso and The Gambia suggested that the declaration in article 6(5) be deleted. The Namibian response succinctly stated that:

> If the Court is seized with the major function of overseeing 'human and peoples' rights', individuals' rights to approach the court should have been included in this article instead of being relegated to 'exceptional jurisdiction' [article 6]. It is obvious that the African Protocol is emulating the International Court of Justice and the European Court of Justice practice of giving jurisdiction on the State Parties. Since states do not suffer from inhuman treatment, human beings should have been granted ordinary access to the Court.

Swaziland opted to retain the prerogative for the African Court to grant individuals and juristic persons the right to institute claims directly before it, in urgent cases of serious, systematic or massive violations of human rights. Whereas Tanzania suggested that article 6(5), as it existed in the Nouakchott Draft Protocol, would be more likely to attract more state parties to ratify the Protocol than the proposal that a mere ratification would invoke the jurisdiction of the African Court.

After a prolonged debate over two sessions at the 67th Ordinary Session in Addis Ababa in February 1998, articles 5 and 6 were reformulated and submitted for reconsideration and adoption by the meeting. They were, thereafter, adopted by consensus. Article 34 was amended with the addition of two new sub-articles and was then also unanimously adopted. The Addis Ababa Draft Protocol presented the final solution for individual's and NGO's access to the African Court by relocating the optional declaration in article 6(5) to article 34(6) and inserting the *locus standi* requirements for individuals and NGOs in article 5(3) as dependent on article 34(6).

From the background material it is firstly evident that even though there was no consensus during the discussions, there was at least a majority voice confirming the importance of direct access of individuals and NGOs to the African Court at all stages of the discussion.[37] However the mode of access was heavily contested from two vantages points namely, the "exceptional circumstances" and the need for the "acceptance" of the Court's jurisdiction in this regard by the relevant states.

Secondly, it is important to note the reoccurring references by state parties to the ACHPR with regard to the process of individual complaints. This indicates the significance of the ACHPR and that any such procedure would first and foremost be guided by the ACHPR.[38] This strengthens the idea put forward under the hierarchy and

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1 (December 1997) ('Addis Ababa Draft Protocol').

[36] Namibia, South Africa, Egypt, Burkina Faso, Swaziland, The Gambia and Tanzania.

[37] See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1, OAU/LEG/EXP/AFCHPR/RPT (2), OAU/LEG/EXP/AFCHPR/Comm (3) and the Report from the twenty-seventh Ordinary Session 23-27 February 1998, Addis Ababa, Ethiopia, CM/2051 (LXVII).

[38] See Council of Ministers, Sixty-fourth Ordinary Session, 1-5 July 1996, Yaoundé, Cameroon CM/Res 1968 (LXIV); Report on the Cape Town Draft Protocol, Council of Ministers, Sixty-

merits arguments below that the Protocol should not be interpreted in isolation.

Thirdly, the suggestion of a direct avenue in relation to gross violations of human rights and exceptional circumstances surrounding human rights violations in the first two drafts took cognisance of the possible violations of *jus cogens* norms such as the prohibitions of torture and genocide for which the international community should not tolerate any impunity. These proposals would furthermore have aligned themselves with the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[39] ('UN Guidelines on the Right to a Remedy') presented in 2006 and discussed in more detail below. The final decision of the state parties indicates that leaving it up to the African Court to determine what "exceptional circumstances" entail would have granted it too wide jurisdiction. Instead they opted to control, contrary to the purpose of such a clause, the overall accessibility to the Court.

Lastly, in analysing the preparatory work it is clear that as the states purport to limit the direct access to the African Court by individuals and NGOs there is more and more reference and reliance on the ability of the African Commission to refer cases to the African Court.[40] In this regard the final compromise did not take cognisance of this important relationship in that the Protocol only qualifies the African Commission for *locus standi* and then refers to the complementarity principle in article 2 and the conclusion of rules of procedure in article 8 to substantiate the Commissions role in this regard. In a sense, the "exceptional circumstances" have been addressed in rule 118(3) of the African Commission's Rules of Procedure as mentioned above. However, this is a poor substitute for direct access as the Rules of Procedure neither stipulates any obligation on the Commission to refer a case nor indicates any involvement of the original complainants in the decision to refer. If the Commission would be willing and able to effectively act as a conduit for individual claims this would arguably lessen the impact of the OPJC and present an alternative route to fulfil the right of access to justice on the regional level.

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fifth Ordinary Session, 24-28 February 1997, Tripoli, Libya CM/1996 (LXV); OAU/LEG/EXP/AFCHPR/PRO (I) Rev 1 Annex III: Comments from Member States; OAU/LEG/EXP/AFCHPR/RPT(2); OAU/LEG/EXP/AFCHPR/Comm (3); OAU/LEG/EXP/AFCHPR/RPT (III) Rev 1 Central documents leading up to the adoption of the Protocol to Establish the African Court on Human and Peoples' Rights (Centre for Human Rights, University of Pretoria, South Africa) <http://www.chr.up.ac.za/chr_old/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHEMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc> accessed 1 June 2016.

[39] UNGA Res 60/147 (16 December 2005) UN Doc A/RES 60/147.

[40] See for example OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1, VII Consideration of Draft Protocol; Report on the Cape Town Draft Protocol. Council of Ministers, Sixty-fifth Ordinary Session, 24-28 February 1997, Tripoli, Libya CM/1996 (LXV), part III The Court as Envisaged in the Present Draft Protocol para 15; Annex III: Comments from Member States (i): Madagascar; OAU/LEG/EXP/AFCHPR/RPT (2), VI General Discussions; OAU/LEG/EXP/AFCHPR (3) Egypt (Introduction) para III.

## 4. A hierarchy of sources?

The significance of the right of access to justice, outside the African domestic realm, is clearly visible in *Lohe Issa Konate v Burkina Faso*[41] ('*Konate*'), one of the first substantial judgments rendered by the African Court. From the conclusions of the African Court in this case, confirming that the Burkinabé legal system did not provide Mr Konate with any effective remedy to enable him to overturn the Burkinabé laws, it was found to be contradictory to the ACHPR. It is clear that had he not been able to access the African Court he would have had no effective recourse to justice.[42]

Access to international justice by individuals, such as in the case of Mr Konate, remains exceptional under international law. One of its main features is that it is based on specific treaty arrangements, not on general principles of international law. The OPJC is a characteristic example of where a general principle of law, the "right of access to justice", conflicts with the sovereign treaty making powers of states and their inherent interest to shield themselves from the jurisdiction of a non-domestic court. Arguably, when the right of access to justice is merely viewed and ensured as a matter of treaty obligation, other rules or principles of international law can and will effectually obstruct its application.

From the sovereign perspective, state parties solely guarantee access to the African Court. However, as the human rights regime continues to develop it has become pertinent to ask whether the right of access to justice is really at any given time "only" guaranteed as a matter of treaty obligation? I deal with the issues relevant to the qualification of the rights of access to justice as a *jus cogens* norm below under sub-section 5.

Conversely, the negotiation of the Protocol did not take place in a vacuum; therefore its contents, as was discussed above, have to be interpreted and understood within a specific context, but also as further set out in this section adhere to the sources hierarchically higher. In this regard even if access to justice is "only" guaranteed as a treaty obligation (which I further refute below) what happens if various sources conflict with each other on this point?

As soon as a legal structure is created where various institutions and sources have to coexist, a hierarchy is necessitated. Such a hierarchy is formulated in article 66 of the ACHPR stipulating that, "[s]pecial protocols or agreements may, if necessary, supplement the provisions of the present Charter." The word "supplement" in article 66 clearly indicates that when a protocol is added it should, as submitted in *Falana*, only be done "to enhance the right guaranteed in the Charter". Access to justice is not only protected in the ACHPR as a right but importantly also as a means to protect other rights.

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41 *Konate* (n 1).
42 ibid para 113.

As the ACHPR is the origin of the Protocol, it has to fulfil the purpose of and is limited by the obligations set out in the ACHPR. This is confirmed by article 30(2) of the VCLT dealing with the application of successive treaties relating to the same subject matter which stipulates that, "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." In analysing the Protocol and the preparatory work it is evident that the Protocol is "subject" to the ACHPR on jurisdictional and substantial matters. Article 7 of the ACHPR demands that "[e]very individual shall have the right to have his cause heard". Furthermore, the last section of the Preamble to the Protocol stipulates that the "attainment of the objectives of the [ACHPR] *requires* the establishment of an African Court on Human [emphasis added]".

In accordance with the hierarchy argument the ACHPR precedes the Protocol, it is the source of the Protocol and it sets the framework for the Protocol. In addition, the EAC Treaty (and arguably the revised treaty of the Economic Community of West African States ('ECOWAS')) reiterates and reinforces these obligations under the ACHPR. The EAC Treaty goes a step further in reframing the legal obligations in article 7(2). These obligations clearly existed on the relevant state parties as they ratified the Protocol. States, AIOs and the African Commission cannot be victims of human rights violations. When the Protocol was conceived in the 1990's no inter-state complaint had reached the African Commission.[43] From this perspective it is difficult to see how a limitation of the access to the African Court by the very victims of human rights violations could, as stated in the preamble of the Protocol, accomplish the objectives of the ACHPR.

Additionally, today the implementation of the ACHPR takes place under the broader human rights mandate of the AU and the New Partnership for Africa's Development ('NEPAD'). The respect for human rights, conceived as a means to promote international cooperation under the OAU Charter, has been given further impetus and now constitutes one of the main objectives of the AU as well as one of the fundamental principles on which it should function.[44] Arguably, as the AU Constitutive Act entered into force in 2001 the OPJC had already been cemented in the Protocol. Nevertheless, it is difficult to imagine a prolonged lifespan of the OPJC within an organisation that should condemn and reject impunity as well as function in accordance with the principles of democracy, human rights, the rule of law and good governance.[45] Furthermore contemporaneous with the establishment of the AU, NEPAD was created. It includes a Declaration on Democracy, Political, Economic and Corporate Governance that commits African governments to promote and protect "democracy and human rights in their respective countries and regions, by developing clear standards of accountability,

[43] The first and only complaint of this nature, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) reached the African Commission in 2003.
[44] Art 2(1)(e) of the Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39 ('OAU Charter'); Arts 3(h) and 4(m) of the Constitutive Act of the African Union (adopted 1 July 2000, entered into force 26 May 2001) 2158 UNTS 3 ('AU Constitutive Act').
[45] Arts 4 (o), 3(h) and 4(m) of the AU Constitutive Act.

transparency and participative governance at the national and subnational levels".[46]

## 5. Material challenges

The material challenge in *Falana* and *Atemnkeng* both departed from the claim that the OPJC violates articles 1 (general right and obligations resting on the state parties), 2 (non-discrimination), 3 (equality before the law) and 7 (access to justice) of the ACHPR. In *Democratic Party*, these articles were reiterated together with articles 6(d) and 7(2) of the EAC Treaty.[47] Article 6(d), similarly to article 4(g) of the Revised ECOWAS Treaty, expounds that the fundamental principles that govern the achievement of the objectives of the EAC by the member states include the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the ACHPR. This article furthermore refers to the overarching principle of good governance including adherence to the principles of democracy and the rule of law. Article 7(2) of the EAC Treaty refers to the operational principles of the EAC where member states undertake to abide by the principles set out in article 6(d) as well as the maintenance of universally accepted standards of human rights.

In aid of the implementation of such principles the EAC has furthermore enacted the EAC Human and Peoples' Rights Act of 2012, established the Second Plan of Action on Promotion and Protection of Human Rights in East Africa (2012-2015)[48] and considered a Draft Protocol on Good Governance[49]. The EAC Human and Peoples' Rights Act refers to access to justice in article 42, stipulating that "[e]very partner state shall ensure access to justice for all persons". The Draft Protocol on Good Governance promotes the adherence to the universal principles of democracy and respect for human rights. Article 4(b) directly refers to the rule of law and access to justice as fundamental principles of the Draft Protocol on Good Governance; and article 5(4)(e) refers to upholding the rule of law by "[h]armonizing strategies, policies and programmes for promotion of respect for the rule of law [to] ensure eradication of the culture of impunity". The East African Legislative Assembly furthermore adopted the EAC Human Rights Bill in 2012. It provides for access to justice in articles 6 and 22(2) and stipulates further that "rights come with responsibilities, such that the upholders of rights (duty bearers) are obliged to (…) [p]rotect and promote human rights in a manner that ensures

[46] UNOHCHR The New Partnership for Africa's Development (NEPAD) Abuja, Nigeria, October 2001 (Excerpts) 2001 <http://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages /NEPAD.aspx> accessed 1 June 2016.

[47] In *Democratic Party* and *Falana* the petitioner furthermore referred to violations of article 13 of the ACHPR, the rights of every citizen to participate freely in the government, to equal access to public service and access to public property and services as well as to article 26 of the ACHPR, the duty to guarantee the independence of the Courts.

[48] EAC Framework of the EAC Plan of Action on Promotion and Protection of Human Rights in East Africa EAC/CM 15/Decision 36.

[49] Report of The Committee on Legal, Rules and Privileges on the Assessment of Adherence to Good Governance in the EAC and the Status of the EAC Political Federation 2nd-6th September 2013, Kampala, Uganda <http://www.eala.org/new/index.php/key-documents/reports/450-adherence-to-good-governance-in-the-eac-and-the-status-of-the-eac-political-federation/file> accessed 1 June 2016.

that (…) affordable and accessible redress is provided in instances where violations occur". As Ebobrah points out the Bill is meant to consolidate the human rights principles set out in the ACHPR and other international human rights agreements.[50]

The substance of articles 1, 2, 3 and 7 (as mirrored in articles 2 (1), 2(3), 14 and 26 of the ICCPR as further discussed below) refer to an obligation resting on the state parties to the ACHPR to protect, promote, fulfil and respect (as a negative and a positive obligation) the right of equal (non-discriminatory) access to justice. This right is equally protected in articles 8 of the UDHR, 2(3) and 14 of the ICCPR and 10(3) of the African Charter on Democracy, Elections and Governance. It is clear from these rights that access to justice is not only a right protected in these instruments but a vital means to protect and enjoy all human rights. In that context, the judges in the dissenting opinion in *Atemnkeng* accepted that the right of access to justice is by necessity a peremptory norm under international law.[51] This is a key aspect of the challenge to the validity of the OPJC, as is further discussed below.

The obligations set out in the ACHPR are important with regard to the application of article 31(1) and (2) (a) and (c) of the VCLT. These provisions spell out that an international treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In addition, the context also comprises of any agreement relating to the treaty that was made between all the parties in connection with the conclusion of the treaty (in this case the ACHPR precedes the Protocol but is clearly linked to it as substantiated above). Article 31(2)(c) moreover refers to any relevant rules of international law applicable in the relations between the parties as constituting the context within which a treaty should be interpreted.

As a point of departure, I propose that access to justice must be viewed as both a procedural requirement and as a human right. Within the context of an individual's access to an international court I argue that it is impossible to separate the two. If it would be accurate to determine access to justice only as a procedural right where states can invoke full sovereignty, the human rights side of the "access" is completely disregarded leaving millions of the most vulnerable individuals without an effective remedy. The right of access to justice as protected under international human rights law therefore *suo moto* necessitates access to international justice where domestic courts cannot or has not afforded an appropriate remedy. As framed by Trindade J "the human being, even in the most adverse conditions, emerges as subject of the International Law of Human Rights, endowed will full international juridico-procedural capacity."[52] Within this context the state's sovereignty is always protected through the requirement of the exhaustion of local remedies.

The reference to "full international juridico-procedural capacity" draws on a very important aspect of the right of access to justices, namely its status as a *jus cogens* rule

[50] S Ebobrah, 'Human rights developments in African sub-regional economic communities during 2012' (2013) 13 Afr J Hum Rts L 178, 181.
[51] *Atemnkeng* (n 2) 4.
[52] Trindade (n 3) 24.

under international law. This was confirmed by the dissenting opinion in *Atemnkeng* where the dissenting judges referred to the applicant's submission that the right of access to justices has *jus cogens* status as *distinguishing* its decision from their dissent in *Falana.*[53] In *Falana* they found the OPJC to be inconsistent with the ACHPR however they found no provision in the Protocol empowering them to declare the OPJC null and void.

Bianchi refers to the "almost intrinsic relationship between *jus cogens* and human rights".[54] In this regard it is significant to fully appreciate the value of access to justice as a superior norm of *jus cogens* (as I argue below) but also as a vehicle to uphold human rights and other *jus cogens* norms alike. In the sense of the latter, it has been unsuccessfully argued before the International Court of Justice ('ICJ') that the breach of a *jus cogens* norm would render an international court jurisdiction regardless of the acceptance of the same, as further discussed below.

The discussion as to whether access to justice is regarded as a *jus cogens* norm within the international community can take many different forms and it is not within the scope of this article to present all the different perspectives. It is however important to point out that there is no exhaustive list of *jus cogens* norms; there is furthermore no universal approach to these norms. However, reference can be made to the fact that the right of access to justice is protected within all major human rights treaties and its importance is furthermore substantiated by reference to the UN Guidelines on the Right to a Remedy. In the resolution adopted by the United Nations General Assembly ('UNGA') in 2005, constituting the UN Guidelines on the Right to a Remedy it was stipulated that a victim of a gross violation of international human rights law should "have equal access to an effective judicial remedy as provided for under international law".[55] The UN Guidelines on the Right to a Remedy furthermore reflects the obligations arising under international law for state parties to secure the right of access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, states should ensure that victims can exercise their rights to remedy for gross violations of international human rights law. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should, according to the UN Guidelines on the Right to a Remedy include "all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies". It moreover stipulates that, "[w]here so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law." It is not difficult to draw parallels between the ideas set out in the UN Guidelines on the Right to a Remedy and the way in which direct access to the African Court was phrased in the Cape Town and later in the Nouakchott Draft Protocols, as discussed above. It is however notable that in cases where direct access is impossible the Commission would have to act without any impediment to foster this type of access. As the Commission's actions in this regard is governed by rule

[53] *Atemnkeng* (n 2) 4.
[54] A Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 EJIL 491.
[55] Annex pt VIII Access to justice (n 38).

118(3) of the Rules of Procedure, it is important to firstly point to the fact that this rule constitutes that the Commission "may" submit a communication under these circumstances, it does not confer an absolute obligation; and secondly the original petitioners have no say as to whether a communication should be transferred.

In defining *jus cogens* norms under international law Trindade J characterises the doctrinal and jurisprudential construction of international *jus cogens* as a new "*jus gentium*, the International Law for Humankind".[56] It reasonably reaches beyond treaty law in encompassing the law of international responsibility of states and the whole *corpus juris* of contemporary International Law.[57] Access to justice has arguably been accepted as such a right under the Inter-American human rights system.[58] In *Villagrán Morales and Others*[59] and the *Institute of Rehabilitation of Minors*[60] it was confirmed that even in situations of the most extreme adversity, justice can be delivered if access to international courts are granted. It is however the relentless work of Trindade J in his many dissenting opinions that has helped elucidate the meaning and position of access to justice as an international human right, as granting access to international courts and as a *jus cogens* norm.[61] In his dissenting opinion in *Masacre of Pueblo Bello*[62] he explained that the interrelatedness between the right to a fair trial and access to an effective recourse leads him to characterise access to justice as "the full realization of justice, as forming part of the sphere of *jus cogens*; in other words, that the inviolability of all the judicial rights established in Articles 25 and 8 considered together belong to the sphere of jus cogens".[63] It is however not without contradiction that these arguments have come to the forefront in a system that completely bars direct access by individuals to the IACtHR; however the qualification is nonetheless important.

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[56] *Trindade* (n 3) 5.

[57] ibid.

[58] In this context, it is important to note the fact that individuals and NGOs are completely barred from the IACtHR and can only access the court through the IAComHR as stipulated in article 61 of the American Convention on Human Rights ('ACHR'). The difference is however firstly that the optional jurisdiction is not only referring to individual complaints but to the total jurisdiction of the IACtHR as stipulated in article 62; and secondly the position and mandate of the IAComHR in the way it involves the original complainants under its Rules of Procedure. If the state in question has accepted the jurisdiction of the IACHR in accordance with article 62 of the ACHR, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with article 50 of the ACHR, it must refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary. In making this decision the IAComHR should, amongst other, take the position of the petitioner into consideration. This does not however completely absolve the lack of access for individuals to the IACtHR. It is also important to note that articles 8 and 25 are worded differently from article 7 of the ACHPR. Article 25 as an example spells out that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws".

[59] *Villagrán Morales et al v Guatemala* (IACHR 1999) Ser C No 63.

[60] *Juvenile Reeducation Institute v Paraguay* (IACHR 2004) Ser C No 112.

[61] *Trindade* (n 3) 18-22.

[62] *Pueblo Bello Massacre v Colombia* (IACHR 2006) Ser C No 140.

[63] ibid. Separate Opinion of Trindade J para 64.

The traditional effect of a *jus cogens* norm is that it ultimately reaches any juridical act such as treaty making which is evident in article 53 of the VCLT. It is also evident in article 41(2) of the Draft Articles on State Responsibility, which requires all states, and as pointed out by Talmon[64] the same is true for international courts and tribunals, not to recognise "as lawful a situation created by a serious breach of *jus cogens*". A situation that is not to be recognised as "lawful" is to be treated as not producing any legal effects indicating that a breach of the principle of access to justice should not produce any legal results. As a priority value within international law it creates obligations *erga omnes* that postulates the pre-eminence of access to justice as a fundamental principle of international law.

The question however remains as to the effect of a breach of a *jus cogens* norm on the jurisdiction of an international court and in the present case the effects of barring individuals from the jurisdiction of an international court *as* a breach of a *jus cogens* norm. In this context, it is again important to draw attention to the dual perspective of this particular right, as a procedural requirement (*locus standi*) and as a human right of *jus cogens* character protecting all other human rights. International courts have for a lengthy period of time avoided the discussion about *jus cogens* norms and as an example it was only in the *Armed Activities on the Territory of the Congo* case ('*Armed Activities*') [65] that the ICJ for the first time confirmed the existence of these rules. In this case the ICJ was set to examine *inter alia* whether (i) the principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention')[66] were principles of *jus cogens* nature with obligations *erga omnes*; and (ii) whether the existence of such rules had any effect on its jurisdiction in a case where the respondent state (Rwanda) had made a reservation to article 9 of the Genocide Convention relating to the jurisdiction of the ICJ to adjudicate on matters relating to the interpretation, application or fulfilment of the Genocide Convention. The ICJ concluded that:

> [T]he mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.[67]

However, the ICJ importantly added that Rwanda's reservation to article 9 of the Genocide Convention only related to the jurisdiction of the ICJ and did not have any effect on the substantive obligations relating to acts of genocide themselves under that Convention. The ICJ established that the nature of a *jus cogens* norm has no effect on the

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[64] S Talmon, *'Jus Cogens* after Germany v Italy: Substantive and Procedural Rules Distinguished', (2012) 25 Leiden J of Intl L 979, 100.

[65] *Case Concerning Armed Activities on the Territory of the Congo* case (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*) ICJ Rep 2006 (Merits).

[66] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 ('Genocide Convention').

[67] ibid para 64.

procedure of the court that is, obligations *erga omes* is one thing but the acceptance of jurisdiction of an international court is still only guided by consent. In *Armed Activities*, the question of the relevance of *jus cogens* was twofold as Dugard explains in his dissenting opinion. The ICJ referred to whether "the allegation of the violation of a norm of *jus cogens per se* confers jurisdiction on the Court" and then it concluded that "where a violation of a norm of *jus cogens* is alleged, the respondent State cannot raise a reservation to the Court's jurisdiction to defeat that jurisdiction".[68] Had the ICJ agreed with the submissions of the DRC a new phase in the application of *jus cogens* norms would arguably have ensued. However, this was not the case; instead the ICJ emphasised that its jurisdiction is based on consent and that no peremptory norm requires states to consent to jurisdiction where the compliance with a peremptory norm is the issue before the Court. The "consent" the ICJ is referring to could to a certain extent be compared to the consent required by the OPJC. From this perspective it seems that the majority in the *Atemnkeng* case made the right decision to ignore the "*jus cogens*" argument. However, I do not agree with this conclusion.

If we analyse the case as submitted by Mr Atemnkeng his claim was that the OPJC as contained in the Protocol is a violation of the right of access to justice (a *jus cogens* norm). The OPJC establishes the jurisdiction of the African Court and a failure to make a declaration arguably has the same effect as a reservation against jurisdiction as in *Armed Activities*. In this case the ICJ established that the reservations did not alter the obligations of the state party and whether the breach was a breach of a *jus cogens* norm or not, did not have any effect on the ICJ's jurisdiction. However, within the context of the failure to make a declaration under OPJC this inaction arguably alters the obligations of a state party under the ACHPR to provide individuals with proper legal recourse. This is so because the OPJC establishes both a procedural necessity (*locus standi*) and enables a human right, the right of access to justice. It furthermore has an adverse effect on the other rights set out in the ACHPR, as access to justice is a vehicle for the protection of these rights. The logical outcome is therefore that within the context of the challenge of the OPJC the *jus cogens* argument would provoke a different outcome than the one stipulated by the ICJ above.

A similar position was later confirmed by the ICJ in *Jurisdictional Immunities of the State* ('*Jurisdictional Immunities*')[69] where another argument against responsibility for human rights atrocities was raised; namely state immunity. Italy argued that the rules of international law contravened were peremptory norms which would confer jurisdiction on the domestic court in cases where the claimants had no other resort. The ICJ thus rejected the claim that state immunity could not be invoked in cases where rules endowed with a peremptory character had been breached.

In *Jurisdictional Immunities*, the ICJ drew a sharp line between substantive rules (of *jus cogens* nature) on the one hand and rules which are procedural in nature (state immunity) on the other. The argument follows the same logic as in *Armed Activities* that state immunity does not alter or limit the actual norm, it simply limits the court's reach. This distinction between substantive rules of a *jus cogens* nature and procedural rules has been heavily

[68] *Armed Activities* (n 65) Dugard J dissenting para. 3.
[69] *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*) ICJ Rep 2012 (Merits).

criticised as being a purely doctrinal proposition, overly formalistic and for being detached from the reality of human rights protection.[70] As stipulated by Talmon much of the criticism seems to be motivated by the unwanted result caused by this distinction "namely *de facto* impunity for the most serious human rights violations".[71]

Again, at a first glance of these cases, the irrelevance of a *jus cogens* claim in the context of the Rwandan reservation to the Genocide Convention, the optionality of article 36 of the Statute of the International Court of Justice ('ICJ Statute') and the creation of the by now well-debated "substantive–procedural" distinction with regard to the impact of *jus cogens* norms, it may seem fruitless to pursue the argument of the invalidity of the OPJC any further. However, there are two fundamental differences. Firstly, as indicated above, a failure to make an OPJC actually alters a vital obligation under the ACHPR because it is the access to justice itself that is disputed; and secondly both cases before the ICJ are dealing with the relationship between states. Arguably other considerations have to be made where the legal capacity of the parties is incomparable and no other remedy exists to remedy the violations. If we agree to a total consideration of state sovereignty within the ambit of the enforcement of human rights law there would be little meaning to this enterprise. It is precisely the nature of international human rights law to break down, in part, states' sovereignty defence that is embraced by the formulation of the right of access to justice as a *jus cogens* norm so vehemently defended by Trindade J. In *Armed Activities* and *Jurisdictional Immunities* the ICJ accepted the shield that was raised against the ICJ's jurisdiction and that a *jus cogens* norm could not pierce this defence as the actions (the reservation and the effect of article 36 of the ICJ Statute) were voluntary state actions only to be guided by its sovereignty that is, its own preferences. I find this argument to be too formalistic but besides that, within the context of the denial of access to justice itself the motivation to prevent impunity seems even greater where it is the victims themselves that will bear the brunt of the denial of access to justice.

Therefore, it is clear to me that the effect of the application of the right of access to justice as a *jus cogens* norm *vis-à-vis* the OPJC is twofold. Firstly, it renders the OPJC null and void based on article 53 of the VCLT and thus carries no legal results. Secondly, as the OPJC denies access to justice it alters the obligations under the right of access to justice as a *jus cogens* norm and has a negative effect on the enforcement of the other rights in the ACHPR. It therefore has an effect on the jurisdiction of the African Court, as optional jurisdiction is not just a procedural issue but central to any merits claim.

Another related point refers to the fact that the rights set out in articles 2, 3 and 7 of the ACHPR also exits under international human rights law which creates legally binding obligations on African states. The ICCPR sets out similar obligations in articles 2, 14 and 26. Almost all African states have ratified the ICCPR and subsequently a dual obligation exists under the ACHPR and the ICCPR. In support of the materials argument above, that the OPJC *per se* violates the rights set out in the ACHPR (and the ICCPR), the Human Rights Committee ('HRC') has confirmed that "the intention of the Covenant is that the rights contained therein should be ensured to all those under a State's party's jurisdiction" and "a failure to allow individual complaints to be brought to the

[70] Talmon (n 64) 981.
[71] ibid.

Committee under the first Optional Protocol [indicates that one of] the essential elements of the Covenant guarantees ha[s] been removed".[72] In this regard it would furthermore be relevant to refer to the HRC's opinion on reservations *vis-à-vis* the complaints procedure set out in the first Optional Protocol to the ICCPR ('ICCPR OP1'). In this regard, the HRC has confirmed that it "considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose". Arguably there is some relevance in this statement within the context of the OPJC; a non-declaration under the OPJC has a similar effect on an individual's access to the African Court as a reservation relating to the complaints procedures under the ICCPR OP1.

## 6. Concluding remarks

With very little incentive for African states to commit to the legally binding decisions of the African Court there is a real danger that the important mandate of the African Court dwindles and impunity for human rights violations continues. The same position remains plausible under articles 8 and 30(f) of the Protocol Establishing the African Court of Justice and Human Rights as it provides the same process for individuals and NGOs to gain access to the African Court of Justice and Human Rights.

In *Falana* and *Atemnkeng* the applicants attempted to overcome an almost insurmountable juridical hurdle to challenge the very part of the Protocol that effectively barred them from the African Court. Under these circumstances it is understandable that some of the arguments presented may seem weak, forced, presented in the wrong forum or even contradictory. Even so, in having the courage to challenge the sovereignty of states and to push against a barrier excluding millions from access to justice, the flaws of the OPJC were exposed. Just because the courts were unwilling to deal with these issues does not mean we should accept this state practice towards jurisdiction. I commenced this article by recognising that my intention was to question the legitimacy of the current state practice prevailing on the African continent not to accept the jurisdiction of the African Court to hear claims of victims of human rights abuses. In this regard, the greatest threat to the legitimacy of the African Court and thus to the AU is the impunity that ensues as long as the OPJC prevails. If this practice is to be altered, such a process is amongst other dependant on legal arguments negating the validity of the open-ended fashion of the OPJC. The optionality of the jurisdiction of the African Court under the OPJC is perhaps unchallengeable under international law even though I have suggested above that the *jus cogens* status of the right of access to justice strongly opposes to this practice. However, the open-endedness, in that there is no time limit to the declarations under the OPJC, could arguably be the target of a judicial or advisory opinion of the African Court.

Just as the reference to "available resources' *vis-à-vis* socio-economic rights may have

[72] HRC General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (1994) UN Doc CCPR/C/21/Rev.1/Add.6 para 12.

seemed indefinable, clear-cut approaches have been laid down in international and domestic law to force states to fulfil these rights as a process of steps. It is important to move away from the one-dimensional qualification of the OPJC as only a procedural aspect of the African Court's jurisdiction and instead think of it as an unqualified limitation to the right of all individuals to access justice affecting civil and political, socio-economic and peoples' rights alike. The African Commission has with regard to socio-economic rights importantly confirmed that even if there is a lack of resources, a practice towards a socio-economic right may never be discriminatory in nature.[73] Arguably the same line of arguments could by analogy apply to the OPJC if we qualify access to justice as a right. Even though the responsibility resting upon states to declare access to the African Court seems limitless, the result of the inactivity of African states in this regard arguably produces an unequal result between the individuals that have and the ones that do not have access.

A clear line needs to be drawn between the optionality of jurisdiction in forums such as the ICJ where parties of the same posture can battle it out and in forums where the one party is completely dependent on the other in seeking legal recourse. In an inter-state scenario, where one state has not recognised the jurisdiction of an international forum, there are other means available; and as a last resort a state towards which continuing and grave injustice have been served can resort to self-defence. An individual oppressed by a state or marginalised by the conditions of his life relies on the access to justices as a key pillar of a dignified life. Human dignity is arguably never optional under any circumstances.

In this article, I attempted to outline a few arguments that could prove valuable in the fight against impunity. One of my conclusions to this end is that regardless of the OPJC, the African Court would be able to assume jurisdiction in cases where grave violations of human rights have taken place either if the complainant has approached the African Commission and it has not made a referral under rule 118(3) of the Rules of Procedure or it has been approached directly with a claim of great urgency or as indicating massive or grave violations of human rights. This is supported by the preparatory work, the *jus cogens* character of the right of access to justice and the UN Guidelines on the Right to a Remedy as discussed in this article.

In a more comprehensive approach to convince state parties that the OPJC does not have a place within a modern human rights structure, I considered the *jus cogens* nature of the right of access to justice together with the object and purpose of the ACHPR as constituting the basis for the Protocol. The conclusions drawn were that on the one hand it is contrary to the VCLT to renegotiate the right of access to justice and on the other as the Protocols' only task is to enhance the enforcement of already existing obligations, a violation thereof would weaken its validity. Furthermore, as the African Commission has thus far not proven to be a real conduit to the African Court, its position has not in any considerable way alleviated the problems created by the OPJC.

Furthermore, a mounting challenge to the African Court, as pinpointed by Ssenyonjo, is

[73] *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) 80.

its inactivity.[74] As the African Court continues to receive a budget that far exceeds that of the African Commission the bulk of its work should not be to pass judgments on the lack of *locus standi*. In this regard Ouguregouz J's suggestion, in his repeated dissenting opinions, is correct, that where the African Court manifestly lacks personal jurisdiction it should not undertake a judicial consideration of the application.[75] The African Court should not create the impression of activity in this way but instead formulate a better strategy to be able to uphold its mandate to interpret and apply the ACHPR, the Protocol and any other relevant human rights instrument. Thus, the OPJC needs to be reconsidered.

Using the courts in a direct challenge has proven futile therefore only one alternative remains; the amendment of the Protocol through the procedure it prescribes. This process could be sparked either directly under article 35 setting out the ways in which the Protocol can be amended or under article 4(1) by the African Court presenting an advisory opinion to such an extent. Under the rules governing the amendment of the Protocol the procedure can be set in motion either by a state party or by the African Court.[76] As the state parties have no real motivation to start such a process the role of the African Court is once again highlighted. The Court is entitled to propose amendments to the Protocol, as it deems necessary, through the Chairperson of the AU Commission.[77] In light of the fact that a third[78] of the complaints that have reached the African Court thus far have been turned away due to a lack of *locus standi* the African Court might be compelled to use this avenue. Seen from the perspective of the complaints lodged in *Falana*, *Atemnkeng* and *Democratic Party* it is obvious that these issues are of great concern and that the arguments set out to some extent compelled at least the African Court, as is visible in the dissenting opinions in *Falana* and *Atemnkeng*.

As any African organisation recognised by the AU can request the African Court to provide an opinion on any legal matter relating to the ACHPR or any other relevant human right, another step towards an amendment could be the request, by an African

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[74] Ssenyonjo (n 9) 52-53.

[75] See the dissenting opinions attached to the judgments in the cases of *Michelot Yogogombaye v The Republic of Senegal* Application No 001/2008; *Efoua Mbozo'o Samuel v Pan- African Parliament* Application No 010/2011; *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v the Republic of Gabon* Application No 012/2011; *Delta International Investments SA, Mr and Mrs AGL De Lange v the Republic of South Africa* Application No 002/2012; *Emmanuel Joseph Uko and Others v the Republic of South Africa* Application No 004/2012; *Amir Adam Timan v Republic of Sudan* Application No 005/2012; and *Falana* (n 10) as well as the dissenting opinion attached to the decision in the case of *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria* Application No 008/2011.

[76] Art 35 of the Protocol.

[77] ibid art 35 (2).

[78] *Youssef Ababou v Kingdom of Morocco* Application No 007/2011; *De Lange v the Republic of South Africa* (n 75); *Uko and Others v the Republic of South Africa* (n 75); *Timan v Republic of Sudan* (n 75); *Baghdadi Ali Mahmoudi v Republic of Tunisia* Application No 007/2012; *Soufiane Ababou v People's Democratic Republic of Algeria* Application No 002/2011; *Daniel Amare and Mulugeta Amare Republic of Mozambique and Mozambique Airlines* Application No 005/2011; *Ekollo v Republic of Cameroon and Federal Republic of Nigeria* (n 75).

NGO, for an advisory opinion on the validity and future of the OPJC.[79] The African Court would have jurisdiction over such a matter and could undertake a proper, in-depth analysis of the OPJC. The requirements for such a request are firstly that it specifies the provisions of the ACHPR or of any other international human rights instrument in respect of which the advisory opinion is being sought; and secondly that the subject matter of the request for an advisory opinion is not relating to an application pending before the African Commission. As I discussed in sub-sections 4 and 5 above, there are several arguments related to the substance of articles 1, 2 and 7 of the ACHPR on the one hand and the hierarchal and purposeful interpretation of article 66 of the same instrument on the other, that could be explored in this regard. Even though the advisory opinions of the African Court are not legally binding they arguably carry legal weight and moral authority which could, if the OPJC is challenged, prove to be persuasive to the Heads of States and governments finally making a decision on the amendment of the Protocol. However, the formalistic approach that the African Court have taken towards other issues of *locus standi* in for example denying the Committee on the Rights and Welfare of the Child *locus standi*, leaves little hope for success of such a request.[80]

[79] Art 4 of the Protocol and rule 68 of the Final Rules of the Court.

[80] The request for an Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights Request No 002/2013.

# 'Of State immunity, phantom waivers and Dark Continents: The curious case of *Zimbabwe v Fick'*

Tawanda Hondora·

*"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."*[1] *- Mr. Justice Holmes in Northern Securities (1904)*

## Introduction

Disputes sparked by Zimbabwe's post-2000 farm expropriations continue to plague the country and her neighbours, blighting the region's economy and investment climate. The expropriations earned the ire of many, including the affected farmers. Among these were many foreigners, off-shore incorporated entities and their shareholders whose interests had been affected. The United States and the European Union imposed financial sanctions against Zimbabwe, in addition to travel bans and asset freezes against several hundred individuals involved in, or considered to be supportive of, the government of Zimbabwe.[2] Not unexpectedly, the economy reeled because of the sanctions, the collapse of Zimbabwe's agro-industrial sector, and related poor economic policies.[3] Zimbabwe's neighbours, particularly those in the Southern African Development Community (SADC), were

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[1] *Northern Securities v United States*, 193 U.S. 197, 400-401 (1904 (Holmes, J., dissenting with the concurrence of the Chief Justice, Justice White, and Justice Peckham.

[2] Refer to the Executive Order ("E.O.") 13288 issued by the US President in 2003 and renewed ever since; the Zimbabwe Democracy and Economic Recovery Act (ZDERA), a law passed by the US congress in 2001, and which remains in place. Using this law, the US blocks financial assistance, debt restructuring, etc., that Zimbabwe may seek from Multinational International Financial Institutions, such as the International Monetary Fund, the World Bank and other regional entities in which the US has influence; available at https://www.treasury.gov/resource-center/sanctions/Programs/pages/zimb.aspx for information on the USA's sanctions programme against Zimbabwe. For information on the UK and EU financial sanctions against Zimbabwe, available at https://www.gov.uk/government/publications/financial-sanctions-zimbabwe.

[3] This period also saw the government of Zimbabwe adopt a near-insane economic policy, which involved the printing of money. This led to hyperinflation not seen since the Weimar Republic and the eventual dollarization of the economy. The country is still not integrated into global financial markets because of the financial sanctions, as well as its outstanding debts.

inevitably drawn into the ruckus[4] with negative effects on inter-SADC States' relations; SADC Treaty-institutions, particularly the SADC Tribunal;[5] and the legal framework that underpins the functions and operations of the regional economic body.[6]

Some of those who were dispossessed complained to the International Centre for the Settlement of Investment Disputes (ICSID) alleging that the expropriations breached Bilateral Investment Treaties.[7] Closer to home, the SADC Tribunal and courts in South Africa were called upon to exercise jurisdiction over some of the disputes. This resulted in the birth of a distinct body of SADC case-law,[8] which in turn gave rise to substantial commentary.[9] This article focuses on this case-law and in particular the case of *Zimbabwe v Fick* (the Fick case).[10] In that case, South Africa subjected Zimbabwe, a foreign State, to the jurisdiction of its courts. The parties quibbled over the registration and enforcement in South Africa of a costs-order issued against Zimbabwe by the SADC Tribunal. The Tribunal issued the costs-order following Fick and his co-litigants' complaint that Zimbabwe had refused to comply with its earlier decision issued over Zimbabwe's land expropriations.[11]

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[4] The Southern African Development Community (SADC) is a trade and economic development zone in Southern Africa known as the Southern African Development Community available at http://www.sadc.int/.

[5] The SADC Tribunal is SADC's dispute resolution body. For information on the SADC Tribunal, available at http://www.sadc.int/about-sadc/sadc-institutions/tribun/ As a direct consequence of the Tribunal's exercise of jurisdiction against Zimbabwe, the SADC Tribunal was suspended and its legal framework amended. The new protocol on the SADC Tribunal restricts the Tribunal's jurisdiction to inter-State disputes.

[6] The fall-out from Zimbabwe's land expropriation and the SADC Tribunal's decision caused the suspension of the regional dispute resolution body. See for example, T. Hondora, The Establishment of the SADC Tribunal: Troubled Beginnings, *SSRN* (2010): available at http://ssrn.com/abstract=1727342 See also D. Matyszak, The Dissolution of the SADC Tribunal (2011), available at www.archive.kubatana.net/docs/.../rau_dissolution_sadc_tribunal_110905.pdf ; S.T. Ebobrah, Tackling Threats to the Existence of the SADC Tribunal: A Critique of the Perilously Ambiguous Provisions in the SADC Treaty and Protocol on the SADC Tribunal, 4 *MLJ* (2010) 2, pp. 199.

[7] See for example the following cases *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe* (ICSID Case No. ARB/05/6) (BIT – Zimbabwe-Switzerland); *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25) (BIT – Zimbabwe-Switzerland, proceedings on-going at the time of writing) *Bernhard von Pezold and Others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) (BIT – Zimbabwe-Switzerland).

[8] The majority of the decisions issued by the SADC Tribunal have been on disputes that arose from Zimbabwe's land expropriation programme. These include the following cases: *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe* (2/07) [2007] SADCT 1 (13 December 2007); *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008); *Nixon Chirinda and Others v Mike Campbell (Pvt) Limited and Others* (09/08) [2008] SADCT 1 (17 September 2008); *Tembani v Republic of Zimbabwe* (SADC (T) 07/2008) [2009] SADCT 3 (14 August 2009); *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009) *Fick and Another v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8 (16 July 2010). In Zimbabwe, the following cases were decided: *Gramara (Pvt) Ltd and Another v. Government of the Republic of Zimbabwe and Others* HH 169-2009. And in South Africa, the following cases were decided: *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013); *Government of the Republic of Zimbabwe v Fick and Others* (47954/2011, 72184/2011, 77881/2009) [2011] ZAGPPHC 76 (6 June 2011) *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012).

[9] However, much of the available literature is best characterised as a restatement, rather than a critical analysis, of the evolving jurisprudence.

[10] *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012 (Hereinafter, the Fick case or Fick decision).

[11] *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

This article argues that the Fick decision misstates and mischaracterises SADC and South Africa's law on State immunity. And, although the dispute raised complex public international law issues, the decision is short on the law and on detail.[12] The decision's opening paragraph sets the scene with a Shakespearean monologue about the West's perception of Africa as the Dark Continent.[13] Thereafter, the court declared that South Africa had jurisdiction over Zimbabwe because it had deposed to a "prior written agreement" in which it (and other SADC Members States) had "expressly waived" their immunity over the registration and enforcement in South Africa of judgments issued by the SADC Tribunal. However, the court inexplicably omitted a few crucial issues. Firstly, to interpret article 32 of the Protocol on the SADC Tribunal (Tribunal Protocol), which it incorrectly ruled amounted to an express waiver of State immunity. Secondly, to interpret relevant provisions of South Africa's Foreign States Immunities Act (FSI Act),[14] the SADC Treaty and the Tribunal Protocol that were key to the resolution of the dispute between the parties. Thirdly, to make reference to a decision of the SADC Tribunal that contradicted its ruling that SADC States had waived their immunity. Finally, the court did not make reference to relevant domestic and international jurisprudence and rules of public international law on State immunity.

The court also created a new, *ex post facto* common law jurisdictional rule, which it retrospectively applied to the case before it and ruled that South Africa had jurisdiction to register and enforce any judgment issued against Zimbabwe (or any foreign State) by an international court if (a) the international court had international competence; (b) the judgment was final, conclusive, and had not become superannuated; (c) the enforcement of the judgment was not contrary to South Africa's public policy;[15] and (d) the judgment was not obtained by fraudulent means. The court did not enquire into whether the dispute between the parties constituted *acta jure imperii* (to acts of a governmental nature) or *acta jure gestionis* (acts of a commercial nature) in breach of rules of customary international law on State immunity and section 2(2) of South Africa's Foreign States Immunities Act. This extraordinary decision and the manner in which it was arrived at should set alarm bells ringing as both are a threat to (i) the security of foreign States' property and investments

[12] A general criticism of the Fick decision and a recurring theme in this article is that the Constitutional Court did not adhere to that time-honoured tradition and rule of practice of providing reasoned analyses for decisions made. See also Oppong who makes the same point regarding the High Court decision. R. F. Oppong, Enforcing Judgments of the SADC Tribunal in the Domestic Courts of Members States, Monitoring Regional Integration, Southern Africa Yearbook (2010) available at http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf.

[13] In the lead opinion, the Chief Justice opens the judgment by proclaiming in a rather confusing statement, that "For the right or wrong reasons, or a combination of both, Africa has come to be known particularly by the western world as the dark continent, a continent which has little regard for human rights, the rule of law and good governance. Apparently driven by a strong desire to contribute positively to the renaissance of Africa, shed its southern region of this development-inhibiting negative image, coordinate and give impetus to regional development, Southern African States established the Southern African Development Community (SADC) with special emphasis on, among other things, the need to respect, protect and promote human rights, democracy and the rule of law." *Fick – Constitutional Court Decision*, para. 1. Whether the Constitutional Court's decision has contributed to the erosion of the West's alleged perception of Africa as the Dark Continent is for the court to decide. However, this uneasiness with the alleged attitudes might explain the outcome in the Fick case.

[14] Foreign States Immunities Act, No. 87 of 1981.

[15] The court held that South Africa's public policy was reflected in its Constitution, and it included the promotion of democracy, human rights and the rule of law. It did not however unpack and interpret these words, or explain the basis upon which it would exercise jurisdiction against a foreign State because and on the back of the phrase – democracy, human rights and the rule of law. *Fick – Constitutional Court*, para. 39.

in South Africa; (ii) intra-SADC trade relations; and (iii) the effective resolution of disputes arising under SADC's investment law and the SADC Protocol on Finance and Investment.[16]

## 1. Context

Mr Fick was one of 79 claimants - citizens of, and companies incorporated in, Zimbabwe - that petitioned the SADC Tribunal in 2007 over the expropriation by Zimbabwe of farms in Zimbabwe as part of its land redistribution programme.[17] A key gripe was Zimbabwe's expropriation of these properties on payment of less than full market value compensation.[18] At the time the SADC Tribunal heard the case Zimbabwe was in the midst of an economic implosion and very few, if any, of those whose farms had been expropriated had been paid any compensation.

In 2008, the SADC Tribunal issued the first judgment in relation to the land disputes, which heralded the birth of new norms of SADC jurisprudence and law.[19] The Tribunal ruled that Zimbabwe had violated the claimants' rights contained in articles 4(c) and 6(2) of the SADC Treaty,[20] described as rights (i) of access to a court; (ii) not to be subjected to race discrimination; and (iii) to fair compensation.[21] It made no order for costs. Zimbabwe disputed the SADC

[16] See the SADC Protocol on Finance and Investment, available at http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf.

[17] Of the seventy-nine applicants, roughly over a third were Zimbabwean legal entities that owned certain farms. And about an equal number were citizens of Zimbabwe who were shareholders in the legal entities in question.

[18] Most commentators erroneously state that under Zimbabwe's land acquisition programme no compensation is payable to dispossessed persons. The Constitution obliges the government to pay compensation. The issue is that the Constitution provides that such compensation will only be for improvements to the land and not for the value of the land. The reasons advanced are that most productive land was in the hands of a few thousand farmers who obtained the land through racist policies of the former colonial government and that the post-independence Zimbabwe government will not pay for the value of the land to those whom its expropriates the land for these reasons. In short, the law provides for less than full market value compensation. See section 72 of Zimbabwe Constitution Act 20 of 2013.

[19] See for example the case of *Mike Campbell (Pvt) Ltd and Others v Zimbabwe*, in which the SADC Tribunal held that the all the applicants had been subjected to race discrimination. However, the Tribunal did not consider the fact that the first applicant and indeed over a third of the applicants were corporate entities, which could not conceivably possess racial characteristics. The Tribunal did not lift the corporate veil or consider the question of how a legal entity could be held, at law, to possess racial characteristics. It also ruled in favour of shareholders of the corporate entities for property expropriated from the latter, without distinguishing between corporate entity and shareholder rights. For an analysis of the SADC Tribunal's decision, see T. Hondora, Off the Beaten Track into the Savannah: The Mike Campbell (Pvt) Ltd v. the Republic of Zimbabwe Ruling Imperils SADC Investment Law, 3 *SADC Law Journal* 1 (2013): pp.23.

[20] *Ibid.* pp. 58. Article 4 of the SADC Treaty provides "Article 4: Principles SADC and its member states shall act in accordance with the following principles: a) sovereign equality of all member states; b) solidarity, peace and security; c) human rights, democracy, and the rule of law; d) equity, balance and mutual benefit; and e) peaceful settlement of disputes." Article 6 of the SADC Treaty provides: General Undertakings 1. Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty. 2. SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill-health, disability or such other ground as may be determined by the Summit. 3. SADC shall not discriminate against any member state. 4. Member states shall take all steps necessary to ensure the uniform application of this Treaty. 5. Member states shall take all necessary steps to accord this Treaty the force of national law. 6. Member states shall co-operate with and assist institutions of SADC in the performance of their duties.

[21] *Mike Campbell (Pvt) Ltd and 78 Others,* SADC Tribunal, Case No. 2/2007, pp. 57-58.

Tribunal's exercise of jurisdiction, albeit belatedly, and terminated its participation in the later and final stages of the sub-regional court's proceedings. It argued that the Tribunal had not been properly established and could not, as a consequence, operate as a court of law. It also declared that it would not recognize any rulings made by the Tribunal.

In 2010, Fick and Co. re-petitioned the Tribunal drawing upon article 32(5) of the Protocol.[22] They requested the Tribunal to refer Zimbabwe to the SADC Summit for its failure to comply with the court's earlier decisions.[23] The SADC Tribunal obliged. It issued the order sought, together with costs of suit, amounting to R112 780.13 and US$5 816.47. Although these sums are paltry, it can't be said this case is much ado about nothing.

Fick and Co. turned to South Africa (and not Zimbabwe) where they applied for permission to register only the costs order, i.e. one part of the SADC Tribunal's order.[24] The High Court in North Gauteng, South Africa, granted the request for an order of edictal citation, permitting the service on Zimbabwe of the application for registration in South Africa of the SADC Tribunal's costs-order.[25]

On service, Zimbabwe entered an appearance to defend. However, not long after, it withdrew the same, resulting in a default judgment.[26] It was only when Zimbabwe got wind that its immovable properties in South Africa were at risk of being attached and sold in execution that it reacted. It petitioned the High Court in South Africa and sought rescission of the default judgment. It contended that it enjoyed and should be accorded jurisdictional immunity in South Africa, and that the default judgment had been issued in breach of South Africa's domestic law and rules of customary international law on State immunity. Zimbabwe's plea was given short shrift. Its immovable property, which it had let out, was later sold in execution of the SADC Tribunal's costs order.

**2. Express waiver of immunity**

The Constitutional Court's consideration of the issue of State immunity and express waiver was extraordinarily brusque. The court did not analyse the question of whether foreign States, such as Zimbabwe, enjoyed immunity in South Africa or refer to principles of public international law on State immunity. Instead, the court conflated the issues of immunity and waiver with Mogoeng CJ., stating that:

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[22] *Fick and Another v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8 (16 July 2010); *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009). See also Article 32 (5) of the Protocol on the SADC Tribunal states: "If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action, available at http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf.

[23] The SADC Summit is the political and policy-formulating arm of SADC, composed of all SADC Heads of State or Government and meets once a year.

[24] Although, this might have been a consequence of the decision in the unrelated case of *Gramara (Pvt) Ltd and Another v Government of the Republic of Zimbabwe and Others*, in which the High Court of Zimbabwe declined to enforce, on public policy grounds, an earlier order issued by the SADC Tribunal. *Gramara (Pvt) Ltd and Another v Government of the Republic of Zimbabwe and Others* HH 169-2009.

[25] *Fick v Zimbabwe*, Case No. 77881/2009, North Gauteng High Court, Pretoria, 13 January 2010, unreported.

[26] *Ibid.*

> "Zimbabwe ordinarily enjoys immunity against civil suits in South Africa in terms of section 2 of the Immunities Act [and that] Section 3(1) of the Immunities Act provides that immunity shall be forfeited in proceedings in respect of which the State expressly waived its immunity. […] Zimbabwe contends that none of the exceptions to sovereign immunity applies to it in this matter. This cannot be correct. Article 32 of the Tribunal Protocol imposes an obligation on Member States to take all steps necessary to facilitate the enforcement of judgments and orders of the Tribunal. It also makes these decisions binding and enforceable "within the territories of the States concerned."[27]

Prompted neither by tradition nor the interests of justice, the court omitted to interpret section 2 of the FSI Act or article 32 of the Tribunal Protocol, opting instead to selectively and incorrectly quote – out of context - phrases from article 32 of the Tribunal Protocol. Mogoeng CJ., stated that article 32 (i) "…imposes an obligation on Member States to take all steps necessary to facilitate the enforcement of judgments and orders of the Tribunal";[28] and (ii) "…makes these decisions binding and enforceable 'within the territories of the States concerned';"[29] and that (iii) "…Zimbabwe is duty-bound to act in accordance with the provisions of article 32 [and] that the obligation stems from its ratification of the [SADC] Treaty and the adoption of the Amending Agreement";[30] and that (iv) "Zimbabwe's agreement to be bound by the Tribunal Protocol, including article 32, constitutes an express waiver in terms of 3(1) of the [FSI Act]."[31] Mogoeng CJ., rounded off by saying "It is a waiver by Zimbabwe of its right to rely on its sovereign immunity from the jurisdiction of South African courts to register and enforce decisions of the Tribunal made against it."[32] This was the sum total of the court's reasoning on the question of Zimbabwe's immunity and its alleged waiver – a ruling made without reference to canons of statutory interpretation or the Vienna Convention on the Law of Treaties (VCLT).[33]

### 3. Inadequate analysis of plea of State immunity and express waiver

The court' consideration of the issue of State immunity did not go beyond bare recitations of article 2 of the FSI Act.[34] The impleading of a foreign State raised obvious questions about the type of

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[27] *Fick Case* – Constitutional Court decision, at para. 32-33. As will be elaborated further below, article 32 of the Tribunal Protocol does not provide that decisions of the SADC Tribunal are binding and enforceable within the territories of the States concerned. Instead, article 32(3) of the Tribunal Protocol provides that "Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned."

[28] *Fick Case- Constitutional Court Decision*, para 33. The Constitutional Court made no attempt to interpret this provision or to express a view on the rights enjoyed by and obligations imposed on States as a consequence of article 32 of the Protocol to the SADC Tribunal.

[29] *Ibid.*

[30] *Ibid.* para 34. The use of the phrase "duty-bound" is curious. The Constitutional Court did not explain what it meant by duty-bound and which provision of article 32 of the Protocol to the SADC Tribunal created particular obligations for SADC member States.

[31] *Ibid.* para 35. Similar to the foregoing, the Constitutional Court did not identify the provision in article 32 of the Protocol to the SADC Tribunal that that had the effect of operating as an express waiver by SADC States of their right under public international law to State immunity.

[32] *Ibid.* para 35.

[33] Adopted on 22 May 1969, entered into force on 27 January 1980.

[34] See also T. Dire who notes that the High Court, the Supreme Court of Appeal and the Constitutional Court in the *Fick Case* did not interpret article 32 of the Protocol to the SADC Tribunal and that they "…did not reveal the

jurisdiction South Africa was exercising. Was it adjudicatory and/or executory jurisdiction? And what, if any, were the relevant rules of South Africa's law and public international law regarding the exercise of either or both jurisdictional bases against a foreign State? Notwithstanding their importance and the different principles applicable to the two jurisdictional bases, these questions remained unaddressed.

In addition, the Constitutional Court did not (i) examine and opine on whether the rule contained in section 2 of the FSI Act reflected a rule of customary international law, or a different rule, and the implications thereof; (ii) reflect on the development of the law, principles and practices, in South Africa (and as relevant, elsewhere in the world) pertaining to the issue of State immunity; (iii) identify the principles applicable in South Africa, and which ought to be followed by lower courts on the meaning of section 2 of the FSI Act, exceptions thereto, and other relevant statutory and common laws rules pertaining to State immunity; (iv) consider the cause of action underpinning the case, and whether it was a dispute in relation to which it was competent, per the relevant rules of South African law and public international law, for courts in South Africa to exercise jurisdiction; (v) examine whether the FSI Act contained and reflected all the rules and laws relating to State immunity, and if not, which aspects were regulated, and if so to what extent, by South Africa's common law; and (vi) consider the relevancy of the doctrine of act of State and *forum non conveniens*. Needless to say, the proper resolution of the dispute between the parties required these issues to be subjected to detailed analysis.

### 3.1. Section 2(1) of the FSI Act codifies the restrictive doctrine of State immunity

Although not canvassed by the court the restrictive State immunity doctrine became part of South Africa's common law in 1980 following the cases of *Inter-Science Research and Development (Pty) Ltd v Republica Popular de Mocambique*[35] and *Kaffraria Property Co. (Pty) Ltd v Zambia*.[36] These cases marked South Africa's break from the absolute State immunity doctrine.[37]

In the *Inter-Science Research* case, Margo J., analysed South African, English and US case law, took judicial notice of foreign legislation and treaties such as the European Convention on State Immunity, and concluded that the rule applicable in South Africa would no longer be the absolute doctrine of State immunity but the restrictive doctrine.[38] Margo J., stated that the restrictive State immunity doctrine gives *jure imperii* immunity, but not *jure gestionis* immunity.[39]

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methodology and the rules of interpretation employed to come to the conclusion that they had been a waiver of immunity. The conclusion that the two provisions constitute a waiver is presented by both courts as a self-evidence fact." T. Dire, Interpretation of Treaties in an International Law Friendly Framework: The Case of South Africa, in H.P. Aust, and G. Nolte, (eds.), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence (International Law in Domestic Legal Orders),* OUP Oxford (2016), pp. 150-151.

[35] *Inter-Science Research and Development (Pty) Ltd v Republica Popular de Mocambique*, 1980 (2) SA 111.

[36] *Kaffraria Property Co. (Pty) Ltd. v Government of the Republic of Zambia*, 1980 (2) SA 709 (E).

[37] The following are examples of judgments reflecting the absolute State immunity doctrine and passed before the *Inter-Science Research Case*. See, *Ex parte Sulman* 1942 CPD 407; *Parkin v Government of the Republique Democratique du Congo and Another* 1971 (1) SA 259 (W); *Leibowitz v Schwartz* 1974 (2) SA 661 (T); *Lendalease Finance Co (Pty) Ltd v Corporation de Mercadeo Agricola and Others* 1975 (4) SA 397 (E); *Prentice Shaw and Schiess v Government of the Republic of Bolivia* 1978 (3) SA 938.

[38] For a criticism of Justice Margo's consideration of the issues in the *Inter-Science Research Case*, see E.K. Bankas, *The State*

In 1981, the restrictive State immunity doctrine was given statutory recognition through the FSI Act.[40] In 1993, the *ratio decidendi* in the Inter-Science case was affirmed by South Africa's Supreme Court of Appeal in the case of *Shipping Corporation of India Ltd v Evdomon Corporation and Another*.[41] These cases and the FSI Act have been cited as evidence of South Africa's adherence to the restrictive State immunity doctrine.[42]

If the Constitutional Court had considered the meaning and import of section 2(1) of the FSI Act, it would have found substantial and direct jurisprudence, both South African and foreign, which would have enabled it to (i) identify and use the most appropriate legal framework to resolve the dispute between the parties; (ii) consider the public international law origins of, and justifications given for, the rule on State immunity; and (iii) disregard previous South African authorities by distinguishing the case before it, assuming it was so disposed.[43]

This approach would have resulted in the court considering the UK's statute, common law and jurisprudence on State immunity from which South Africa law and practice on State immunity is drawn.[44] Section 2(1) of the FSI Act, which is copied from section 1(1) of the UK enactment,[45] has been declared to lay down a rule of immunity, that:

> "…conforms with the terms of [several] international instruments [and] a number of domestic statutes elsewhere, such as section 1604 of the United States Foreign Sovereign Immunities Act 1976, section 3(1) of the Singapore State Immunity Act 1979, section 3(1) of the Pakistan State Immunity Ordinance 1981, section 2(1) of South Africa's Foreign State Immunities Act 1981, section 3(1) of the Canadian State Immunity Act 1982 and section 9 of the Australian Foreign States Immunities Act 1985."[46]

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*Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts*, Springer Science & Business Media (2005), pp. 65.

[39] *Ibid.* pp. 122.

[40] See in particular section 2(1) of the FSI Act, which provides that "A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder."

[41] *Shipping Corporation of India Ltd v Evdomon Corporation and Another* (686/91) [1993] ZASCA 167.

[42] See for example, the decision of the Privy Council in the case of *La Générale des Carrières et des Mines (Appellant) v F.G. Hemisphere Associates LLC* (Respondent), [2012] UKPC 27, at para 42.

[43] Xiaodong Yang correctly notes that "The legal basis on which States enjoy immunity before foreign domestic courts has never been satisfactorily specified or identified, and perhaps never will. Empirical evidence indicates that State immunity cannot be based on any one of the grounds suggested from various quarters, such as sovereignty, independence, equality, dignity, comity, and the Latin maxim par in parem non habet imperium. They may or may not have collectively served as the legal basis for immunity; but this is unimportant and beside the point." X. Yang, *State Immunity in International Law*, Cambridge University Press (2012), pp. 74.

[44] See for example Neville Botha who noted that "In South Africa the question of sovereign immunity followed a course strikingly similar to that of the British doctrine." N. Botha, Some Comments on the Foreign States Immunities Act, 87 of 1981, *The Comparative and International Law of Southern Africa*, (1982): pp. 335.

[45] Section 1(1) of the UK States Immunities Act provides: "A State is immune from the jurisdiction of the courts of the United Kingdom except as is provided in the following provisions of this Part of this Act."
See *Shipping Corporation of India Ltd v Evdomon Corporation and Another* (686/91) [1993] ZASCA 167, per Corbett CJ, at pp. 39.

[46] The court's attention would have been drawn to numerous other authorities, including the ECtHR cases such as *Al-Adsani v the UK* in which the ECtHR stated that "…sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperim*, by virtue of which one State shall not be subject to the jurisdiction of another State."[46] *Al-Adsani v UK* (2002) 34 EHRR 111, ECHR, para 56. In the Jones case the ECtHR held "…the grant of immunity pursued the legitimate aim of complying with international law to promote comity and good relations

### 3.2. Section 3(1) and (2) of the FSI Act: Waiver exception

In support of its assertion that Zimbabwe had expressly waived its immunity and therefore subject to South Africa's jurisdiction, the Constitutional Court pointed to section 3(1) of the FSI Act, which is the first exception to the general rule proscribing the exercise of jurisdiction by South African courts over foreign States. However, despite reciting the provisions of section 3(1), the court did not subject them to any interpretation. As a result, although not conceded, the conclusion that Zimbabwe expressly waived its immunity in terms of section 3 of the FSI Act is presented as a statement of fact, rather than as a contested question of law.

Section 3 of the FSI Act provides:

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic *in proceedings in respect of which* the foreign state has expressly waived its immunity or is...deemed to have waived its immunity."

(2) Waiver of immunity may be effected after the dispute which gave rise to the proceedings has arisen or by *prior written agreement*, but a provision in an agreement that it is to be governed by the law of the Republic shall not be regarded as a waiver. *[Emphasis added]*

The court did not address the question of the "proceedings" in relation to which a foreign State may waive its immunity enabling the lawful exercise of jurisdiction by South Africa. In the Fick case there were two sets of proceedings: one before the SADC Tribunal and the other before courts in South Africa. In view of this, the court should have identified which of these proceedings was relevant for purposes of an alleged waiver of immunity per section 3 of the FSI Act.

If a foreign State expressly waives its immunity in a written agreement regarding proceedings in South Africa then section 3(1) of the FSI Act would be engaged and South Africa would be permitted, although not obliged, to exercise jurisdiction over the foreign State.[47] However, what about a situation, such as in the Fick case, in which Zimbabwe - the foreign State - is alleged to have waived its immunity regarding proceedings before the SADC Tribunal but, on the facts of the case, did not waive its immunity regarding proceedings in South Africa? Does such waiver in favour of the international court also operate as an express waiver for purposes of proceedings in South Africa? The court did not consider this issue, declaring instead that Zimbabwe had deposed to a "prior written agreement" in which it had waived its immunity.[48]

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between States through the respect of another State's sovereignty. *Jones and Others v Saudi Arabia*, [2006] UKHL 26, para. 9. The International Court of Justice stated in the Jurisdictional Immunities Case that "…the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening),* Judgment, I.C.J. Reports 2012, pp. 99, para. 57.

[47] See article 7 of the United Nations Convention on Jurisdictional Immunities of States and their Property. The International Law Commission notes, for example, that "Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent." Report of the International Law Commission on the work of its forty-third session, at pp. 28, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf.

[48] *Fick – Constitutional Court Decision*, para. 35.

### 3.3. Waiver of immunity in a "prior written agreement"

In response to Zimbabwe's plea that it enjoyed immunity before South African courts under customary international law and that none of the exceptions contained in the FSI Act applied in the circumstances, the Constitutional Court's retorted that: "This cannot be correct. Article 32 of the Tribunal Protocol *imposes an obligation* on Member States to take all *steps necessary to facilitate the enforcement of judgments and orders of the Tribuna*l."[49]

However, the court did not examine the nature of the alleged obligation or consider whether, and if so how, this alleged obligation operated to displace a rule of customary international law on State immunity. If the court had interpreted article 32(2), it would have realised for example that it was not permitted to execute decisions issued by the Tribunal against SADC institutions because of article 31 of the SADC Treaty[50] and the SADC Protocol to the Treaty on Immunities and Privileges.[51] Article 32 of the Tribunal Protocol could not therefore be an immunity waiving provision.

Notwithstanding, and demonstrating a classic example of circular reasoning, the court stated:

> "Zimbabwe's agreement to be bound by the Tribunal Protocol, including article 32, constitutes an express waiver in terms of section 3(1) of the Immunities Act.[52] It is a waiver by Zimbabwe

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[49] *Ibid.* para. 33. [Emphasis added] It seems the Constitutional Court interpreted article 32 to mean that it had an obligation to remove the hurdle imposed by the law of State immunity regarding decisions issued by the SADC Tribunal. Article 32 stipulates:

"Enforcement and Execution

1. The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the State in which the judgement is to be enforced shall govern enforcement.
2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.
4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.
5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action. The law and rules of civil procedure for the registration."

For a contrary view, see para 44 of the *Fick – Supreme Court of Appeal Decision.*

[50] Article 31 of the SADC Treaty provides that (1) SADC, its institutions and staff shall, in the territory of each Member State, have such immunities and privileges as are necessary for the proper performance of their functions under this Treaty, and which shall be similar to those accorded to comparable international organisations. (2) The immunities and privileges conferred by this Article shall be prescribed in a Protocol.

[51] The SADC Tribunal issued judgments in several employment cases against the SADC Secretariat and the SADC Parliamentary Forum. Due to article 31 of the SADC Treaty and the Protocol on Immunities and Privileges, South Africa would have been precluded from enforcing the decisions, assuming cases had been initiated in its jurisdiction. It is clear therefore that article 32 of the Tribunal Protocol is not an immunity waiving clause. If it was, it would have made reference to article 31 of the SADC Treaty and the Protocol on Immunities and Privileges. See the following cases *Kanyama v SADC Secretariat* (SADC (T) 05/2009) [2010] SADCT 1 (29 January 2010); *Kethusegile-Juru v Southern African Development Community Parliamentary Forum* (SADC (T) 02/2009) [2010] SADCT 2 (5 February 2010); *Kethusegile-Juru v Southern African Development Community Parliamentary Forum* (SADC (T) 02/2009) [2010] SADCT 7 (11 June 2010); *Mondlane v SADC Secretariat* (SADC (T) 07/2009) [2010] SADCT 3 (5 February 2010); *Mtingwi v SADC Secretariat* (1/2007) [2008] SADCT 3 (27 May 2008).

[52] It is unclear what the court meant by stipulating that "Zimbabwe's agreement to be bound by the Tribunal Protocol, including article 32, constitutes an express waiver." Quite how this amounted to an express waiver of State immunity is a mystery.

> of its right to rely on its *sovereign immunity from the jurisdiction of South African courts to register and enforce decisions of the Tribunal made against it*."[53]

Both these assertions indicate that in the court's opinion, the written agreement in which Zimbabwe had allegedly expressly waived its immunity was the Protocol and in particular article 32. However, the court did not define what, in its opinion, constituted a "prior written agreement." Obviously, a treaty can constitute a prior written agreement from which certain rights and obligations may flow. However, it cannot be gainsaid that a court decision that turns on the finding that a foreign State waived its immunity in a "prior written agreement" should, at a minimum, point to, identify and interpret relevant provisions of, the agreement in question. This is necessitated by the fact that the question of whether a provision in a treaty amounts to an agreement to waive immunity is a question of construction, which requires the use of interpretive tools and the application of rules of law.[54]

The court vacillated between article 32(1), (2) and (3) and did not indicate with any level of precision, which specific provision(s) affirmed the existence of, and/or had the effect of creating, an *express waiver* of State immunity for SADC Member States and the operation of that waiver to enable South Africa to exercise jurisdiction over them. The court should have (i) considered whether the SADC Tribunal had interpreted article 32;[55] (ii) considered whether it was appropriate – in view of the State immunities doctrine, as reflected in international law and in South Africa's domestic law – to rule upon this issue, including in the manner that it did; (iii) clarified what in its opinion and South Africa's law constitutes an express waiver of State immunity; and (iv) reviewed relevant comparative jurisprudence on express waiver of State immunity.

Although not entirely clear, it seems the court was of the opinion that SADC States expressly waived their immunity through article 32(3) of the Tribunal Protocol.[56] Mogoeng CJ., stated, for instance, that article 32(3): "…gives binding force to the decisions of the Tribunal on the parties *including the affected Member States*, paves the way and *provides for the enforceability of the Tribunal's decisions within the territories of the Member States*."[57]

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[53] *Fick - Constitutional Court Decision*, para. 35. *Emphasis added.* The court's declaration can be described as an example of "it is because I say it is!" In addition, the court did not, however, pause to consider the situation of whether a court in South Africa had jurisdiction over a case involving the attempted registration of an order issued by the SADC Tribunal in favour of Malawi against Mozambique – to use a different set of SADC countries. Posing the issue in this way throws into sharp relief the purpose of article 32 of the Protocol and the improbability of the correctness of the court's ruling.

[54] See also Collins et al, *Dicey, Morris & Collins, The Conflict of Laws,* Sweet and Maxwell, (Fifteenth Ed 2010), pp. 350, para. 10-028.

[55] The SADC Tribunal is the dispute resolution body with the express remit of interpreting the provisions of the SADC Treaty and related protocols. See article 16(1) of the SADC Treaty.

[56] Mogoeng CJ stated that "The Tribunal had jurisdiction over all disputes relating to the interpretation and application of the Treaty and over disputes between Member States and natural or legal persons. This was subject to prior exhaustion of all available remedies unless otherwise domestically unavailable. Member States are required to take all measures necessary to ensure execution of the decisions of the Tribunal. Provision is also made for the enforcement of the decisions of the Tribunal, the role of Member States in that regard and the binding effect of those decisions. *What all these provisions boil down to, is that both Zimbabwe and South Africa effectively agreed that domestic courts in the SADC countries would have jurisdiction to enforce orders of the Tribunal made against them."* [*Emphasis added*] This is an extraordinary statement made without any attempt to subject any of the provisions of the Tribunal Protocol to interpretation.

[57] *Constitutional Court Decision*, para 59. Emphasis added.

If article 32(3) provides that a judgment issued by the Tribunal is enforceable in the territory of the State that was party to the dispute, as well as in other [SADC] States, it would mean that SADC States agreed to waive their immunity. Despite its importance, the court omitted to interpret article 32(3) and ended up misquoting the article. Article 32(3) does not provide that decisions of the Tribunal are binding on the parties (to a dispute) "*including the affected Member States*."[58] It provides that decisions of the Tribunal are binding on the parties to a dispute and are *enforceable in the States concerned.*[59]

### 3.4. The Constitutional Court ignored the SADC Tribunal's interpretation of article 32(3)

According to the SADC Tribunal, "Under…Article [32(3)], the decision of the Tribunal is binding upon the parties to the dispute in respect of a *given case* and is *enforceable within the territory of the Member State concerned.*"[60]

The Tribunal made this statement in the five-page judgment that Fick and Co. were applying to register and enforce in South Africa. This makes the court's failure to refer to the Tribunal's interpretation of article 32(3) all the more remarkable. In the opinion of the Tribunal, its judgments were not enforceable in all SADC Members States. Instead, they were binding on, and enforceable within the territory of, the SADC Member State involved in "*a given case"* before the SADC Tribunal. As a consequence, according to the Tribunal's jurisprudence SADC States did not waive their immunity pursuant to article 32(3); and South Africa did not have jurisdiction to register and enforce the Tribunal's judgments pertaining to cases to which it was not a party.[61]

If Zimbabwe was bound by the SADC Tribunal's decisions, so too was South Africa.[62] In view of the Tribunal's ruling, the Constitutional Court ought to have dismissed Fick's claim. Alternatively, it could have stayed the proceedings and referred the question of the proper interpretation of article 32(3) to the Tribunal. It could, in addition, have invited submissions from the South African government and other relevant organs from SADC. Since SADC operates on the basis of the

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[58] The court's restatement confuses matters further. It begs the questions (i) States affected by what; and (ii) what does "affected member States" mean. But see also Erika de Wet who appears to make the same error as the Constitutional Court. She states that "[I]n the final analysis, the Fick case introduced an interesting new phase in relation to South Africa's greater openness towards public international law. It confronted both courts and the legislature with the reality that the legal system does not yet sufficiently provide for the domestic enforcement of binding international judicial decisions." E. de Wet, The case of the Government of the Republic of Zimbabwe v Louis Karel Fick: A first Step Towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order. 17 *PER* 1 (2014) pp. 555. de Wet did not address the question of how the Fick decision was binding on South Africa.

[59] Article 32(3) of the Protocol provides that "Decisions of the Tribunal shall be binding upon the parties to the dispute in *respect of that particular case* and *enforceable within the territories of the States concerned*." *[Emphasis added]*

[60] The SADC Tribunal in a decision delivered by H.E. Justice Isaac J. Mtambo, SC, held "Article 32 (1) provides as follows: "The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the Member State in which the judgement is to be enforced shall govern enforcement." And under paragraph 3 of that Article, the decision of the Tribunal is binding upon the parties to the dispute in respect of a given case and is enforceable within the territory of the Member State concerned." *Fick v Zimbabwe*, SADC (T) 01/2010, pp. 3-4.

[61] The court's failure to consider the view of the Tribunal on this question is puzzling, more so because it had correctly noted earlier in its judgment that "[T]he [SADC] Tribunal had jurisdiction over all disputes relating to the interpretation and application of the Treaty..." Fick - Constitutional Court decision, para. 48.

[62] *Fick – Constitutional Case*, para. 54.

sovereign equality of all States,[63] it was wholly improper for the court to ignore the Tribunal's jurisprudence and to impose obligations on SADC Member States following its idiosyncratic re-interpretation of article 32(3). Article 32(3) has now been given two mutually incompatible meanings: one by the SADC Tribunal, and the other, by South Africa. Which of these is correct? This question is complicated by the fact that neither decision was supported by any analysis.

### 3.5. Article 32(3) of the Tribunal Protocol is ambiguous

Article 32(3) of the Tribunal Protocol provides that: "Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and *enforceable within the territories of the States concerned."* It is readily apparent that article 32(3) is ambiguous.[64] Does the phrase "States concerned" mean the States party(ies) involved in the "particular case"; or State(s) concerned with the *enforcement* of a decision of the SADC Tribunal, i.e. any and all State(s) in SADC (or the world at large) in whose jurisdiction a decision of the SADC Tribunal is sought to be registered and enforced?

If the phrase "States concerned" means any and all States where a successful party has initiated proceedings to register and enforce a decision of the SADC Tribunal and is not limited to the State that was party to the "particular case" before the Tribunal, then the Constitutional Court's ruling would arguably be correct. Article 32(3) would arguably constitute an agreement to waive immunity over the registration and enforcement in a SADC State of judgments issued by the SADC Tribunal.

Since the phrase "States concerned" is not defined in the SADC Treaty or Tribunal Protocol the Constitutional Court should, if it did not wish to apply the meaning ascribed to article 32(3) by the SADC Tribunal, have subjected this and related provisions to treaty interpretation drawing upon the VCLT.[65]

#### 3.5.1. Purpose of article 32(3) of the Tribunal Protocol

The heading and the individual provisions of article 32 of the Tribunal Protocol spell out the rules on the enforcement and execution of the SADC Tribunal's decisions. However, none of them, contrary to the Constitutional Court's ruling, state that SADC States agree to waive their immunity in matters concerning the registration and execution of decisions issued by the SADC Tribunal.[66] Is the failure by SADC States to refer to State immunity and waiver a deliberate omission because member States did not intend to waive immunity or not an omission at all because States Parties

[63] See article 4(a) which provides that SADC States operate on the principle of the sovereign equality of all States.
[64] See also E. de Wet, who also notes that the phrase "within the territories of the States concerned" is broad wording (notably the ambivalent reference to "states concerned"). E. de Wet, *supra* note 57.
[65] Although South Africa is not a party to the VCLT, the provisions of article 31 reflect customary rules of interpretation of rules of public international law. Use of this interpretive framework will most likely have resulted in the Constitutional Court reaching a much more considered decision. See also Tladi Dire who also notes that the Constitutional Court did not refer directly to the rules of interpretation contained in the Vienna Convention on the Law of Treaties, in addition to failing to clearly articulate a clear interpretive basis. T. Dire, *supra* note 33.
[66] Instead, article 32(3) stipulates that decisions of the Tribunal are binding on the parties to a dispute and enforceable in the "States concerned."

were agreed that article 32(3) and in particular the reference to "States concerned" operated as a waiver of immunity by all SADC States, regarding the registration and enforcement of the Tribunal's decisions?

It is generally accepted that alleged waivers of State immunity contained in treaty or contract provisions should be clear and express. An example of a treaty, which provides for the express waiver of State immunity and which could have been used by the Constitutional Court as a comparator is the USA-Netherlands Treaty of Friendship, Commerce, and Navigation (TFCN).[67]

In addition, a case, which would have provided useful guidance in the interpretation of article 32 of the Protocol, had it been considered by the court, is that of *NML Capital Ltd. v Argentina*,[68] in which bonds issued by Argentina that were governed by New York law, contained a *waiver and jurisdiction* clause. The UK Supreme Court held that, despite not specifically mentioning English courts, the clause providing that judgments on the bonds could be enforced in any court to the jurisdiction "…of which Argentina is or may be subject by a suit…" amounted to a waiver of State immunity in England.[69]

The Constitutional Court should have also considered the law and practice in other jurisdictions concerning ambiguities over whether a particular provision in an international agreement provides for waiver of immunity. In the US, for example, any ambiguity in an alleged waiver provision is read in favour of the foreign State. An oft-cited case is that of *Argentine Republic v Amerada Hess Shipping Corp*, in which the US Supreme Court stated that it did not:

> "…see how a foreign state can waive its immunity under [the US Foreign States Immunities Act] § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."[70]

This notwithstanding, if article 32(3) is considered through the prism of a typical singular dispute between one SADC State against another SADC State or a person against a SADC State, it becomes apparent that the phrase "States concerned" refers to the State involved in the particular case, and against which a decision was issued by the SADC Tribunal. If a dispute is between a person and a SADC State, the Tribunal's decision will be enforceable within the territories of that particular State. If the dispute is between two SADC States, the Tribunal's decision will be enforceable, as relevant, within the territories of the States, which were party to the dispute.

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[67] Article XVIII of the TFCN provides that: "No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, to the extent that it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, *claim, or enjoy, either for itself or for its property, immunity* therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein." [*Emphasis added*]

[68] *NML Capital Ltd., v Argentina* [2011] UKSC, 31.

[69] *Ibid.* para. 59.

[70] *Argentine Republic v. Amerada Hess Shipping Corp.* 488 US 428 - Supreme Court 1989, at pp. 442-443.

### 3.5.2. Article 32(3) of the Tribunal Protocol should be read *Noscitur a Sociis* and in context

The Constitutional Court should have read the phrase "States concerned" *noscitur a sociis*. Article 32(3) states that "decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that *particular case*…" If the subsequent phrase "States concerned" is read *noscitur a socii* its meaning will be restricted with reference to the phrase "particular case." In other words, it would mean that decisions of the Tribunal are *enforceable* in the territories of the Member State(s) upon whom the decision is *binding*, i.e., the State(s) involved in the particular dispute/case. The Constitutional Court's conclusion that it was bound by the SADC Tribunal's decisions against Zimbabwe is based on an inexplicable misreading of article 32(3) of the Tribunal Protocol.[71]

A *noscitur a socii* construction of article 32(3) avoids the logical tautology that results from interpreting the phrase to mean States concerned with enforcement. It makes little sense to hold that:

> "Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and *enforceable* within the territories of the States concerned" *with enforcement*.

Moreover, if the phrase "States concerned" was intended to expand the jurisdictions in which decisions of the SADC Tribunal were capable of being enforced beyond the State or States involved in a given case then it is reasonable to assume that instead of referring to States concerned, article 32(3) would simply have provided that decisions of the Tribunal shall be…enforceable within the territories of SADC States.

Further, asserting that "Decisions of the Tribunal shall be enforceable within the territories of States concerned with enforcement" leads to the inevitable question: which States are concerned with enforcement? It is inconceivable, as noted above, that article 32(3) can and should be read to mean that the Tribunal's decisions are enforceable in any State chosen at the instance and election of the successful State or non-State party. Does article 32(3) permit Malawi to sue South Africa in Lesotho or Guatemala and register and enforce a cost-order issued by the SADC Tribunal in its favour? It is reasonable to assume that SADC States would not have waived their immunity in such a way in the absence of a clear expression and/or an agreement regulating State immunity.

At a practical level, Zimbabwe is the State which the Tribunal's judgment(s) on Zimbabwe's land expropriation programme and/or Zimbabwe's failure to comply with decisions of the Tribunal was intended to be enforced. The Constitutional Court should have considered the appropriateness of Fick and Co.'s forum shopping and application to register in South Africa only the costs-order leaving out the substantive part of the SADC Tribunal's decision and dismissed the application on the ground of State immunity and act of State.[72]

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[71] The court stated that article 32(3) of the Protocol "…gives binding force to the decisions of the Tribunal *on the parties including the affected Member States*, paves the way and *provides for the enforceability of the Tribunal's decisions within the territories of the Member States*. Article 32(3), as stated above, says nothing of the sort. *Fick – Constitutional Court Decision*, para. 59.

[72] The Constitutional Court also referred to article 32(1) in a way that suggests that it was of the view that the provision supported its conclusion that Zimbabwe had waived its immunity and courts in South African had jurisdiction. Unfortunately, it does not. Mogoeng CJ stated that "Article 32 of the Tribunal Protocol is an offshoot of the Amended Treaty that binds South Africa. It is foundational to the development of the common law on enforcement in this matter and provides that States 'shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.' *It also provides that the 'law and rules of civil procedure for the registration and enforcement of foreign judgments in the territory of the State in which judgment is to be enforced shall govern enforcement' of the Tribunal's decisions*." [*Emphasis added*] (Internal citations omitted).

For these reasons, the interpretation of article 32(3) that does not result in a tautology and an absurdity is the one that provides that "Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and shall be enforceable within the territories of the States concerned" *with that particular case*. There is no need to restate this italicised phrase as it is redundant under a proper construction of the phrase "States concerned."

### 3.6. The Constitutional Court did not identify the test for express waiver of State immunity

Despite declaring that Zimbabwe had expressly waived its immunity the Constitutional Court did not identify the legal test used to determine what amounts, under South Africa's law, to an express waiver of State immunity. Moreover, the court did not consider South African jurisprudence on the legal standard for determining express waivers of a right or enforceable interest and the standard, if different, regarding waivers of State immunity and it did not take into account comparative jurisprudence on the subject of waiver of immunity.

In South Africa, as elsewhere, an express waiver can generally be described as a voluntary, intentional and specific relinquishment or abandonment of a legal right or interest.[73] This restatement is also reflective of the law on express waivers under South Africa's Roman-Dutch law of contract.

In the US, in apposite jurisprudence, the general rule is that to constitute an express waiver for purposes of its Foreign States Immunities Act, the foreign State's actions must give a "clear, complete, unambiguous, and unmistakable" manifestation of the sovereign's intent to waive its immunity.[74] And, in situations where a sovereign State has clearly waived its immunity, such waiver is narrowly construed "…in favour of the sovereign" and is not enlarged "…beyond what the language requires".[75]

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*Fick - Constitutional Court Decision*, para 58. Article 32(1) provides that "The law and rules of civil procedure for the registration and enforcement of foreign judgments in the territory of the State in which judgment is to be enforced shall govern enforcement." And, section 3(2) of the FSI Act precludes the application of article 32(1) to the question of jurisdiction and waiver by providing that "…a provision in an agreement that it is to be governed by the law of the Republic *shall not be regarded as a waiver*." [*Emphasis added*] See also E. de Wet who falls into the same error. She wrote "More concretely, article 32(1) determines that the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced shall govern enforcement." E. de Wet, *supra* note 57.

[73] B.A. Garner (ed.), *Black's Law Dictionary*, West (Seventh Ed., 1999), pp. 1574.

[74] *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.,* 179 F.3d 1279, 1292 (11 th Cir. 1999); See also *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, S.A., 676 F.2d 47,49 (2od Cir. 1982); *Aguinda v. Texaco, Inc.*, 175 F.R.D. 50, 52(S.D.N.Y. 1997); *Jota v. Texaco, Inc.,*157 F.3d 153 (2d Cir. 1998); *Watters v. Washington Metro. Area Transit Auth.*, No. 01-7092, slip. op. at 5, 2002 WL 1484943 *1 (D.C. Cir. July 12, 2002) (requiring "clear and unequivocal" waiver); *Forman v. Small*, 271 F.3d 285, 296 (D.C. Cir. 2001) - A foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so; *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1100 n. 10 (D.C. Cir. 1982) (holding that under the FSIA, Congress contemplated waivers of a "specific and explicit nature"); *C L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 421 n. 3, 423, 121 S.Ct. 1589, 1594, 149 L.Ed.2d 623 (2001) (holding that "to relinquish its immunity, a tribe's waiver must be clear" and "not ambiguous."

[75] *Library of Cong. v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250 (1986) *World Wide Minerals v.*

The same is true of the law and practice in the UK. In the *Pinochet* case, the House of Lords aptly noted that:

> "…a state's waiver of its immunity by treaty must…always be express. Indeed, if this was not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied."[76]

The view that to constitute an express waiver the terms of an international agreement must be clear, specific and express is also reflected in article 7 of the UN Convention on Jurisdictional Immunities of States and their Property.[77]

The Constitutional Court should have also considered the remedy SADC States accorded to a successful party if the State party to a dispute failed to comply with an order issued by the Tribunal. The SADC Treaty and Tribunal Protocol do not give the successful State or non-State party a right of action to enforce such decisions before the courts of fellow SADC Member States (or other foreign States) or oblige, let alone, permit SADC Member States to exercise jurisdiction against the errant SADC State(s). The remedy open to a successful and unsatisfied party is the right to petition the Tribunal for the relevant errant State party to be referred to the SADC Summit.[78]

Subjected to proper interpretation, it become clear that article 32 is not an immunity-waiver clause. It can hardly be argued that it is a "clear, complete, unambiguous, unequivocal and unmistakable manifestation of [Zimbabwe's or any other SADC State's] intention to waive its immunity."[79] Indeed, the existence of a contrary interpretation by the SADC Tribunal should have caused the Constitutional Court to decline to exercise jurisdiction.

### 3.7. Implied waiver of State immunity

Since the Constitutional Court read into, rather than relied upon, the provisions of article 32 to identify a waiver of immunity, it is arguable that what it had in mind was not an express waiver, but rather its kin, an implied waiver. Section 3(3) of the FSI Act lists the categories of situations in which a foreign State will be deemed to have waived its immunity. The list is short and exclusive. A foreign State will be deemed to have waived its immunity if it has itself instituted proceedings in a South African court,[80] or intervened or taken any step in proceedings,[81] but not if it did so in order to claim immunity, assert an interest in property in circumstances in which it is entitled to immunity.[82] Needless to say, none of these provisions applied to the facts of the Fick case. And given the effect

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*Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002)).

[76] *Regina v. Bartle and the Commissioner of Police for the Metropolis* and *Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others*; *Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division) (Pinochet No. 3), 2 W.L.R. 827 (H.L. 1999), at pp. 31.

[77] Article 7 of the United Nations Convention on the Jurisdictional Immunities of States and their Property.

[78] See article 32(4) of the Tribunal Protocol.

[79] X. Yang, pp. 319.

[80] Section 3(3)(a) of the FSI Act.

[81] Section 3(3)(b) of the FSI Act.

[82] Section 3(3)(c) of the FSI Act.

of section 2(1) of the FSI Act, it is unlikely that South Africa's law permits the creation of an additional category of implied waiver of State immunity.[83]

### 3.8. State immunity is a fundamental rule of SADC treaty law

The Constitutional Court justified its exercise of jurisdiction, *inter alia*, on article 4(c) of the SADC Treaty, which stipulates that: "SADC and its member states shall act in accordance with the following principles…(c) "*human rights, democracy and the rule of law."* The Constitutional Court repeatedly referred to this phrase[84] stating for instance that the dispute over the "…costs order is a dispute that implicates human rights and the rule of law, which are central to the [SADC] Treaty and our Constitution. A constitutional matter does, therefore, arise here in relation to access to courts - an element of the rule of law."[85]

Unsurprisingly, the court recited but did not interpret article 4(c). Had it done so, its attention would have been drawn to other provisions and in particular to article 4(a) - a provision that prescribes SADC law on State immunity.[86]

The SADC and its Member States are obliged, pursuant to article 4(a) of the SADC Treaty, to act in accordance with the principle recognising the "sovereign equality of all Member States."[87] This article is not qualified by or made subject to any other provision of the SADC Treaty or protocol or any other international treaty. Article 4(a) is drawn from article 2(1) of the United Nations Charter, which stipulates principles with which the United Nations and its Member States are obliged to comply. Article 2(1) of the UN Charter provides that the UN is "…based on the principle of the sovereign equality of all its Members."

Regarding article 2(1) of the UN Charter, the ICJ stated that:

> "…the rule of State immunity occupies an important place in international law and international relations. It derives from the *principle of sovereign equality of States*, which, as Article 2 paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory."[88]

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[83] Section 2(1) of the FSI Act provides that "A foreign State shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder."
[84] *Fick - Constitutional Court Decision*, twice in para. 1; twice in para. 6; para 12; twice in para 21; twice in para 39; footnote 52; twice in para 60; para 62; and para 68.
[85] *Ibid.* para. 39.
[86] Article 4 of the SADC Treaty provides that "SADC and its member states shall act in accordance with the following principles:
a) *sovereign equality of all member states;*
b) solidarity, peace and security;
c) human rights, democracy, and the rule of law;
d) equity, balance and mutual benefit; and e) peaceful settlement of disputes." [*Emphasis added*]
[87] *Ibid.*
[88] *Jurisdictional Immunities Case*, para. 59.

State immunity is therefore an integral norm of SADC law. And, South Africa had an obligation to read article 4(c) consistently with article 4(a) and respect and uphold Zimbabwe's immunity as required under article 4(a) of the SADC Treaty and rules of customary international law. Its failure to do so constitutes an internationally wrongful act.

**4. Observations**

The Constitutional Court could have taken judicial notice of the law and the practice of the European Convention on Human Rights' (ECHR) States regarding the enforceability in other Members States of judgments, including costs orders, issued against a fellow State by the European Court of Human Rights (ECtHR).[89] Although article 46(1) of the ECHR does not suffer from the ambiguity that afflicts article 32(3) of the Tribunal Protocol, it is clear that the law and practice within the ECHR system is that the ECtHR's decisions are binding only on the State that is party to a dispute and does not give the successful litigant the right or a cause of action to enforce such judgment on the territory of other ECHR Members States, which were not party to the dispute.

To mitigate Fick decision-type risks SADC States should consider adopting a treaty, which regulates State immunity within SADC. The European Convention on State Immunity is a good example.[90] Such a treaty will apply to a wide variety of matters, including those concerning SADC investment law. Further, deliberate focus on this issue should result in the promulgation of legislation in SADC States on, and a better understanding of, the law on State immunity. Leaving the determination of the applicable rules to the discretion of member States' courts will perpetuate chaos and undermine the development of a coherent jurisprudence and practice on State immunity in SADC. The SADC Summit and/or Committee of Ministers of Justice and Attorney Generals should in addition, restate and affirm SADC law and practice on State immunity.

After declaring that Zimbabwe had expressly waived its immunity the Constitutional Court proceeded to consider whether the law in South Africa permitted the registration and enforcement of judgments issued against foreign States by international courts, such as the SADC Tribunal. The court referred in the first instance to the Enforcement of Foreign Civil Judgments Act 32, 1988 (the Enforcement Act). The court correctly noted that the Enforcement Act did not authorise South

[89] The full provision reads: "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee. 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph1. 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of 26 27 paragraph1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

[90] The Constitutional Court should have asked the question why States in the Council of Europe, which are members of the ECHR (Austria, Belgium, Germany, Luxembourg, Netherlands, Switzerland and the United Kingdom) signed the Basle Convention on State Immunity, notwithstanding the provisions of the ECHR. This question would have resulted in the Constitutional Court concluding that immunity cannot be said to have been expressly waived owing to article 32 of the Protocol to the SADC Tribunal, which stipulates nothing to that effect.

Africa to exercise jurisdiction against Zimbabwe because it regulated the registration and enforcement of judgments issued by courts of foreign States and not those issued by international courts.[91] In addition, the Enforcement Act granted jurisdiction to South Africa's Magistrates Courts and not the High Court where Mr. Fick and Co. had filed their application for registration and enforcement of the SADC Tribunal's costs order.

The Court did not, however, consider whether the FSI Act regulated the registration and enforcement of judgments issued by international courts against foreign States.[92] It turned its attention instead to South Africa's common law and the case of *Jones v Krok* - a case concerning the registration in South Africa of a US court judgment. The parties in dispute in that case were individuals and not States.[93] The court correctly noted that as of the date of the judgment in Zimbabwe's appeal, South Africa's common law rules contained in the *Jones v Krok* case did not provide for, or enable, the registration and enforcement of judgments issued by international courts against foreign States.[94] The *Jones v Krok* rules regulated the registration and enforcement of foreign judgments issued against non-State defendants.

These findings should have resulted in the Constitutional Court upholding Zimbabwe's appeal since no rule of South Africa's statute and common law permitted the registration and enforcement of the SADC Tribunal's costs-order against Zimbabwe.[95] The finding by the Constitutional Court meant that the High Court and the Supreme Court of Appeal's decisions, premised as they were on South Africa's common law, were wrong and neither court had lawfully exercised jurisdiction against Zimbabwe. Further, Fick and Co. did not, as a consequence, possess any valid cause of action under South Africa's law as of the date of their application for, and Zimbabwe's appeal against, the registration and enforcement in South Africa of the SADC Tribunal's costs order.

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[91] *Fick - Constitutional Court Decision*, at para. 53. See article 2 of the Enforcement of Foreign Civil Judgments Act, 32, 1988, which stipulates that "This Act shall apply in respect of judgments given in any *country* outside the Republic which the Minister has for the purposes of this Act designated by notice in the Gazette." [*Emphasis added*]

[92] The FSI Act does not permit courts in South Africa to exercise jurisdiction against foreign States over the registration and enforcement of judgments issued by international courts.

[93] *Jones v Krok* 1995 (1) SA 677 (A). This is South Africa's *locus classicus*, which drew upon the restatement in Jobert (ed.), *The Law of South Africa*, and reaffirmed the rules under the common law for the exercise of jurisdiction by the High Court in matters concerning the registration and enforcement of foreign judgments. The words used by the court are revealing. It stated that: "What remains to be explored is whether the High Court had the jurisdiction under the current common law to enforce the costs order against Zimbabwe" indicating that in its view, the High Court exercised jurisdiction not on account of section 3 of the FSI but under South Africa's common law. This point will be addressed in some detail below.

[94] *Fick – Constitutional Court Decision*, para. 53-54.

[95] Mogoeng CJ., stated "It follows from the requirements listed in Purser v Sales that the South African common law on the enforcement of foreign civil judgments was, thus far, developed to provide only *for the execution of judgments made by domestic courts of a foreign State*. It does not apply to the enforcement of judgments of the Tribunal and there is no other legal provision for the enforcement of such decisions in our country. This then gives rise to the need to develop the common law of South Africa in order to pave the way for the enforcement of judgments or orders made by the Tribunal." *Fick- Constitutional Court Decision*, at para. 53. Obviously, what the Honourable Chief Justice should have said, is that the law under the Jones v Krok rules provided for the registration and enforcement of judgments passed by domestic courts of a foreign State. The reference to execution only is an error. That said, this statement about the state of South Africa's law did not give rise to the setting aside of the decisions of the High Court and Supreme Court of Appeal, which is remarkable given the numerous references to the right to a fair trial that were made in the case.

However, in a remarkable turn of events the Constitutional Court changed the rules mid-game. It created a new common law rule enabling for the first time in South Africa the registration and enforcement of judgments issued against foreign States by international courts, such as the SADC Tribunal.[96] This *mero motu* action and the promulgation of an *ex post facto* law was improper and precipitous. First, it is clear from section 2 of the FSI Act that it is for (i) the legislature to determine the principles under which foreign States can be subjected to jurisdiction; and (ii) the executive to determine which foreign States are to be subjected to jurisdiction. And, courts interpret and apply rules of domestic and/or international law, which are binding on the State and do not create – in the absence of clear authority - new inter-State rights and obligations.[97] The court (i) issued its decision without considering rules of public international law on State immunity or reference to the FSI Act;[98] and (ii) did not (a) provide any cogent legal and policy reasons explaining the legal basis for the new law, (b) outline the new law's essential characteristics; (c) explain the reasons for the retrospective application of the law to the case against Zimbabwe; and (d) explain why it was necessary to subject foreign States to the jurisdiction of South African courts. As a consequence, this case raises inevitable and troubling fair trial rights questions.[99]

### 4.1 An extraordinary exercise of jurisdiction against foreign states

The Supreme Court of Appeal and the Constitutional Court were both of the view that the new law did nothing more than add judgments issued against foreign States by international courts to a list of foreign judgments that were already registrable and enforceable in South Africa.[100] This reasoning

[96] *Fick - Constitutional Court Decision*, para. 53. The Constitutional Court's verb of preference was "develop."

[97] Courts may issue declaratory orders that create and impose obligations on the domestic State if permitted by the relevant State's Constitution or some other domestic rule of law or if drawing upon rules of international law contained in treaties or other binding norms of law, such as rules of customary international law.

[98] Apart from the few and very basic references to the FSI Act in the first few paragraphs of the decision, the Constitutional Court did not refer the FSI Act when it moved to consider whether there was any other rule of South Africa's law that permitted the exercise of jurisdiction. The Constitutional Court would not have needed to undertake this exercise, if Zimbabwe had indeed, as a matter of fact and law waived its immunity regarding the proceedings in South Africa. Such submission to South Africa's jurisdiction would have rendered the question of jurisdiction redundant, but would still have left open the question whether the issue which constituted the substance of the dispute between the parties was one which it was proper for South Africa to exercise jurisdiction under the restrictive doctrine of State immunity.

[99] The Constitutional Court held that the new common law rule applied only to the Zimbabwe case and future cases. *Fick - Constitutional Court Decision*, para. 72. The ruling by the Constitutional Court would not have been retrospective if it had ruled that the courts below had misinterpreted the law and all it had done was to clarify its meaning and applied it to the facts before it. The Constitutional Court created a new law on appeal, which until that date did not exist, and then applied it against a party to a dispute and ruled against it in a manner that resulted in that party losing property. This can hardly be described as a fair trial. The court's attempt, however well intentioned, to do justice to one party resulted in injustice to the other party.

[100] In the Supreme Court of Appeal, Nugent JA stated that although: "…the authorities referred to [*Jones v Krok, Purser v Sales*] are directed at the enforcement of a judgment of the domestic courts of a foreign country, I see no reason to disagree with Patel J [in the Zimbabwe High Court case of *Gramara v Zimbabwe*] that they are applicable as well to an order of an international tribunal whose legitimacy has been accepted." At pp. 15. See also the opinion of Jafta J in the Constitutional Court affirming the statement made by Nugent JA. *Fick - Constitutional Court Decision*, para. 91. The Supreme Court of Appeal cited with approval the decision of Patel J, but the issue before Patel J did not concern the subjection of a foreign State to Zimbabwe's jurisdiction. The reliance on the statement by Patel J was wholly misplaced.

betrays a startling under-appreciation of the substantive legal issues, especially regarding the law regulating the exercise of jurisdiction by one State over another.

The issue for consideration was not simply whether the phrase "foreign judgment" could be re-interpreted to include decisions issued by international courts but whether it was competent for the court to subject foreign States to its jurisdiction. The new law has muddied the waters on South Africa's law on State immunity and arguably rendered Africa's leading economy an outlier on this most important subject.

According to the *Jones v Krok* test a foreign judgment will be recognized and enforced in South Africa if the following conditions are satisfied, i.e., if (i) the foreign court had *international competence,* as determined under South African law; (ii) the judgment was final, conclusive, and had not become superannuated; (iii) the enforcement of the judgment is not contrary to South African public policy (which includes rules of natural justice); (iv) the judgment was not obtained by fraudulent means; (v) the judgment did not involve the enforcement of a penal or revenue law of the foreign state;[101] and (vi) enforcement was not precluded by the Protection of Businesses Act 99 of 1978.[102] Under South African law, the rule that the foreign court had international competence has been interpreted to mean that the defendant should either have (a) been resident or physically present in the jurisdiction of the foreign court; or (b) submitted to the foreign court's jurisdiction by agreement or conduct.[103]

With the change in the common law, the High Court's exercise of jurisdiction, which until then had been unlawful, was declared lawful. The Constitutional Court then declared that (i) Zimbabwe had submitted to the jurisdiction of the SADC Tribunal by agreement, i.e. through the Tribunal Protocol; (ii) the costs-order was final and had not become superannuated; (iii) the enforcement of the judgment was not contrary to South African public policy, which policy was reflected in South Africa's Constitution pertaining to "…democracy, human rights and the rule of law";[104] (iv) the judgment was not obtained by fraudulent means; (v) the judgment did not involve the enforcement of the penal or revenue law of a foreign State; and (vi) the enforcement was not precluded by the Protection of Businesses Act.

As a consequence, the law in South Africa is that (i) *any judgment* issued against a foreign State by an international court will be registered and enforced in South Africa for as long as the first four rules of the *Jones v Krok* test are satisfied;[105] (ii) the rules stipulating that the judgment (a) should not

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[101] Ironically, the court did not appear to consider the public international law context explaining the rule that South Africa will not enforce the penal or revenue laws of foreign States. See for example, Lord Keith of Avonholm in the case of Government of *India v Taylor* who noted that enforcement of such claims would be an extension of the sovereign power, which imposed the taxes. He stated that: "…an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties." *Government of India v Taylor* [1955] A.C. 491, 511. See also: *Attorney-General of New Zealand v Ortiz* [1984] A.C. 1 (CA), at pp. 20-21, per Lord Denning M.R., at p. 32, per Ackner L.J.; *Williams and Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] A.C. 368, at 428, per Lord Templeman; *Derby & Co Ltd v Weldon* (No. 6) [1990] 1 W.L.R. 1139 (CA), at 1154, per Staughton L.J.

[102] *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E.

[103] W.A Joubert, J.A. Faris, and L.T.C Harms (eds.), *The Law of South Africa* (Vol. 2, Butterworth), para 478.

[104] *Fick – Constitutional Court Decision*, para. 39.

[105] The first four rules of the *Jones v Krok* test are that: (i) the foreign court had international competence, as determined by South African law; (ii) the judgment was final, conclusive, and had not become superannuated; (iii) the enforcement

involve the enforcement of a penal or revenue law and (b) should not be precluded by the Protection of Businesses Act are, for obvious reasons, inapplicable to judgments issued by international courts against foreign States; and (iii) the nature of the underlying dispute, which gave rise to the exercise of jurisdiction by the international court and the judgment is irrelevant for purposes of the registration and enforcement in South Africa of the international court's judgment.

The court's ruling had the effect of creating in one fell swoop an infinite number of grounds in terms of which South Africa is enabled to exercise jurisdiction against foreign States, in addition to those prescribed in the FSI Act. This is due to the fact that the Constitutional Court did not make the exercise of jurisdiction under the new common law rule conditional upon the foreign State having submitted to the jurisdiction of the court as provided in the FSI Act or that the High Court should have jurisdiction under the other provisions of the FSI Act. It is clear from the court's decision that the new common law rule is a free-standing, self-contained and self-reinforcing jurisdictional ground. This raises an important question not addressed by the court, which is: how is this new and open-ended common law jurisdictional ground against foreign States to be reconciled with article 2 of the FSI Act, which stipulates in imperative terms the general rule of State immunity in South Africa, that: "A foreign state shall be immune from the jurisdiction of the courts of the Republic *except as provided in this Act or in any proclamation issued thereunder*."

### 4.2 Types of international courts covered

The Constitutional Court appears to have attempted to restrict the types of international courts whose judgments would be enforced by South Africa under its new law. It stated that: "[T]his development of the common law extends to the *enforcement* of judgments and orders of international courts or tribunals, *based on international agreements that are binding on South Africa*."[106]

This qualification, if it is one, is poorly conceived. It raises more questions than answers. Does the new law not cover the registration of judgements? The court referred only to *enforcement of judgments*. Foreign court judgments are not directly enforceable in South Africa. They constitute a cause of action. As a consequence, South Africa's courts exercise adjudicatory and executory jurisdiction – and since the Fick case, over foreign States. Is the reference to enforcement only an oversight?

The court did not explain what it meant by "international agreements that are binding on South Africa." What specifically about an international agreement needs to be binding on South Africa to enable the exercise of *executory* jurisdiction by South Africa against a foreign State? Is it a condition precedent that the international agreement should oblige *or* permit South Africa to register and enforce the decisions of the particular international court? If so, it can hardly be argued that the provisions of the SADC Treaty or the Protocol obliged or permitted South Africa to place foreign States under its jurisdiction. South Africa is bound by the International Covenant on Civil and Political Rights (ICCPR). Does it mean that it will enforce a decision made by any foreign court against a foreign State for as long as such court refers to provisions of the ICCPR? Further, it

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of the judgment is not contrary to South African public policy; and (iv) the judgment was not obtained by fraudulent means.

[106] *Fick - Constitutional Court Decision*, para. 53.

remains unclear why the court did not extend the new common law rule to cases involving the enforcement of judgments issued by international courts, which were established pursuant to agreements to which South Africa was not a party, assuming that this is what it meant by international agreements binding on South Africa.[107] These and related questions remain.

### 4.3 Principles lost in the mists of rhetoric

Largely rhetorical, the explanations given by the court to explain why it was necessary to expand South Africa's common law to permit the registration and enforcement of decisions issued by international courts against foreign States were off-piste. Although the new common law rule directly targeted and affected foreign States the court omitted to consider any rules of public international law on State immunity. The court stated, without context or analysis, that the "…development [of South Africa's common law] was driven by the need to ensure that lawful judgments are not to be evaded with impunity by *any State* or person in the global village."[108]

The question is whether the court's rulebook includes laws requiring respect for, and proscribing the violation of, foreign States' immunity?[109] The court proceeded to cite an inapposite decision concerning a commercial dispute between private individuals, and stated that:"…the enforcement of judgments of foreign courts [is required by] the exigencies of international trade and commerce [and because] not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions."[110]

Needless to say, the case between Zimbabwe against Fick and Co. did not concern *acta jure gestionis*. The court also referred, without acknowledging the irony or implications, to the: "…principle of comity, which requires that a State should generally defer to the interests of foreign States, with due regard to the interests of its own citizens and the interests of foreigners under its jurisdiction, in order to foster international cooperation and (ii) the principle of reciprocity, the import of which is

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[107] In any event, the fact that an international agreement is binding on South Africa does not mean, without more, that South Africa can subject a foreign State to the jurisdiction of its courts. As a consequence, South Africa's treatment of Zimbabwe, a foreign State, as if it were an ordinary person defendant, and its failure to consider – in its exercise of adjudicatory and executory jurisdiction – the provisions of the FSI Act and other rules of public international law on State immunity is faulty, puzzling and opens the door to tit-for-tat retaliatory exercise of jurisdiction. It does not bode well for comity and orderly resolution of disputes.

[108] *Fick – Constitutional Court Decision*, para 54.

[109] According to Mogoeng CJ., "South Africa has essentially bound itself [per article 32 of the Protocol to the Tribunal] to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them, particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated." Ibid., at para. 59. A swashbuckling and suitably crusading statement that ignored the proscription in article 4(a) of the SADC Treaty and rules of customary international law on State immunity. The court should have asked itself: is it "legally permissible" for one State to subject a foreign State to the jurisdiction of its courts? If it had, it would have considered and utilised the correct and most appropriate legal framework and rules to resolve the dispute between the parties.

[110] *Ibid.* para. 55.

that courts of a particular country should enforce judgments of foreign courts in the expectation that foreign courts will reciprocate."[111]

Needless to say, comity militated against South Africa's exercise of jurisdiction. It also explains the existence of the rule of public international law on the State immunity.[112] In addition, Fick and Co. were citizens of Zimbabwe and the judgment did not explain or explore the ways in which they were under South African jurisdiction beyond the act of forum shopping.[113] Moreover, South Africa's law on the recognition and enforcement of foreign judgments is not premised on the principle of reciprocity and the issue is irrelevant in the context of foreign State defendants.[114]

The court further stated that it was:"…enjoined by [South Africa's] Constitution to develop the common law in line with the spirit, purport *(sic)* and objects of the Bill of Rights."[115] However, the court did not consider whether (i) the provisions of South Africa's Bill of Rights gave rights of action to all people in the world who wished to enforce in South Africa judgments issued by international courts against foreign States; (ii) a jurisdictional link to South Africa was required; and (iii) rules of State immunity reflected in South Africa's common law and the FSI Act applied at all.[116]

The court then stated that South Africa's Bill of Rights recognised that the:"…right to an effective remedy or execution of a court order [is] a crucial component of the right of access to courts [and that the] observance of the right of access to courts would…be hollow if the costs order were not…enforced. To give practical expression to the enjoyment of this right, *even in relation to judgments or orders of the Tribunal*, *articles 32(1) and (2) of the Tribunal Protocol and section 34 of the Constitution must be interpreted generously to grant successful litigants access to our courts for the enforcement of orders, particularly those stemming from human rights or rule of law violations provided for in treaties that bind South Africa*."[117]

The grant of a generous and seemingly open-ended invitation to any and all successful litigants to access South Africa's courts is laudable, but ultimately unrealistic. That said, the court did not subject the provisions of section 34 of South Africa's Constitution or article 32(1) and (2) of the Protocol to which it referred to any interpretation, despite stating that these provisions must be

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111 *Ibid.* para. 56.

112 See for example, Diplock LJ., in *Buck v Attorney General* [1965] Ch. 745, 770 (CA).

113 According to Mogoeng CJ., in a speech on 2014 in which he discussed the Fick case, after Zimbabwe refused to comply with the SADC's Tribunal's earlier decision, Mr Fick and Co. approached the Tribunal "…and it made a cost order against Zimbabwe which was also disregarded. Because some of the applicants were in South Africa where Zimbabwe had immovable property, the applicants turned to South African courts for relief." It seems clear, therefore, that the applicants were in South Africa only for purposes of seeking to attach Zimbabwe's immovable property and South Africa had no other reason to exercise jurisdiction in the matter.

114 South Africa repealed the Reciprocal Enforcement of Civil Judgments Act 9 of 1966, replacing it with the Enforcement of Foreign Civil Judgments Act 32 of 1988, which is not based on reciprocity.

115 *Fick – Constitutional Court Decision*, para 59.

116 Earlier, the Court had in an incredible statement asserted that the "…origin of that costs order is a dispute that implicates human rights and the rule of law, which are central to the Treaty and our Constitution. A constitutional matter does, therefore, arise here in relation to access to courts which is an element of the rule of law. Constitutional Court decision, para. 21. What the court was doing is to rule and express an opinion on a dispute occasioned by the act of a sovereign State. The court did not consider whether it was appropriate for it to venture an opinion in the manner that it did. And even assuming that a complainant was a South African citizen, the law in South Africa on act of State precludes the court from subjecting foreign States to the jurisdiction of its courts.

117 *Ibid.* para. 61 and 62.

interpreted generously.[118] Further, section 3(2) of the FSI Act precluded the court from regarding article 32(1) as granting South African courts jurisdiction over foreign States.[119] In addition, it is puzzling that the court concluded that article 32(2) of the Tribunal Protocol, which stipulates that "States and institutions of the Community shall take forthwith all measures necessary to ensure the execution of decisions of the Tribunal" meant that South Africa was empowered to ignore article 4(a) of the SADC Treaty and customary international law on State immunity.

These supposed statements of principle and South Africa's common law as reflected in the case of *Jones v Krok* were irrelevant to the question of the exercise of jurisdiction against a foreign State. The cases of Jones v Krok and Purser v Sales[120] did not concern the enforcement of a foreign judgment against a foreign State. In fact, none of the authorities cited by the Constitutional Court involved foreign States or disputes over foreign States' immunity. The court should, of course, have relied on, or at the very least examined and distinguished, the 1980 Inter-Science case - South Africa's *locus classicus* on the restrictive State immunity doctrine. In the end, the court's decision is fatally flawed because it utilised wrong legal principles to resolve the dispute between the parties. The court appears to have gone after the red herring.

### 4.4. Was the dispute over *acta jure imperii* or *acta jure gestionis*?

The Constitutional Court also failed to consider the substantive character of the dispute between Mr Fick and Zimbabwe. To recap: Fick and Co. applied to register and enforce a costs order issued in their favour against Zimbabwe by the SADC Tribunal. However, it is trite that a costs order is never made in a vacuum. It is recompense to, and a consequential order made in favour of, a party to legal proceedings for legal expenses incurred. Fick and Co. neither sought nor were they granted leave to register the underlying decisions issued by the SADC Tribunal against Zimbabwe.[121] In addition, the

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[118] Quite what the court meant by a generous interpretation is unclear.

[119] Article 32(1) of the Tribunal Protocol provides that "The law and rules of civil procedure for the registration and enforcement of foreign judgments in the territory of the State in which judgment is to be enforced shall govern enforcement." And section 3(2) of the FSI Act precludes the application of article 32(1) to the question of jurisdiction and waiver by providing that "…a provision in an agreement that it is to be governed by the law of the Republic *shall not be regarded as a waiver*." [*Emphasis added*]

[120] The court referred to the case of *Purser v Sales* more than it did to the seminal case of *Jones v Krok*.

[121] The SADC Tribunal issued the following order in the main application filed by the 79 applicants, among which was Mr Fick. It held

"(a) by unanimity, the Tribunal has jurisdiction to entertain the application;
(b) by unanimity, the Applicants have been denied access to the courts in Zimbabwe;
(c) by a majority of four to one, the Applicants have been discriminated against on the ground of race, and
(d) by unanimity, fair compensation is payable to the Applicants for their lands compulsorily acquired by the Respondent.
The Tribunal further holds and declares that:
(1) by unanimity, the Respondent is in breach of its obligations under Article 4 (c) and, by a majority of four to one, the Respondent is in breach of its obligations under Article 6 (2) of the Treaty;
(2) by unanimity, Amendment 17 is in breach of Article 4 (c) and, by a majority of four to one, Amendment 17 is in breach of Article 6 (2) of the Treaty;
(3) by unanimity, the Respondent is directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the Applicants, except for Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd. and France Farm (Pvt) Ltd. that have already been evicted from their lands, and to take all appropriate measures to

costs order was issued consequent to an application made by Fick under article 32(4) of the Tribunal Protocol for Zimbabwe to be referred to the SADC Summit for its failure to comply with an earlier decision. In other words, Fick's rights and cause of action arose only from article 32(4) of the Protocol to the SADC Tribunal and not from any other rule of public or private international law, and arguably had no legal validity beyond, and was only binding on, Zimbabwe and the claimants.

A question, which the Constitutional Court should have considered and addressed is whether the restrictive State immunity doctrine - which is reflected in South Africa's statutes, common law, SADC law, and rules of customary international law - permits the exercise of jurisdiction by South Africa over a foreign State regarding the registration and enforcement of an international court's costs order granted against the foreign State in proceedings over that State's refusal to abide by an earlier decision of that international court? Had it considered this question, the Constitutional Court's attention would have been drawn to the instructive statement by Lord Wilberforce in the case of *Playa Larga v I Congreso del Partido*, in which he stated that:

> "…in considering, under the 'restrictive' theory, whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) on which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the state has chosen to engage or whether the relevant act(s) should be considered as having been done outside that area and within the sphere of governmental or sovereign activity….[and that the issue] is not that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform."[122]

Another relevant authority not considered by the court is that of the ICJ in the Jurisdictional Immunities case. In that case, one of the disputes concerned the registration by Italy's courts of Greek court judgments against Germany over horrific atrocities committed by the latter during World War II. Germany complained to the ICJ contending that Italy's recognition of the judgments breached Germany's immunity. The ICJ ruled: "Where a court is seized…of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question."[123]

It stated further, that:

> "It follows…that the court seized of an application for *exequatur* of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction – *having regard to the nature of the case in which that judgment was given* – before the courts of the State in which exequatur proceedings have been instituted. In other words, it has to ask itself whether, *in the event that it had itself been seized of the merits of a dispute identical to that*

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ensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants, and
(4) by unanimity, the Respondent is directed to pay fair compensation, on or before 30 June 2009, to the three Applicants, namely, Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd. and France Farm (Pvt) Ltd.
By a majority of four to one, the Tribunal makes no order as to costs in the circumstances." *Mike Campbell (Pvt) Ltd v Zimbabwe*, pp. 57-59.

[122] *Playa Larga (Owners of cargo lately laden on board) v I Congreso del Partido (Owners)* [1983] 1 AC 244, at pp. 262. See also *Kuwaiti Airways Corporation v Iraqi Airways Co.* [1995] 3 All ER 694, at pp. 704-705; *Controller and Auditor-General v Ronald Davison* (CA 226/95) [1996] 2 NZLR 278.

[123] *Jurisdictional Immunities Case*, para. 130.

*which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State.*"[124]

If the Constitutional Court had assessed the dispute between the parties through the appropriate and most relevant legal framework and applied the correct legal tests it would not have ruled that it had jurisdiction to adjudicate over the dispute between Zimbabwe and its nationals (legal entities and natural persons) who complained to the SADC Tribunal about Zimbabwe's (i) land expropriation programme in Zimbabwe; and (ii) refusal to comply with the SADC Tribunal's decisions. These disputes were most certainly over *acta jure imperii*. None of the provisions of the FSI Act permits the exercise of jurisdiction over proceedings regarding such foreign acts of State.[125]

Further, the FSI Act removes immunity for foreign States for specific disputes over commercial transactions,[126] contracts of employment,[127] personal injuries and damage to property,[128] patents and trademarks,[129] membership of associations,[130] arbitration,[131] and admiralty proceedings.[132] In some, but not all, of these instances, the FSI Act introduces a defined jurisdictional link to South Africa and in all cases; the nature of the permissible exercise of jurisdiction is qualified. And, doubtless, the FSI Act distinguishes between *acta jure imperii* and *acta jure gestionis*, as does the United Nations Conventions on Jurisdictional Immunities, the European Convention on State Immunity, and the draft Inter-American Convention on Jurisdictional Immunity. The Fick decision is an anomaly, which should be redressed with the objective of bringing South Africa's law and practice on State immunity back in from the Karoo.

### 4.5 Human rights exception to State immunity

The Constitutional Court did not state that there exists a human rights violations-exception to the international law rule on State immunity. However, its ruling that it was enjoined to create a new common law rule to permit the exercise of jurisdiction over foreign States to enable successful litigants' right of access to a court points to the existence – in effect - of a human rights exception in South Africa's law on State immunity.[133] In the High Court, Claassen J., stated that the application

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[124] *Ibid.*

[125] See for example, Fox and Webb who note that "In common law courts the doctrine known as 'act of state' may refer to the legislative or executive acts of a foreign State and if successful the English court will refuse to investigate the propriety of an act of a foreign government and exercise restraint in the adjudication of disputes relating to legislative or other governmental acts which a foreign State has performed within its territorial limits." H. Fox and P. Webb, *The Law of State Immunity*, OUP (3 ed., 2013), pp. 50. In addition, it is odd that the court was willing to exercise jurisdiction under South Africa's common law over the foreign respondent State over a costs order without enquiring into whether (i) it had jurisdiction to register and enforce the underlying main order issued by the SADC Tribunal; and (ii) it was appropriate, from a policy perspective to enforce only the costs part of a foreign order.

[126] Section 4 of the FSI Act.

[127] Section 5 of the FSI Act.

[128] Section 6 of the FSI Act.

[129] Section 8 of the FSI Act.

[130] Section 9 of the FSI Act.

[131] Section 10 of the FSI Act.

[132] Section 11 of the FSI Act.

[133] Mogoeng CJ stated that "No law gives effect to the farmers' right of access to courts for the purpose of enforcing their costs order against Zimbabwe in this country. *This Court is thus enjoined,* not only by article 32 of the Tribunal

for registration of the costs order in South Africa was a matter related "…to human rights affairs"[134] and concluded that under the restrictive immunity doctrine South Africa could disregard Zimbabwe's immunity.[135]

There is merit in the contention that States, which violate *jus cogens* norms, such as the prohibition of torture, should be denied immunity. However, the Fick case stands alone, creating as it does a new rule of law and cause of action permitting the exercise of jurisdiction against foreign States for failure to pay costs-orders issued by an international court on the alleged basis that the enforcement of such a costs order ensured South Africa's compliance with the right of access to a court.[136]

Fick and Co.'s dispute had been subjected to litigation before the SADC Tribunal and was still before the SADC Summit. In these circumstances it was hardly arguable that their right of access to a court had been breached. Remarkably, the court did not unpack and examine the constituent elements of the right of access to a court and why it was necessary to exercise jurisdiction against a foreign State in the circumstances.

If the Constitutional Court had considered comparative jurisprudence, it would have found a wealth of authority confirming that the recognition of a foreign State's immunity by a forum court does not constitute a breach of the right of access to justice. Numerous authorities abound, including ECtHR cases such as (i) Fogarty,[137] Al Adsani,[138] and Jones,[139] all which were against the UK; (ii) the case of *Kalogeropoulou and Others v Greece and Germany*;[140] and (iii) *McElhinney v Ireland*.[141] In the latter case, the ECtHR stated that: "…the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."[142]

It further stated that:

> "…measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee

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Protocol but also by section 8(3) of the Constitution, to either apply or develop the common law in order to give effect to the farmers' right to have the costs order enforced. And since the common law as it stands does not provide for the enforcement of the Tribunal's decision, the only option available is development." What he meant was – create a new law and retrospectively apply it to the case before the court. So much for the right to a fair trial in South Africa. See *Fick – Constitutional Court Decision*, para. 64.

134 *Government of the Republic v Louis Karel Fick and Others*, para 25.

135 Like the Constitutional Court, Claassen J did not provide reasons or identify supporting authority for the conclusions that he drew.

136 *Fick v Zimbabwe*, CC, paras. 60 – 70. The Constitutional Court's ruling also raises the question of whether, South Africa is now a World Court and its Bill of Rights, a Universal Treaty on Human Rights.

137 *Forgaty v The UK*, ECHR App No 37112/97, Admissibility 1 March 2000; Judgment 21 November 2001; (20010 34 E.H.R.R. 302.

138 *Al Adsani v The UK*, ECHR App 35753/97; (2002) 34 E.H.R.R 111; 123 ILR 23.

139 *Jones and Another v The United Kingdom Jones* (2014) ECHR 32.

140 *Kalogeropoulou and Others v Greece and Germany* No. 59021/00

141 *McElhinney v Ireland*, App 31253/96; (2002) 34 E.H.R.R. 302.

142 *McElhinney v Ireland*, para. 35.

> in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity." [143]

In the Jurisdictional Immunities case, the ICJ stated that: "…a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."[144]

However much one might quibble with these decisions, including those of many domestic courts,[145] they reflect the current state of international law on State immunity. Attempts to end impunity and ensure justice for victims of human rights violations are laudable and are to be encouraged. However, it is crucial that such disputes should be resolved using the appropriate, relevant and properly contextualised legal rules and framework. And to comply with the principle of legality, court decisions should be fully reasoned.

### 4.6 Different rules for different folk?

Will South Africa continue to assert, as it has in the past, that it enjoys immunity before foreign courts? To give three notable examples: South Africa was sued (i) in 1984 in the USA in the case of Martin v South Africa;[146]in 1992 in Spain in the case of *Diana Gayle Abbott v South Africa*;[147] and in

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143 *McElhinney v Ireland*, para. 37.

144 *Jurisdictional Immunities Case*, para 91.

145 In the US, the Court of Appeals concluded that the US, FSI Act does not provide for an exception to the immunity of foreign States alleged to have committed violations of jus cogens norms. See *Siderman de Blake v Argentina* (1992) 965 F.2d 699 (Ninth Circuit); *Princz v. Germany* (1994) 26 F.3d 1166 (D.C. Circuit); and *Smith v. Libya* (1997) 101 F.3d 239 (Second Circuit); and Sampson v. Germany (2001) 250 F.3d 1145 (Seventh Circuit)). In Italy, the Court of Cassation stated, for instance, that: "[…] the fact that one is unable to enforce one's rights […] does not prevent the foreign State's behaviour being considered unlawful at the international level. Nevertheless, even in this case a denial of justice in respect of individual situations is the necessary and simultaneous result of immunity […] such acts of unlawfulness may only be sanctioned at the inter-State level on the initiative of international subjects and not of those private individuals who may have suffered from a 'denial of justice'." *Case of Campione v Peti-Nitrogenmuvek NV and Hungarian Republic* (1972) 65 ILR (1984), 287, at pp. 302-303. In the UK, the House of Lords confirmed in the case of *Jones and Others v the Kingdom of Saudi Arabia* that the law on State immunity did not recognise a human rights exception. *Jones and Others v Saudi Arabia and Others* [2006] UKHL 26. In Canada, see Canada (*Bouzari v. Islamic Republic of Iran, Court of Appeal of Ontario*, [2004] Dominion Law Reports (DLR), 4th Series, Vol. 243, p. 406; ILR, Vol. 128, p. 586; allegations of torture). In France, see (judgment of the Court of Appeal of Paris, 9 September 2002, and Cour de cassation, No. 02-45961, 16 December 2003, Bulletin civil de la Cour de cassation (Bull. civ.), 2003, I, No. 258, p. 206 (the Bucheron case); Cour de cassation, No. 03-41851, 2 June 2004, Bull. civ., 2004, I, No. 158, p. 132 (the X case); and Cour de cassation, No. 04-47504, 3 January 2006 (the Grosz case); allegations of crimes against humanity). In Slovenia, see (case No. Up-13/99, Constitutional Court of Slovenia; allegations of war crimes and crimes against humanity). In New Zealand, see (*Fang v. Jiang, High Court,* [2007] New Zealand Administrative Reports (NZAR), p. 420; ILR, Vol. 141, p. 702; allegations of torture). In Poland, see (Natoniewski, Supreme Court, 2010, Polish Yearbook of International Law, Vol. XXX, 2010, p. 299.

146 See the case of *Martin v Republic of South Africa*, United States Court of Appeals, Second Circuit 836 F.2d 91 (2d Cir. 1987) This facts of the case reflect the harrowing cruelty that was apartheid South Africa not so long ago. Barry J Martin, the claimant was a black United States citizen. He travelled to South Africa in 1983 and was injured in a one-car accident while travelling in South Africa. The car was being driven by his white colleague, Mr Peter Fink. Peter Pink was transported by an ambulance to the Paul Kruger Hospital where he was treated. Martin was left at the scene of the accident because he was black. Martin was later transported to the H.F. Verwoerd Hospital 65 miles away in a private car where he was treated 24 hours after admission and only after being granted "honorary white status." The accident and lack of prompt medical attention resulted in Martin becoming quadriplegic. Martin sued South Africa, Paul Kruger

2006 in Botswana in the case of *Sebina v South African High Commission*.[148] In all cases, South Africa pleaded the defence of foreign State immunity. In the first two cases cases, its immunity was upheld. The third case was dismissed on procedural grounds. Will these countries accept South Africa's plea of State immunity in a dispute, if their property and interests in South Africa are at risk under it's new Fick common law rule?

South Africa's law and practice on State immunity is now at odds with that obtaining in fellow SADC States, including Botswana,[149] Namibia[150] and Zimbabwe.[151] These countries follow the restrictive State immunity doctrine and are South Africa's main trading partners in SADC. Will South Africa's re-interpretation of article 32 of the Tribunal Protocol and its declaration that SADC States do not enjoy immunity before courts in South Africa over decisions issued by the SADC Tribunal cause these and other SADC States to similarly disregard South Africa's immunity? To avoid a race to the bottom, the SADC Summit and/or Committee of Ministers of Justice and Attorneys General should affirm the applicable law and rule of practice on State immunity in SADC. SADC should, in any event, consider adopting a SADC Protocol on the Jurisdictional Immunities of States and their Property, in addition to Members States ratifying the UN Convention on Jurisdictional Immunities.

Several other questions remain. What of the rest of the world? Are foreign States (not party to the SADC Treaty) with interests in South Africa likely to review the extent to which they are exposed to

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Hospital and Verwoerd Hospital in the US. Courts in the US upheld South Africa's plea of foreign State immunity.

147 *Diana Gayle Abbott v. Republica de Sudáfrica*, Tribunal Constitucional, 1 July 1992, [1992] Aranzadi, Decision No. 107, 113 ILR 413. In the case, Diana Gayle Abbott, an American who was employed at South Africa's Embassy in Madrid, Spain alleged that she had been unlawfully dismissed. She sued and made a claim for damages. South Africa successfully pleaded that it enjoyed immunity from legal suit in Spain. In the decision, Spain's Constitutional Court stated that "the restrictive approach to immunity covers both adjudication and execution and is based on the distinction between *acta jure gestionis* and *acta jure imperii"* which the court considered to be a general rule of international law.

148 In the case, the South African High Commission refused to appear before an employment court, stating the following in his letter:

"Dear Sir

RE: UNFAIR JUDGMENT - MAXWELL SEBINA

Your notification to attend a hearing at the instance of Mr Maxwell Sebina, an employee of the Republic of South Africa, addressed to the South African High Commission refers. As you are no doubt aware, the South African High Commission is the representative of the Sovereign Republic of South Africa. Whilst the High Commission recognises and respects the established labour dispute resolution process in Botswana, the High Commission exercises its sovereign right not to be subjected to its jurisdiction in this particular instance, on the basis that the subject matter of the proposed mediation is a domestic one.

Yours faithfully

HIGH COMMISSIONER'

See *Sebina v South African High Commission* 2010 (3) BLR 723 IC

149 See the following cases *Dube and Another v American Embassy and Another* 2010 (2) BLR 98 IC; *Republic of Angola v Springbok Investments (Pty) Ltd* 2005 (2) 159 (HC); *Mantimane and Others v United States of America* 2011 (1) BLR 305 (HC); *Majid Properties v Republic of France* 2012 (2) BLR 482 HC.

150 See the case of *Mazila and Others v Iran and Others* (A13/2015) [2015] NAHCMD 24 (13 February 2015).

151 See the case of *Barker McComarc (Pvt) Ltd v Government of Kenya* 1983 (2) ZLR 72 (SC) at p 79 G-H Georges JA stated "I am completely satisfied therefore that the doctrine of sovereign immunity generally applied in international law is that of restrictive immunity. There are no decisions of courts of this country and no legislation inconsistent with that doctrine and it should be incorporated as part of our law." See also *Ministry of Foreign Affairs v Michael Jenrich and Others* HH/232/15; *Phyllis Sibanda and Another v The International Committee of the Red Cross* HH/54/2002.

the Fick common law rule? Will South Africa find its pleas of foreign State immunity before foreign courts rejected on the basis of rules similar to South Africa's Fick common law rule? The Fick decision is a threat to foreign State's property and investments in South Africa. Using the decision as authority any person in possession of a judgment issued by an international court can register and enforce such order against the property of a foreign State in South Africa without the courts (i) enquiring into the nature of the substantive dispute, i.e. whether it is *acta jure imperii* or *acta jure gestionis*; (ii) distinguishing between, and applying the different rules applicable to, the exercise of adjudicatory and executory jurisdiction; and (iii) subjecting South Africa's laws (statutes and the common law) and treaties to interpretation.

## 5. Conclusion

Following the Fick case, South Africa's FSI Act - an often-cited example of state practice reflecting the restrictive State immunity doctrine - is now of questionable import. The Constitutional Court's decision and the manner at which it arrived at the same are concerning both for the law on State immunity in SADC as well as more broadly. At a 2014 speech given at the Singapore Academy of Law Lecture, Mogoeng CJ., made reference to the Fick case and stated that "[T]he Constitutional Court developed the common law on the enforcement of foreign judgments in line with our Constitution, to apply to orders of the Tribunal and *similar international courts*. This decision not only advanced the human rights agenda but it also challenged the Southern African region to honour its own human rights commitments as set out in its own instruments."[152] This restatement of the law in South Africa confirms that foreign States are not accorded immunity in the country – *for now* – over the registration and enforcement of judgments – including those concerning *acta jure imperii* - issued against the foreign State by an international court. More than a double-edged sword, the law can be a fickle mistress. The big question is this: How long will it take to put the genie back into the bottle?

[152] Mogoeng Mogoeng (2014) Twenty years of the South African Constitution – Origins, Aspirations and Delivery" Singapore Academy of Law Lecture 2014, at pp. 22, available at http://www.judiciary.org.za/doc/Twenty-years-of-the-South-African-Constitution_Origins-Aspirations-and-Delivery.pdf See also E. de Wet who concludes that it "…remains to be seen whether [South Africa's] courts will in future tend to treat all decisions of international courts and tribunals as foreign decisions for the purpose of enforcement, or whether they will find other creative ways for interpreting the common law in order to give domestic effect to decisions of international court." E. de Wet, *supra* note 57. It ought to be stated as well that the principles of "human rights, democracy and rule of law" much referred to by the Constitutional Court do not, without more enable the identification of legal and enforceable rights and interests or State's obligations. Real and substantial justice is dispensed through the application of relevant, certain, clear and applicable legal rules and frameworks, properly supported by authorities and reasoning. Anything less is not justice.

# 'The World Trade Organization Agreement on Agriculture and the Right to Food'

*Ahmed MOKARRAB**

**Introduction**

The World Trade Organization Agreement on Agriculture[1] (AOA/ the Agreement) was adopted to address the inequities in world agricultural markets.[2] The aim was to afford "a greater improvement of opportunities and terms of access for agricultural products of particular interest to [developing country] members."[3] With high expectations, the Agreement has been hailed as a tool to establish a fair and market-oriented agricultural trading system that advances food security in developing countries.[4]

These hopes and expectations have turned out to be unrealistic and the ideal of a "fair agricultural trading system" and "food security in developing countries" have remained illusory.[5] Two-thirds of the world's poor and food insecure people live in rural regions of developing countries and rely on agriculture for their immediate livelihoods and future prospects.[6] In 2014, about 795 million people of the 7.3 billion people in the world had suffered from chronic undernourishment. Almost all of those live in developing countries.[7]

Unlike in the developing countries, the Agreement permitted the major industrialized countries to enhance their protections for their agricultural industries, and to dump their excess produce on foreign markets at lower prices in a way that neglects the interests of the developing countries.[8] In addition, the Agreement has operated to hinder developing countries from initiating further measures toward food security promotion; and to increase food insecurity by exacerbating rural poverty and inequality.[9] In reality the

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[1] World Trade Agreement on Agriculture, 1867 U.N.T.S. 410, which entered into force on 1 January 1995.

[2] *Ibid.* preamble, para 2.

[3] *Ibid.* para. 3, 5.

[4] WTO, 'WTO Agriculture - Gateway', (2016) available at https://www.wto.org/english/tratop_e/agric_e/agric_e.htm (accessed 3 April 2016).

[5] C.G. Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries', 27 *COLUM. J. ENVTL. L.* (2002): pp. 433 – 460.

[6] FAO, 'The State Of Food And Agriculture 2005 – Agricultural Trade And Poverty: Can Trade Work For The Poor?' (2005) available at http://ftp://ftp.fao.org/docrep/fao/008/a0050e/a0050e_full.pdf (accessed 8 April 2016) 61.

[7] FAO, 'The State Of Food Insecurity In The World' (2015) available at http://www.fao.org/3/a-i4646e.pdf (accessed 8 April 2016).

[8] S. Joseph, *Blame It On The WTO? A Human Rights Critique,* Oxford University Press (2011), p.185

[9] C.G. Gonzalez, *supra* note 5,461.

Agreement appears in the eyes of the world's poor to be the tool by which the economic dominance of wealthy, industrialized countries is continued and maintained.[10]

My intention is to examine the validity of charges of unfairness and inequality directed at the WTO Agreement on Agriculture. This paper argues that the AOA systematically favours agricultural producers in Western countries at the expense of poor farmers in developing countries. The agreement prioritizes the interests of Western countries while ignoring food security interests of developing countries.

I will begin by highlighting the significance of the right to food and the requirement of food security. Secondly, I shall illustrate the inequalities introduced by the agreement between industrialized and developing countries, and its impact on food security in developing countries. Finally, I shall suggest that additional trade reforms are required to promote food security in developing countries and to ensure food access by all people at all times.

**1. The Right to Food and Requirement of Food Security:**

The right of every individual to have adequate food is an indispensable human right.[11] The right to food originates from the human right guarantee to an adequate standard of living.[12] The first reference to this right is located in the Universal Declaration of Human Rights (UDHR).[13] Article 25 provides that, "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food."[14] Similarly, Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (from now on ICESCR)[15] recognizes the right of all people to adequate food as an integral part of the right to an adequate standard of living.[16] Furthermore, the same Article in paragraph (2) stipulates that the right to be free from hunger is a component of the right to food.[17] For the realization of the right to food, States parties are required to take appropriate measures to ensure recognition of this right, improve methods of food production and distribution, and consider the food problems relating to import and export in order to ensure at the end, an equal distribution of food according to need.[18]

The Committee on Economic, Social and Cultural Rights (CESCR), has in its General Comment No (12)[19] illuminated the normative content of the right to adequate food. According to the Committee, the right to adequate food is realized when every person has continuous economic and physical access to adequate food or means for its

[10] J. Birovljev and B. Cetkovic, 'The Impact Of The WTO Agreement Agriculture On Food Security In Developing Countries', *European Association of Agricultural Economists* (2013) available at http://ageconsearch.umn.edu/bitstream/160372/2/03-Birovljev,%20Cetkovic%20-%20EAAE %20135 .pdf (accessed 28 March 2016).

[11] FAO, 'The Right to Food In Practice: Implementation At The National Level' (2006) 2 available at http://www.fao.org/3/a-ah189e.pdf (accessed 27 March 2016).

[12] I. Bantekas and L. Oette, *International Human Rights Law And Practice,* Cambridge University Press (2013), pp. 400.

[13] Universal Declaration of Human Rights, adopted by UN General Assembly10 December 1948.

[14] *Ibid.* Art. 25.

[15] International Covenant on Economic, Social and Cultural Rights, adopted by UN General Assembly, 16 December 1966, entered into force 23 March 1976.

[16] ICESCR, Art. 11.

[17] I. Bantekas and L. Oette, *supra* note 12, p. 401.

[18] ICESCR, Art. (11) para. (2).

[19] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.12: The Right to Adequate Food, 12 May 1999, E/C.12/1999/5.

procurement.[20] In other words, food should be available in a sufficient quantity and in appropriate quality to satisfy the dietary needs of individuals without financial or barriers for anyone to procure it. Also, food should be accessible in a sustainable way that does not interfere with the enjoyment of other human rights.[21]

Moreover, the right to food presupposes food security. According to the Committee, food security will be realized in the case of food accessibility for both present and future generations.[22] In addition, food security will exist "when all people, at all times, have physical, social and economic access to sufficient safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."[23] Food security, in WTO terms, requires principally the availability of imported food for net-food importing countries if world prices get higher and/or the supply of concessional food declines as a result of trade liberalization.[24] The enhancement of food security was one of the primary goals of the 1st Millennial Development Goals.[25] This goal could be achieved through eradicating extreme poverty and reducing the proportion of people who suffer from hunger.[26]

In addition to the general obligations imposed upon States to respect, protect, and fulfill the right to food,[27] the realization of the right to food also requires international co-operation between states.[28] The Committee affirmed that if a particular State lacks sufficient resources to protect its individuals from hunger; it must seek assistance from other States to "ensure the availability and accessibility of the necessary food".[29] Furthermore, the Committee in General Comment 12 also affirmed the important role of international co-operation for States to ensure the right to food and to food security. Accordingly, States should comply with their obligation to take joint and separate measures towards the full realization of the right to food. This also means that States should respect one another's obligation to ensure the right to food, and to protect that right, and to provide assistance to one another toward ensuring accessibility to food. Such obligation should be reflected in the international agreements that may have an impact on the right to food. Such agreements should affirm that the right to adequate food is given due attention.[30]

Although States are common parties to both the AOA and to the ICSECR, the notion of international co-operation, as illustrated previously in General Comment 12, was not reflected in the agreement's provisions. As will be mentioned later, Western countries sought only their State interest irrespective of the interests of their poorer cousins – the developing countries.

[20] *Ibid.* para 6.
[21] *Ibid.* para 8.
[22] *Ibid.* para 7.
[23] FAO, The state of food insecurity in the world. Rome: Food and Agriculture Organization of the United Nations (2002)..
[24] J. Birovljev, *supra* note 10, pp. 60.
[25]UN, 'Millennium Development Goals Report 2008' (2008) available at: http://www.un.org/millenniumgoals/2008highlevel/pdf/newsroom/mdg%20reports/MDG_Report_2008_ENGLISH.pdf accessed 8 April 2016.
[26] *Ibid.* 4.
[27] J. Birovljev and B. Cetkovic, *supra* note 10.
[28] General Comment 12, *supra* note 19, para17.
[29] *Ibid.*
[30] S. Joseph, *supra* note 8, pp. 182.

**2. The AOA as unequal agreement in favour of industrialized countries**

By the adoption of The AOA, WTO members, except least industrialized countries (LDCs) were required to make commitments in three specific areas, namely, market access, domestic support and subsidies for agricultural exports. The idea was to liberalize agricultural trade. These three 'pillars' were targeted for liberalization.[31] However, since coming into force, the AOA has demonstrated several weaknesses. The Agreement failed to take into consideration the essential differences between agricultural systems in developing and industrialised countries.[32] The examination of key provisions of the Agreement revealed that it was enacted to achieve the most possible benefits for industrialized countries. During the Uruguay Round, negotiations the EU and the US ensured protection of Western interests while developing countries' interests took a back seat concern.[33]

**2.1 The Uruguay Round Negotiations**

As a result of pressures from US and other Western states, agriculture has always been exempted from the GATT[34] rules applicable to industrial products and benefited from special arrangements which derogate from the rules within the GATT.[35] They declared food security a reason for the exceptional treatment of agriculture.[36] However, in reality, Western countries aimed at protecting their agricultural sectors from liberalization by maintaining their government support to agricultural goods, including domestic farm support and export subsidies.[37] For a long time, developing states continued to use numerous mechanisms to protect and support their agricultural sectors. Because of loan conditions imposed by the international financial institutions, including the IMF and the World Bank, developing countries were forced to reduce their protections or subsidies for their agricultural sector.[38]

This situation remained until the 1980s, when the US and the European Union discovered that the cost of protecting their agricultural sectors turned out to be

[31] D.E. McNiel, 'Furthering The Reforms Of Agricultural Policies In The Millennium Round', 9 *Minn. J. Global Trade* (2000): pp. 41-50. See also, A. Prema-Chandra, 'Asian Developing Countries and the Global Trading system for Agriculture: Uruguay Round Achievements and Post-Uruguay Round Issues' in J. A. McMahon (ed.), *Trade and Agriculture: Negotiating a New Agreement*?, Cameron May (2001), pp. 121, 127.

[32]Action AID, 'The WTO Agreement On Agriculture' (2005) 3 available at https://www.actionai d.org.uk /sites/default/files /doc_lib/51_1_agreement_agriculture.pdf (accessed 8 April 2016).

[33] S. Joseph, *supra* note 8, p.185.

[34] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 187.

[35] T. Reichert, 'Agricultural Trade Liberalization in Multilateral and Bilateral Trade Negotiations' in FIAN and others (eds), *The Global Food Challenge: Towards a Human Rights Approach to Trade and Investment Policies,* FIAN (2009), pp. 31. See also: C.P. Braga, 'Agricultural Negotiations: Recent Developments In The Doha Round' *World Bank* (2004); F. Jawara and A. Kwa, *Behind The Scenes At The WTO,* Zed Books, in association with Focus on the Global South (2003), pp. 26; J. J. Steinle, 'The Problem Child of World Trade: Reform School For Agriculture', 4 *Minnesota Journal of Global Trade* (1995): pp. 333-335.

[36] M. G. Desta, 'Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach', 35 *Journal of World Trade* (2001): pp. 449.

[37] S. Bilal, 'Agriculture in a Globalising World Economy' in S. Bilal and P. Pezaros (eds.)*, Negotiating the Future of Agricultural Policies; Agricultural Trade and the Millennium WTO Round* Wolters Kluwer (1st edn, 2000 ), pp. 1.

[38] S. Joseph, *supra* note 8, p.185.

expensive and was getting out of hand.[39] The growing costs for maintaining their agriculture protections led Western countries to adopt the idea of including agriculture formally in the GATT.[40] Accordingly, in the Uruguay Round, commitments were made to liberalize trade in agricultural and food products.[41] However, industrialized countries were keen to make sure that their benefits would not be affected by the new agreement irrespective of the interest of developing countries.

**2.2 Market access**

The first pillar of the AOA is about increasing market access. Accordingly, AOA member states were required to convert all non-tariff barriers on agricultural products to tariffs and to reduce them.[42] Developing countries had more relaxed schedules of reductions, and the LDCs were exempt from these cuts.[43] However, there were two major exceptions on the previous obligation. The first exception, according to Article (5) of the Agreement, was that Member States parties have the right to impose additional duties to protect them from sudden import surges in terms of volumes or low prices. The use of this special safeguard (SSG) provision would apply only to goods that were 'tariffed' prior to the AOA.[44] The second exception allowed states to retain existing import restrictions on specific individual products for non-trade reasons such as environmental protection, food safety, etc.[45]

The Agreement's impact on the ability of developing countries to obtain access to industrialized countries markets has been modest and often disappointing.[46]Their share of agricultural exports to industrialized countries has remained at 22.4% between 1990-1991 and 2000-2001.[47] While developing countries were obliged to open their markets for industrialized countries products, the markets of industrialized countries were not open for developing countries. Western countries appear to have manipulated the AOA's provisions to their advantage by maintaining high tariff rates on products produced by developing countries. In this way, industrialized countries appear to discriminate against products exported by developing countries.

During the tariffication process, industrialized countries set a particular tariff at a level higher than it should have been in order to enable them to implement tariff reduction commitments without suffering any real loss of protection for their domestic producers.

[39] J. Clapp, 'Developing Countries and The WTO Agriculture Negotiations', Cigionline.org (2006) 3 available at https://www.cigionline.org/publications/2006/3/developing-countries-and-wto-agriculture-negotiations (accessed 6 April 2016).
[40] *Ibid.* 4.
[41] S. Henson and R. Loader, 'Barriers To Agricultural Exports From Developing Countries: The Role Of Sanitary And Phytosanitary Requirements', 29 *World Development* (2001): pp. 85-102.
[42] AOA , *supra* note 1, Arts. 4 and 5 and Annex 5.
[43]C.G. Gonzalez, *supra* note 5 ,453. See also, N.S. Fieleke, 'The Uruguay Round Of Trade Negotiations', 1 *New England Economic Review* (1995): pp.7.
[44] C. Dommen, 'Raising Human Rights Concerns In The World Trade Organization Actors, Processes And Possible Strategies', 24 *Human Rights Quarterly* (2002): pp. 36.
[45] J. Birovljev, *supra* note 10, p.61.
[46] FAO, 'World Agriculture: Towards 2015/2030. Summary Report' (2002) available at http://www.fao.org/docrep/004/y3557e/y3557e07.htm (accessed 6 April 2016). See also, B. O'Connor, 'The Law Of International Trade In Agricultural Products. From GATT 1947 To The WTO Agreement On Agriculture', 6 *Journal of International Economic Law* (2003): pp. 535-537.
[47] M. Ataman Aksoy and J. C. Beghin, *Global Agricultural Trade And Developing Countries,* The World Bank (2005), pp. 22-23.

Accordingly, they escaped from the main objectives of the agreement by using what is called "Dirty Tariffication".[48] In addition, industrialized countries used another way to protect goods produced by their domestic processing industry known as "tariff escalation". Lower tariffs have been set on raw materials while higher tariffs have been set on processed agricultural products to protect domestic processing industries.[49] Essentially, tariff escalation was designed to discourage developing states from promoting their secondary agricultural industries and to disable them from "climbing the ladder of development."[50] Furthermore, Western countries maintain high tariffs (tariff peak) on goods they themselves produce to ensure protection for their domestic products while keeping low or reduced tariffs on products that they themselves do not produce (less sensitive products).[51]

The impact on developing countries of the previous manipulation exercised by industrialized countries was that their markets remained closed for developing country producers. However, developing countries' markets opened up through reduced tariffs, consistent with their commitments as stipulated under the AOA. Therefore, many developing countries suffered from import surges, flooding their domestic markets with cheap products from industrialized countries.[52] Unfortunately, the agreement did not provide developing countries with sufficient tools to protect from import surges made by industrialized countries. The implementations of the special safeguard clause provided by article (5) are only applicable to goods that were 'tariffed' prior to the AOA. Only 22 developing countries had non-tariff barriers that enabled them to qualify. Only 31.8% of the SSG products are available to developing countries as against 68.2 % to industrialized countries.[53] Thus, industrialized countries appeared to abuse these safeguards to impose more restrictions on access to their own markets.[54]

**2.3 Domestic Support**

One of the principal objectives of the Agreement was to reduce domestic governmental subsidies in the agricultural sector because of the perception that domestic support subsidies distort trade and production.[55] Accordingly, the AOA imposes an obligation upon its Member States parties to reduce their domestic support subsidies with different percentages for both industrialized and developing states. In addition, no Member State party can introduce new types of domestic support other than those programs that have already existed since 1986–1988.

[48] I. Sturgess, 'The Liberalisation Process in International Agricultural Trade: market Access and Export Subsidies' in S. Bilal and P. Pezaros (eds.), *Negotiating the Future of Agricultural Policies; Agricultural Trade and the Millennium WTO Round* , p. 148 – 149 . See also, Action AID, 'The WTO Agreement On Agriculture' (2005) 6 available at https://www.actionaid. org.uk/sites/default/ files/doc_lib/51_1_agreement_agriculture.pdf (accessed 6 April 2016).

[49] B. O'Connor, 'Dispute Settlement In International Trade, Investment And Intellectual Property' (the United Nations Conference on Trade and Development (UNCTAD) 2003) 6 available at http://unctad.org/en/docs/edmmisc232add32_en.pdf (accessed 6 April 2016). See also, J. Hunter, 'Broken Promises: Agriculture And Development In The WTO', 4 *Melbourne International Law Journal* (2003): pp. 299, 311.

[50] O. De Schutter, 'International Trade in Agriculture and the Right to Food' (Friedrich Elbert Stiftung 2009) 11 available at http://library. fes.de/pdf-files/bueros/genf/06819.pdf (accessed 6 April 2016).

[51] B. O'Connor, *supra* note 49, p. 7.

[52] J. Clapp, *supra* note 39, p. 7.

[53] Action AID, *supra* note 35, p.6.

[54] I. Sturgess, *supra* note 48, 150.

[55] The AOA, *supra* note 1, Art. 6.

The Agreement distinguished between support programs that directly stimulated production and those which did not have the same direct effects. Domestic support programs, known as Amber Box,[56] that have direct effects on agricultural products' production and trade should be reduced. Meanwhile, other support programs such as, crop insurance programs, income safety-net programs and payments under environmental programs, known as Green Box, have minimal impact on trade and exempt from the reduction.[57] Another exception was the exclusion of Blue Box subsidies from the domestic support reduction commitment. Blue Box referred to payments directly related to acreage or animal numbers, but under arrangements which also limit production by imposing production quotas or asking farmers to set aside part of their land.[58]

The AOA rules in the context of domestic support exacerbated the trade injustice between developing and industrialized countries.[59] Although it was supposed that domestic subsidies would be dramatically reduced, industrialized countries' domestic subsidies increased since the mid-1980s, as a result of the exceptions provided by the Agreement.[60] The classification of a different kind of domestic support into different boxes was for the benefit of the industrialized countries to offset the impact of reductions in Amber Box subsidies. Thus, Green and Blue Box subsidies were introduced to be another alternative for support subsidies for their farmers. The majority of industrialized countries shifted their subsidies into the Green and Blue Boxes to save them from being reduced.[61]

Unlike major industrialized countries, developing States were not allowed such exceptional subsidies as the only domestic subsidy provided by the majority of developing countries before the period 1986–1990 was the Amber Box support. This meant that, according to the Agreement, they were not allowed to adopt the program which has been previously adopted by industrialized countries.[62] Accordingly, developing countries were obliged to reduce their domestic support for their agricultural goods and trade while industrialized countries maintained their support for goods, resulting in unfair competition. The implementation of the Agreement enabled industrialized countries to avoid domestic subsidy reduction commitments without assigning significant benefits to developing countries.[63]

[56] *Ibid.* Annex 2.
[57] C.G. Gonzalez, *supra* note 5, p. 466.
[58] B. Ogolla et el, 'International Biodiversity And The World Trade Organization: Relationship And Potential For Mutual Supportiveness ', 4 *Environmental Policy and Law* (2003) 117-121.
[59] J. Birovljev, *supra* note10, p. 62 .See also C. Dommen, *supra* note 44, p. 35.
[60] D. Diakosavvas, 'The Uruguay Round Agreement On Agriculture In Practice: How Open Are The OECD Markets? ', *Agriculture and the New Trade Agenda Creating a Global Trading Environment for Development,* Cambridge University Press (1st edn, 2004), pp. 37-73.
[61] FAO, 'WTO Agreement On Agriculture: The Implementation Experience: Developing Country Case Studies' (2003) available at http://www.fao.org/docrep/005/y4632e/y4632e04.htm#bm04 (accessed 6 April 2016).
[62] O. de Schutte, 'Report Of The Special Rapporteur On The Right To Food, Mission To The World Trade Organization' UN Human Rights Council (2008) UN Doc. A/HRC/10/5/Add.2, para. 11 available at http://www.refworld.org/docid/49abb71d2.htm (accessed 6 April 2016).
[63] J. Birovljev, *supra* note10, p. 65.

**2.4 Export Subsidies**

The Agreement imposed an obligation upon developing and industrialized countries to reduce existing export subsidies by a specified percentage over the Agreement's implementation period and prohibited the introduction of new subsidies after the period of 1986-1988.[64] The non-prohibition of all export subsidies has been criticized because of its contradictions with the objective of promoting trade liberalization in the agricultural sector. It has also been argued that such an obligation merely results in permissible levels of market distortion.[65]

Prior to the implementation of the Agreement, developing countries, unlike industrialized countries, were not familiar with export subsidies. Thus, by prohibiting the adoption of new export subsidies, the Agreement confirmed the unfair competitive advantage held by industrialized countries. While industrialized countries were allowed to maintain their export subsidies for agricultural sector, developing countries have been deprived of a significant tool that may be used to increase export revenues and afford employment opportunities in the agricultural sector. Only 25 countries out of 135 countries have the right to subsidize agricultural exports.[66]

**3. The AOA's Influence on the Realization of the Right to Food and Food Security**

As previously argued, the Agreement appeared to prioritize the interests of industrialized countries while those of developing countries were set aside. The AOA appears to be strikingly unbalanced and appears to work steadily against developing countries and the world's poor.[67] The AOA's influence on developing countries potential to realize the right to food security can be summarized in two distinct ways. First, the Agreement exacerbates rural poverty and inequality by entrenching food insecurity. Second, the Agreement undermines the ability of developing countries to initiate measures to promote food security.[68]

Developing countries' access to markets of industrialized countries remains unattainable because of the high tariff protection maintained by industrialized countries. High tariffs, especially on agriculturally based goods, penalize investors in developing countries who seek to promote the agricultural sector. At the same time, the inaccessibility of developing countries' agricultural products into industrialized countries markets reduces the export revenues that could be utilized by developing countries' governments to promote food security

Furthermore, developing countries potential to fulfil their obligation to reduce tariffs on imported goods results in an additional reduction of the revenues that could have been used to finance food researches, modern cultivation, irrigation projects and other projects required to increase food production.[69] Such low tariffs in developing countries

[64] The AOA, *supra* note 1, Art. 9.
[65] D. E. Hathaway and M. D. Ingco, 'Agricultural Liberalization And The Uruguay Round', *The Uruguay Round and the Developing Economies,* (The World Bank 1995), pp. 19.
[66] C. Stevens, *The WTO Agreement On Agriculture And Food Security* (Commonwealth Secretariat 2000), pp. 48.
[67] I.A.W Mohamed, 'Review Of Relationships Between Trade Liberalization And Poverty In Developing Countries,' 3 *Journal of Development Economics* (2011): pp. 1-10.
[68] C.G. Gonzalez, *supra* note 5, p. 466.
[69] C.G. Gonzalez, *supra* note 5, p. 471 – 472

disabled them from providing domestic protection for poor farmers from unfair competition from subsidized industrialized country farmers.[70]

In addition to the aforementioned defects, developing countries' obligations to reduce existing domestic support coupled with the prohibition of any new support for agricultural sector restricted investments impedes and undercuts developing countries' potential to ensure the right to food and food security.[71] Furthermore, restrictions on domestic support decrease the ability of developing countries to achieve food security by preventing the support required to enhance the productive capacity of and economic opportunities for, small-scale farmers.[72] Moreover, unlike industrialized countries, the Agreement deprived developing countries from making use of export subsidies which ensure the unfair competitive advantage of industrialized country producers. Consequently, developing countries were deprived of an additional important tool of agricultural policy that could be used to increase export revenues and create employment opportunities in the agricultural sector.

Also, the availability of low-priced imported food products encouraged imported food dependence and decreased food production, thereby undermining food security in developing States. Many African countries turn out to be net food importers, while up until 1970s they were net food exporters. The greatest danger is that those countries do not have sustainable funds to depend on food imports. It is obvious that this will dramatically affect the human right guarantee to right to food and food security in developing countries.[73]

Finally, it is obvious that the unfair, bias and unequal provisions of the AOA have a negative impact on the agricultural sector and trade in developing countries. Accordingly, the realization of the right to food and the maintenance of food security in developing countries has been severely undermined by the implementation of the AOA.

## 4. Conclusion

This essay critically examined the validity of charges of unfairness and inequality directed at the WTO AOA. It argued that the AOA appears to systematically favour agricultural producers in Western countries at the expense of poor farmers in developing countries. The Agreement appears to prioritize the interests of the Western countries while ignoring food security interests of developing countries.

This essay illustrated the inequality established under the Agreement between industrialized and developing countries, and the potential impact of that on the realization of the right to food and food security in developing countries. It showed that the high level of protection available for industrialized countries' products, coupled with domestic support and export subsidies combine to hinder developing countries from realizing any comparative advantages in agriculture. As alternatives are often lacking, this

[70] J. von Braun, 'Making Agricultural Trade Liberalization Work ForThe Poor' available at https://www.wto.org/english/tratop.../symp04_paper_von_braun_e.doc (accessed 7 April 2016).
[71] S. Joseph, *supra* note 8, p.190
[72] O. De Schutter, *The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First In The International Trade System*, The World Trade Organization (2011).
[73] D.E. Hathaway and M.D. Ingco, *supra* note 65, p.15.

locks them into poverty, with serious repercussions for the degree with which notably the right to food and food security can be realized.[74]

Perhaps developing countries should seek additional reforms for the Agreement to protect their interests. The required reforms should promote food security in developing countries to ensure access by all people at all times to sufficient, safe and nutritious food. All trade barriers in agriculture should be reduced. Industrialized countries should decrease subsidies offered to their farmers. Also, industrialized countries should enhance market access for agricultural products from developing countries. At the same time, there should be a mechanism within the AOA that would enable developing countries to adjust their tariff levels according to the level of production and trade distorting subsidies in the exporting country. The Agreement should be redeveloped to ensure cooperation between industrialized and developing countries to enhance a fair market-oriented agricultural trading system. The enjoyment of the right to food and the abolition of hunger should be the real aim of any further reforms to the Agreement instead of continual focus on industrialized countries' private commercial interests.

[74] K. Mechlem, 'Harmonizing Trade In Agriculture And Human Rights: Options For The Integration Of The Right To Food Into The Agreement On Agriculture' in A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law,* Koninklijke Brill (2006), pp.127-190 at p.140.