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BOOK REVIEW:

Courts in Africa and the Right to a Fair Trial under International Human Right Law

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Increasing recognition of customary law brings with it a need for development of functional interfaces between customary and positive legal regimes.[1]

1. Introduction

Customary courts in Africa also colloquially known as local courts, primary courts or native courts has been in existence since time immemorial. Customary courts in Africa[2] or Native courts as they have become to be popularly known can be understood in both the simplest and complicated forms. In its simplest form it is defined as a court established as part of the traditional justice system.[3] Following the complex form, it can be understood to mean 'a body, which in a particular locality, is recognised as having the powers to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition'.[4]

The advent of colonialism resulted in legal pluralism, which meant the settler's legal systems were applied side-by-side with indigenous customary laws.[5] Although at first customary law had been deemed as barbaric, western colonizers later accepted it. For instance the theory of indirect rule revealed that the British colonial ideology recognized native courts as part of the official court system. Customary courts were part of a larger administrative strategy of indirect rule. As the implementation of custom was largely left in the hands of traditional authorities in native courts, British officials had little control over intra-African legal matters. Indigenous law was subject to the repugnancy clause which provided that native law and custom were to be applied only as far as they did not overstep the boundaries of civilized law, but intervention in native justice was infrequent.

Similarly, despite the initial assimilation policy in French colonies in Africa the bulk of the population remained under pre-colonial forms of justice set up two different hierarchies of courts: French courts applying French law to French citizens, and a hierarchy of native courts applying customary law to native subjects unless they were not contrary to the principles of French civilization and public order. Basically, all African countries had this experience of legal dualism or more appropriately legal pluralism..[6] This necessitated the continuance of African traditional courts as arbiters for customary law in many African states.

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[1] Brendan Tobin, Indigenous Peoples Customary Law and Human Rights Why Living Law Matters, Routledges 2014 61.

[2] We refer to customary courts in Africa to illustrate that there are a viriety of courts on the continent additionally, to avoid implying that there is a distinction between customary courts in Africa and customary courts elsewhere.

[3] See The South African Traditional Courts Act s.1

[4] See section 1 of the Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa (2003) DOC/OS/(XXX)247 of 2003, reproduced in Murray R and Evans M (eds.) Documents of the African Commission on Human and Peoples' Rights vol II 1999-2007, Hart Publishing. 381.

[5] Fremont offers a succinct explanation that in many cases colonial authorities chose to impose public law while allowing for traditional private law to survive, leaving intact the fundamental sphere of social community life.He observed further that in other cases, colonial authorities have squarely refused to recognise and allow for traditional rules to subsist (such as allowing marriage for children or polygamy) as against public order. According to him, colonial authorities would let traditional laws survive on condition they did not violate rules of natural justice or public decency according to colonial authorities. Jacques Fremont 'Legal Pluralism, Customary Law and Human Rights in Francophone African Countries' (2009) 40 Victoria University of Wellington Law Review 153.

[6] See in particular Hinz, M.O. 2009. 'Traditional governance and African customary law: Comparative observations from a Namibian perspective', in N. Horn & A. Bosi (eds), Human Rights and the Rule of Law in Namibia. Windhoek: McMillan Namibia pp.61-63.

In the present day, customary courts continue to play a significant role in the lives of large segments of the population partly because of the subject matter areas they govern such as cases of family law, property law, and traditional authority. These are matters that impact greatly on the daily lives of many African societies. Moreover, in modern times, access to courts is recognized as a fundamental human right in a number of human rights instruments.[7] However, for the indigent and illiterate, the right of access to the courts will remain illusory due to the exobitant legal costs, confusing and rigid procedures associated with the formal courts.[8] To soothe this situation, recourse has been made via the creation of customary courts. Again, given the number of conflicts in Africa, there has been a proliferation of attempts to adapt and institutionalize customary courts as part of the international criminal justice system to address contemporary post conflict issues such as the case of Rwanda[9], and Uganda to mention a few.

There are serious concerns, however, that customary courts violate international human rights norms in the administration of justice particularly with reference to the right to a fair trial.[10] It is against this background that this article seeks to critically analyse the normative space of these courts within the context of international and regional human rights law principles that guarantee the right to equality, fair trial before courts and tribunals. The main purpose of this paper is to examine whether, customary courts should be judged on the basis of international human rights norms or be treated as courts *sui generis* in dispensing their roles even under international mandate

At this juncture, it is important to define some key terms that are useful for the purposes of this article. Customary law has been often defined as:

> [a]n established system of immemorial rules [...] evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his councillors, their sons and their sons' sons until forgotten, or until they became part of the immemorial rules.[11]
>
> Define the two terms living and official customary law.

According to Griffiths Legal pluralism can be loosely defined as a situation,

> Today, 'pluralism' can refer to; (1) the way the state acknowledges diverse social fields within society and represents itself ideologically and organisationally in relation to them; (2) the internal diversity of state administration, the multiple directions in which its official subparts struggle and compare for legal authority; (3) the ways in which the state itself competes with each other states in larger arenas, (the EU, for one instance) and the world beyond that (4) the way in which the state is interdigitated (internally and externally) with non governmentally semi autonomous social fields which generate their own (non legal) obligatory norms to which they can induce or coerce compliance; (5) the ways in which law may depend on the collaboration of non state social fields for its implementation and so on.[12]

Having defined key terms, it is important to bring the main limitations of this article. Customary courts in Africa are by no means homogenous.. There are always some differences from one community to

[7] Most notably in The Universal Declaration of Human Rights Articles 7 and 8; *International Covenant on Civil and Political Rights* (ICCRP) Article 2

[8] Dana Kaersvang 'Courts in South Africa: Legal Access for the Poor' (2008) 15 Journal of the International Institute 4, 9.

[9] See the Organic Law No.16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1st, 1990 and December 31, 1994

[10] See in general David S Koyana 'Customary law and the role of customary law courts today' (1997) Consltus 126-128.

[11] JC. Bekker (Ed.) 'Seymour's Customary Law in Southern Africa' (1989). 11. Compare this with Gordon, Woodman 10 A customary law may be defined as a normative order observed by a population, having been formed by regular social behaviour and the development of an accompanying sense of obligation. A normative order is a body of international norms, or of rules and principles. It has been argued that customary law in Africa, at least those which existed in the past should not be seen as bodies of norms, because "rules per se had no particular value for African societies" in the period before colonization.

[12] Sally F Moore, Certainities Undone: Fifty Turbalent Years of Legal Anthropology 1949-1999 p107.

the other.. This article does not attempt to address the conflict between customary courts in Africa with human rights it is only limited to the right to a fair trial. The remainder of this article will proceed as follows. (I think this must form part of the Introduction) Section B deals with the main characteristics of the customary courts, section C lays the normative framework of the right to a fair trial under international human rights law. Section D deals with the positive law challenges to customary courts consider the question of sources of law, including secondary rules of recognition; dynamism of social values under cultural change dynamo. Section E dwells on the tension between customary courts and the norms of fair trial as envisaged in the international human rights instruments. Section F deals with the conclusion.

2. Some Characteristics of Customary courts in Africa

It is widely understood that customs vary from place to place, and from one ethnic group to another, concomitantly characteristics of customary courts also vary between places and ethnic groups in Africa. What this suggests is that there is no homogenous body of customary law but rather different systems for different tribes. Madnani points out that; "There was not a single customary law to govern all tribes defined as one radicalized group – natives. Instead, each tribe was ruled under a separate set of laws, called customary laws."[13] However, there are common salient features, which distinguish customary courts in Africa from regular courts as shall be seen below.

2.1. Conceptual basis

The basic concept of customary courts in Africa has been the subject of much analysis by scholars studying African jurisprudence. According to Owor, African traditional court system operates within an inter-connected web of kinship, law, religion and culture, which is based on the African philosophy of humanism called *Ubuntu*.[14] She further explains that the concept of *Ubuntu* is expressed in the rule of reconciliation that seeks to restore harmony in the society through principles related to the concepts of group rights and natural justice.[15] She further explains that, the entire clan took part in the administration of justice through a communitarian notion of human rights.[16]

Another scholar Matavire explains that under the African principle of personhood,

> 'It is the community which defines an individual as a person, and the same community defines traditional values and ethics that are to be upheld by the members of the customary community. Any violation of these ethical values is an offence to the whole community and is punishable.'[17]

According to Matavire, when a matter arises it is viewed as that of the whole community or group. Therefore, the major conceptual basis of customary courts, is premised on strong communitarian character. The main goal is the search for truth, reconciliation, compensation, and retribution contrary to the procedural justice, retribution, incarceration, and revenge that form the basis of the European

[13] Mahmood Mamdani, Making Sense of Political Violence in Post Colonial Africa, in Reclaiming the Human Sciences and Humnities Through African Perspectives,,vol 1 Helen Leuer and Kofi Anyidoho eds. Ghana, Acraa, 2012, Sub-Saharan, 181-199, 188.

[14] S v Makwenyane and Another 1995 (3) SA 391 (CC), where the constitutional court described ubuntu/botho as the source of communal tradition. The court also considered it important to recognize African values. One such value was the value of ubuntu.

[15] Maureen Owor 'Creating an Independent Traditional Court: A study of Jopadhola Clan Courts in Uganda' (2012) 56 Journal of African Law 215, 222.

[16] ibid 222.

[17] Monica Matavire 'Interrogating the Zimbabwean Traditional Jurisprudence and the position of Women in Conflict Resolution. A Case of the Shona Tribes in Muzarabani District' (2012) 2 International Journal of Humanities and Social Science 219.

justice administration system.[18] This was necessary and influenced by the natives need for continued close social and economic cooperation for their survival. [19]

Consequently, customary courts in Africa feature a high degree of public participation with every adult member of the community free to participate in its proceedings such as by taking part in the cross examination of the accused or witnesses.[20] The process is voluntary and the decision is based on consensus, for example the *Ibo* village assembly in eastern Nigeria, Eritrean village assembly *bayto*, of the Təgrəññа speaking areas of Eritrea and Təgray (Northern Ethiopia), *gadaa* (age-set) system of Ethiopia's and partially Kenian Oromo societies; *kiama* (council of elders) of the Kikuyu in Kenya and are among popular examples where decisions are made in a consensual manner before some clan courts.[21]

2.2. Composition

Customary courts in Africa are commonly composed of the traditional leader, normally the chief or the headman who is an arbitrator appointed from within the community normally on the basis of status or lineage.[22] In traditional patriarchal societies women could not succeed to chieftainship and **were** unable to preside over traditional courts. However, some evidence suggests that there is a shift in paradigm and this practice is now changing. For instance, in South Africa[23], Zimbabwe, Ghana, Uganda, and Namibia women can be appointed as tribal chiefs or headman. In urban or peri-urban areas where there are no traditional chiefs or headman, community courts can possibly be established through a commitee of elected members by the residents of a particular village or urban locality with the mandate to adjudicate over disputes.[24]

The presiding chief or headman is customarily accompanied by a group of councilors or advisors who are appointed mainly because of seniority and on other basis such as intelligence, knowledge of the customs and eloquence of speech or any other personal credentials such as integrity and good sense of judgment.[25] The final judgment rests exclusively with the head of the community who also holds executive and legislative power.[26] However, as already explained, all the members of the community are allowed to participate in the process.[27] Is it not possible that in many communities' adults have various degrees of status, and some categories of persons may not speak in public. For example, in most traditions a young man may not be able to speak if his father is present such as among the Shona tribes in Zimbabwe. Moreover, there are many instances where adult women are not allowed to speak in public gatherings. However, this is also changing and in some courts equal gender representation at the traditional courts is guaranteed.

[18] Reinauer T, Traditional Courts in South Africa As tumbling block on the road towards a modern constitutional state? (Konrad-Adenauer-Stiftung, June 2012) at 2 available at <http://www.kas.de/wf/doc/kas_31491-1522-2-30.pdf?120702103719> last viewed 18 September 2013.

[19] Penal Reform International Report, *Access to justice in sub Saharan Africa: The role of traditional and Informal justic systems.* (2000), Astron Printers 9.

[20] Reinauer (n 18) 2.

[21] Economic Commission for Africa, Relevance of African Institutions of Governance (june 2007) at 3 available at <repository.uneca.org/bitstream/handle/10855/3086/bib.%2025702_1.pdf> (last accessed 10 October 2013).

[22] The difficulty here is that there are many ethnic groups in Africa which do not have the institution of chieftaincy – the acephalous societies. The colonisers did not like this, and the British went around demanding that every community appoint a chief, but this was not in accordance with the customary laws in many communities.

[23] See the case of *Shibulana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC).

[24] South Africa Law Commission *The Hamonisation of the Common Law and Indegenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (SALC No 82, 1999) 16.

[25] Matavire (n 17) 221.

[26] Reinauer (n18) .

[27] Source pg 1 Lucrecia Seafield, South Africa: The Interdependence of All Human Rights, in Human Rights Under African Constitutions- Realizing the Promise for ourselves, Lucrecia Seafield Abdullai Ahmed An-Na'im (Ed) 330.

2.3. Powers

In general the mandate of traditional courts is limited in relation to personal jurisdiction, subject matter, the law or other normative regulations applicable, and the type of remedies they can pass. During colonial times the personal jurisdiction of traditional courts was premised on ethnicity. Hitherto, traditional courts could only exercise their jurisdiction on issues where the parties were the indigenous people. However, as the South Africa Law Committee (SALC) correctly noted that the personal jurisdiction of customary courts is no longer be based on race or color but on such factors as residence, proximity, nature of transaction or subject matter and the law applicable.[28]

For instance, if the nature of the case falls under customary law and other facts sway in favour of customary law, then the matter should be addressed by the traditional court, regardless of the race of the parties.[29] A classic example of the application of customary law even under circumstances where the parties are not in agreement on its jurisdiction is the Zimbabwean case of *Lopez v Nxumalo.*[30] In this case for seduction damages by a black Zimbabwean against a white Portuguese man the Supreme Court imposed jurisdiction of traditional courts after weighing up all the facts surrounding the case that it was 'just and proper' for the case to be adjudicated before a traditional court.

This is in tandem with their objectives to restore harmony and facilitate reconciliation in the society. The subject matter jurisdiction of African tradtional courts in many countries is also limited when it comes to issues of status of women and youths. For example, in Zimbabwe, traditional courts are excluded from adjudicating matters where women are likely to be prejudiced by patriarchal attitude of the male dominated traditional courts on issues such as maintenance, custody or guardianship of minor children, dissolution of marriage and interpretation, validity and effect of wills.[31]

Again, in most countries traditional courts do not have the mandate to deal with criminal issues (Zimbabwe[32] and Uganda[33]) and in other states they deal with minor crimes (Botswana[34] and Swaziland[35]) in some countries they have jurisdiction over offences that are known to customary law (Namibia[36]). However, the distinction between civil and criminal matters is irrelevant under customary law 'since customary law does not distinguish between civil matters and penal matters.'[37] Finally, another important limitation in terms of their jurisdiction is that traditional courts in Africa normally award orders for compensation and restitution only. They do not have the mandate to order for retribution or the award of deterrent damages as in common law courts.[38]

2.4 Effectiveness

The effectiveness of customary courts in Africa can be attributed to a series of factors. Amongst others, simplicity and informality, as Koyana observed, 'the simplicity of the procedure they follow, the

[28] SALC (n24) 22.

[29] SALC (n24) 22.

[30] SC-115-85.

[31] Customary Law and Local Courts Act (Cap. 7:05), Section 16 (1) (b).

[32] Ibid.

[33] Resistance Committee (Judicial Powers) Statute, No 1 of 1988.

[34] Chapter 04:05 Laws of Botswana (Customary Courts) sections 11&17.

[35] Swazi Courts Act No 80 of 1950. Section 12.

[36] Traditional Authorities Act, No 17 of 1995. Section 10(3).

[37] Jean Salem Israel and Marcel Kapya Kabesa Handling Guilty under Customary Law-Concept and Basis < http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2010/07/Handling-Guilt-Under-Customary-Law-Concept-and-Basis-Jean-Salem-Israel-Marcel-Kapya-Kabesal.pdf> accessed on 15 October 2013.

[38] Ibid 3.

absence of interpretation, the absence of anything like "a trial within a trial", and the facts that postponements are surprisingly infrequent as compared to magistrates courts, are all factors which contribute to these courts being preferred by many in the rural areas.'[39] Moreover, many litigants approach these courts because they are familiar to customary law and the proceedings are conducted in local dialects. Further, traditional courts are almost free of charge thus making them affordable and accessible. In South Sudan, for instance, one source found that African traditional courts provide the only practicable and affordable method of resolving conflicts amongst the rural population located far away from the modern court systems.[40]

Further, a study by the Institute for Security Studies (ISS) in three African states reveals that people prefer greater access, speed and familiarity of law and processes rooted in their own culture and traditions.[41] This corroborates Fremont findings that unsurprisingly, many African populations especially from a rural society remain on a day-to-day basis under their traditions' direct influences and are somehow resistant to the rules and approaches of modern law.[42]

Finally, it should be mentioned that, enforcement of customary courts decisions varies from state to state. However, in general customary courts in Africa decisions were enforced by sanctions against parties. Despite absence of prisons or police forces, and fines may have been rare, but the force of public opinion could be overwhelming. If an entire community ostracized an individual member, their daily life would become impossible. As one author noted, customary law does not need a strong individual or institution for its enforcement rather it is respected because each individual recognise the benefits of abiding by the law, only laws that are made from the top by the minority need strong enforcement mechanisms.[43] Thus public consensus adds to the effectiveness of African traditional courts by facilitating enforcement of decisions secured through social pressure because disobeying a final ruling is tantamount to disobeying the entire community and may attract social isolation.[44]

3. Normative framework of a fair trial

International human rights law provides the normative framework for the right to equality before the courts and tribunals and to a fair trial. The key legal text on fair trial is article 14 of the International Covenant on Civil and Political Rights (ICCPR).[45] According to the UN Human Rights Committee (HRC), General Comment No. 32, on the right to equality before the courts and tribunals and to a fair trial, article 14 is a particularly complex nature, combining various guarantees with different scopes of application.[46] The right to a fair trial refers to regimes in which has at a minimum some or all of the following characteristics are present: (a) the right to be heard by a competent, (b) independent and impartial tribunal (c) the right to a public hearing (d) the right to be heard within a reasonable time (e) the right to counsel and (f) the right to interpretation.

Essentially, for this article, the HRC 'recognises the existence of legal plurality insofar as it holds that article 14 of the ICCPR which protects the right to fair trial applies "where a State, in its legal order, recognises courts based on customary law, or religious courts to carry out or entrust them with judicial

[39] D.S Koyana, 'Customry Law and the Role of Customary Courts Today', *Conslutus* November 1997, (126-128 at 127.

[40] Tierman Mennen 'Legal Pluralism in Southern Sudan: Can the Rest of Africa Show the Way?' (2007) 3 Africa Policy Journal 49.

[41] ibid 3.

[42] Jacques Fremont, 'Legal Pluralism, Customary Law and Human Rights in Francophone African Countries', Victoria University of Wellington Law Review 40 (2009) 1,149-166 at 150.

[43] B Benson 'The Enterprise of Law: Justice without the state' (1990) Pacific Research Institute 12-15.

[44] Penal Reform International Report (n 19) 26 and 33.

[45] GA res 2200A (XXI), 21 UN GOAR supp (no 16) at 52:UN doc A/6316 (1996).

[46] In fact article 14 is fourfold, para 1. In the first part set out a general guarantee of equality before courts and applies regardless of the nature of proceeding s before such bodies, b. entitles individuals to a fair and public hearing by an independent and impartial tribunal established by law. Para 2-5 procedural guarantees available to a person charged with a criminal offence. Para 6 compensation in cases of justice miscarriage. Para 7 prohibits double jeopardy. See Human Rights Committee, General Comment No. 32.

tasks".'[47] The HRC further highlights certain significant standards and requirements, which should be observed by traditional courts before their judgments can be considered binding by the state, as follows:

> *I. Proceedings before such courts are limited to minor civil and criminal matters;*
> *ii. Proceedings meet the basic requirements of fair trial and other relevant guarantees of the Covenant;*
> *iii. The guarantee under Article 14(1) "is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; and*
> *iv. The judgements of such courts are "validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of Article 14 of the Covenant".*[48]

Similarly, in the context of the African human rights jurisprudence the right to equality before the courts and tribunals and to a fair trial is provided for under article 7 of the African Charter of Human and Peoples Rights (the Charter). [49] Article 7 of the Charter is further, articulated in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the Guidelines) which specifically enumerates the areas in which traditional courts, 'where they exist, are required to respect international standards on the right to a fair trial.'[50] Section Q of the Guidelines is multifaceted; paragraph (b) (1)-(12) is a list of the minimum requirements on the general right to equality before traditional courts and paragraph (c) specific requirements for the independence of courts. Paragraph (d) deals with impartiality and finally paragraph (e) lays the procedural guarantees security and tenure of employment to members of traditional courts. From both legal regimes, international and regional, the right to equality before the courts and tribunals and to a fair trial touches a plethora of separate and distinct aspects. This forms the subject matter of the next section of this article.[51]

4. Positive Law Challenges to Customary Courts in Africa

Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. The English jurist John Austin (1790-1859) formulated it thus: "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." [52] What then is distinctive of societies with legal systems and, within those societies, of their law? Before exploring some positivist challenges law to customary law in Africa, it bears emphasizing that these are not the only questions worth asking. As Green noted, 'While an understanding of the nature of law requires an account of what makes law distinctive, it also requires an understanding of what it has *in common* with other forms of social control.'[53]

From the foregoing discussion on characteristics of customary courts one can begin to notice that there is a fundamental difference between the kinds of legal rules that come up in customary law as applied by customary courts in Africa, and the sorts of legal rules that are part of common law courts on the other. The rules of common law seem to define standards of conduct; they are about what you can and cannot do, or more precisely, rules that forbid certain conduct and then attach punishments for

[47]International Council on Human Rights Policy *When Legal Worlds Overlap Human Rights, State and Non-State Law*

[48] Ibid p29 and 30

[49] OAU doc CAB/LEG/67/3/Rev.5 (1981), came into force on 21 October 1986

[50] DOC/OS /(XXX)247 of 2003, reproduced in R Murray and M Evans (eds) Documents of the African Commission on Human and Peoples Right (vol II 1999) 2007, 2009, Hart Publishing) 381.

[51] Ibid Section Q.

[52] Austin, John (1832). *The Province of Jurisprudence Determined* W.E. Rumble (Ed.) (Cambridge University Press)1995 157.

[53] Green, Leslie, "Legal Positivism", *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/fall2009/entries/legal-positivism/> accessed on 23 September 2017.

disobedience. The rules of customary law are different. It's true that certain customary remedies do provide sanctions for breaches, but most of customary law is about making harmonization. Succinctly put, in common law, the state makes up the rules of conduct where as in customary law, the community creates its own rules of conduct.

Despite or because of its popularity, the 'increasing recognition of customary law brings with it a need for development of functional interfaces between customary and positive legal regimes.'[54] At this jancture it is interesting to note what legal theorists have to say about the relationship. H.L.A. Hart, who at first made a distinction of the rules of tort and criminal law as "primary rules," and the rules of contract law as "secondary rules", advanced one of the most important views of this interface.[55] Hart advocates that, primary rules are rules that govern conduct, and secondary rules are rules that do not. Thus, the distinction between primary and secondary rules is just a bit different than the difference between duty-imposing and power-conferring rules: duty-imposing rules impose duties, whereas power-conferring rules confer power.[56] This leaves open the possibility that some rules can regulate other rules, but do so by imposing duties. For example, a secondary rule might impose a duty to legislate in a certain way or a prohibition on certain kinds of rule creation.[57]

One of the significances about Hart's introduction of the distinction between primary and secondary rules was his account as to why secondary rules are important. We can certainly imagine a system in which there were primary rules, but no secondary rules. This would be a system of customary law. Certain actions would be required; others would be taboo. But there would be no mechanism by which the set of obligations could be changed. Of course, customary law need not be completely static. It is possible that customs might gradually change over time, but this process would require a change in social norms. It could not be legislated. Secondary rules enable relatively more rapid legal change at a lower cost.

Hence some commentators have argued for the adoption of a revisionist approach initially advanced by proponents include scholars such as Fitzpatrick, Moore, Benda-Beckmann, Ranger, Merry, Snyder, Mann and Roberts, Chanock, and others. These scholars have shown how colonial and post-colonial actions such as codifications and case law, created a customary law different in form, content, and effect from that lived by local communities. We will return to this debate on whether customary law and by corollary customary courts should or may change to be in line with international human rights in a positive law context in section 5.

5. Tensions between customary courts in Africa and international human rights law

It's a *conditio sine qua non* to dispense with the misconception that some early commentators had on customary law in Africa, before delving into the tension between customary courts in Africa and international human rights law on fair trial. Some misconceived and inaccurate statements viewed that "African law is not law per se, but a form of custom, primitive practice which predates law"[58] Secondly, and related to the positivism discourse in the previous section, which alludes that positivism considers sanctions as the clearest indicator of what constitutes law, the absence of discernible sanctions in dispute resolution mechanisms influenced European understanding of customary law in Africa. European jurists failed to observe, early on, the main factor why enforceable sanctions were not clearly evident in customary law in Africa thus. Again, as intimated above the foundation on which disputes were settled in customary courts is based on reconciliation of parties involved .[59]

When legal anthropologists eventually discovered that customary courts in many African societies were not as easily identifiable as in western societies, they confusingly view African laws in terms of

[54] Brendan Tobin, Indigenous Peoples Customary Law and Human Rights Why Living Law Matters, Routledges 2014 61.

[55] H.L.A Hart, The Concept of Law, Claredon Law Series, 1961

[56] Ibid.

[57] Ibid.

[58] Antony Costa, 'Myth of Customary Law' (1998) South African Journal on Human Rights 14 (4) 525, p526

[59] See PH Gulliver 'Introduction,' in L Nader (ed.) Law in Culture and Society (California: University of California 1969).

"processes, conflict resolutions, or folk concepts".[60] Therefore dismissing customary courts as just gatherings of sorts and not as judiciary bodies.

Without being side tracked into the misconceptions about customary law as applied in Africa, from the characteristics of traditional courts enumerated above one can deduce that there are a number of clashes with international human rights law, although this is a contentious issue.[61] The remainder of this section is an analysis of the African traditional courts against the right to a fair trial. A series of specific rights to a fair trial have been crystallized under section 14 of the ICCPR and article 7 of the African Charter as further elaborated in the Guidelines and HRC general comment number 32.

5.1. Right to equality before the law

According to the HRC general comment 32, the right to equality before the law and equal access to the court or access to administration of justice must be effectively guaranteed and no individual should be deprived of his or her rights to claim justice regardless of the type of the judicial body.[62] Similarly, Article Q (b) (1) of the Guidelines, guarantees the right to equality before traditional courts regardless of gender as a minimum requirement to all proceedings before customary courts in Africa.

Thus, an essential element of the principle of equality is that women must have equal access to courts in order to be able to effectively vindicate their rights**.** A cursory glance at customary courts in Africa can reveal that in many instances they discriminatee against women. According to many traditions women cannot access the court unless represented by a male relative. Unfortunately, widows during the mourning period and menstruating women are not allowed to access traditional courts in some communities.[63] As Matavire notes in most cases when women are represented by male relatives their opinions are not represented well.[64] The inferior status of women who are considered as minors at many African traditional courts amounts to discrimination and is a violation of the right to equality before the law.

5.2. Right to equality of arms

The HRC general comment 32 recognizes the right to equality of arms as a cornerstone of the right to a fair trial.[65] Equality of arms 'means that same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.'[66] On the same note, the Guidlines states that traditional courts should guarantee 'adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence' by both parties to a dispute regardless of gender.[67]

Customary law in many instances favours some members of the of the community such as older men, particularly as arbitrators themselves chiefs, elders and religious priests are likely to be put at an advantage against disadvantaged members of the community who are oftenly looked down upon on the basis of social status such as gender, caste, age and marital status.[68] Matavire observations of

[60] Karl Nickerson Llewellyn and Edward Adamson Hoebel The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (W.S. Hein & Company) 1941.

[61] Some scholars believe it is an ambitious task to expect traditional courts to subscribe to the notion of international human rights given their perculier practice.M Baderin 'Recent developments in the African Regional Human Rights System ' (2005) 5 Human Rights Law Review 117, 126.

[62] U.N. Doc. CCPR/C/GC/32 (2007) para 9.

[63] Reinauer (n18) 3.

[64] Matavire (n 17).

[65] U.N. Doc. CCPR/C/GC/32 (2007) para 13.

[66] ICCPR Article 14 para 1 and Guidelines Q(b) (6).

[67] Guidelines (n37) Q(b)(6).

[68] Penal Reform International Report (n 19) 37.

traditional courts, is that in most cases during proceedings women are in a weaker position to challenge men and therefore there is no equality of arms between men and women before traditional courts.[69]

5.3. Right to legal representation

The right to legal representation is one of the components of a fair trial.[70] Be that as it may, professional legal representation for either plaintiff or defendant before a traditional court is prohibited in most countries. It has been argued this is contrary to an individual's rights to be legally represented by a legal practitioner of his or her own choice[71]. According to Reinauer

> Not being able to have a legal representative assistance is in court is problematic since it puts the applicant or the accused at the risk of suffering from unequal chances to decide a case for him/herself. Especially in rural areas individuals of the poor strata of society might not well have sufficient access to and knowledge of sources of customary law and thus might have to face unfair disadvantages in court towards the better informed.[72]

The question of legal representation clearly illustrates the conflict between the universal application of human rights. The guidelines guarantee the right to 'an entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court.'[73] The Guidelines are silent about the right to legal representation and this may mean that it is not a requirement. Similarly, an analysis by the SALC took into consideration various factors and concluded that it is justified to exclude legal representation before customary courts.[74]

5.4. Presumption of innocence

It has been stated that the inquisitorial procedure whereby the chief and his councilors question a party to proceedings in traditional courts, amounts to a presumption of guilt against a person accused of an offence. The accused person before a customary court is expected to convince the court of his or her innocence.[75] The right to be presumed of innocent until proven guilty according to law is further compromised because customary courts take into account factors such as the past conduct of the accused, or that of the accused's family when dealing with offences. Moreover, the right to silence is unknown in customary law a person who is unable to clearly articulate his or her position may prejudice his or her case. [76] This is in conflict with article 14, paragraph 2 of the ICCPR which guarantee that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

5.5. Right to court records

Many African customary courts are not courts of record, this basically means that they do not have record of proceedings. Many customary courts are not equipped with the equipment to record proceedings and the situation is excerbated in some situations where the presiding officers cannot even read and write. A record of proceedings is normally necessary in case of review or appeal so that the higher court can satisfy itself that the lower court made the correct decision and that proper procedures were followed**.** One of the principles of a fair trial specified in the Guidelines under section C(b) states must ensure that proper systems exists for recording all proceedings before judicial bodies, storing such information and making it accessible to the public.

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[69] Matavire (n 17) 222.

[70] 7(1)(c) of the African Charter, art. 14(3(d) of the ICCPR).

[71] Article 14. Para 1.

[72] Reinauer (n18) 3 .

[73] Guidelines (n37) Q(b)(8).

[74] See a detailed discussion in the SALC (n 24) 36-39.

[75] Ibid 4 para 222.

[76] ibid (n10) 4

However, whether or not this is a violation of the right to a fair trial is not clear as some scholars have held the view that records are not necessarily important before customary courts in Africa since matters are heard over again on appeal.[77] On the other hand other proponents of traditional courts in Africa believe that these courts should all be made to be courts of record. This means that customary courts must be upgraded, modernized and equipped with the necessary personnel, as well as court buildings, offices and court equipment.[78]

5.6. Similar cases dealt similarly

The general right to equality before courts and tribunals under article 14(1) of the ICCPR also demands that similar cases be dealt with in similar proceedings and that any dissimilarity should be based on objective and reasonable grounds.[79] However, because of some salient features of customary courts in Africa disputes tend to be resolved by searching for the underlying motive that instigated the wrongful act or the criminal intent with the objective to preclude a reoccurrence of the problem in the future, it has been argued that with this approach cases are rarely similar.[80] Consequently, like cases need not be treated alike**.** Moreover, there is no strict adherence to legal certainty and due process before traditional courts because the proceedings are mainly voluntary and although the parties are responsible for coming up with a solution, the chief and other community members who may also influence the outcome moderate this.[81]

According to the Penal International Reform (PIR) in their report on access to justice in Sub-Saharan Africa, the fact that similar cases are not treated the same is an 'anathema to the concept of justice which demands equality before the law based on due process including legal certainty.'[82] Moreover, it is quite important for traditional courts to maintain uniformity because they deal with almost similar cases, in such situations cases some uniformity should be maintained for practical purposes.[83]

5.7. Right to appeal and review

The right to appeal or for a review against a criminal conviction or sentence is provided for under article 14 paragraph 5 of the ICCPR and article 7(1) b of the Charter.[84] This right is regarded as part of a fair trial because it carters for error correction. The mechanisms for error correction are significant in any legal system because of inevitable differences that can occur in in passing judgment, fact finding or in the application of rules.[85] Therefore, error correction can in turn serve a lot of other functions such as legitimacy of the courts, consistency and prevent miscarriage of justice.[86]

Basing his arguments on the views of a Ugandan political scientist Mamdani, Maru argues that 'there is a theoretical right to appeal from local courts to the formal legal system but in practice such appeals are

[77] SALC (n 24) 15.

[78] Homolisa P ' (2011)Balancing law and Tradition-The TCB and its Relations to African Systems of Justice Administration Crime Quarterly 35, 17-22.

[79] UN HRC General Comment 32 para 14

[80] Penal Reform International Report on Access to justice in Sub-Saharan Africa, 36.

[81] ibid 36.

[82] ibid 36.

[83] Cited with approval from Strauss DA, Must Like Cases Be Treated Alike? Chicago Public Law and Legal Theory Working Paper No. 24 (2002) p1 <http://www.law.uchicago.edu/files/files/24.strauss.like-cases.pdf> (last viewed 18 October 2013).

[84] In this article, appeal and review are used as general, synonymous terms.

[85] Peter. D Marshall 'Comparative Analysis of the Right to Appeal' (2011) 22 Duke Journal of Comparative and International Law 1, 2.

[86] Ibid 3.

quite rare.'[87] He argues that such reviews are not independent because they are carried out by a law officer who is a member of the executive not the judiciary as required under international human rights law.[88] Reinauer, also commented that the limited of knowledge the people have of sources of law poses a problem for the enforcement of their rights and thus render possibilities of review and appeal practically ineffective.[89]

5.8. Separation of powers

Chiefs and headman do not satisfy the concept of separation of powers because traditional government combines legislative, executive and judicial functions.[90] Traditional leaders are part of the state administrative arm, they implement government policies and enforce the law they are attached to the executive and in some cases they hold the capacity of being the 'complainant, prosecutor and the judge.'[91] Be that as it may, according to the SALC report that since customary courts judicial process involves administering mainly simple customary law rules in simple disputes, a formal separation of powers between the executive and the judiciary is neither crucial nor practical at this point in time.[92]

5.9. Legal qualifications

Traditional leaders are not legally qualified and that at face value appears to be a violation of the right to be tried in a fair manner which requires that judicial officers should have some training in legal studies. However, as with any other issue discussed above they are two conflicting views. According to Owor formal educational and legal qualifications is not required due to the uncomplicated participatory nature of customary law proceedings.[93] On the contrary, other proponents of customary courts in Africa like, Homolisa, acknowledges the need to train traditional leaders on the legal principles. It is argued that customary courts do not deal only with cultural and custom-related cases as they also handle criminal and civil cases that are based on common and statutory laws. It is necessary and imperative, therefore, that the judicial officers undergo some kind of paralegal training to empower them with the requisite skills and knowledge to handle such matters.[94]

5.10. Manner of appointment

According to the HRC general comment 32 the manner of appointment determines whether a court of law is independent and fair.[95] Similarly, the intention of the framers of the Guidelines was that section Q (c) (1) was that the appointment procedure for national courts can be replicated for customary courts.[96] Customary courts have been polarised by politicians who at times influence the selection of traditional chiefs. The result is that the selected clandestinely do not command the same respect and legitimacy with those chosen through customary means.[97] This is a violation of the Guidelines which clearly state under section A (4) (h) the process of appointment of judicial officers should be transparent and accountable and an independent body should be created for this purpose.

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[87] Vivek Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide' Yale Journal of International Law 31(2) 428, p437.

[88] Ibid.

[89] Reinauer (n18) 3.

[90] Owor (n 8) 231.

[91] SALC (n 24) 14

[92] Ibid 14.

[93] Owor (n 15) 237.

[94] Holomisa (n78).

[95] HRC General Comment 13: UN doc HRI/GEN/1/Rev.1 (1994) at 14, para 3.

[96] Owor (n 15) 233.

[97] Matavire (n 17) 222.

5.11. Security of tenure

According to the HRC in General Comment 32, under the contours of independence of the judiciary falls, in particular, rules that guarantees security of tenure of judicial official until a mandatory retirement age or the expiry of their term of office and the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.[98] Traditional leaders in many countries do not enjoy security of tenure as that accorded to judicial officers. They may be deprived of their right to hold courts by the minister who confers the jurisdiction in the first place and who is a member of the executive.[99] According to Nowack this will be a violation of the principle of independence which requires judicial officers to serve a reasonably long term.[100] Comparatively Madhuku underscores the significance of security of tenure, arguing that if judges can easily be removed from office, then there is in reality no independence of the judiciary.[101]

6. What is the Future of Customary Courts in Africa?

To determine the future of traditional courts in Africa it is of paramount importance to note firstly that, as alluded in the 2013 Human Rights Watch global report, the human rights movement is not opposed to the existence of customary law or cultural traditions; be this as it may, it is concerned and very opposed to aspects of customary practices that constitute violations of human rights.[102]

Secondly, customary law in Africa is not incompatible with international human rights. However, 'every society is a product of its social relations, otherwise called culture. Most of the accusations against customary law centre on its patriarchal nature'.[103] The tension generally reflects the human rights debate on the conflict between universalism versus cultural relativism, thus. In brief, the theory universalism takes the view that there are certain ethical principles which are universally applicable: that, for example, every society ought, regardless of its culture and history, to have respect for human life. Cultural relativism, on the other hand, says that every culture has its own ethical principles, and there is no basis for claiming that some are wrong and should change or be changed. Peart warned that,

> 'the danger is, however, that if customary law is to be struck down because it is in conflict with European notions of morality and ethics, there may be little left of customary law.'[104]

If this holds true, then what is the legitimacy for evaluating African customary practices applied before customary courts with international human rights?

The evaluation of African traditional practices before the traditional courts can be legally justified on the principle of *pacta sunt servanda*, according to which States must discharge in good faith the obligations assumed in treaties. Thus, Africa has become part of the global human rights movement, by virtue of adopting and ratifying international human rights instruments, and thus, African states are tacitly accepting the universality of human rights.[105]

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[98] HRC General Comment 13: UN doc HRI/GEN/1/Rev.1 (1994) at 14, para 19.

[99] SALC (n 24) 14.

[100] Nowack M, United Nations Covenant on Civil and Political Rights:CCPR Commenatry, 2nd Edition, Engel Publishers, Kehl note 3 at 319-20, para 25.

[101] Lovemore Madhuku 'Constitutional Protection of the Independence of the Judiciary: A survey of the position in Southern Africa' (2002) 46 Journal of African Law 232, 237.

[102] Human Rights Watch, World Report 2013, "The Trouble with Tradition" p28.

[103] Anthony C. Diala, A Revisionist Viewpoint of African Customary Law and Human Rights in the Context of South Africa's Multicultural Constitution Guest Lecture at University of the Western Cape 30 Sept. – 01 Oct. 2013 p6.

[104] Quoted in Koyana (n 4)126.

[105] Muna Ndulo 'African Customary Law, Customs, and Women's Rights' (2011) 18 Indiana Journal of Global Legal Studies 87, 90.

A few cases from selected African countries shows that official customary law has not kept up with changes in living customary law. In *Mifumi vs Attorney General* the courts in Botswana ruled that customary practice of refunding bride wealth as a condition for dissolution of marriage undermines the dignity of women, as well as their equality rights with men. Similarly, in Uganda, in the case of *Ramantale v. Mmusi & 3 others* the court said that customary law should "modernises with the times" and its need to be "continuously modified on a case by case basis" (Para 77). These cases highlights the need for revisionist scholarship on African customary law.

7. Conclusion

African traditional courts offer essential access to justice to the majority of the African citizens. However, despite this noble goal, tension between these courts and international human rights norms governing the administaration of justice continue to rise. The gender imbalance before customary law courts has the potential to corrode the efficacy and relevance of these courts. There is therefore, need for further research to come up with informed methods that will harmonize taditional customary law with the peremptory norms of equality, indepence and fair trial.

However, in this endeavor African traditional courts should be treated as courts *sui generis* as warned by the SALC.[106] As already pointed out above, the conflict between African courts and the human rights law regime illustrates the dispute between universalism versus cultural relativism in the application of human rights. It has been argued that 'while African customary law emphasizes rights in the context of the community and kinship rights and duties of individuals to their communities, human rights norms typically enjoin state parties to treaties to respect human rights and take all appropriate measures to eliminate discrimination against women.'[107] There is a need to strike a balance between community rights and gender rights.

In this as in other matters reference can be made to international and regional instruments on human rights. In addition to the binding instruments namely the ICCPR and the Charter, the Guidelines and the Human Rights Committee general comment on the right to a fair trial and equality can be very instructive.

[106] SALC (n 24) 15, para 4.3.

[107] Muna Ndulo 'African Customary Law, Customs, and Women's Rights' (2011) 18 Indiana Journal of Global Legal Studies 87,90

The International Protection Of The Marine Environment

Tafsir Malick NDIAYE·

1. Introduction

The protection of the environment has recently gained more and more interest due to growing concerns around the world. Damages to the environment is of multiple origins and is essentially caused by the activities of man and its consequences on the different areas of the world. The global ecosystem is affected although the extent of it remains to be determined. The environment appears to be the new religion. We must note that global environmental issue, such as climate change, or the loss of marine biodiversity has less to do with individual States than with ecosystems. They need a firm interstate cooperation to be addressed properly, that is why one must pay attention to the BBNJ process and the negotiating procedure ahead.

However, the legal aspect of the environment is still to be completed at both domestic and international levels. There is a conceptual migration shifting the environment from a third-generation[1] human right to a quest for a legal system that will be, a homogeneous and systemic body of rules to be consolidated and harmonized between independent legislations and uncertain or rapidly changing domestic principles.[2]

At international level, it is a system, applicable to certain areas and the activities carried out there, established by States having the regulatory competence to do so. These States must work to elaborate an international treaty on environmental law to govern the multiple aspects in this field.

The points of reference are, in this case, the Stockholm Declaration of 16 June 1972, the Rio Conference on Environment and Development of 3-14 June 1992, as well as, Specific Conventions, relating both to the law on armed conflicts[3] and to the legal regimes of areas.[4]

·Judge of the International Tribunal for the Law of the Sea

[1] Human rights are typified in three generations in the international order. The civil and political rights or rights of the first generation are analyzed in law, as opposable to the State. They assume to be implemented an abstention from the state. These rights were consecrated with the French revolution of 1789. They are sometimes called rights-attributes or rights of freedom. These rights appear most often as individual rights: freedom of movement, freedom of expression, etc. With regard to economic, social and cultural rights, also known as second-generation rights, they emerged in the Mexican (1910) and Bolshevik (1917) revolutions and can be seen as human rights, not opposable to The State but due to him. They are thus analyzed as claims against the State. It is the equality rights whose implementation presupposes a state service. These rights are most often collective rights: the right to work, the right to health, the right to education, the right to information, etc. However, human rights are not static concepts. Every day can bring its new human right. Hence, we speak of the human right of the third generation or of solidarity. They are rights that are at once opposable to the State and are due to it and which presupposes the conjunction of the actors in the social game. These include, for example, the right to development; The right to peace; Of the right to a healthy environment (which is found in many contemporary Constitutions), which is based on the Stockholm Declaration of 16 June 1972; Right to the common heritage of mankind etc ... See, Tafsir M. Ndiaye, 'Human Rights Today' in Rüdiger Wolfrum, Maja Seršić, Trpimir Šošić (eds), *Contemporary Developments in International Law, Essays in honor of B. Vukas* (Brill / Nijhoff 2016),, from p.574.

[2] As Alexander Kiss puts it:

> Dans le domaine de l'environnement, l'interprétation s'est accentuée : Tantôt ce sont des droits nationaux qui inspirent des solutions internationales, tantôt des principes internationaux pénètrent dans la règlementation d'Etats et les orientent, lorsqu'il ne s'agit pas du tout simplement de l'exécution de normes internationales par les moyens de droits nationaux, in *De Beaud et Bougherra (dir), l'Etat de l'Environnement dans le monde* (La Découverte,1993) p. 420.

[3] For example, in the field of armed conflict, the ENMOD Convention of 1977, Additional Protocol No. 1 to the Geneva Conventions of 1949 (1977), Article 35 of which reads: "1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. 2. It is prohibited to use weapons, projectiles and materials, and methods of warfare to cause unnecessary suffering. 3. It is prohibited to use methods or means of warfare which are designed to cause, or may be expected to cause, extensive, lasting and serious damage to the natural environment ". The same applies to the 1997 convention on the uses of international watercourses (article 29), not to mention the regional conventions drawn up with the assistance of the United Nations Environment Program within the framework of its plan, Action on regional seas: the Barcelona Convention of 16 January 1976, the Abidjan Convention of 23 March 1981 and the Cartagena Convention of 24 March 1983, etc.

Commercial navigation, exploration and exploitation of mineral resources and the fisheries have an adverse impact on the international protection of the marine environment. This impact generates different forms as far as the fisheries are concerned[5]. The first one is the depletion of fish stock due to overfishing and over exploitation of the fishery resources[6] was a negative consequence on other species, mammal marines and birds. The second form of fisheries adverse impact on marine environment is the indiscriminate catch of species as well as the destruction of marine habitat.

In fact, number of non-desired species as well as dolphins found themselves mostly on drifting nets.[7] The last impact may be analyzed as a cause and consequence of adverse effect of fisheries and marine environment because it has to do with technology, which appears very efficient. The innovation are more and more amazing in particular in the fish monitoring: use of plane and sonar, use of artificial nets, synthetic fiber, fisheries catch processing, etc.[8]

Another point of reference relates to pollution control, in the form of measures. The conditions of exploration and exploitation of natural resources and particularly oil and gas, must be determined with scrutiny to establish a legal regime that will protect the marine environment.

First, preventive measures aimed at implementing UNCLOS article 193. Second, policing measures consisting of the identification of possible infringements and the actions to face them. After that, repressive measures aimed at establishing the criminal jurisdiction of the State. Lastly, measures to restore damage in bringing responsibility and liability.[9]

The protection and preservation of the marine environment is nowadays a growing field of influence affecting international law. Part XII and 46 articles of the United Nations Convention on the Law of the Sea[10] are dedicated to it.

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[4] As regards the regime of space, we have, for example, the 1959 Antarctic Treaty, the 1967 Space Treaty, the 1979 Moon Agreement, etc.

[5] See report by UN Secretary General, unsustainable fisheries, UN doc A/59/298 (2004) §§. 20-22

[6] Canadian example is significant "« there was a collapse in the stocks of most commercial species on the Grand Banks off Newfoundland in the early 1990 as a result of persistent overfishing". See fisheries and Oceans Canada, What is holding back the cod Recovery (2013) at WMN.dfo-mpo.gc.ca/science/ Publication/ article: 2006/01-11-2006-eng.htm.

[7] See Bruce Miller, 'Combating Driftnet Fishing in the Pacific ' in James Crawford and Donald R. Rothwell (eds) *The Law of the Sea in the Asian- Pacific Region* (Martinus Nyhoff 1995) p.155

[8] See FAO collaboration between International Institutions in the field of fisheries, doc: COFI/71/g(b), annexe III, p. 15; Tafsir M. Ndiaye 'The IUU fishing in West Africa ' in Raymond Ranjeva (ed) *Liber Amicorum*, (Pédone 2013) pp. 233 – 264.

[9] Cf. James Crawford *Articles of the ILC on State Responsibility* (Pedone, 2003)
"International responsibility means the legal institution by virtue of which the State to which an unlawful act is imputable under international law must make reparation to the State against which that act was committed. While responsibility is generally an essential part of any legal system, it is of particular importance in the international order. It would in fact be incorrect to bring it back to the civil institution of the same name, an identical terminology designating two different institutions in this case: for if, within the framework of domestic law, Compensation within the framework of the law of nations, responsibility appears to be the very sanction of the actions of any politically organized and internationally independent community. Right still primitive in many respects, public international law reserves only a small place to the advanced technique of sanctioning the act and knows little more than the sanction against the subjects of law themselves. Consequently, the normal form of international litigation is that of litigation of compensation and not, as under domestic law, that of litigation of legality or of annulment. In other words, reparation by equivalent - in the usual form of pecuniary compensation - is the normal sanction of international law ". Charles Rousseau, *International Public Law, Volume V, Conflicting Relations (*Sirey, 1983) p.6.

[10] Rene Jean Dupuy (ed), *L'avenir du droit international de l'environnement*, (Nijhoff 1985)p. 514; Rene Jean Dupuy and Daniel Vignes (eds), *L'avenir du droit international de l'environnement , Traité du Nouveau droit de la mer*, (Economica/Bruylant 1985) p.1447; Jene Rene. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle*, (Pédone 1977) p. 319 ; Laurence Boisson de Chazournes, 'La mise en œuvre du droit international dans le domaine de la protection de l'environnement : enjeu et défis' (1995) 1 *Revue générale de Droit International Public* pp.37-76 ; P.M. Dupuy, 'La préservation du milieu marin' in R.J. Dupuy et D. Vignes, op. cit., Chapite 20, pp. 979-1045 ; Nicolas de Sadeleer, *Les principes du pollueur-payeur, de prévention et de précaution*, (Bruylant 1999) p.437; Pascale Martin-Bidou, "Le principe de précaution' (1990) *Revue générale de Droit International Public* pp. 631-666 ; P.M. Dupuy, " Où en est le droit international de l'environnement à la fin du siècle ? ' (1997) 4 *Revue générale de Droit International Public* pp. 873-904 ; Laurence Boisson de Chazournes, Richard Desgagné, Cesare Romano, *Protection internationale de l'environnement* ;

Although the rules governing the use of State territory and spaces were well known to experts, who, in the past, examined them in terms of limitations of sovereignty, it is only recently that international environmental law has been studied as such. In fact, the international environmental law is being developed on the deficiencies of the international law and is becoming autonomous, with the global sustainability approach.
A series of ecological accidents have raised the awareness in the different States: Torrey Canyon, Amoco Cadiz, Ecofisk, Bhopal, Chernobyl, chemical waste poured at Abidjan Laguna, etc.
That is why UNCLOS entrusted the States to take measures aiming at preventing pollution following maritime accidents. These are measures proportionate to the damage actually suffered or damage they are exposed to, in order to protect their shores or related interests, as well as the fisheries, from pollution or a threat of pollution that could have negative consequences.[11]

As a result, the United Nations Conference on the Human Environment adopted the famous Stockholm Declaration of 16 June 1972, which embodies the principles relating to the preservation of the marine environment. It must be noted that ecological accidents have enlightened the inadequacy or weakness of international law in this area. The States have expressed concerns over land-based pollution, before attempting to define the various obligations incumbent upon them and those to be borne by the various users of the sea under their jurisdiction.

With the works of the third United Nations Conference on the Law of the Sea, legal problems raised by the protection and preservation of the marine environment have been examined from a global perspective. We will overview the applicable rules (I), the International judge action (II) and lastly, the Prospects (III).

2. The Applicable Rules

The United Nations Convention for the Law of the Sea (UNCLOS) is the legal basis for the international protection of the marine environment, which requires an international cooperation to establish a juridical or legal system for the seas and the oceans to protect and preserve of the marine environment.

The Convention relies upon two fundamental principles, the rule of law of the sea and the steadfast safeguarding of the interests of the international community, as a whole, conscious that the problems of maritime spaces are closely related to each other. The main challenge is to eradicate the risks related to the geo-strategy of the seas of the world. In that respect, the Convention is regarded as the "Constitution of the Oceans" designed to rule on all aspects of the resources, as well as, the use of the Oceans: the energy; the minerals; the biological resources, the ocean spaces used for the navigation, the leisure, the military activities, the scientific research, the fishing, evacuation of wastes, etc. anything that could hinder the protection and the preservation of the marine environment. The Convention was supplemented by the 48/362 resolution of 1994 of the United Nations General Assembly the related to part XI that deals with the "Zone", that is to say the seabed beyond national jurisdiction, on one hand. On the other, UNCLOS is supplemented by the Agreement of 4 august 1995 related to the conservation

Recueil d'instruments juridiques (Pédone, 1998) p.1117; Rudiger Wolfrum, "Purposes and principles of international environmental law' (1990) 33 *German Yearbook of International Law* pp.308-330 ; Fred L. Morrisson and Rüdiger Wolfrum (eds.), *International, Regional, and National Environmental Law* (Kluwer Law International 2000)p. 976 p. ; Rudiger Wolfrum, Cristine Langenfeld, Petra Minnerop, *Environmental Liability in International Law* : *Towards a Coherent Conception* (Verlag 2005) p. 586; P. Daillet, A. Pellet, *Droit international public*, Paris, L.G.D.J., 2002, 7e éd., 1510 p. ; P.M. Dupuy, *Droit International Public* (4th edn, Dalloz 1998)p. 684 ; J. Combacau, S. Sur, *Droit International Public* (6th edn, Montchrestien 2004) p.809 p. ; T M. Ndiaye and R. Wolfrum (eds), Law of Sea, environmental Law and Settlement of Disputes ; Liber Amicorum Judge Thomas A. Mensah, (Martinus Nijhoff 2007) p. 1186 p., spec. pp. 1055-1186. T.M Ndiaye "La Responsabilité Internationale pour dommages au milieu Marin' in B. Vukas and T.M. Sosic (eds.), *International Law: New Actors, New concepts-continuing Dilemmas; Liber Amicorum Bozidar Bakotic*, pp. 265-279.

[11] See Article 221 of UNCLOS, 10 December 1982.

and the management of fish stocks, moving in and beyond Exclusive Economic Zones (Straddling Fish Stocks) and Highly Migratory fish stocks.

The Convention is comprehensive and of great authority and even the few States that have not yet acceded to it – like the United States of America – however consider it as the applicable law. Consequently, UNCLOS is the starting point of all examination and assessment, all issues relating the law of the sea, its challenges and prospects[12] and particularly the international protection of the marine environment.

The Convention adopted what is called the zonal approach, because of the growing number of claims of coastal States and thrives to find a balanced solution to reconcile these claims with the interests of other States.

The normative framework of the law of the sea is very diverse and comprehensive, despite the rapidly changing environment. That is why; the legal system is facing multiple challenges, inherent to the approach selected by UNCLOS itself, which consist of the sharing of the Ocean between the States of the world. The weakness of this zonal approach is the discrepancies or divergence between the nature and the law.

The scope of coastal States jurisdiction on maritime spaces is defined according the distance criteria, not taking into account the intrinsic nature of the ocean and the biological and non-biological resources residing in it [see articles 3, 33, 57, and 76 paragraph 1].

This 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 different zones are: the territorial sea, the contiguous zone; the archipelagic waters; the Exclusive Economic Zone; the Continental Shelf; the High Seas; the international seabed; inland waters; the archeologic zone and historic bays.

The implementation of the Convention, however, reveals that the difficulties are hard to overcome. The main challenge, here, is the completion of the sharing and since "only change is constant", new problems arise, unknown at the time of the drafting of the Convention or that could not be resolved solely based on the Convention. This situation created new challenges that can bring about new prospects for the law of the sea; it looks like nature took its revenge on law.[13]

The main applicable rules for the protection of the marine environment at international level are the principle of non-harmful use of the territory (A); the principle of prevention (B); the precautionary principle (C); and the other derived rules.

2.1. The Principle Of Non-Harmful Use Of The Territory

This principle reflects the idea that the State[14], in exercising its sovereign rights in its territory, must respect the territorial integrity of the neighboring State and its environment. A State cannot therefore allow activities in its territory to entail or cause damage resulting from transboundary pollution.
Thus, the State shall make reparation for damage caused to a contiguous State by an unlawful act committed in its territory.[15]

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[12] See Tafsir. M. Ndiaye, 'Challenges and Prospects of the New Law of the Sea' (2016) 3 *State Practice and the International Law Journal* pp. 1-39.

[13] See Infra, Section III : Prospects

[14] According to the expression of P.M. Dupuy, La responsabilité internationale ..., op. cit. (Note 5).

[15] This aspect is particularly emphasized in the Basel Convention of 22 March 1989 on 'the Control of Transboundary Movements of Hazardous Wastes, International Legal Materials (I.L.M.) ' vol.28, p.649 (1989).

The principle of the prohibition of transboundary pollution appears to be a customary rule today. The doctrine sets it out in numerous occasion, even though the case law is not emphatic, due to the scarcity of contentious cases relating to it at the international stage. In this regard, the 11 April 1941 award of the Tribunal in the Trail Smelter case[16] is often referred to. According to that award,

> No State shall have the right to use its territory or permit its use in such a way that smoke causes harm in the territory of another neighboring State or to the property of persons If there are serious consequences and if the damage is proved by clear and convincing evidence.[17]

The principle will later be confirmed and put in practice in the Lake Lanoux[18] arbitration and in that of the Gut Dam.[19] The United Nations Conference on the Human Environment, held in 1972 in Stockholm, was to reiterate the rule. Principle 21 of the Stockholm Declaration reads as follows:

> In accordance with the Charter of the United Nations and the principles of international law, States have the sovereign right to exploit their own resources in accordance with their environmental policies and have a duty to ensure that activities within the limits of Their jurisdictions or their control do not cause damage to the environment in other States or in areas beyond national jurisdiction.[20]

The same principle will be proclaimed by the Rio Declaration on Environment and Development adopted on 13 June 1992[21]. In its advisory opinion of 8 July 1996 on the lawfulness of the threat or use of nuclear weapons, the International Court of Justice confirms the binding force of the principle. It states :

> The environment is not an abstraction, but the space where human beings live and on which the quality of their lives and their health depend, including for future generations. The general

[16] Arbitral Tribunal, established between the United States and Canada by the Compromise of April 15, 1935, relating to damage caused to the American owners of the State of Washington by deleterious fumes emanating from a smelter situated in British Columbia at 7 miles Of the border. Text in R.S.A., vol.III, pp. 1938-1981.

[17] Ibid, p. 1965. The same problem arose in the Franco-Swiss relations with the case of the foul smoke of the Annemasse dump; RGDIP, 1969, pp. 185-186.

[18] The Tribunal says: "21: Article 11 of the Additional Act imposes on the States in which it is proposed to carry out work or new concessions capable of changing the regime or volume of a successive watercourse, Double obligation. One is to give prior notice to the competent authorities of the neighbouring country; The other is to set up a system of claiming and safeguarding all interests incurred on both sides The first obligation does not require much comment since it is intended to allow the implementation of the second. However, the possibility of an infringement of the regime or volume of water contemplated in Article 11 would in no case be left to the exclusive assessment of the State proposing to carry out such work Or to make further concessions; The French Government's assertion that the proposed works can not cause any damage to the Spanish residents is not sufficient, contrary to what was argued [... à, to exempt it from any of the obligations laid down in Article 11[...]. The State liable to suffer the repercussions of the work undertaken by a neighbouring State is the sole judge of its interests, and if the latter has not taken the initiative, the other can not be denied the right to require notification Works or concessions that are the subject of a project; The content of the second obligation is more difficult to determine. The claims referred to in Article 11 relate to the various rights protected by the Additional Act, but the essential problem is to establish how to safeguard all the interests which may be incurred on either side, Http://untreaty.un.org/cod/riaa/cases/vol_XII/281-317-Lanoux.pdf., P.314.

[19] See, Settlement of Gut Dam Claims (US V. Canada) I.L.M., 8, p, 118 (Lake Ontario Claims Tribunal 1969). See also United States of America and the Government of Canada concerning the establishment of the Gut Dam. Signed at Ottawa on 25 March 1965 (U.N.T.S., vol 607, p.141). The Exchange of Notes constituting an agreement for the final settlement of claims relating to Gut Dam. Ottawa, 18 November 1968 ", it reads:" following the conclusion of the Tribunal's second session in February, 1968, it was proposed by the Tribunal that it may compromise settlement might be negotiated. In consequence, representatives of the two Governments have consulted over the past few months in an effort to resolve the longstanding dispute in respect of Canada's alleged liability arising out of the construction of Gut Dam. These discussions were held in the atmosphere of good neighborliness and friendship which traditionally characterizes the relationship of our two Governments.
As a result of the discussions, the two Governments were in a position to inform the Tribunal at its meeting of September 27, 1968, that a settlement had been reached for the final disposal of the dispute. [...] pp. 320-322.

[20] Stockholm Declaration adopted on 16 June 1972 by the United Nations Conference on the Human Environment.

[21] Rio Declaration, 14 June 1992, United Nations Conference on Environment and Development, A / Conf / 51/26 / rev.1.
The principle reads: "In accordance with the Charter of the United Nations and the principles of international law, States have the sovereign right to exploit their own resources in accordance with their own environmental and development policies, To ensure that activities within their jurisdiction or power do not affect the environment of other States for areas beyond the limits of their national jurisdiction ".

> obligation of States to ensure that activities carried out within their jurisdiction or under their control, respect the environment in other States or in areas beyond national jurisdiction is now part of the body of rules of international environmental law.[22]

States, under the United Nations Convention on the Law of the Sea, have the duty "to protect and preserve the marine environment."[23] The Convention reiterates the principle of the illegality of transboundary pollution and entrust the States to take the necessary measures to tackle this issue.

The same applies to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal, as well as the 1992 Convention on Biological Diversity[24]. The principle has generated a body of rules, the main ones being the principle of prevention, the principle of precaution and that of cooperation.

2.2. The Principle Of Prevention

The principle of prevention is embodied in the Stockholm Declaration. Reiterated by that of Rio[25]:

> The preventive principle requires action to be taken at an early stage and if possible, before damage has actually occurred. This means that, in the event of an environmental impact assessment, it is necessary to ensure that the environmental impact assessment is carried out in accordance with the principles of environmental protection.[26]

States must implement the relevant obligations of the United Nations Convention on the Law of the Sea[27].

The often irreversible nature of damage to the environment, referred to by The Hague Court, justifies preventing its occurrence[28]. The principle of prevention obliges States to be vigilant in accordance with international standards in order to prevent the activities carried out on national territory from affecting the transboundary environment. It guided the first sectoral agreements relating to the preservation of certain areas[29], and it establishes the essential rules for the preservation of the marine environment in Part XII of the Convention.

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[22] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, C.I.J. Reports 1996, p. 226, spec. pp. 241-242, para. 29; See also the case concerning the Gabcikovo-Nagymaros Project (Hungary / Slob- vakia) of 25 September 1997, C.I.J. Reports 1997, p. 7, spec. P.41, para. 53.
In the Corfu Channel case, the ICJ had already proclaimed "an obligation on any State not to allow its territory to be used for acts contrary to the rights of other States". C.I.J. Reports 1949, p. 22.

[23] See Article 192

[24] See article 3

[25] Notes 9 and 10 supra

[26] See Rio Declaration, op. cit., note 21.

[27] Those provided for in Part II, Section II of the Convention: Cooperation at the global or regional level, Notification of imminent threat of damage or actual damage, Pollution Emergency Plans, Studies, research programs and Exchange of information and data, Scientific criteria for the development of regulations. The Convention also provides for a series of obligations to prevent, reduce and control pollution of the marine environment. See sections 207 to 212 which form section 5

[28] In the Gabcikovo-Nagymaros case, the ICJ said: "... the Tribunal does not lose sight of the fact that, in the field of environmental protection, vigilance and prevention are often irreversible damage to the environment and limitations inherent in the actual mechanism of repairing this type of damage.
Throughout the ages, man has not ceased to intervene in nature for economic or other reasons. In the past, it has often done so without taking into account environmental effects. Thanks to the new opportunities offered by science and a conscious awareness that the continuation of these interventions at a reckless and sustained pace would represent for mankind - be they present or future generations - new norms and requirements Which have been set out in a large number of instruments over the last two decades. These new standards must be taken into account and these new requirements properly appreciated not only when States are considering new activities but also when they are pursuing activities they have undertaken in the past. The concept of sustainable development reflects the need to reconcile economic development and environmental protection.
For the purposes of this case, this means that the Parties should review the environmental effects of the operation of the Gabcikovo-Nagymaros Power Station. In particular, they must find a satisfactory solution with regard to the volume of water to be dumped in the old bed of the Danube and in the arms situated on either side of the river ", Gabcikovo-Nagymaros project (Hungary / Slovakia), ICJ judgment, Reports 1997, p. 7, spec. pp. 74-75, para. 140.

[29] See Wolfrum, op. cit. (Note 10), p. 8; Burhennew (ed.), International Environment Law-Multilateral treaties, pp. 951-992. These sectoral conventions establish special regimes of responsibility, in private international law, for the private person or

Suffice to recall rrticles 192, 193, 194 paragraph 5 and 197 and to stress that pollution is essentially the consequence of modern technology. Therefore, the exercise of the States' sovereign rights is subject to the obligation to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. The regulation of the fisheries is of high importance due to overfishing, overexploitation of the fish stocks and particularly the illegal, unreported and unregulated fishing[30], unknown at the time of the drafting of the Convention.

The enshrinement of the Exclusive Economic Zone notion by UNCLOS, whose goal is to end the conflict of interest between coastal States and those possessing long-range flotillas, only aggravated it. The enjoyment of coastal States' sovereign rights through exploration and exploitation, conservation and the management of natural and biological resources of waters superjacent to the seabed in its EEZ, resulted in the flotillas moving from what was considered the High Seas to areas adjacent to the Exclusive Economic Zone, where catches have increased.

This situation is the consequence of State subsidies policies, which facilitated the introduction of numerous fishing vessels to the extent that the official gross tonnage of the world fleet increased exponentially, endangering the sustainability of the resource.

Indeed, the catch capacity of the fishing vessels has risen significantly due to the implementation of new fishing techniques, given that the technology is at its height. The innovations are more and more ingenious, particularly in fish tracking: the use of aircraft and sonar in the purse-seine fishery and the guided trawling. As well as the use of new floating trawlers, new fishing nets, fishing pumps, synthetic fibers, new freezing techniques and fish processing equipment, and mother vessels constituting a wide network of recreational harbors.[31]

This terrifying arsenal is the cause of incidental and indiscriminate catches and as a result, destroys the marine habitat and prevents the reproduction of fishes. The consequence of this situation is the overfishing due to overexploitation of fish stocks, hampering the marine economy and the global ecosystem.

2.3. The Precautionary Principle

It relates to the principle of prevention and is awaiting a formal customary consecration in the absence of consistency and precision in order to translate the expression of a collective *opinio juris.*[32] The precautionary principle is polluted by polysemia and multiple invocations in the most diverse and dissimilar domains of which it is the subject.[33] It is found in principle 15 of the Declaration:

> To protect the environment, precautionary measures must be widely applied by States

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the private person [Jure Gestionnis] who is expressly designated. See also Wolfrum, Langenfeld, Minnerop, op. cit. (Note 10), spec. pp. 4-135.

[30] See Tafsir.M.. Ndiaye, 'La Pêche illicite, non déclarée et non règlementée', op. cit., Note 8 supra.

[31] See FAO, Collaboration between the International Institutions in the fishery, document COFI/71/g (b) Annex III, p.15

[32] See Laurence Boisson de Chazournes, 'The Implementation of International Environmental Law: Issues and Challenges' (1995) *Revue générale de Droit International Public* p.37 et seq .; L. Lucchini, "The precautionary principle in international environmental law: shadows more than light", French Directory of International Law (AFDI), 1999, p. 710 et seq .; P.M. Dupuy, "The Precautionary Principle and the International Law of the Sea" in La Mer and its Law, Mixtures offered to Laurent Lucchini and Jean pierre Queneudec, Paris, Pédone, 2003, pp. 205-220; R. Wolfrum, op. cit. (Note 1), p. 10-15; O. McIntyre and T. Mosedale, 'The Precautionary Principle as a Norm of Custyomary International Law' (1997) 9 *Journal of Environmental Law* pp.221-235.

[33] As written by P.M. Dupuy, op. cit. (Footnote 32), p. 205: "The precautionary principle seems to be everywhere and nowhere. Everybody talks about it, and its evocation animates the media according to the scandals or the disasters that afflict our technical societies, too quickly developed in the perspective of an immediately profitable progress to take the time to study the impact of good Innovation on ecological balance or Human health; Contaminated blood, mad cows, British sheep slaughtered with foot-and-mouth disease, uncertainty about the safety of genetically modified organs, fear of genetic research losing its soul, everything seems to make a world become an apprentice to take on what the Principle 15 of the Rio Declaration, adopted at the first Earth Summit in 1992 called for "precautionary measures".

according to their capabilities. In the event of irreversible or serious risks of damage, the absence of absolute scientific certainty should not be used as a pretext for delaying the adoption of effective measures to prevent environmental degradation.[34]

Exhortatory, the principle seems to determine obligations of means, not of results. It "Reflects the growing tendency in international environmental law, which is better protected through prevention through remediation or remedial measures. It has become an intrinsic part of international environmental policy [...]."[35] The precautionary principle is embodied in a series of resolutions and declarations and subsequently reproduced in a number of treaties that specify their scope.[36]

The principle raises two essential questions. On the one hand, under which case can the precautionary principle be invoked? and restricting an activity based on principle can it guarantee its review or reconsideration on the other? t was suggested that the precautionary principle should only apply where there is a risk of serious or irreversible damage to the environment. This approach is consistent with the spirit of the Rio Declaration. It may also be thought that the earlier the damage is likely to occur, the sooner the precautionary principle must be invoked.[37] Another approach recommends a cautious attitude in any case in order to ensure the vigilant protection of the environment. In case of a restricted or prohibited activity, based on the precautionary principle, the risk or lack of scientific certainty that justified the restriction or prohibition must be reviewed or reconsidered from time to time.

Initiatives, based on the sustainability criteria, had to be taken. The sustainability criteria has been hampered by the overfishing and the detrimental effect on human activity, such as oil rigs; the erosion of bays; the destruction of the mangroves; industrial pollution; pesticides; the use of explosives, destroying marine life.

Thus, to sustain the Straddling and Highly Migratory fish stocks as well as, other biological resources, adjacent to their Exclusive Economic Zone, coastal States engaged in diplomatic negotiations that led to the agreement related to the conservation and management of the High Seas fish stocks that sets the basic principles and lay down the obligations and policing powers of the flag States.

The States practicing High Seas fishing shall cooperate with coastal States to ensure the sustainability of the fish stocks, build on reliable information, apply the precautionary approach, avoid as much as possible, pollution, waste, catch by lost or discarded gear, catch of non-target species and impacts on associated or dependent species, in particular endangered species, protect the biological diversity, apply and enforce the conservation and management measures through effective monitoring, control and surveillance systems.

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[34] Note 21 supra

[35] Wolfrum, op. cit. (note 1). As well as, David Freestone and Ellen Hey (eds.), The precautionary principle: A fundamental principle of International Law (Kluwer,1996) p. 274.

[36] P.M. Dupuy, op. cit. (Note 32) pp. 207-215. For example, Article 2 (a) of the Convention for the Protection of the Marine Environment of the North East Atlantic provides:

> Contracting Parties shall apply:
> a) The precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm to living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of causal relationship between the inputs and the effects.

[37] Wolfrum, op. cit. (note 10) p. 13, explains that: "However, it is common to all interpretations there should be at least a prima facie finding that a given activity may result in considerable harm to the marine environment. Nonetheless, there remains some uncertainty over when the precautionary principle is to be applied with the effect that one considers to undertake a particular activity has to prove its hamlessness rather than the one envisaging to restrict or prohibit that activity to Environmental damage, however qualified."

In addition, States practicing High Seas fishing and coastal States shall engage in direct cooperation, through regional or sub regional fisheries organisations to the implementation of conservation and management measures. Under article 94 of UNCLOS, the flag State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. These general provisions are supplemented with the Agreement on Straddling Fish Stocks, which institutes a monitoring system of vessels fishing on the High Seas by the flag State by granting licenses and authorizations. Moreover, the flag State shall carry out thorough investigations and shall take legal action in case of clear evidence of infringement. The Agreement, also, grant policing powers to States, other than the flag State. It sets comprehensive rules, in respect to boarding and inspection, as well as, investigations on failures of the flag State.

The guidelines in Annex II of the Agreement precisely detail the precautionary measures and the implementation of the various points of reference in fishery management strategies that apply the precautionary principle. One might think that the formal consecration of the principle will come from the conventional regulation, which has increased recognition in these times of urgency as the international judge observes a certain caution in this matter.[38] Case law (II) will be examined before we consider the prospects offered to us (III)

3. Case Law

For the protection of the marine environment, the United Nations Convention on the Law of the Sea is an essential legal instrument. It contains 46 articles on the subject and appears to be the depository of a universal vocation. Moreover, it sets up mandatory procedures leading to binding decisions. Its purpose is to resolve "all problems relating to the law of the sea" and to establish "a legal order for the seas and oceans"[39].

Part XII contains most of the articles dealing with disputes relating to the interpretation and application of these provisions.The environmental aspect is present in many disputes and concerns: fishing and the problems raised by the overexploitation of fishery resources; the risks of radioactive pollution of the sea; consequences for the marine environment of State land reclamation works; non-harmful use of the territory; compliance with protection and preservation measures taken by RFMO / RFMO Member States; obligation to cooperate in the protection of the marine environment, or the obligation of due diligence, or the obligation to protect "fragile ecosystems"

[38] It will be recalled that the ICJ abstained in the Gabcikovo-Nagymaros case (see footnote 17 above) to rule on the existence and scope of the precautionary principle in general international law. Similarly, in the Southern Bluefin Tuna cases, Australia and New Zealand invoked the precautionary principle to request the International Tribunal for the Law of the Sea to prescribe provisional measures to prevent Japan from continuing to fish in addition to the quota to him allotted. According to the Australian Council Pr. Crawford, "The Applicants view of the SBT stock and its current state is a plausible view, and it indicates a reasonable concern. That is all we need for present purposes. You do not have to decide the merit of this case; that is for the future. What is the future of the future, which should be kept open by the preservation of the future, and especially by the avoidance of unilateral increases in catch? I have given powerfully, I have given power, I have given power, I have given power, Contribute tit ha conclusion [...]

The effect of these five points is cumulative. They all point the same way, even without the precautionary principle; They make the case for conservation now. The International Tribunal for the Law of the Sea, Memorials, Minutes of Public Hearings and Documents, (Vol. 4, Martinus Nijhoff 1999) [Bluefin tuna (New Zealand v. Japan, Australia c Japan) provisional measures], p.427. If the Tribunal has not formally designated the principle and has not ruled on its existence and scope in general international law, it has retained the substance: "Considering that, in the opinion of the Tribunal, the parties Should therefore act with caution and precaution and ensure that effective conservation measures are taken to prevent severe damage to the bluefin tuna stock.

TIDM Case of Southern Bluefin Tuna, New Zealand v. Japan; Australia c. Japan, Application for the Prescription of Provisional Measures, Order of 27 August 1999, para. 77.

[39] UNCLOS preamble of December 10. 1982

Up to now, it was essentially the urgent procedures that served as the basis for referral to the Tribunal in environmental disputes. First, the provisional measures contain two scenarios. On the one hand, if a dispute has been duly submitted and if it considers *prima facie*, it has jurisdiction, ITLOS may prescribe any provisional measure which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision. On the other hand, pending the constitution of an Annex VII tribunal, ITLOS may prescribe, modify or revoke provisional measures if it considers *that prima facie,* the Tribunal, which is to be constituted would have jurisdiction and that the urgency of the situation so requires.[40]

Next, the prompt release procedure appears to be the counterpart of the recognition of the concept of EEZ. The procedure is designed to preserve the balance between coastal States and flag States, in particular in the field of navigation; in order to avoid exorbitant economic damage to ship owners and operators. This procedure contains objective limits in the protection and preservation of the marine environment. It focuses on fisheries and the problems posed by the overexploitation of fishery resources.[41]

After that, we have the requests for advisory opinions. Under UNCLOS and the status of the Tribunal, the advisory function is exercised by the Chamber for the settlement of seabed disputes. On 1st February 2011, the Chamber issued its first advisory opinion on "The Responsibilities and Obligations of States sponsoring Persons and Entities with respect to activities in the Area". These two instruments did not contemplate the advisory jurisdiction of the Tribunal in plenary session. This is a creation of the Tribunal in the development of its Rules of Procedure in 1996;
The possibility was then raised for the full court to give advisory opinions. For this reason, the jurisdiction clause is contained on the rules of the Tribunal, in its Article 138, which provides that the Tribunal may give an advisory opinion on a legal question as far as an international agreement relating to the purpose of the Convention expressly provides for a request of such opinion shall be submitted to the Tribunal.

Finally, the cases treated by the Ad Hoc tribunals dealt with the environment either by preterition or in *Obiter Dictum*. It is clear from the case law that provisional measures play a special role in the protection of the marine environment. Let us examine the jurisprudence through the aforementioned procedures.

3.1. Provisional Measures

3.1.1. Southern Bluefin Tuna Case [ITLOS Order of 27 August 1999] Cases N° 3 and 4. Japan / Australia / New Zealand.

This case is related to the overexploitation of the Southern Bluefin Tuna fish stocks. New Zealand asserted that Japan did not comply with its obligation to cooperate in the management and the conservation of the Southern Bluefin Tuna fish stocks by refusing to take the necessary measures, against its nationals fishing in High Seas, in order to maintain the Southern Bluefin Tuna fish stocks at constant sustainable yield.[42]

[40] UNCLOS, article 290, para. 1 and 5,

[41] To date, ITLOS has experienced more than nine cases of prompt release. See www.itlos.org/business.

[42] See paragraphs 28-31, order of the 27 august 1999

In its request of 30 July 1999, Australia demands that Japan immediately ceases its unilateral experimental fishing catch of SBT and restricts its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna.[43]

Whether provisional measures are required pending the constitution of the arbitral tribunal, the Tribunal notes, "in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment" (para. 67).[44]

The Tribunal observes that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment"[45], and that "there is no disagreement between the parties that the stock of southern Bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern".[46] The Tribunal notes that it "has been informed by the parties that commercial fishing for southern Bluefin tuna is expected to continue throughout the remainder of 1999 and beyond"[47], that "the catches of non-parties to the Convention of 1993 have increased considerably since 1996" (para. 76)[48], and that "the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern Bluefin tuna".[49]

The Tribunal notes that "there is scientific uncertainty regarding measures to be taken to conserve the stock of southern Bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern Bluefin tuna".[50] It then states that, "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern Bluefin tuna stock".[51]

3.1.2. Mox Plant case (United Kingdom / Ireland; ITLOS Order of 3 December 2001]: No. 10.

Whether provisional measures are required pending the constitution of the arbitral tribunal, it states that, "in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment" [52], and that "according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires in the sense that action prejudicial to the rights of either party or causing serious harm to the marine environment is likely to be taken before

[43] Ibid, paragraph 32; See paragraph 33 for the conclusions and arguments presented by Japan in its statement of claim.

[44] Order of 27 October 1999, para. 67.

[45] *Ibid, para. 70.*

[46] *Ibid, para. 71.*

[47] *Ibid, para. 75.*

[48] *Ibid, para. 76.*

[49] *Ibid, para. 77.*

[50] *Ibid, para. 79.*

[51] *Ibid, para. 80.*

[52] Order of 3 December 2001, para. 63

the constitution of the Annex VII arbitral tribunal".[53] "The Tribunal must, therefore, decide whether provisional measures are required pending the constitution of the Annex VII arbitral tribunal".[54]

The Tribunal notes Ireland's contentions that, once the MOX plant becomes operational, "some discharges into the marine environment will occur with irreversible consequences"[55], and "it is not possible to return to the position that existed before the commissioning of the MOX plant simply by ceasing to feed plutonium into the system".[56] The Tribunal also notes that Ireland "argues that the precautionary principle places the burden on the United Kingdom to demonstrate that no harm would arise from discharges and other consequences of the operation of the MOX plant, should it proceed, and that this principle might usefully inform the assessment by the Tribunal of the urgency of the measures it is required to take in respect of the operation of the MOX plant."[57]

The Tribunal takes note of the arguments of the United Kingdom which "contends that it has adduced evidence to establish that the risk of pollution, if any, from the operation of the MOX plant would be infinitesimally small"[58], that "the commissioning of the MOX plant … will not … cause serious harm to the marine environment or irreparable prejudice to the rights of Ireland, in the period prior to the constitution of the Annex VII arbitral tribunal…"[59], and that "neither the commissioning of the MOX plant nor the introduction of plutonium into the system is irreversible, although decommissioning would present the operator of the plant with technical and financial difficulties, if Ireland were to be successful in its claim before the Annex VII arbitral tribunal."[60] The Tribunal also notes that, in the view of the United Kingdom, "Ireland has failed to supply proof that there will be either irreparable damage to the rights of Ireland or serious harm to the marine environment resulting from the operation of the MOX plant and that, on the facts of this case, the precautionary principle has no application."[61]

The Tribunal observes that the Respondent, at the public sitting held on 20 November 2001, "has stated that 'there will be no additional marine transports of radioactive material either to or from Sellafield as a result of the commissioning of the MOX plant"[62], that "'there will be no export of MOX fuel from the plant until summer 2002' and that 'there is to be no import to the THORP plant of spent nuclear fuel pursuant to contracts for conversion to the MOX plant within that period either"[63]. The Tribunal places on record these assurances given by the United Kingdom.[64]

For these reasons, the Tribunal does not find that in the circumstances of this case "the urgency of the situation requires the prescription of the provisional measures requested by Ireland, in the short period

[53] *Ibid, para. 64*

[54] *Ibid, para. 65*

[55] *Ibid, para.68*

[56] *Ibid, para.70*

[57] *Ibid, para.71.*

[58] *Ibid, para.72.*

[59] *Ibid, para.73.*

[60] *Ibid, para.74.*

[61] *Ibid, para.75.*

[62] *Ibid, para.78.*

[63] *Ibid, para.79.*

[64] *Ibid, para.80.*

before the constitution of the Annex VII arbitral tribunal."[65] The Tribunal notes, however, "that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention."[66] "[I]n the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate."[67]

In its Order, the Tribunal[68]: Unanimously, Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measure under article 290, paragraph 5, of the Convention: Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to: (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant; (b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea; (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.

3.1.3. Land reclamation case (Malaysia v. Singapore) case N° 12, Order of 8 October 2003

Whether provisional measures are required pending the constitution of the arbitral tribunal, the Tribunal notes that "in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment."[69] In relation to the Applicant's argument that the Respondent has breached certain provisions of the Convention, and in relation thereto, the precautionary principle[70], the Tribunal notes that during the oral proceedings Singapore, in response to the measures requested by Malaysia, reiterated its offer to share the information requested by Malaysia with respect to the reclamation works (para. 76)[71], stated that it would provide Malaysia with a full opportunity to comment on the reclamation works and their potential impacts[72], declared that it was ready and willing to enter into negotiations[73] and assured the Tribunal that it would not accelerate its works.[74]

The Tribunal places on record these assurances given by Singapore (para. 81)[75]. With respect to the infilling works in Area D at Pulau Tekong, which was of primary concern to Malaysia (para. 84)[76], the Tribunal notes the commitment made by Singapore at the hearing not to undertake any irreversible

[65] *Ibid, para.81.*

[66] *Ibid, para.82.*

[67] *Ibid, para.84.*

[68] *Ibid, para.89.*

[69] Order of 8 October 2003, para. 64.

[70] *Ibid, para.74.*

[71] *Ibid, para.76.*

[72] *Ibid, para.77.*

[73] *Ibid, para.78.*

[74] *Ibid, para.80.*

[75] *Ibid, para.81.*

[76] *Ibid, para.84.*

action to construct the stone revetment around Area D pending the completion of a joint study to be undertaken by independent experts (para. 87)[77]. The Tribunal places on record this commitment.[78]

The Tribunal considers that "it cannot be excluded that, in the particular circumstances of this case, the land reclamation works may have adverse effects on the marine environment"[79], and that "given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned."[80] The Tribunal states that "Malaysia and Singapore shall ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the Annex VII arbitral tribunal may render."[81]

In its Order, the Tribunal (para. 106)[82]: " Unanimously, Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention: Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to: (a) establish promptly a group of independent experts with the mandate (i) to conduct a study, on terms of reference to be agreed by Malaysia and Singapore, to determine, within a period not exceeding one year from the date of this Order, the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation; (ii) to prepare, as soon as possible, an interim report on the subject of infilling works in Area D at Pulau Tekong; (b) exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works;

3.1.4. Delimitation of the maritime boundary between Ghana and Côte d'Ivoire (Order of 25 April 2015)

Whether provisional measures are required pending the final decision, the Special Chamber states that its power "to prescribe provisional measures under article 290, paragraph 1, of the Convention has as its object the preservation of the respective rights of the parties to the dispute or the prevention of serious harm to the marine environment pending the final decision"[83], and that it "may not prescribe provisional measures unless it finds that there is 'a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute."[84] The Special Chamber refers, in this connection, to paragraph 72 of the Tribunal's Order of 23 December 2010 in the M/V "Louisa" Case. The Special Chamber also notes that "urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered."[85]

[77] *Ibid, para.87.*

[78] *Ibid, para.88.*

[79] *Ibid, para.96.*

[80] *Ibid, para.99.*

[81] *Ibid, para.100.*

[82] *Ibid, para.106.*

[83] Order of 25 April 2015, para.39.

[84] Ibid, para.41.

[85] Ibid, para.42.

As regards Côte d'Ivoire's request for "provisional measures to prevent serious harm to the marine environment" [86], "the Special Chamber finds that Côte d'Ivoire has not adduced sufficient evidence to support its allegations that the activities conducted by Ghana in the disputed area are such as to create an imminent risk of serious harm to the marine environment."[87] The Special Chamber, however, notes that "the risk of serious harm to the marine environment is of great concern to [it]"[88] and that in its view "the Parties should in the circumstances 'act with prudence and caution to prevent serious harm to the marine environment."[89]

The Special Chamber refers, in this connection, to paragraph 77 of the Tribunal's Order of 23 December 2010 in the M/V "Louisa" Case, to paragraph 77 of the Tribunal's Order of 27 August 1999 in the Southern Bluefin Tuna Cases and to paragraph 132 of the Seabed Disputes Chamber's Advisory Opinion of 1 February 2011 (Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area).[90]

3.2. Advisory Opinions

3.2.1. Case No. 17: Responsibilities and obligations of States sponsoring Persons and Entities with respect to Activities in the Area [Advisory Opinion of 1 February 2011]

The Council of the International Seabed Authority raised the following question: What are the legal responsibilities and obligations of States-Parties to the Convention the sponsor the activities in the zone, in accordance with the 1994 Agreement related to the application of part XI of UNCLOS? The seabed chamber gave the following answer[91]: Sponsoring States have two kinds of obligations under the Convention and related instruments: A. The obligation to ensure compliance by sponsored contractors with the terms of the contract and the obligations set out in the Convention and related instruments. This is an obligation of 'due diligence'. The sponsoring State is bound to make best possible efforts to secure compliance by the sponsored contractors. The standard of due diligence may vary over time and depends on the level of risk and on the activities involved.

This 'due diligence' obligation requires the sponsoring State to take measures within its legal system. These measures must consist of laws and regulations and administrative measures. The applicable standard is that the measures must be 'reasonably appropriate'. B. Direct obligations with which sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors. Compliance with these obligations may also be seen as a relevant factor in meeting the 'due diligence' obligation of the sponsoring State.

The most important direct obligations of the sponsoring State are: (a) the obligation to assist the Authority set out in article 153, paragraph 4, of the Convention; (b) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the 'due diligence' obligation of the sponsoring State and applicable beyond the scope of the two Regulations; (c) the obligation to apply the 'best environmental practices' set out in the Sulphides Regulations but equally applicable in the context of the Nodules Regulations; (d) the obligation to

[86] Ibid, para.64.

[87] Ibid, para.67.

[88] Ibid, para.68.

[89] Ibid, para.72.

[90] Ibid, para.72.

[91] Advisory opinion of 1 February 2011, Operative part.

adopt measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and (e) the obligation to provide recourse for compensation.

The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with its obligation to conduct an environmental impact assessment set out in section 1, paragraph 7, of the Annex to the 1994 Agreement. The obligation to conduct an environmental impact assessment is also a general obligation under customary law and is set out as a direct obligation for all States in article 206 of the Convention and as an aspect of the sponsoring State's obligation to assist the Authority under article 153, paragraph 4, of the Convention

3.2.2. Advisory Opinion of the SRFC of 2 April 2015 (Case N°. 21)[92]

By a letter dated 27 March 2013, received on 28 March 2013, the Permanent Secretary of the Sub-Regional Fisheries Commission (SRFC) transmitted to the Tribunal a request for an advisory opinion, pursuant to a resolution adopted by the Conference of Ministers of the SRFC at its fourteenth session, held on 27 and 28 March 2013. 2. In the said resolution, the Conference of Ministers had decided, in accordance with article 33 of the 2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC, to authorize the Permanent Secretary of the SRFC to seize the Tribunal, pursuant to article 138 of the Rules, in order to obtain its advisory opinion on the following questions: "1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States? 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag? 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question? 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?"

In its advisory opinion, the Tribunal (para. 219): Unanimously Replies to the first question as follows: The flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations enacted by the SRFC Member States concerning marine living resources within their exclusive economic zones for purposes of conservation and management of these resources.

The flag State, in fulfilment of its obligation to effectively exercise jurisdiction and control in administrative matters under article 94 of the Convention, has the obligation to adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the exclusive economic zones of the SRFC Member States which undermine the flag State's responsibility under article 192 of the Convention for protecting and preserving the marine environment and conserving the marine living resources which are an integral element of the marine environment.

The foregoing obligations are obligations of 'due diligence'. The flag State and the SRFC Member States are under an obligation to cooperate in cases related to IUU fishing by vessels of the flag State in the exclusive economic zones of the SRFC Member States concerned. The flag State, in cases where it receives a report from an SRFC Member State alleging that a vessel or vessels flying its flag have been involved in IUU fishing within the exclusive economic zone of that SRFC Member State, has the obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation, and to inform the SRFC Member State of that action.

[92] Advisory opinion of 2nd April 2015, case N° 21, (para. 219)

By 19 votes to 1 Replies to the fourth question as follows: Under the Convention, the SRFC Member States have the obligation to ensure the sustainable management of shared stocks while these stocks occur in their exclusive economic zones; this includes the following:
(i) the obligation to cooperate, as appropriate, with the competent international organizations, whether subregional, regional or global, to ensure through proper conservation and management measures that the maintenance of the shared stocks in the exclusive economic zone is not endangered by overexploitation (see article 61, paragraph 2, of the Convention);
(ii) in relation to the same stock or stocks of associated species which occur within the exclusive economic zones of two or more SRFC Member States, the obligation to 'seek ... to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks' (article 63, paragraph 1, of the Convention);

(iii) in relation to tuna species, the obligation to cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of such species in their exclusive economic zones (see article 64, paragraph 1, of the Convention).

The measures taken pursuant to such obligation should be consistent and compatible with those taken by the appropriate regional organization, namely the International Commission for the Conservation of Atlantic Tunas, throughout the region, both within and beyond the exclusive economic zones of the SRFC Member States. To comply with these obligations, the SRFC Member States, pursuant to the Convention, specifically articles 61 and 62, must ensure that: conservation and management measures are designed to maintain or restore stocks at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special needs of the SRFC Member States, taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global.

In exercising their rights and performing their duties under the Convention in their respective exclusive economic zones, the SRFC Member States and other States Parties to the Convention must have due regard to the rights and duties of one another. This flows from articles 56, paragraph 2, and 58, paragraph 3, of the Convention and from the States Parties' obligation to protect and preserve the marine environment, a fundamental principle underlined in articles 192 and 193 of the Convention and referred to in the fourth paragraph of its preamble. Living resources and marine life are part of the marine environment and, as stated in the Southern Bluefin Tuna Cases, 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment

4. Arbitral Awards

4.1. South China Sea Arbitration (Philippines v. China) Award of 12 July 2016

Under article 192 and 194, the states are under the obligation to protect and preserve the marine habitat. In this regard, they take, separately or jointly, measures, in line with the Convention, that are necessary to prevent, reduce and avoid the pollution of the marine environment, whatever the source. They take all the necessary measures so that activities under their authority cannot cause damages through pollution to other States. Concerning the responsibility of the flag State, each parties must ensure that vessels flying its flag do not exercise any activity, likely to compromise the effectiveness of the international measures of conservation and management.[93]

The measures taken must encompass the protection and the preservation of rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

[93] ITLOS advisory Opinion of 2 April 2015, op. cit.

Otherwise, the flag State may carry out in depth investigation in the allegation of an infringement. [The Pulp Mills case (ICJ); Responsibilities and obligations of sponsoring States… (Advisory Opinion of 1 February 2011 – ITLOS); Chago Marine Protection Arbitration case; Mox Plant case (ITLOS)]. We shall now look at the prospects offered to us, these days

4.1.1. Prospects

There are two problems of concern to the international community of States as a whole. It is about:

4.1.1.1. Consequences Of Climate Change

The consequences of climate change on the oceans are likely to be on the Law of the Sea agenda for a long time and may well occupy a number of international institutions. The 2010 report of the UN 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; increased frequency of extreme weather events and transfers in the distribution of biological species ". [94] That is why the United Nations General Assembly continues to stress 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.[95] One of the flagship measures is raising public awareness of the adverse effects of climate change on the oceans.[96]

As part of its revised mandate, approved by the General Assembly, UN-Oceans, the inter-agency coordination mechanism for oceans and coastal issues, continued to give priority to a searchable online database containing an inventory of mandates and activities.[97] In accordance with its mandate[98], the UN-Oceans Coordinator held the sixteenth meeting of the consultative process on the work of this mechanism[99]. UN-Oceans also organized a briefing session on the activities of UN-Oceans members on the sidelines of the Conference of the Parties (COP 21) at the United Nations Framework Conference on Climate Change in Paris The issue of Oceans and climate change and the acidification of the oceans.[100] The issue of climate change is of global concern. It is multidimensional[101] in that it covers the most diverse and dissimilar domains.[102]

[94] See United Nations document A/65/69/Add.2, para.374

[95] UN GA, Resolution 69.245

[96] See UN Secretary-General report

[97] Ibid.

[98] See resolution 68/70, annexe.

[99] See www.un.oceans.org

[100] See http://unfccc.int/files/meetings/Bonn_jun_2015/

[101] See UN document A/65/69/add.2, para 374 ; Rosemary Rayfuse and Shirley Scott (eds.) *International law in the Era of Climate Change* (Edward Elgar 2012),; John Dryzek, Richard Norgaard and David Schlosberg (eds.), *Oxford Handbook of Climate Change and Society* (OUP 2011); A. Boyle, 'Climate Change and Ocean Governance' in M.C. RIBEIRO (ed.), 30 years after he signature of the UNCLOS … op. cit.[Note 112], pp. 357-382, où l'auteur écrit: "Rather, the important lesson is that climate change should be on the negotiating agenda of all international institution whose mandate is affected by it. It is a human rights issue. It is a trade issue. It is also an issue for IMO and those convention secretariats responsible for protecting the marine environment pursuant to part XII of the 1982 Convention", p. 358.

[102] As stated in the 2014 summary report dedicated to the leaders:

"1) Human influence on the climate system is clear … recent climate changes have had widespread impacts on human and natural systems;

2) many of the observed changes are unprecedented;

3) the atmosphere and oceans have warmed, that amounts of snow and ice have diminished, and sea level has risen;

As Ph.Sands says:

> 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 endeavour and action. Each of us contributes to climate change; each of us will be affected by climate change.[103]

Given the prolific nature of the problems raised 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 islands and the low-tide elevation that may disappear. The problem of the rights to the maritime areas which fell within the jurisdiction of the said islands after the disappearance of the low-tide elevation will have consequences for the determination of the baselines.

Scientists have revealed that sea-level rise was faster from 2000 to 2009 than in the previous 5,000 years.[104] The immediate challenge facing this situation is the protection of archipelagos likely to be threatened by rising sea levels and populations living on the coast. The various island formations of certain archipelagos are at a very low level above the present level of the sea.[105]

The melting of continental glaciers and polar ice will affect the law of the sea. It will generate new continental shelves; new shipping routes and may be a new piracy due to the idleness of indigenous peoples likely to be and the migration of fish stocks to these new ice-free areas. This situation can create new fishing activities at the same time as a new hydrocarbon or gas industry, that is to say also a

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4) anthropogenic greenhouse gas emissions are extremely 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 , to very high risk of severe, wide-spread and irreversible impacts globally and

11) there are multiple mitigation pathways that are likely to limit warming to below 2°C relative to pre-industrial levels. the pathways would require substantial emissions reductions over the next few decades and near zero emissions of CO2 and other long-lived greenhouse gases by the end of the century", IPCC, Climate Change 2014 Synthesis Report, Summary for Policymakers, http://www.ipcc.ch/pdf/assessment. Report/ar5/syr/AR5 SYR FINAL SPM. pdf.

[103] Ph. Sands, 'Climate change and the Rule of Law: Adjudicating the Future in International Law' Public Lecture, United Kingdom Supreme court, 17 September 2015, 530 pm, pp. 1-21, spec.p.6.

[104] It is estimated that one third of the increase is due to the melting of continental glaciers and polar ice (average winter 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. See Jean P. Pancracio, *Law of the Sea* (Dalloz 2010) p. 2.

[105] 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 high; Which exposes them singularly.

possible pollution. This means that many issues will emerge and will require a very close international cooperation to remove these zones from a geo-economic and geostrategic conflict situation.

Meanwhile, 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."[106] They are thus required to take measures to prevent, reduce and control pollution of the marine environment. In particular, States must take all necessary measures to ensure that activities within their jurisdiction or control are conducted in such a way as not to cause pollution damage to other States and their environment and to ensure that the resulting pollution Incidents or activities within their jurisdiction or control does not extend beyond the areas where they exercise sovereign rights.[107]

This principle of non-harmful use of the territory[108] appears to be a due diligence[109] obligation, and therefore liable to involve the responsibility of a State.[110] The other major challenge is the acidification of the oceans, whose level of scientific knowledge is in the limbo of stagnation, prompting the Community of Nations 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.[111]

4.1.1.2. Marine Genetic Resources

The 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 related to the conservation and sustainable use of marine biodiversity in Areas beyond national jurisdiction "the Ad Hoc Working Group". [112]

This work is carried out through 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

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[106] Article 192 of UNCLOS and Article 194 paragraph 5 to clarify that "measures taken in accordance with this Part shall include measures necessary to protect and preserve rare or delicate ecosystems and the habitat of species and other marine organisms in decline , Threatened or threatened with 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

[107] Article 194, para.2

[108] See Tafsir.M..Ndiaye, 'The International Responsibility of States for Marine Damage' in B. Vukas, T. SOSIC (eds.), *International Law: New Concepts, Continuing Dilemma, Liber Amicorum Boziclar Bakotic*, (Martinus Nijhoff 2010) pp. 265-279, 267; See also the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes, International Legal Materials (ILM), Vol. 28, p. 649 (1989).

[109] See ITLOS, Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities in Activities Conducted in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Tribunal), paragraphs 115-120.

[110] On the justiciability of climate change, see Boyle, op. cit. [Note 141] pp.378-380; Sands op. cit. [Note 143], p. 11-15.

[111] See, Tommy Koh, in Lillian Del Castillo (ed.) *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea, Liber Amicorum Judge Hugo Caminos* (Brill / Nijhoff, 2015) p.108; In its resolution, the General Assembly of the United Nations says: "§81 Takes note of the work of the Intergovernmental Panel on Climate Change, including its conclusions that, The effects of ocean acidification on marine biology are not yet known, this progressive acidification is expected to have a negative impact on shellfish marine organisms and their dependent species, and in this regard encourages States to continue, Urging research on ocean acidification, in particular observation and measurement programs' , A / RES / 62/215 of 14 March 2008, Resolution adopted by the General Assembly of the United Nations on 22 December 2007 , P. 16, para. 81.

[112] See A / 61/65 and Corr. 1

the Ad Hoc Working Group To consider this issue[113]. Discussions were held on the legal regime to be applied to marine genetic resources in areas beyond national jurisdiction, in accordance with UNCLOS and the General Assembly had to ask States to continue consideration of this issue in within the mandate of the Ad Hoc Working Group, to advance the work.[114]

The community of States is doubly aware of the abundance and diversity of marine genetic resources and their value in terms of the benefits that can be derived from it and the goods and services to which they may give rise, a part. On the other hand, it is also aware of the importance of research on marine genetic resources to better understand and better manage marine ecosystems and their potential uses and applications.[115]

The first meetings of the Informal Working Group saw very little progress in the discussions where there was strong disagreement and divergence on the issue of the applicable legal regime for marine biodiversity, including marine genetic resources beyond the national jurisdictions.

The particular nature of genetic resources, which must be thoroughly explored, makes discussions very difficult. The question that arises is whether they belong to the seabed or to the 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 have clashed in the process. On the one hand, some States have argued that the fundamental principle to be applied in this matter is that of the common heritage of mankind, while other States have asserted the principle of freedom of the high seas, 'other.Three types of arguments are advanced to support the different positions.

First, the question of whether the regime applicable to the Area concerns resources other than minerals. It is well known that UNCLOS means resources of all in situ solid, liquid or gaseous mineral resources in the area that are on the seabed or subsoil thereof, including polymetallic nodules and once extracted from the Zone, are called "minerals"[116]. The argument is sometimes developed on the basis of an analogy with the status of sedentary species on the continental shelf.

Second, 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 for exclusively peaceful purposes and in the interest of all humanity In accordance with Part XIII[117]. Finally, the question of whether the International Seabed Authority is called upon 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[118].

It was in 2011 that the Working Group was to recommend the establishment of a process whereby the

[113] 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.

[114] See document A / RES / 62/215 of 14 March 2008, p.24, para. 133.

[115] Ibid. Paragraphs 134 and 135; See also J. Wehrli and Th. Cottier 'Towards a Treaty Instrument on Marine Genetic Resources' in M. C. Ribeiro (ed.), *30 years after the signature of the UNCLOS* op. cit. [Note 112] pp. 517-549 where it is stated that "The law, and international law, finds itself in the classic constellation of ex post assessment of the implications of rules not per se designed to deal with novel and impending challenges. […] Even the deep sea, which belongs to the least explored areas in the world, supports mammals and fish, including sea stars, sponges, jellyfish and bottom – dwelling fish, worms, molluscs, crustaceans, and a board range of single-celled organisms", p.518; M. Allsopp and al., World Watch Report 174: Oceans in Peril: Protecting Marine Biodiversity, World Watch Institute, Washington DC, September 2007, p. 7.; 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 [PowerPoint].

[116] UNCLOS, article 133, para. a) and b)

[117] The words of Article 143, paragraph 1, of the UNCLOS relating to "Marine Scientific Research" in the Area, that is to say, the seabed and its subsoil beyond the limits of jurisdiction national.

[118] UNCLOS, article 157

legal framework for the conservation and sustainable use of marine biodiversity in areas not under national jurisdiction reflects Different points of view of States. In particular, "taken jointly and as a whole", issues relating to marine genetic resources, including those related to benefit-sharing, measures such as area management tools, including marine protected areas, Impact on the environment, as well as capacity building and transfer of marine technology.

This recommendation will be adopted by the United Nations General Assembly and is presented as the package deal of negotiations in the development of an international legally binding instrument related to UNCLOS on the conservation and sustainable use of Marine biodiversity in areas not under national jurisdiction (BBNJ)[119].

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 on the other. The General Assembly convened that the Working Group should hold several meetings to prepare the decision it was due to take at its 69th session and for which it requested recommendations on terms of reference [120], application, parameters and possibilities for the development of an international instrument related to the Convention.

After considering the recommendations[121] of the Ad Hoc Open-ended Working Group and welcoming the progress made by the Working Group in implementing, in accordance with its mandate[122], the General Assembly decided to develop a legally binding international instrument on 19 June 2015.

It also decides to establish, before the date of an intergovernmental conference, a preparatory committee, open to all Member States of the United Nations, members of the specialized agencies and parties to the Convention.[123] The Committee is responsible for making substantive recommendations to the General Assembly on the elements of the draft international legally binding instrument relating to the Convention. The Committee will have to take into account the various Co-Chairs' reports on the work of the ad hoc informal working group on issues related 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 took place from 28 March to 8 April and the second session will take place from 26 August to 9 September. The same will happen in 2017 and the Preparatory Committee will report to the General Assembly on the status of its work by the end of 2017. The Preparatory Committee is chaired by Ambassador Eden Charles of Trinidad and Tobago.[124]

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, on the

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[119] See United Nations document A / RES / 69/292 of 6 July 2015, adopting the Resolution adopted by the General Assembly on 19 June 2015 'Preparation of an international instrument relating to UNCLOS, Sustainable use of marine biodiversity in areas beyond national jurisdiction' , p. 2, para. 1.

[120] See A / RES / 69/292 op. [Note 113] where the first recital reads: "The General Assembly, Reaffirming the commitment made by the Heads of State and Government in para. 162 of the outcome document of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil from 20 to 22 June 2012, entitled "The future we want, IJ endorsed in its resolution 66/288 of 27 July 2012, to address urgently the issue of Conservation and Sustainable Use of Marine Biodiversity in Not based on national jurisdiction, on the basis of the work of the Ad Hoc Open-ended Working Group ij Open-ended Composition on the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond Of the limits of national jurisdiction and in particular to take a decision on the adoption of an international instrument relating to the United Nations Convention on the Law of the Sea before the end of its sixty-ninth session."

[121] See doc. A/69/780, annex sect.I

[122] See resolutions 66/321 of 24 December 2011 and 67/78 of 11 December 2012

[123] See doc. A/69/780, annex sect. I

[124] Ibid. For the organisation and the ruling of the preparatory committee, paragraph 1,

organization and date of the opening of an intergovernmental conference, To be held under the auspices of the United Nations; The recommendations of the Preparatory Committee and the development of an international legally binding instrument related to the Convention.

On 28 February 2017, the Chairman of the Preparatory Commission submitted a text entitled 112 pages "Non-paper" and 759 proposals from States, which constitute the elements of the draft international legally binding instrument on the conservation and sustainable management of Biodiversity beyond national jurisdiction.

The text is a reference document, which will greatly assist delegations in the consideration of issues and ideas under discussion in the Preparatory Committee.[125] Section E of Chapter III, "Environmental Impact Assessments", is particularly important for the protection and preservation of the marine environment with the suggested principles: "Precautionary principle / Approach; Ecosystem approach; Science-based approach; Transparency in decision making; Inter-and-Intra Generational Equity; Responsibility to protect and preserve marine environment; Stewardship; No-net-loss principle.[126]

This process of negotiation will undoubtedly be enhanced by the interpretation and application of Part XII of UNCLOS. Moreover, the dialogue between international and arbitral tribunals will gradually establish an international regime for the protection of the environment.

[125] See www.un.org/depts/los/biodiversity/prepcom.htm]

[126] See Non Paper, ibid, pp. 64-78

The International Criminal Court/African Union Tension as a Metaphor for the Dysfunctionality of International Criminal Justice

Maurice Canice CHUKWU·

1. Introduction

On the 6th of July 2017, the International Criminal Court (ICC or Court) delivered a decision[1] under Article 87(7) of the Statute of the International Criminal Court[2] (Rome Statute or Statute) on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Sudanese President, Omar Al-Bashir when he visited South Africa between 13 and 15 June 2015 to attend the 25th Summit of the African Union (AU) held in Johannesburg.

The Court found that South Africa failed to comply with its obligation under the Statute by not executing the Court's request for the arrest of Al-Bashir and his surrender to the Court.[3] The Court however, decided that, given the circumstances of the case, a referral to the Assembly of States Parties (ASP) to the Rome Statute and/or the United Nations Security Council (UNSC) of the matter of South Africa's non-compliance with the Court's request is not warranted and would not foster cooperation with South Africa.[4]

In a rather unprecedented move, in paragraph 138 of the decision, the Court made a damning verdict against the UNSC that referred the Darfur situation to it as being unfit for purpose for failing in the past to take measures against States Parties referred to it for failing to comply with their obligations to cooperate with the Court.[5]

The decision, which is the latest in the line of chaotic and inconsistent decisions by the Court in its stalled bid to bring sitting Sudanese President, Omar Al-Bashir to justice, mirrors the Court's tensed relationship with African states in the light of the AU's decisions not to cooperate with the Court, and directive of mass withdrawal from the ICC, particularly in the context of the 27 October 2017 withdrawal of Burundi from the Rome Statute,[6] and South Africa's (failed and/or suspended)

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[1] See Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09, coram Cuno Tarfusser J (presiding), Marc Perrin de Brichambaut J and Chang-ho Chung J (hereinafter, "Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa").

[2] Rome Statute of the International Criminal Court opened for signature July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter, Rome Statute].

[3] See Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa (n 1) para 53.

[4] Ibid.

[5] Six States Parties have been referred to the UNSC in the past for failing to comply with their obligations to cooperate with the Court. See Pre-Trial Chamber I, "Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir", 13 December 2011, ICC-02/05-01/09-139-Corr; Pre-Trial Chamber I, "Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir", 13 December 2011, ICC-02/05-01/09-140-tENG; Pre-Trial Chamber II, "Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir", 26 March 2013, ICC-02/05-01/09-151; Pre-Trial Chamber II, "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 9 April 2014, ICC-02/05-01/09-195; Pre-Trial Chamber II, "Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute", 11 July 2016, ICC-02/05-01/09-266; Pre-Trial Chamber II, "Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute", 11 July 2016, ICC-02/05-01/09-267.

[6] BBC News 'Burundi leaves International Criminal Court amid row', 27 October 2017, available at www.bbc.co.uk/news/world-africa-41775951, accessed 27 October 2017.

withdrawal from the Court.[7] The ICC has jurisdiction over the most serious crimes of international concern: genocide, crimes against humanity, war crimes and aggression.[8] Al-Bashir is charged before the Court for war crimes and genocide.

The Court and the Office of the Prosecutor (OTP) contend that "the rights and obligations as provided for in the Statute, including article 27(2), are applicable to Sudan by imposition of the UNSC acting under Chapter VII of the UN Charter".[9] That "the immunities of Omar Al-Bashir as Head of State do not bar States Parties to the Rome Statute from executing the Court's request of his arrest and surrender".[10] That Article 98(1) of the Statute is not applicable to the situation of Omar Al-Bashir, and States Parties to the Rome Statute are under duty to execute the warrants of arrest issued by the Court".[11]

The AU insists that ICC arrest warrants against serving Heads of State trump the well-established customary international law principle of sovereign immunity and would jeopardize local and regional peace initiatives, or lead to an increase in violence in the effected regions.[12] That states cannot contract outside customary international law, and cannot impose a treaty obligation to a state not party to that particular treaty.

With varying outcomes, this complex nature of international law also played out in *S and Marper* (2008),[13] the *Khadi* case (2008),[14] and the *MOX Plant* case (2006).[15]

In *S and Marper v United Kingdom*,[16] the European Court of Human Rights ("ECtHR" or "Strasbourg") was faced with the question of the legality or otherwise of alleged infringements on Article 8(2) of the European Convention on Human Rights ("ECHR")[17] on the protection of privacy rights, as well as the proportionality of permissible limitations thereto such as those in pursuit of "national security", "public safety" or "the prevention of disorder or crime" under UK law, particularly the Human Rights Act (1998) ("HRA")[18] and the Police and Criminal Evidence Act ("PACE).[19]

Pursuant to sections 61 and 63 of PACE, the UK police had taken the fingerprints and DNA samples of S, a minor charged for attempted robbery and Michael Marper, charged for 'harassment of his partner". However, the police denied the application to have their fingerprints and DNA samples destroyed after proceedings against them had ended in an acquittal and a discontinuance respectively.

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[7] Matt Killingsworth, 'ICC Ruling on South Africa and Al-Bashir**:** Pragmatism Wins the Day', The Conversation, 27 July 2017, available at theconversation.com/icc-ruling-on-south-africa-and-al-bashir-pragmatism-wins-the-day-81500 accessed 27 July 2017; News24, 27 July 2017, available at: www.news24.com/Africa/News/icc-ruling-on-sa-and-bashir-pragmatism-wins-the-day-20170727 accessed 27 July 2017.

[8] See Rome Statute (n 2) arts 5 and 5*bis*.

[9] See Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa (n- 1), para 107.

[10] Ibid.

[11] Ibid.

[12] See Draft Decision of the 24th AU Summit on the ICC and the African Court of Justice and Human Rights, Doc Assembly/AU/18 (XX14).

[13] *S and Marper v. United Kingdom*, Applications Nos. 30562/04 and 30566/04, Council of Europe: European Court of Human Rights, (4 December 2008)

[14] *Kadi and Al Barakaat International Foundation v. Council and Commission* Case C–402/05 P and C–415/05, [2008] ECR I–6351.

[15] *Commission of the European Communities* v. *Ireland,* 30 May 2006, Court of Justice of the European Communities, No. C-459/03, p. I-04635.

[16] *R (Marper) v Chief Constable of the South Yorkshire Police* [2002] 1 WLR 3223 (CA), [2004] 1 WLR 2196 (HL); *S and Marper v. United Kingdom*, Applications Nos. 30562/04 and 30566/04, Council of Europe: European Court of Human Rights, (4 December 2008), 50.

[17] *Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms,* as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[18] *United Kingdom: Human Rights Act 1998* [United Kingdom of Great Britain and Northern Ireland], 9 November 1998.

[19] *United Kingdom: The Police and Criminal Evidence Act 1984*.

The question before the UK courts was whether storage of fingerprint, photograph and DNA information on national databases was both legally authorized and proportionate to these aims. There was disparity in principle, however, between the Court of Appeal and the House of Lords on the correct interpretation and application of the HRA (1998) which had transposed the ECHR into a UK law, particularly, section 2(1) thereof which allows domestic courts to consider the decisions of the ECtHR when interpreting the rights guaranteed under the Convention.

The Court of Appeal contended that domestic courts can interpret the Convention rights in ways more generous than Strasbourg, taking into cognizance the cultural traditions in the UK. Conversely, the House of Lords viewed the ECHR as "an international instrument, the correct interpretation of which can be authoritatively expanded only by the Strasbourg court".[20] However, the Court of Appeal and the House of Lords found the limitations on Article 8 justified, sanctioning the limited purposes for which the DNA information of the applicants was retained (the detection, investigation and prosecution of crime), and the advantages of having such a database for the fight against serious crime.

Aggrieved, the applicants approached Strasbourg for judicial review of the police's refusal to destroy their fingerprints and DNA samples, arguing, *inter alia,* that the decision violated their rights to private life under article 8 of the ECHR.[21] The Strasbourg court, relying heavily on European and Canadian state practice on data protection,[22] held the "blanket and indiscriminate" storage powers of data from persons suspected of criminal offences to be disproportionate, and as failing to strike a fair balance between the prevention of serious crime and individual rights.

S and Marper, exposes the complex question of, on the one hand, ensuring that state organs have the supporting tools to investigate and combat crimes, and protecting recognized human rights norms, on the other. The supranational organization (the ECtHR) prioritizes human rights first over fighting crimes. Whereas the state (the UK) would rather prioritize the fight against crime – without the database, many serious cases will go unresolved – which itself, could be argued, probably enhances human rights protection, rather than prioritize individual liberties.

The case, which sanctioned the supremacy of supranational law over national law, further demonstrates the dilemma facing domestic courts and a key ambiguity regarding how to approach the interpretation of a regional instrument that is simultaneously incorporated into a domestic law. This appears to have influenced Lord Hoffman's strong objection to, and call for the UK to come out of Strasbourg, which he perceives as interfering with the UK's judicial and parliamentary sovereignty in the guise of safeguarding human rights.[23]

Similarly, in the *Kadi* case[24] decided by the European Court of Justice ("ECJ") in 2008, the UNSC had identified the Applicant as a possible supporter and financier of Al-Qaida in the aftermath of the September 11, 2001 attacks in the US. Consequently, the UNSC adopted resolution 1267 (1999), which, *inter alia*, listed him for sanction and for an asset freeze. The European Union ("EU") transposed the UN sanction via Common Position 1999/727/CFSP.[25] Kadi approached the EU Courts, challenging his sanction and asset freeze, and the legitimacy and accuracy of UNSC resolution 1267 (1999).

The Court of First Instance declined the invitation to review the EU regulation, contending that it will in effect amount to reviewing the UNSC resolution. Nonetheless, it considered the question of whether the UNSC had respected *jus cogens*, especially the contravention of the fundamental right to fair hearing but found no violation.

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[20] See *R (Marper) v Chief Constable of the South Yorkshire Police* [2002] 1 WLR 3223 (CA), [2004] 1 WLR 2196, para 27.
[21] *S and Marper v United Kingdom*, Applications Nos 30562/04 and 30566/04, ECHR, para 12.

[22] Ibid, paras 45-54.

[23] See Lord Hoffmann, '*The Universality of Human Rights'*, (2009) Judicial Studies Board Annual Lecture, available at: www.judiciary.gov.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/ accessed 6 September 2017.
[24] *Kadi and Al Barakaat International Foundation v. Council and Commission* Case C–402/05 P and C–415/05, [2008] ECR I–6351.
[25] See Council of Europe, Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, 1) adopted on 15 November 1999, as amended by Common Position 2001/154/CFSP (OJ 2001 L 57, 1) adopted 26 February 2001.

On appeal before the Grand Chamber of the ECJ, the court chose instead to review the lawfulness of the EU regulation transposing the UNSC resolution.[26] It argued that since the legal order of the EU is firmly anchored on the protection of fundamental rights,[27] all its measures must align with fundamental right norms.[28] That the scrutiny does not amount to a review of the lawfulness of a UNSC resolution but the regional EU Common Position 1999/727/CFSP which gives effect to the resolution.[29] That the applicant, Kadi had not been informed of the reason for his inclusion in the list of sanctioned individuals and organizations, resulting in the contravention of his right to be heard, the right to effective judicial review,[30] and the right to property.[31] Per Advocate General Polares Maduro:

> The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.[32]

Kadi raises a complex problem as it challenges the *raison d'etre* of the UN, which is to ensure international peace and security. The executive powers of the UNSC under the UN Charter to issue executive orders, following a determination of its sub-committees, are enormous because the goal they pursue – international peace and security – is too great. Ideally, this should never be challenged or sacrificed as the UNSC power is exercised for global benefits. Yet, a supranational organization (the ECJ), focused only on the interest of a region, reviews the UNSC resolution and overrules it.

The disparity in the decisions of the Court of First Instance and that of the Grand Chamber also showed the complexity of the issues before the courts. However, that does not detract from the importance of the role of the executive orders of the UNSC under the UN Charter. Many have criticized *Kadi* for "underscoring and defending the autonomy of EU law",[33] and being "unfaithful to the traditional fidelity to public international law".[34]

The problem this complex state of international law raises is manifold. Firstly, it mirrors the conflict between supranational, international and national law. Secondly, it raises procedural and substantive law issues around jurisdiction and application of international criminal law. Thirdly, especially for African states, it raises procedural issues around international organizations on recondite issues for which international law has remained silent, such as the question of compensation for victims of slavery, and the obnoxious principle of *uti possidetis* which prohibits colonial boundaries from being changed, even after independence, as affirmed in 1986 by the International Court of Justice ("ICJ") in *Burkina-Faso v Mali.*[35]

Some other unresolved issues such as the 'emergent challenges around sovereign immunity and diplomatic protection', the 'unresolved individual criminal responsibility matters in the advent of international human rights protection', and the 'challenges to general international law arising from the

[26] See *Kadi and Al Barakaat*, (n 14) para 290.
[27] Ibid. para 303.

[28] Ibid, para 281.

[29] Ibid. para 286.

[30] Ibid. para 384.

[31] See *Jokela v Finland,* ECtHR in App. No. 28856/95, 21 May 2002, Reports of Judgments and Decisions 2002-IV, para 45.
[32] See *Kadi and Al Barakaat*, (n 14) para 24.
[33] See Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*'* (2012) 23 (4) *The European Journal of International Law*, 1015–1024; De Búrca, 'The European Court of Justice and the International Legal Order After Kadi', [2010] 51 *Harvard International Law Journal*, 1, 44; Riccardo Pavoni, 'Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ Kadi Judgement: A Misplaced Argument Hindering the Enforcement of International Law in the EC', (2009) *Yearbook of European Law,* 627, 630; H. Krenzler and O. Landwehr, '"A New Legal Order of International Law": On the Relationship Between Public International Law and European Union Law After Kadi', in U. Fastenrath (ed.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011), 1004, 1022.
[34] See Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance? (n 33) 1015–1024; De Búrca, 'The European Court of Justice and the International Legal Order After Kadi', [2010] 51 *Harvard International Law Journal*, 1, 44.
[35] See *Frontier Dispute, Burkina Faso v Mali, Provisional Measures, Order,* [1986] ICJ Rep 3, ICGJ 114 (ICJ 1986), 10th January 1986, International Court of Justice [ICJ].

emergence and strengthening of supranational legal orders', etc.[36] make international law very complex. This article therefore problematizes the ICC practice in Africa under the light of emergent jurisprudence, State practice, and commentary on the *Al-Bashir* case (2009).[37]

Most of the *opinion juris* on the ICC practice in Africa dwell on the question of immunities of serving state officials, which has been the principal issue in the Al-Bashir case. The extant literature could be categorized into two divergent views: The proponents of the ICC who contend that immunity is ousted by the referral of a situation by the UNSC to the ICC, and others who insist that the ICC ought to observe the principles of customary international law immunities. Akande and others maintain that UNSC resolution 1593[38] made pursuant to its compulsory Chapter VII powers referring the situation in Darfur to the ICC binds Sudan to the provisions of the statute as if it were a party to the statute. That article 27 "becomes applicable to Sudan" mandating it to cooperate with the Court by waiving its immunity.[39]

Conversely, Gaeta and others contend that the absence of immunities before an international court does not mean that national authorities may ignore the rules prohibiting a person who benefits from personal immunities.[40] For Du Plessis, the ICC/AU tension merely points to a conflict between two norms: the ICC's norm of arrest and surrender, and the AU's norm of immunity from arrest and surrender.[41]

Other scholars maintain that whereas African states are subjected to international criminal investigation, political expediency has always trumped the prosecution of powerful Western states despite their participation in similar crimes.[42] Professor Chigara contends that there appears to be "an emergent *lex specialis* regional AU anti-ICC customary international law" that ought not be wished away by the ICC,[43] and by national courts, particularly "lower court judges of judicially evolving post-colonial States".[44]

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[36] Benedict Abrahamson Chigara, 'The Administration of International Law in National Courts and the Legitimacy of International Law' (2017) 17 *International Criminal Law Review*, 909-934, 914.

[37] See Situation in Darfur, Sudan in the Case of *the Prosecutor V. Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir") Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009.

[38] United Nations Security Council resolution 1593, S/RES/1593 (2005), issued on 31 March 2005 (hereinafter "Resolution1593) available at: www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf accessed 10 January 2017.

[39] See Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) *AJIL* 98, 407-433; Michael Tunks, 'Diplomats or Defendants? Defining the Future of the Head-of-State Immunity' (2002) 52 *Duke LJ*. 651, 656; Rosanne Van Alebeek, *The Immunities of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 222.

[40] See Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', (2009) 7 *Journal of International Criminal Justice*, 315–332; Douglas Guilfoyle, *International Criminal Law* (OUP, 2016) 397, 411; Anthony Colangelo, 'Jurisdiction, Immunity, Legality, and Jus Cogens' (2013) 14 *Chicago Journal of International Law* 1, 53; Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13(4) *EJIL* 855, Shiv Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Hart 2007) 232; Than C and Shorts E., *International Criminal Law and Human Rights* (Sweet & Maxwell 2003) 59; Joanne Foakes, '*The Position of Heads of State and Senior Officials in International Law* '(OUP 2014) 82; Bellal, 'The 2009 Resolution of the Institute of International Law on Immunity and International Crimes: A Partial Codification of the Law?' 9 *JICJ* (2011) 227, Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (3rd edn, OUP 2014) 321; Roger O' Keefe, *International Criminal Law* (OUP 2015), 440 – 441; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (OUP, 2005) 198; Sevrine Knuchel, 'Samantar v Yousuf: Narrowing the Prospects for Human Rights Litigation Against Foreign Officials?' (2011) 11, *Human Rights Law Review*, 152-169; William Dodge, 'Foreign Official Immunity in the International Law Commission: The Meanings of 'Official Capacity'' (2015) *American Journal of International Law*.

[41] Max Du Plessis, '*Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga'*, in Evelyn Ankumah (ed) *The International Criminal Court and Africa: A Decade On (*Intersentia 2016), 245-274, 254.

[42] Ifeonu Eberechi, 'Rounding Up the Usual Suspect: Exclusion, Selectivity, and Impunity in Enforcement of International Criminal Justice and the African Union's Emerging Resistance', (2011) 4 *African Journal of Legal Studies*, 5-84, 56.

[43] See Benedict Chigara and Chidebe Nwankwo, 'To be or not to be?' African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33 *Nordic Journal of Human Rights*, 243-268, 244.

[44] See Benedict Chigara, 'The Administration of International Law in National Courts and the Legitimacy of International Law' (n 36) 909-934.

With the ICC/AU tensed relationship in the light of the *Al-Bashir* case (2009) as a case study, this article goes beyond the over-debated question of immunities of serving state officials, and deconstructs various elements of international criminal justice *vis-à-vis* state practice thereto. This article argues that the extant international criminal justice mechanism is dysfunctional in that it is driven by selfish state interests, reciprocity,[45] and judicial-politics, as opposed to a genuine international attempt at fighting impunity and putting an end to the commission of egregious international crimes – war crimes, crimes against humanity and genocide – as contemplated under Article 5 of the Rome Statute.[46] The dysfunctionality is caused by the political preferences and leanings of the stakeholders in international politics and diplomacy, such as, the UNSC, the ICC, the AU, member states parties to the Rome Statute, and the selfish interests of (powerful) third states.

It is also argued that the ICC faces the challenge of existential justification leading to its inconsistent and chaotic decisions on the question of Al-Bashir's immunities. The struggle for relevance between national, supranational and the universal law exposes the complex nature of international justice.

The ICC refuses to acknowledge and recognize the AU's supranational jurisdiction, and therefore, compelling Africa states to act contrary to the directive of the AU. This has stalled the ICC mandate of bringing an end to impunity and human rights violations by bringing those suspected of having committed egregious international crimes to justice. This article finds that in the confrontation between international criminal justice and powerful western nations, the former more often caves in under the weight of the latter's political pressure, leading to an emergent AU resistance whereupon African states attempt to become equal contributors to international criminal justice, as opposed to being perceived as victims, and a testing ground for the nascent ICC.

If the international criminal justice mechanism as projected in the Rome Statute is dysfunctional, as is herein canvassed, what are the elements of the dysfunctionality? Is the dysfunctionality due to the factors that shape the Court's decision making or the external interference from the UNSC, and powerful non-states parties to the Rome Statute? Is the dysfunctionality because of the struggle for relevance between national, supranational and the universal judicial mechanisms? Or is the AU simply bent on encouraging impunity as is being canvassed by the West? And how can this dysfunctionality be amended to inherit the benefits of having the international criminal justice system?

The literature in this area does not explore the questions herein raised in detail but offer some speculations. This article aims to close this gap in the existing literature - without arguing for or against the ICC or the AU as has been the case with the extant literature.

This article is discussed in five parts. The first part is introductory and characterizes the elements of dysfunctionality of the international criminal justice mechanism. The second part deconstructs the multifaceted factors and states practices influencing the enforcement of international criminal justice. The third part analyses the prosecutorial practice of the OTP and the jurisprudence of the ICC in the light of the Court's search for relevance and legitimacy. In the fourth part, the role of the AU as the custodian of African interests and policies is analyzed under the light of the proposed African criminal court and the AU collective withdrawal strategy from the ICC. The last part proposes options for making international criminal justice functional, and makes tentative recommendations.

2. Characterizing The Elements Of Dysfunctionality Of The ICC/AU Relationship

A major concern being raised by the AU is that Africa is the primary target of international criminal justice. Although selective enforcement of criminal justice, *per se*, is neither inherently wrong, nor, subject to few exceptions, a defence in law,[47] its pattern of occurrence in Africa since the inception of the ICC has elicited a huge debate among scholars. For Robert Cryer, "when a law, general on its face, is in practice enforced only against a group or groups, the effect is the same as if it were targeted at

[45] See Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia University Press, 1979).

[46] See Rome Statute (n 2) arts 5 and 5*bis*.

[47] See Ifeonu Eberechi, 'Rounding Up the Usual Suspect' (n 42) 56.

those group by its term".[48] Some of the factors leading to the strained ICC/AU relationship are examined hereunder.

2.1. The emerging anti-ICC regional customary international law of the AU

In 2005, the UN Security Council adopted resolution 1593 which referred the Darfur conflict to the ICC for investigation.[49] This subsequently led to the issuance of two warrants of arrest of the President of Sudan, Omar Al-Bashir, in relation to the crime of genocide and crimes against humanity committed in the Darfur region. According to the AU, the ICC process would jeopardize the delicate peace process that it was spearheading in respect of the Darfur conflict. It requested the UNSC to exercise its powers under Article 16 to suspend the ICC process.[50] Following the failure and/or refusal of the UNSC to consider its request, the AU directed all its member states not to cooperate with the ICC in the arrest and surrender of Al-Bashir.[51]

Again, in 2011, the UNSC adopted resolution 1970 which referred the situation in Libya to the ICC.[52] To quell demonstrations, which broke out on 15 February 2011 against the administration of Muammar Gaddafi, state security agents used weapons, which resulted in the death of several civilians. Subsequently, the ICC issued a warrant of arrest was issued against Col. Gaddafi.[53]

The AU, yet again, decided not to cooperate with the Court in the arrest and surrender of Gaddafi, contending that the arrest warrant "seriously complicates the efforts aimed at finding a negotiated political solution to the crises in Libya".[54] It requested the UNSC to defer the ICC process in Libya in the interest of justice as well as peace in the country in accordance with the provisions of Article 16 of the Statute. The UNSC never considered this request till Gaddafi was killed.

In 2013, Kenya, with the support of AU, sought to defer the cases pending before the ICC against its president Uhuru Kenyatta and his deputy, William Ruto.[55] The two leaders are charged before the ICC with crimes against humanity alleged to have been committed following the violence that occurred subsequent to the contested 2007 election in Kenya.[56] For the AU, the continued prosecution of the president and his deputy undermined the sovereignty, stability and peace of the people of Kenya, and compromise their ability to spearhead the fight against terrorism in the East Africa region.

The UNSC considered Kenya's request but failed to adopt a draft resolution to defer the ICC proceedings.[57] African representatives criticized the UNSC for not being an "institutional destination for serving complex and fluid international security and political problems".[58] The AU criticized the

[48] Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (OUP 2005) 194.
[49] See *Prosecutor v. Omar Hassan Ahmed Al-Bashir* (n 37).

[50] See African Union, Peace and Security Council, Communique PSC/PR/COMM. (CLXXV), 5 March 2009.

[51] Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/DEC.245(XIII), Sirte, July 3, 2009, Para. 9-10

[52] See UNSC resolution 1970 26 February 2011, 6491st meeting, UN Doc S/RES/1970 (2011).

[53] *Situation in Libya, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 27 June 2011.

[54] African Union Assembly, Session on the Implementation of the Assembly Decision on the International Criminal Court, Assembly/AU/DEC.366 (XVII), DOC.EX. CL.670 (XIX), 30 June – 1 July 2011, para 6.

[55] African Union Assembly, *Decision on Africa's Relationship with the International Criminal Court (ICC),* Ext/Assembly/AU/Dec 1, October 2013.

[56] See *Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali - Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"*, ICC-01/09-02/11 O A, International Criminal Court (ICC), 30 August 2011.

[57] UNSC, 7060th meeting, S/PV.7060 '*Peace and Security in Africa'*, 15 Nov 2013.

[58] UNSC, 7060th meeting, S/PV.7060 '*Peace and Security in Africa'*, 15 Nov 2013.

UNSC for failing to acknowledge its resolution that no sitting heads of state or government should appear before the ICC.[59]

Consequently, for the past one and half decades, the AU appears to have been developing "unequivocal regional anti-ICC standards of its own".[60] The directive of the AU to its member states parties "not to co-operate pursuant to the provision of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of Sudanese President Al-Bashir to the ICC"[61] at its 13 African Union Summit held on 6 July 2009 characterized the anti-ICC regional laws it has been developing over the period. To further assess Africa's relationship with the ICC, the AU convened an Extraordinary Session of the Assembly of Heads of State and Governments of the African Union on 12 October 2013 in Addis Ababa, Ethiopia[62] Professor Chigara succinctly summarized the AU position as follows:

(i) "That no international court or tribunal has the capacity to commence or continue charges against any serving AU head of state or government or anybody acting or entitled to act in such capacity during their term of office;
(ii) That the trials by the ICC against President Uhuru Kenyatta and Deputy President William Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they finish their terms in office; and
(iii) To fast-track the establishment of the criminal jurisdiction of the African Court on Human and Peoples' Rights and to table for discussion at the Assembly of State Parties of the ICC amendments to the Statute on immunity of heads of states and government among others". [63]

The AU Assembly subsequently directed that "any AU member state that wishes to refer a case to the ICC may inform and seek the advice of the African Union".[64] According to President Zuma of South Africa, "there is an African stance on this and we are not different from it … the UNSC should have listened to Africa before issuing the interdict".[65] Whereas while President Zuma's comments "might be taken as evidence of *opinio juris* regarding the emergent regional anti-ICC customary international law",[66] the refusal of Uganda, Chad, Kenya, Djibouti, Malawi, Congo, South Africa, and Egypt to be involved in the arrest and surrender of President Al-Bashir to the Court "evidenced this emergent anti-ICC customary international law". Some have, however, described the AU directive as an "overt politicization of what should be [an] impartial legal process".[67]

Ever since, the AU has consistently passed resolutions calling on its member states parties not to cooperate with the ICC in the arrest and surrender of Al-Bashir. The question arises as to whether the AU is competent in law to formulate its *lex specialis* regional customary international law? This is because an important means of identifying customary international law is the reference to international

[59] See Kenyan Ministry of Foreign Affairs (2013), Full Statement by the Ministry of Foreign Affairs, Kenya, on the Negative UN Security Council Vote, available at: whereiskenya.com/full-statement-ministry-foreign-affairs-kenya-negative-un-security-council-vote/, accessed 22 July 2017.
[60] Benedict Chigara and Chidebe Nwankwo, 'To be or not to be?' (n 43) 244.

[61] See South African Government News Agency, '*AU leaders will not Extradite Al Bashir',* available at: www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir, accessed 21 June 2017.
[62] See African Union (2013) Decisions and declarations of the Assembly of the African Union, Extraordinary Session of Heads of States and Government. Ext/Assembly/AU/Dec. 1-2. 12 October 2013
[63] Benedict Chigara and Chidebe Nwankwo, 'To be or not to be?' (n 43) 244.

[64] African Union (2013) Decisions and declarations of the assembly of the union, extraordinary session of heads of states and government. Ext/Assembly/AU/Dec. 1-2. 12 October 2013, para 10(iii).

[65] South African Government News Agency, *'AU leaders will not Extradite Al Bashir'* available at: www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir, accessed 21 June 2017.

[66] See Benedict Abrahamson Chigara*,* 'The Administration of International Law in National Courts and the Legitimacy of International Law' (2017) 17 *International Criminal Law Review,* 909-934, 919; Benedict Chigara and Chidebe Nwankwo, 'To be or not to be?' (n 43) 244.

[67] Tim Murithi, 'Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court' in Gerhard Werle et al. (eds.), *Africa and the International Criminal Court* (Asser Press 2014) 179-193, 189.

treaties,[68] UN General Assembly resolutions,[69] International Law Commission documents and state practice.[70]
However, there is an ongoing debate on the emergence of 'modern approaches' to customary international law.[71] In contrast to the 'traditional approaches' that are primarily concerned with the identification of patterns of state practice,[72] modern customary law is rather based on interpretative techniques and *opinio juris*.[73]

Hence, the *lex specialis* outcomes of the AU Extraordinary Summit could possibly mirror this sudden or wild customary international law "requiring none of custom's gradual crystalizing element, including the passage of time to observe a consistent and uniform practice".[74] This could be described as indicative of the formation of 'instant custom', or 'wild custom', or 'civilized custom', or even 'modern custom' under the doctrine of customary international law.

Professor Bradley likens the development of customary international law to the development of common law rules and calls on judges to actively develop custom, considering state preferences and consequentialist considerations.[75] But it remains to be seen whether this emergent AU regional customary international law will trump the international criminal law that it is challenging, which is a result of over seven decades of manifestation of standards on the prohibition of and enforcement against genocide, crimes against humanity and war crimes.

The ICC/AU tension "has posited a seeming conflict between two norms: the ICC's norm of arrest and surrender, and the AU's norm of immunity from arrest and surrender".[76] As the Gauteng

[68] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Resolution 276 [1970]*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, para. 94; *Fisheries Jurisdiction (U.K. v. Iceland)*, Jurisdiction of the Court, 2 February 1973, ICJ Reports (1973) 3, para. 36; *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12, paras 52–59; *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment of 24 May 1980, ICJ Reports (1980) 3, para 62; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, paras 46–47; *Continental Shelf (Tunisia v. Libya)*, Judgment of 24 February 1982, ICJ Reports (1982) 18, paras 45, 101, 111; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, 14 June 1993, ICJ Reports (1993) 38, paras 48, 54–58; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, paras 79, 82; *Arrest Warrant of 11 April 2000 (D.R.C. v. Belgium)*, Judgment of 14 February 2002, ICJ Reports (2002) 3, para. 52; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment of 10 October 2002, ICJ Reports (2002) 303, paras 263, 264; *Armed Activities on the Territory of the Congo (D.R.C. v. Uganda)*, Judgment of 19 December 2005, ICJ Reports (2005) 168, paras 172, 214, 217; *Armed Activities on the Territory of the Congo (D.R.C. v. Rwanda)*, Judgment of 3 February 2006, ICJ Reports (2006) 6, paras 41, 46; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, para 80 – all cited in Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law', (2017) 28 *European Journal of International Law*, 357-385, 372.

[69] See *Armed Activities (D.R.C. v. Uganda)*, (n 68) paras 162, 244; *Kosovo*, (n 68) para 80.

[70] *Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 29 April 1999, ICJ Reports (1999) para 62.

[71] See Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', (2001) 95 *American Journal of International Law,* 757; Peter Tomka, 'Custom and the International Court of Justice', (2013) 12 *Law and Practice of International Courts and Tribunals,* 195; Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (n 68) 361-362.
[72] See Mendelson, 'The Formation of Customary International Law', (1998) *Recueil des Cours*, 155, 272.

[73] See *Statute of the International Court of Justice*, 18 April 1946 s. 38(1) (a-j). For a detailed discussion on this, see Anthea Roberts, '*Traditional and Modern Approaches to Customary International Law* (n 71) 758; William Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches', (2014) 45 *Georgetown Journal of International Law,* 445, 470.
[74] See also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ Reports (1969) 4; Mario Prost and Paul Clarke, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?' (2006) 5(2) *Chinese Journal of International Law* 341–370; Benedict Chigara and Chidebe Nwankwo, 'To be or not to be?' (n 43) 245-246.

[75] Curtis Bradley, 'Customary International Law Adjudication as Common Law Adjudication', in Curtis Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 34, 49-50.
[76] See Max Du Plessis, 'Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga' (n 41) 254; Paulo Gaeta, 'The ICC Changes Its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again, Opinio Juris, 23 April 2014, available at: http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/, accessed 1 August 2017.

High Court of South Africa correctly observed, "South Africa is not the only Rome Statute signatory that has failed to carry out its duties under the Rome Statute when it could have done so, based on a conflict between its regional affiliation on the one hand and its broader international obligation on the other".[77] Du Plessis writes that:

> "There is an unenviable position for African ICC parties, with a prima facie conflict between two obligations under international law. The first is their obligation as signatories to the ICC under, among others, Article 87 of the Rome Statute to cooperate in the arrest and surrender of Al-Bashir; the second being the obligation under Article 23 of the Constitutive Act of the AU to comply with decisions of the AU Assembly not to cooperate with the ICC".[78]

The question of resolving norm clashes in international law is in a state of flux,[79] and has remained quite controversial. Articles 58 and 61 of the International Law Commission's Draft Articles on the Responsibility of International Organizations, 2011 appears to prohibit a state from breaching an obligation it already owes under international law by seeking to undermine that obligation through an international organization.

Hence, the legality or otherwise in international law, of ICC members, after being placed under obligation to comply with the ICC arrest warrants, are competent to create or vote for an AU *lex specialis* resolution which circumvents the ICC process, remains debatable. Nevertheless, in compliance with the AU directive, African states such as Malawi, Nigeria, Chad, Congo DRC, Djibouti and South Africa failed to arrest Al-Bashir when he visited their countries. There is therefore, a real question of opposing obligations between the AU and the ICC which needs to be resolved to inherit the benefits of international criminal law.

The foregoing raises the question whether there exists an international dispute in law between the AU and the ICC. According to the ICJ in its Advisory Opinion in the case concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (1950)[80] "whether there exists an international dispute is a matter for objective determination". For Professor Chigara, that objectivity is ensured by referencing a list of considerations.[81] In the *Mavrommatis Palestine Concessions Case* (1924), the Permanent Court of Justice (PCJ) referred to these considerations when it stated that: "A dispute is a disagreement on a point of law or fact, *a conflict of legal views or of interest between two persons"*[82] (Emphasis supplied).

It could be gleaned from the foregoing that a legal dispute, that is, a clash of interests, legal views and point(s) of law or fact(s) exist between the AU and the ICC. This raises the further question of whether the AU can be characterized as a legal person for these purposes. The UN Charter recognizes regional entities as legal persons,[83] and the UN has on several occasions entered peace mission agreements with the AU.[84] Hence, the AU could be characterized as a legal entity.

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[77] See *SALC and Another v. National Director for Public Prosecutions and Others* (Judgment) Case No. 77150/09, para. 34, available at: www.saflii.org/za/cases/ZAGPPHC/2012/61.pdf, accessed 23 July 2017.

[78] Max Du Plessis, 'Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga' (n 41) 255.

[79] See Marko Milanovic, 'Norm Conflict in International Law: Wither Human Rights', (2009) 20 *Duke Journal of Comparative and International Law*, 69-131.

[80] 26 ICJ Reports, 195, 74; Benedict Chigara 'The Humwe Principle: A Social-Ordering Grundnorm for Zimbabwe and Africa?', in Robert Home, *Essays in African Land Law* vol 1 Pretoria University Law Press, 2011) 113-133; Sven Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* (The Hague: TMC Asser Press, 2008) 11–16.

[81] Benedict Chigara and Chidebe Nwankwo, 'To be or not to be?' (n 43) 244.

[82] PCIJ, Series A, No 2, 11.

[83] Benedict Chigara and Chidebe Matthew Nwankwo, 'To be or not to be?' (n 43) 249.

[84] See UN Security Council, *Security Council resolution 1769 (2007) [on establishment of AU/UN Hybrid Operation in Darfur (UNAMID)]*, 31 July 2007, S/RES/1769 (2007), para 1.

The ICC process in Sudan and Libya, its efforts to do justice to the UNSC referral of the situations, and the *propio motu* Kenya situation, are heavily depended on the support of AU member states parties. In the light of the AU's continued concerns about the ICC's action against President Al-Bashir and its emergent 'modern' anti-ICC customary international law, and the ensuing standoff, there is a growing concern within the international criminal justice community in Africa and globally about the Court's ability to achieve its mandate under Article 5 of the Rome Statute. This is exacerbated by the multifaceted factors, discussed *infra,* which influence the Court's operations, particularly its interventions in Africa.

3. The Multifaceted Factors Influencing The Enforcement Of International Criminal Justice

This part analyses some of the factors influencing the enforcement of international criminal justice in the light of the ICC's interventions in Africa.

3.1. The UNSC politics of referrals

The question of referral of non-state parties by the UNSC pursuant to Article 13(b) of the Rome Statute has generated much debate. Some have argued that Article 13(b) is incompatible with the Vienna Convention on the Law of Treaties,[85] and ought not to be extended to states that have not ratified the Rome Statute. In analyzing the use of Article 13(b), we will consider the related practice of the ICJ. The ICJ is very reluctant to extend the scope of a treaty to a party that has not ratified it and has explicitly objected to its application. In the *North Sea Continental Shelf* judgment,[86] the ICJ declined the invitation to accept Article 6 of the Geneva Continental Shelf Convention as customary law against the opposition of Germany. Equally, in the *Territorial and Maritime Dispute,*[87] the ICJ avoided applying a specific provision of UN Convention on the Law of the Sea when Colombia explicitly objected to its application. Hence, the AU insists "the effect of being legally bound by a decision of the UNSC to a Statute that a country has not even ratified is not acceptable".[88]

This brings into focus the role of power and national interests in matters of international criminal justice, and, subsequently and unavoidably, of "victor justice"[89] - where a permanent international court exercises jurisdiction within parameters set by the UNSC, a body, which, according to Article 27(3) of the UN Charter, decides based on power politics, and not in line with the requirements of the international rule of law. The UNSC seems to have impeded the Court's ability to be impartial and independent. It can directly or indirectly prevent the Court from pursuing situations and cases that involve its members and their allies, or which for political expediency supersedes a firm commitment to justice.

Some have criticized the UNSC's swiftness in referring the Darfur and Libya situations to the ICC, whilst neglecting the situations in Sri Lanka, the Palestinian territories, Afghanistan and Syria because of some UNSC members' political strategic interests. In relation to the ongoing Syria conflict, the Human Rights Council observed that "Syrian government has committed crimes against humanity, [that] both parties to the conflict have committed war crimes, [and that] a referral to justice is imperative".[90] The UNSC has failed to refer the situation to the ICC because of Russia's support for the Assad regime.[91]

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[85] See Hans Kochler, 'Justice and Realpolitik: The Predicament of the International Criminal Court', (2017) 16 *Chinese Journal of International Law*, 1–9, 3.

[86] *North Sea Continental Shelf (Germany v. Denmark; Germany v. the Netherlands)*, Judgment of 20 February 1969, ICJ Reports (1969) 3.

[87] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, ICJ Reports (2012) 624, paras 117–118.

[88] See Draft Decision on the International Criminal Court, Doc. EX.CL/1006(XXX), African Union, Assembly of the Union, Twenty-Eighth Ordinary Session, 30-31 January 2017, Addis Ababa, para 4.

[89] Hans Kochler, 'Justice and Realpolitik: The Predicament of the International Criminal Court' (n 85) 4.

[90] See UN Human Rights Commission, Independent International Commission of Inquiry on the Syrian Arab Republic: *Human rights abuses and international humanitarian law violations in the Syrian Arab Republic*, 21 July 2016- 28 February 2017. Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic -

According to Bosco, "there is strong evidence that the Court has trodden very carefully in areas where major powers have strong interests".[92] The right of an external authority (UNSC) to interfere with the Court's exercise of jurisdiction has made the ambitious commitment to guarantee "lasting respect for and the enforcement of international justice"[93] – the Court's founding idea according to the Preamble of the Rome Statute – a rather elusive goal.

Article 16 of the Rome Statute empowers the UNSC, through a resolution under Chapter VII of the UN Charter, to suspend an ICC investigation or prosecution for a renewable period of 12 months. This means that the UNSC can interfere with the work of the ICC if it considers the Court's intervention as threatening global peace and security. Chapter VII of the UN Charter authorizes the UNSC to take measure to maintain or restore international peace and security where it has been established that there is a threat to the peace, breach of peace or act of aggression.

In 2002, the UNSC by resolution 1422[94] (renewed via resolution 1487) made pursuant to Article 16 of the Rome Statute, exempted the ICC from exercising jurisdiction over personnel from non-state parties to the ICC involved in an operation authorized by the UNSC for a period of 12 months. The contributing states were given exclusive jurisdiction over their troops. This exemption did not apply to officials from Sudan and Libya.[95] The United States prompted the resolution with the motive of protecting its troops participating in UN operations from possibly being prosecuted before the ICC. The UNSC acceded to the US requests for the renewal of the resolution when the US threatened to pull out of peacekeeping efforts if its request was not granted.[96]

Article 16 was intended to be invoked once the ICC is seized of a situation, that is, once the prosecutor starts investigations or after a person has been charged before the Court, marking the beginning of prosecution. Instead, the US-backed resolutions 1422 and 1487 used Article 16 to preemptively grant immunity under the Rome Statute to troops belonging to powerful states not party to the ICC. It is difficult to see how the hypothetical future possibility of the ICC investigating or prosecuting a peacekeeper from a country not party of the ICC would threaten the peace and security of the country.

The *travaux preparatories* of Article 16 reveals that the intendment of Article 16 upon adoption was that the power of the UNSC to defer investigations or prosecutions would be applied only in exceptional situations bothering on threat to peace and security for a limited time frame.[97] It is obvious that the US (and other permanent members of the UNSC) abused their power under Article 16 by applying the same rule differently to different people. The UNSC is a political body and political interests and considerations appear to trump the interest of justice in the exercise of their powers pursuant to the UN Charter and the under the Rome Statute.

The AU has been unsatisfied with the manner the UNSC has handled its requests for deferrals, particularly, the failure to accede to its request to defer the Al-Bashir case.[98] This calls for a scrutiny

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A/HRC/34/CRP.3 Release date: **13 March 2017 available at:** http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx, accessed 25 July 2017.

[91] Alana Tiemessen, 'The International Criminal Court and the Politics of Prosecutions', (2014) *International Journal of Human Rights*, 444-461, 449; Recently a referral to the ICC was removed from a draft UNSC resolution prepared by France.

[92] David Bosco, 'Justice Delayed', Foreign Policy, June 29, 2012, available at: http://foreignpolicy.com/2012/06/29/justice-delayed-2/, accessed 25 July 2017; Alana Tiemessen, 'The International Criminal Court and the Politics of Prosecutions', (2014) *International Journal of Human Rights*, 444-461, 449.

[93] Hans Kochler, '*Justice and Realpolitik: The Predicament of the International Criminal Court*' (n 85) 5.

[94] See S.C. Res 1422, UN SCOR, 57th Session, 4572nd meeting, UN DOC S/RES/1422 (2002).

[95] See UN DOC S/RES/1593 (2005), Preambular para 2; UN DOC S/RES/1970 (2011) Preambular para 12.

[96] Resolution 1422 was renewed in 2003 through resolution 1487 extending the same status quo for a further 12 months via UNSC resolution 1487, UN SCOR, 58th Session, 477nd meeting, UN DOC S/RES/1487 (2003).

[97] Charles Jalloh, '*Assessing the African Union Concern about Article 13 of the Rome Statute of the International Criminal Court*, 18-21.

[98] See Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Assembly/AU/Dec/245 (XIII) Sirte, July 3, 2009; African Union Assembly, Session on the Implementation of the Assembly Decision on The International Criminal Court, Assembly/AU/DEC.366 (XVII), DOC.EX.

into whether AU's contention is genuine or rather an attempt to prevent justice for many victims of international crimes in Africa.[99]

A factor that militated against the AU's requests for deferral of the Darfur[100] and Libya[101] situations is that both were referred to the ICC by the UNSC under Article 13(b) of the Rome Statute. According to Professor Tladi, it would be difficult to envisage a situation that has been referred to the ICC by the UNSC as qualifying for a deferral under Article 16.[102] A deferral request would ideally require proof that the situation has further deteriorated owing to the Court's intervention. For Okoth, the AU has failed to show that the ICC intervention in Darfur and Libya constituted a threat to peace, and that its suspension would lead to the restoration of that peace.[103]

In the (stalled) Kenya case, the AU contended that the ICC proceedings would prevent the Kenya President, Uhuru Kenyatta and his deputy, William Ruto from discharging their constitutional mandates, thereby undermining the sovereignty of the Kenyan people. Both leaders are charged with crimes against humanity alleged to have been committed following the violence that occurred after the 2007 elections in Kenya.[104] To bring the request for deferral within the purview of security threat under Article 16, the AU argued that the problem of *Al Shabab* terrorism in the East Africa region demand a full concentration from the Kenyan leaders as their role in fighting terrorism were being compromised by the ICC prosecution.[105]

This raises the question whether the UNSC can invoke Article 16 citing the official capacity of the accused person(s). This argument can neither be supported by the peace and security criteria set out under article 16 nor by Article 27(2) of the Rome Statute which overrides the immunity of state officials of states parties to the Rome Statute. The Kenya deferral request would not only contradict Article 16 (as did resolutions 1442 and 1487) but also set a dangerous precedent and encourage impunity as those indicted by the ICC could seek elective office, and thereafter frustrate the proceedings through the deferral process.

A related question is whether threat to peace and security under Article 16 must relate directly to the situation that necessitate the Court's intervention, or may be extended to any other situation of peace and security, like the *Al Shabab* terror threat. An assessment of the *travaux prepatoires* of Article 16 shows that its drafter could not have intended that the question of peace and security be extended to situations that do not directly relate to the question of justice before the ICC.[106] The AU's (and Kenya's) contention is unattainable as it is difficult to rely on the terrorist threat in Kenya as a reason that would justify an Article 16 intervention in the proceedings against its leaders.

Nevertheless, the AU's assertion that the UNSC applies double standards on questions of international criminal justice could have merit in the light of the initial deferral requests, which granted immunity from the Court's jurisdiction to troops of powerful states not party to the Rome Statute.

CL.670 (XIX), 30 June – 1 July 2011, para 6; Dire Tladi '*The African Union and the International Criminal Court'* (2009) 34 South African Year Book of International Law.

[99] See Juliet Okoth, *'Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals'* in Gerhard Werle et al*., Africa and the International Criminal Court* (Asser Press, 2014) 196.

[100] See *Prosecutor v. Omar Hassan Ahmed Al-Bashir* (n 37).

[101] Ibid.

[102] Dire Tladi '*The African Union and the International Criminal Court'* (n 98) 68.

[103] Juliet Okoth, *'Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals'* (n 99) 203.

[104] See *Prosecutor v. William Samoei Ruto and Joshua Arap Sang; Prosecutor v. Uhuru Muigai Kenyatta* (n 56).

[105] See African Union Assembly, Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Doc. 1, October 2013.

[106] Juliet Okoth, *'Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals'* (n 99) 205.

Comparing these earlier situations to the AU's requests for deferral, the Kenya situation would in fact make more sense for the application of Article 16.

3.2. Self-referrals and State practice thereto

There appears to be a pattern wherein some states directly or indirectly place political limits on the scope of ICC prosecutions, hampering the Court's ability to be impartial, independent, and apolitical.[107] According to Shklar, regimes in power use "political trials" as a judicial means to eliminate perceived political enemies.[108] This can be applied to the practice of State referrals where ruling elites in the referring states appear to use the ICC as a tool to eliminate perceived human rights violators, finding it convenient that such violators are undesirable to both the international community and their political and military rivals. This practice is examined under the light of the Uganda, DRC and Cote d'Ivoire situations.

In 2003, the Ugandan government referred the situation in Northern Uganda to the ICC. The OTP was mandated to investigate all parties and crimes in the conflict between the militia group, the Lord's Resistance Army (LRA) and the government and its military, the Ugandan People's Defence Forces (UPDF). The ICC has since indicted five LRA leaders for crimes against humanity and war crimes that include killings, rape, and use of child soldiers. But, all those indicted, including LRA notorious leader, Joseph Kony, remain at large.

The OTP has neither investigated nor indicted anyone in the Ugandan government or military for attacks against civilians, use of child soldiers or forcible population displacement of Acholi communities in the north, allegedly for their own "protection".[109] Justifying what seems an imbalanced prosecutorial strategy, former ICC prosecutor, Moreno Ocampo argued that the Ugandan government's alleged crimes do not meet the "gravity threshold"[110] relative to the crimes of the LRA.

The Ugandan government has repeatedly threatened to withdraw its cooperation if any of its senior political or military official is indicted. For Tiemessen, state referrals and threats of non-cooperation "produces a strategic benefit for the government by directing the Court's attention only to LRA crimes, while leaving the crimes of ruling elites unaccounted for and *de facto* sanctioned".[111]

According to Amnesty International, the government's policy of forced displacement clearly represents a war crime or crime against humanity. The government's crimes, even if relatively less grave, are verifiably atrocities against civilians. The rights of victims will be denied without accountability on all sides.

In the DRC self-referral wherein the ICC notably secured two convictions,[112] some have argued that the DRC situation is an example of "political justice" because President Kabila "sought to gain a political advantage over his political rivals by referring the situation to the Court".[113] Presently, all those indicted are rivals of Kabila and his government's authority in the eastern region, whereas the alleged crimes of the DRC military and the command responsibility of the government and regional actors, notably Rwanda, have not been subjected to investigation or indictments.[114]

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[107] Alana Tiemessen, *'The International Criminal Court and the Politics of Prosecutions'* (n 91) 451.

[108] Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1964), 149.
[109] Alana Tiemessen, *'The International Criminal Court and the Politics of Prosecutions'* (n 91) 451.

[110] See Susana SaCouto and Katherine A. Cleary, 'The Gravity Threshold of the International Criminal Court', (2008) 5 *American Journal of International Law*, 807–54; William Schabas*, Unimaginable Atrocities: Justice, Politics, and Rights at War Crimes Tribunals* (OUP, 2012).

[111] See Alana Tiemessen, *'The International Criminal Court and the Politics of Prosecutions'* (n 91) 451.

[112] Five warlords of various non-state armed groups have since been targeted by the ICC: Thomas Lubanga Dyilo and Germain Katanga were tried and found guilty; Mathieu Ngudjolo Chui was acquitted; Bosco Ntaganda surrendered and is awaiting trial; and Sylvestre Mudacumara remains at large.
[113] See Steven Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law* (Rowman and Littlefield, 2006), 625.
[114] Alana Tiemessen, *'The International Criminal Court and the Politics of Prosecutions'* (n 91) 452.

The investigations to the Cote d'Ivoire situation were initiated *proprio motu* by the ICC Prosecutor after newly-elected President Alassane Ouattara invited the OTP to investigate the Ivorian post-election violence of 2011.[115] Though not a state party to the Rome Statute, Ouattara's request appeared to "signal his commitment to international human rights while pledging to investigate and mete out accountability for all victims and perpetrators on both sides of the conflict, and to foster reconciliation".[116]

However, even with reports by the UN Commission of enquiry, Cote d'Ivoire's Commission of Enquiry, and investigative reports from various human rights groups all alleging that both sides to the conflict committed grave atrocities during the conflict, the ICC has focused only on ousted President Gbagbo and his militia leader whereas no member of the Republican Forces has been arrested on charges for crimes committed during the conflict. According to Human Right Watch, "the Court's successes have led some countries to seek to use it for political ends rather than to support its independent judicial mandate".[117]

In the examined instances of State practice in relation to the referral of situations to the ICC, a pattern has emerged whereby the ruling elites are primary agents and beneficiaries of international judicial interventions. The ICC's prosecutorial strategies have failed to hold ruling political and military elites accountable, with the public justification that their crimes are comparatively less egregious than those of their rivals.

The ruling elites in referring states have been given the benefit of the doubt in their promises of accountability, in part "because of their diplomatic overtures to the ICC and in part out of fear that prosecuting them will result in loss of state cooperation and the foiling of the Court's activities".[118] Investigating and prosecuting the alleged crimes of government and military officials, in addition to those of their rivals, ought to be an essential function of the ICC. It is these ruling perpetrators who are least likely to be held accountable by domestic courts.

4. The Prosecutorial Practice Of The OTP, The Jurisprudence Of The ICC, And State Practice In The Application Of International Criminal Justice

Proponents of international justice and proponents of the ICC's judicial interventions make normative and empirical claims that the Court is and should be an apolitical institution.[119] The Court asserts its credibility and legitimacy by claiming that it is impartial, independent and has interests and policies that are guided by judicial and legal criteria, not by the strategic and political interests of external actors. Conversely, critics of the ICC suggest that its indictments and trials constitute "selective and partial justice".[120] Since its inception, the ICC has prosecuted only Africans. In its January 2017 meeting, the AU unequivocally accused the ICC of lacking legitimacy.[121] This part examines the prosecutorial practice of the OTP and the jurisprudence of the Court in Africa under the light of the *Al-Bashir case (2009).*

4.1. The ICC and the search for legitimacy

According to Thomas Franck's theory, legitimacy is the generic label placed on the factors that affect the willingness [of states] to comply voluntarily with commands.[122] Several partly-overlapping systematic factors account for what seems to be a legitimacy crisis of the ICC. Firstly, the Rome

[115] Cote d'Ivoire is not a State Party to the Rome Statute.
[116] Barbara Plett, 'Ouattara vows to temper Justice with Reconciliation', BBC News, May 23, 2011 available at: http://www.bbc.co.uk/news/world-africa-13508356, accessed 17 July 2017; 'Ivorian President Vows Reconciliation', France 24, January 28, 2012 available at: http://www.france24.com/en/20120127-ivory-coast-ouattara-heal-rifts-reconciliation-gbagbo-sarkozy/, accessed 17 July 2017.

[117] HRW, 'ICC: New Prosecutor takes Reins', Human Rights Watch, June 14, 2012, available at: https://www.hrw.org/news/2012/06/13/icc-new-prosecutor-takes-reins, accessed 25 July 2017.
[118] See Alana Tiemessen, *'The International Criminal Court and the Politics of Prosecutions'* (n 91) 454.

[119] See Alana Tiemessen, *'The International Criminal Court and the Politics of Prosecutions'* (n 91) 446.
[120] Ibid.
[121] See African Union Assembly, Draft Decision on the International Criminal Court, Assembly/AU/Draft/Dec.1 (XXVIII) Rev 2 Page 1 Doc. EX.CL/1006(XXX) ("Draft ICC Withdrawal Strategy") paras 1-3.
[122] See Thomas Franck, *The Power of Legitimacy Among Nations* (OUP, 1990), 150.

Statute is the result of 'political compromises' during the drafting process, especially in relation to the exercise of jurisdiction and the relationship between the Court and the UN.

Secondly, the Court is also faced with structural impediments to the independent exercise of its jurisdiction insofar as powers – such as the US – that were instrumental in the drafting of the ICC Statute, and succeeded in introducing certain provisions in the Statute, eventually chose not to ratify the treaty they had shaped themselves, while nonetheless making use of those provisions as non-members - as in the case of UNSC's referral and deferral rights under Articles 13(b) and 16 of the Rome Statute. This gives the UNSC's permanent members enormous leverage over the Court's functioning.[123]

The third structural problem is the incomplete ratification status of the Rome Statute.[124] Presently, 124 countries have ratified the Rome Statute. However, most of the militarily and economically powerful countries have failed to sign on. Only France and the United Kingdom, out of the five permanent members of the UNSC, are parties to the ICC. The US, China and Russia have failed to sign up. This has made it difficult for the Court to establish itself as "a universally accepted permanent institution of international criminal justice".[125]

According to Professor Kochler, even if exercising its mandate fully, the ICC can do nothing about "the existence of double standards insofar as officials of some of the most powerful countries cannot be investigated or prosecuted for crimes within the Court's jurisdiction". The Court continues to operate "in a framework of judicial apartheid" where officials of some powerful countries will continue to enjoy impunity unless their acts fall under the territorial jurisdiction of the Court.

The basic dilemma of the ICC is that it is meant to be an agent of the international rule of law in an environment that is determined by its very absence. The system of international law in its present state lacks consistent and universal enforcement mechanisms. The UN is not a world government. The UNSC, the only institution with universal enforcement powers in matters of peace and security, is principally a political body where the national interests of the permanent members determine whether principles of international law are enforced or not. For Murithi, 'political justice' informs the current cases before the ICC.[126]

In the present scheme of things, only officials from states, and particularly non-states parties, which do not enjoy the protection of a permanent member will be subjected to the scrutiny of the Court. The ICC also faces the challenge of existential justification. And it is not the first international court to be faced with that challenge. When the ICJ was established in 1945, it also faced existential justification challenges. It went for five years without a single decision, making many to question the justification for the huge funds being expended in running the court.

The first case to come before the ICJ was *UK v Albania,*[127] which case probably the court did not have jurisdiction because Albania was not a member of the UN at the material time, neither had it accepted the jurisdiction of the ICJ. There appeared to be no international standard for the regulation of the matter as the UK failed to find a legal basis on which to mount its case. It referred to a treaty that Albania was not a party to as Albania's source of legal obligation, pointing to Albania's behaviour as having incurred international responsibility under the treaty. Having dismissed the UK's preferred treaty, the ICJ pulled out of the hearth a new norm of customary international law – the doctrine of innocent passage – without showing the state practice to support it. The ICJ experience shows that the various inconsistent decisions of the ICC on immunities are evidence of a desperate international institution making the case for existential justification.

[123] Hans Kochler, '*Justice and Realpolitik: The Predicament of the International Criminal Court*' (n 85) 2.

[124] Ibid.

[125] Ibid.

[126] Hans Kochler, '*Justice and Realpolitik: The Predicament of the International Criminal Court*' (n 85) 2.

[127] See *Corfu Channel Case (United Kingdom v. Albania); Merits*, International Court of Justice (ICJ), 9 April 1949.

4.2. The investigation and prosecutorial practice of the OTP

The OTP is responsible for determining whether a situation meets the legal criteria established by the Rome Statute to warrant investigation by it. As at 20 September 2017, the OTP has only ten situations under investigation, out of which nine are from Africa. To decide whether there is a reasonable basis to open an investigation, the OTP has carried out 'preliminary examinations' in Afghanistan, Colombia, Iraq, Palestine, Registered Vessels of Comoros, Greece and Cambodia and Ukraine.

In the case of Afghanistan, the OTP has examined the situation concerning the commission of war crimes and crimes against humanity for more than ten years without a decision to formally investigate. In the case of Iraq, an examination was terminated in 2006 (because the alleged crimes, according to the Prosecutor, did not meet the gravity threshold under Article 17(1)(d)), but was reopened in May 2014 upon receipt of new information.

In the case of the referral by the Union of the Comoros of a situation on a Comoros-registered ship (Mavi Marmara) of the Humanitarian Aid Flotilla bound for the Gaza Strip (31 May 2010), the Prosecutor decided, in November 2013 (after an examination of less than six months), not to open an investigation into the alleged commission of international crimes, citing insufficient gravity of the alleged crimes.[128]

The OTP has been exceedingly careful and restrictive in the interpretation of admissibility criteria when the investigation of acts by officials or personnel from the US and her allies (Afghanistan), the UK (Iraq) and Israel (Comoros registered vessel) would be required. The two successive Prosecutors, Luis Moreno Ocampo and Fatou Bensouda (since June 2012) were much less restrictive in the interpretation of their mandate in relation to the situations of the self-referrals by African countries, and the situations where they initiated an investigation *proprio motu*.[129] The Court's 'timidity' stands in sharp contrast to the extremely quick and expedient prosecutorial action, including arrest warrants, against officials from countries, such as Sudan and Libya which are not States parties, but whose situations have been referred to the Court by UNSC".[130]

It appears that consideration of not alienating potential future states parties or powerful member States had an influence on the rather 'timid' attitude of the Prosecutor regarding situations in several non-African countries such as Philippines, Palestine, Syria and Afghanistan.

For instance, Russia 'unsigned' the Rome Statute on the 16 of November 2016, citing alleged lack of efficiency and independence, biased attitude and high cost on the part of the ICC as the reason for its action.[131] The date of Russia's 'unsigning' appears to coincide with the ICC Prosecutor's annual Report on Preliminary Examination Activities released on 14 November 2016, which appears to question Russia for alleged crimes against humanity and war crimes, committed by its nationals in Crimea and Eastern Ukraine.[132] No further action has been taken against Russia since.

The focus on African countries, including two non-States Parties appears to be the reason why the ICC has not been able to dispel the suspicion of 'victor's justice' (in the sense of accommodating the interests of powerful states) that plagued almost all projects of international justice to date.

Prior to President Al-Bashir's arrival for the 2015 AU Summit in Johannesburg, South Africa had requested a consultation under article 97 of the Rome Statute. The consultation was basically unsuccessful as South Africa referred to the "political and diplomatic contexts" of the Al-Bashir saga,

[128] Hans Kochler, '*Justice and Realpolitik: The Predicament of the International Criminal Court*' (n 85) 6.

[129] Ibid.

[130] Ibid.

[131] See Statement by the Russian Foreign Ministry made on 16 November 2016, available at: http://www.mid.ru/ru/foreign_policy/news//asset_publisher/cKNonkJE02Bw/content/id/2523566?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB, accessed 12 August 2017.

[132] See ICC Prosecutor's annual Report on Preliminary Examination Activities released on 14 November 2016, paras 158, 171-183.

arguing that "as a leading player in peace efforts in Africa, [that it] cannot disengage from the AU or adopt a policy that would suggest [that it] is not going to host AU heads of state".[133]

In addition to identifying customary international law as the basis of Al-Bashir's immunity, South Africa contended that it was obliged by article VIII (1) of the Host Agreement concluded between itself and the AU to respect the immunities of Al-Bashir.[134] It requested the Chamber to "obtain an authoritative interpretation of Resolution 1593 from the UNSC" or request it to approach the ICJ for an advisory opinion under Article 96(1) of the UN Charter".[135]

However, the OTP preferred a 'judicial process', contending that the fact that consultation under article 97 took place at the behest of South Africa did not alter or suspend the "pre-existing, clear, standing obligation to comply with the arrest warrants.[136] That South Africa "failed to comply with the Statute by failing to hold Al-Bashir pending the exhaustion of the consultations and a determination by the Court on [the] merits."[137] For the Court, the question of the immunities of Omar Al-Bashir and the request for his arrest and surrender to the Court could be settled only as a "judicial process" and with reference to the applicable law, rather than through a "political and diplomatic process".[138]

4.3. An evaluation of the ICC jurisprudence on Al-Bashir's immunities

In the *Malawi,*[139] and *Chad*[140] decisions, the Court decided that customary international law creates an exception to head of state immunity before international courts where such a head of state commits an international crime. That "there is no conflict between Malawi's obligations towards the Court and its obligations under customary international law, and that article 98(1) of the Statute does not apply."[141] Then, in the *Democratic Republic of Congo*[142] decision, the Court resorted to the UNSC resolution 1593 argument, holding that UNSC resolution 1593, which referred the situation in Darfur to the Court, "implicitly waived the immunities granted Omar Al-Bashir under international law attached to his position as a Head of State".[143] The Court has since followed this line of argument in the *Djibouti*[144] and *South Africa*[145] decisions, without explicitly overruling the earlier decisions.

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[133] Decision under article 87(7) of the Rome Statute on the non-compliance by South (n 1) para 40.

[134] Ibid para 33.

[135] Ibid para 41.

[136] Ibid para 43.

[137] See Decision under article 87(7) of the Rome Statute on the non-compliance by South (n 1) para 51.

[138] Ibid. para 118.

[139] See Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-139, 12 December 2011, Pre-Trial Chamber I, Decision, Case: *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Situation: Situation in Darfur, Sudan, available at: https://www.icc-cpi.int/pages/record.aspx?uri=1287184, accessed 31 July 2017.

[140] Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG, 13 December 2011, Pre-Trial Chamber 1, Decision, Case: *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Situation: Situation in Darfur, Sudan available at: https://www.icc-cpi.int/pages/record.aspx?uri=1384955, accessed 31 July 2017.

[141] See *Malawi* decision (n 139) para 43.

[142] Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195 09 April 2014, Pre-Trial Chamber II Decision, Case: *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Situation: Situation in Darfur, Sudan.

[143] Ibid.

[144] Pre-Trial Chamber II, "Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute", 11 July 2016, ICC-02/05-01/09-266

[145] See Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa (n 1) para 107.

On the relationship between articles 27(2) and 98(1) of the Statute, the latest position of the Court is "that by the imposition of the UNSC acting under Chapter VII of the UN Charter, the rights and obligations as provided for in the Rome Statute, including article 27(2), are applicable to Sudan".[146] That "the immunities of Omar Al-Bashir as Head of State do not bar States Parties to the Rome Statute from executing the Court's request of his arrest and surrender for crimes under the jurisdiction of the Court allegedly committed in Darfur within the parameters of the UNSC referral".[147] That "the UNSC referral puts Sudan in the position of a State Party and renders article 98(1) of the Statute inapplicable to the situation of Omar Al-Bashir, and States Parties to the Rome Statute are under the duty to execute the warrants of arrest issued by the Court, and to implement the Court's request for the arrest of Al-Bashir and his surrender to the Court".[148]

The foregoing analyses reveals that the ICC has taken three differing positions with immunity on the *Al Bashir* case. Firstly, in the initial arrest warrant for President Al-Bashir, the ICC was of the view that there is no immunity before international courts. Immunity was taken for granted as the Court merely reproduced Article 27 of the Rome Statute, insisting that if immunity is granted, it would lead to the promotion of impunity.

Secondly, in the *Malawi* and *Chad* decisions, the ICC asserted that immunity is removed under customary international law. The Court's analyses on the trend to remove immunity is correct but the conclusion reached is wrong because the trend to remove immunity by treaty is not the same as to remove immunity under customary international law.

Thirdly, in the *DRC* and *South Africa* decisions, the Court recognized the relationship between article 27 and article 98 of the Statute. Unfortunately, it did not resolve the conflict thereto. Articles 98 and 27 reflect the relationship between immunity under customary international law, and immunity by treaty. The real purpose of Article 98 is to recognize that some states will not be parties to the Rome Statute. Article 27 is not applicable to such third states as Article 98 protects their immunities. This means that the ICC will request the third states to waive their immunities. It is only when they so waive that article 27 becomes applicable to them.

The Court's argument has been that it is the trend of international criminal law to remove immunity either under an agreement by treaty or by UNSC referral. The AU insists that states cannot contract outside customary international law; that states cannot impose a treaty obligation to a state not party to a treaty. Since 1948, immunity has been waived either by treaty or UNSC referral. But, the treaties which removed immunities form an exception to the rule that only states can remove immunities. For instance, Article 7 of the Nuremberg IMT Charter,[149] Article 6 of the Tokyo IMT Charter,[150] Article 7(2) of the ICTY Statute 1993,[151] and Article 6(2) of the ICTR Statute 1994[152] which explicitly removed immunities were for a limited jurisdiction, and did not apply to persons outside the jurisdiction of these tribunals. In the case of South Africa, if it had arrested Al-Bashir, it would have committed an internationally wrongful act against the state of Sudan (a non-party to the Rome Statute), and not against Al-Bashir.

[146] See Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa (n 1) para 107.

[147] Ibid.

[148] See Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa (n 1) para 107.

[149] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* 8 August 1945.

[150] Ibid.

[151] UN Security Council, *Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827 (1993).

[152] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994.

Many have criticized the various ICC decisions on the *Al-Bashir* case for their "incorrect, inadequate and/or inconsistent reasoning on immunities.[153] The Court's contention that there has never being the "slightest ambiguity" about the legal position regarding the immunities of Al-Bashir[154] is unconvincing. Its departure from the *Malawi* and *Chad* decisions (without either clarifying or overruling them) demonstrates the continuing uncertainty about the complex question of immunities.[155] This situation has left not only states and commentators but also different Chambers of the ICC with differing interpretations of the interplay between Article 98(1) and 27(2), customary international law, and resolution 1593.

The lack of a clear defined position on immunities makes it difficult to conclude that there is no immunity under customary international law. It suffices to state that respecting the customary international norm on immunities is not a license to impunity as it can only bar prosecution for a certain period or for certain offices, but does not exonerate the person to whom it applies from all criminal responsibility.[156]

In its desperate bid to get Al-Bashir to face his trial at all costs, the Court should contemplate the aftermath of his arrest and surrender to The Hague whilst he is still the sitting president and commander in-chief of Sudan, a country unsettled by a long-standing civil war and fierce conflicts. Invariably, his arrest and surrender will further exacerbate the delicate political situation in Sudan. There is, therefore, a need for the ICC Appeal Chambers to put a definite end to this issue, particularly in the light of South Africa's indication that it will appeal the 6 July 2017 decision.

The failure to arrest Al-Bashir, and the failed trials of Kenyatta and Ruto demonstrate the manifold practical limitations of going after as a sitting Head of State. Though this is an inconvenient outcome, it points to the reality of international criminal justice, particularly the ICC, which is proving to be "an over-ambitious project that has been unable to meet the expectations it has created".[157]

4.4. An evaluation of the 6 July 2017 ICC decision on South Africa's con-compliance

The 6 July 2017 ICC decision under article 87(7) of the Statute "reflects the Court's tensed relationship with African countries in the light of the AU's directive of mass withdrawal from the ICC, particularly in the context of The Gambia, Burundi, and South Africa's (failed) withdrawal from the Rome Statute."[158] Killingsworth observes that:

> It would have been perfectly reasonable and legitimate to refer South Africa to the ASP or the UNSC [but] the ongoing legitimacy of the Court depends not only on the number of signatories to the Rome Statute – currently 124 – but also their geographical spread. The support of African countries is imperative to the Court's

[153] See Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09-139), Pre-Trial Chamber I, 12 December 2011; Decision pursuant to article 87(7) of the Rome Statute on the refusal by the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir, Al-Bashir (ICC-02/05-01/09-140), Pre-Trial Chamber I, 13 December 2011; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court, Al Bashir (ICC-02/05-01/09-195), Pre-Trial Chamber II, 9 April 2014, s. 26ff; Decision following the Prosecutor's Request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, Al Bashir (ICC-02/05-01/09-242), Pre-Trial Chamber II, 13 June 2015. See also Max Du Plessis and Guenael Mettraux, '*South Africa's Failed Withdrawal from the Rome Statute,* (2017) 15(2) Journal of International Criminal Justice, 361-370, 379, available at: https://doi.org/10.1093/jicj/mqx015, accessed 22 July 2017.

[154] See *Democratic Republic of Congo* decision (n 142) para 22.

[155] See André de Hoogh and Abel Knottnerus, 'ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again', *EJIL*: Talk! 18 April 2014, available at: https://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/, accessed 31 July 2017.

[156] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* 2002 ICJ Reports, 3.

[157] Hans Kochler, *'Justice and Realpolitik: The Predicament of the International Criminal Court'* (n 85) 9.
[158] Matt Killingsworth, *'ICC Ruling on South Africa and Al-Bashir: Pragmatism Wins the Day'* (n 7).

> continuing legitimacy. Its decision is therefore partly informed by the need to keep African counties onside.[159]

The decision not to refer South Africa to the ASP or the UNSC, despite finding that it failed to comply with its obligation under the Statute by not executing the Court's request for the arrest of Al-Bashir and his surrender to the Court,[160] appears to be a political move by the ICC to safeguard the supremacy of international law over supranational *lex specialis* AU law whilst still retaining its relevance in the African continent. The decision also suggests that the Court is aware of the 'political sensitivities and realities' of future prosecutions involving third states as it appear to be entering a 'new phase' of investigations outside of Africa.

Furthermore, a significant aspect of the decision was what appears to be an indictment of the UNSC by the Court:

> The Chamber observes that States Parties have been referred to both the Assembly of States Parties and the United Nations Security Council in six instances in relation to failures to arrest and surrender Omar Al-Bashir … However, [these] have not resulted in [UNSC] measures against States Parties that have failed to comply with their obligations to cooperate with the Court.[161]

This pronouncement by the Court is a "damning indictment of the UNSC".[162] It points to the dysfunctionality of international criminal justice as it is presently constituted. It also brings to focus the need to amend the Rome Statute and revisit provisions such as Article 87. It also raises the question of the factors that propel the decision of international tribunals. Studies have revealed "a significant correlation between the political preferences of judges and their judicial decision making".[163] Legal norms do not completely determine judicial decision-making in international law[164] as judges mainly follow their political preferences. The ICC takes a political decision while making it appear judicial.[165]

Beyond the foregoing, the question arises as to whether the ICC is competent to adjudicate when it is in conflict with a state party? A non-cooperation proceeding under Article 97(7) is not a core mandate of the Court but a dispute between it and a state party, with the Court as an interested party. Article 97(7) appears to offend the principle of *nemo judex in causa sua* (one cannot act as a judge in a case he participates as a party). The ICC ought to have recused itself from the non-cooperation proceeding against South Africa. This raises a further question of which court would have jurisdiction if the ICC recuses itself. There is need to amend Article 97(7) of the Statute so that disputes between the Court and states parties may be referred to the ASP and/or to the UNSC for it to request the advisory opinion of the ICJ.

From the tenor of the 6 July 2017 decision, one could also perceive a tension and the struggle for relevance and jurisdiction between the national, supranational and the universal jurisdiction. According to the Monist jurisprudence, there is never a conflict between the national, supranational, and international jurisdiction. With the universal jurisdiction at the apex, and national jurisdiction at the base, the national jurisdiction can only do what is being delegated by universal jurisdiction and not more. Similarly, with supra-nationalism, the supranational jurisdiction was expected to also do what it

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[159] Ibid.

[160] See Decision under article 87(7) of the Rome Statute on the non-compliance by South (n 1) para 53.

[161] See Decision under article 87(7) of the Rome Statute on the non-compliance by South (n 1) para 138.

[162] Matt Killingsworth, *'ICC Ruling on South Africa and Al-Bashir: Pragmatism Wins the Day'* (n 7)

[163] See Segal and Cover, 'Ideological Values and the Votes of U.S. Supreme Court Justices', (1989) 83 *American Political Science Review*, 557; Segal., 'Ideological Values and the Votes of U.S. Supreme Court Justices Revisited', (1995) 57 *Journal of Politics* 812; Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002); Brennan, Epstein and Staudt, 'The Political Economy of Judging', (2009) 93 *Minnesota Law Review,* 1503; Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', (2008) 102 *APSR*, 417.

[164] Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (n 68) 359.

[165] William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at War Crimes Tribunals* (n 110) 89.

is delegated by the universal jurisdiction. However, the supranational jurisdiction asserts otherwise in *Kadi*. There is, therefore, a need for a theoretical reappraisal of the Monist jurisprudence.

The decision also exposes the problem of the recognition of order – the ICC refusing to recognize the AU's supranational jurisdiction, and therefore, compelling South Africa to act contrary to the AU directives. What will happen if the ICC acknowledges and recognizes AU supranational law? It will go bankrupt; it will go out of business. Hence, it must resist the AU by paying a blind eye to its supranational jurisdiction (which, one may argue, exists in-between), preferring to deal directly with the African states.

4.5. Universal jurisdiction and complementarity as complements to the ICC

By Articles 1 and 17 of the Rome Statute, complementarity enables states to retain jurisdiction over crimes committed in their territories and by their nationals. Professor Cassese illuminated thus:

> It is healthy, it was thought, to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based on a link with the case (territoriality, nationality) or even on universality. Among other things, these national courts may have more means available to collect the necessary evidence and to lay their hands on the accused.[166]

Some African states embraced the principle by incorporating same into their domestic jurisdiction. In South Africa, Section 4(3) of the ICC Implementation Act provides for South African universal jurisdiction over international crimes. The principle has been sanctioned by domestic courts, for instance, in *SALC and Another v. National Director for Public Prosecutions*,[167] a South African High Court confirmed that South African authorities are under obligation to act as a complement to the ICC in investigating – using South Africa's universal jurisdiction provisions in its ICC implementation legislation – alleged acts of torture committed in Zimbabwe by Zimbabwean police officials against Zimbabwean victims.

The AU has decried what it perceives as the use of universal jurisdiction by Western courts to indict African leaders for international crimes.[168] Between 1993 and 1999, the Belgian government amended its penal code to exercise universal jurisdiction over international crimes. In 2002, a Belgian court, under the universal jurisdiction law, sentenced four Rwandans – two Roman Catholic nuns, a physics professor, and a former government minister – to prison terms of 12 to 20 years over crimes connected with genocide.[169] The successful prosecution of the Rwandans won general applause for what was described as "the triumph of justice".[170]

However, the indictment of some US senior political and military officials – President George Bush, Vice-President Dick Cheney, Secretary of State Colin Powell, and General Norman Schwarzkopf – for war crime regarding the bombing of civilian shelters in Baghdad which killed over 403 people, including 261 women and 52 children,[171] in the Persian Gulf War of 1991 proved to be a 'suicide mission' for Belgian universal jurisdiction.

In response to the charges, the US warned the Belgian government that it was at the risk of losing its status as the diplomatic capital and host for NATO by allowing investigation of those who

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[166] Antonio Cassese, *International Criminal Law* (OUP, 2003), 351.

[167] See *SALC and Another v. National Director for Public Prosecutions and Others* (Judgment) Case No. 77150/09, (n 77).

[168] See *Decision on the Abuse of the Principle of Universal Jurisdiction,* Assembly Dec.271(XIV), 14th session, AU Doc Assembly/AU/Dec.268–288 (XIV) (31 January – 2 February 2010); *Decision on the Abuse of the Principle of Universal Jurisdiction*, Assembly Dec.335(XVI), 16th session, AU Doc Assembly/AU/Dec.332–361(XVI) (30–31 January 2011); Council of the European Union, 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (Report No 8672/1/09, 16 April 2009) 33-38. Charles Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', (2010) 21 *Criminal Law Forum* 1, 11–54.

[169] Ifeonu Eberechi, 'Rounding Up the Usual Suspect: Exclusion, Selectivity, and Impunity in Enforcement of International Criminal Justice and the African Union's Emerging Resistance' (n 42) 64.

[170] Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?' (2003) 25 *Cardozo Law Review*, 247, 249.

[171] Ibid 251.

might visit Belgium.[172] It threatened that its officials and the officials of other members of NATO would never attend any meetings of NATO in Belgium, and that it will withhold its pledge of 70 million dollars for the construction of the new NATO headquarters until the suits against its officials were dismissed.

Within two weeks of these threats, Belgium withdrew the charges, and amended its universal jurisdiction law to the effect that Belgian courts will only entertain a criminal action in the exercise of their universal jurisdiction only if there is a link between Belgium and the crime.[173] For Eberechi, the indictment of the US officials "led to the ultimate death of the Belgian law in its potent form – and the inevitable decline of universal jurisdiction".[174]

Although the merit or otherwise of the indictment of US officials is not part of this discourse, the capitulation of the Belgian government by not proceeding with the charges is 'an unambiguous evidence of how international criminal justice has been manipulated in favour of the powerful Western nations'.[175] It also demonstrates that in a confrontation between international criminal justice and Western nations, the former more often caves in under the weight of the latter's political pressure.[176] This appears to be the 'wrong' the AU seeks to amend by insisting on an international criminal justice system that perceives African states as contributors, rather than victims.

5. The African Union As The Custodian Of African Interests And Policies

This part of the article evaluates the role of the AU in the articulation of African interests and policies. The proposed African Criminal Court, and the AU's collective withdrawal strategy from the ICC, and the practice of domestic courts in the interpretation of international law will be examined.

5.1. The proposed African Criminal Court

Through the Malabo Protocol,[177] the AU intends to create its *lex specialis* regional complementarity by extending the jurisdiction of the African Court on Human and Peoples' Rights to include international crimes such as genocide, crimes against humanity and war crimes, which will be heard in a special criminal chamber. However, as at 20 September 2017, no African country has ratified the Malabo Protocol.[178]

The purpose of the proposed criminal jurisdiction of the African Court appears to be, firstly, to fend off perceived discriminatory foreign attempts to 'meddle' in African affairs.[179] Secondly, the AU intends to appear to be willing and able to prosecute international offences[180] since the ICC's complimentary jurisdiction is triggered by the unwillingness or inability of states with jurisdiction to prosecute alleged crimes.[181] The AU intends "to keep the ICC out by creating a regime of regional

[172] Kingsley Moghalu, *Global Justice: The Politics of War Crimes Trials* (Stanford University Press, 2008) 92.
[173] See Stephen Ratner, 'Belgium's War Crimes Statute: A Post-mortem' (2003) 97 *American Journal of International Law,* 887, 891.
[174] Ifeonu Eberechi, 'Rounding Up the Usual Suspect: Exclusion, Selectivity, and Impunity in Enforcement of International Criminal Justice and the African Union's Emerging Resistance' (n 38) 66.

[175] Ibid, 67.

[176] See Kingsley Moghalu, *Global Justice: The Politics of War Crimes,* (n 167) 92; Ifeonu Eberechi, 'Rounding Up the Usual Suspect' (n 38) 67.

[177] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted in Malabo, Equatorial Guinea on June 27, 2014, available at: au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights, accessed 10 September 2017.
[178] See AU website: au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights accessed 20 September 2017.

[179] See Benedict Chigara and Chidebe Nwankwo, 'To be or not to be?' (n 43) 244.

[180] Ibid.

[181] See Rome Statute Establishing the International Criminal Court (n 2) art 17; Lijun Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) 4 *Chinese Journal of International Law*, 121.

complementarity",[182] and, to perhaps, assert AU *lex specialis* supranational law over universalism – as the ECJ did in the *Kadi* case.

But the Rome Statute did not envisage complementarity at the regional level but with domestic courts. This raises the question whether the proposed criminal jurisdiction of the African Court will find legal basis under the Rome Statute.

However, 'normative justification' for granting the African Court criminal jurisdiction could be found under Article 52(1) of the UN Charter, which permits regional arrangements, or agencies that are necessary for the maintenance of international peace and security provided they are consistent with the purpose and principles of the UN.[183] Also, the prosecution of international crimes on a regional level appears to derive validity from the Constitutive Act of the AU[184] which rejects impunity and mandates the AU to intervene in member states in the event of grave crimes such as war crimes, crimes against humanity and genocide.[185]

There could be a potential conflict between the criminal jurisdiction of the African Court and the ICC as both courts will potentially seek to exercise jurisdiction in relation to the same situations and the same defendants. It is trite that international tribunals and their instruments have no hierarchy as every international tribunal operates as a separate legal regime. Consequently, the African Court may well become a rival to the ICC, and the relationship could be one of competition rather than cooperation.

This raises the question of whether there is a genuine intention on the part of the AU to prosecute high ranking state officials who perpetrate human rights violations in Africa, such as political figures and military commanders, or simply to stand in the way of the ICC in the subtle battle between supra-nationalism and universalism over the control of the soul of national jurisdictions?

While it is arguable that the proposed criminal chamber of the African Court can genuinely prosecute high ranking state officials, the emergence of a strong and autonomous African Court and a prosecutor capable of prosecuting international crimes without political interference will be of great service to the African continent, and more importantly, will create the much-trumpeted 'African solution' to the problem of impunity in Africa.

5.2. The AU's collective withdrawal strategy from the ICC

States have several ways to impose sanctions on international courts and thus constrain judicial decision-making indirectly.[186] They may choose not to comply with the court's judgments. Non-compliance may render the court's decisions ineffective, damage its reputation and weaken its institutional position.[187] States can also exit the jurisdiction of an international court by withdrawing their acceptance of the Court's compulsory jurisdiction.[188]

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[182] Rowland Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal' (2014) 14 *Melbourne Journal of International Law,* 670, 694.

[183] See United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 52(1); *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995); Rowland Cole, '*Africa's Relationship with the International Criminal Court: More Political Than Legal*' (n 177) 695.

[184] See Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000.

[185] Ibid, art 4 (o) and (h).

[186] See Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (OUP, 2004) 271–275; Richard Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', (2004) 98 *American Journal of International Law*, 263–267.

[187] See Tom Ginsburg, 'Political Constraints on International Courts', (2013) 453 *University of Chicago Public Law and Legal Theory Working Paper*, 491-492.

[188] Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (n 68) 364.

In the 1970s, France withdrew from the compulsory jurisdiction of the ICJ after the decision in the *Nuclear Tests* cases.[189] The US also withdrew after the ICJ found that it had jurisdiction in the *Nicaragua* case in 1984.[190] When fewer states have accepted the compulsory jurisdiction of an international court, the institutional position of the court becomes weaker. In relation to the ICC, a state party can withdraw from its jurisdiction under Article 127 of the Statute.

The AU is not pleased with the manner the Court interprets the Rome Statute. Hence, in January 2017, it adopted an 'ICC Withdrawal Strategy'.[191] This mirrors the problems faced by international criminal justice in the current system of international relations.[192] The right to withdraw from treaties lies within the powers of states. This raises the question whether the AU (an international organization) is competent under international law to mandate its member states parties to withdraw from the ICC (another international organization).

This question is closely related to the directive of the AU to its members not to cooperate with the Court in the arrest and surrender Al-Bashir".[193] The two issues can however be distinguished. In the *Al-Bashir* case, the AU called on its members to respect what it views as a sacrosanct customary international law principle of Heads of State immunity whereas in the collective withdrawal directive, the AU requires African states to take the political decision of an international treaty membership.

On the AU's competence under international law to mandate its member states parties to withdraw from the ICC, the related practice of the UN and other international and regional organizations come in handy. The UNSC can require member states to take a wide range of measures relating to peace and security. It has adopted several Chapter VII resolutions requiring North Korea to return ('retract withdrawal') to the Treaty on Non-Proliferation of Nuclear Weapons.[194] Likewise, the EU had entered into agreements, which require its members "to seek to take steps towards ratifying and implementing the Rome Statute and related instruments".[195] Accordingly, the AU may direct (but not compel) its members to consider withdrawing from the jurisdiction of ICC, albeit, in line with their national law.

According to Thomas Franck, the failure of a member of an international community to obey a command could be an acceptable way to bring about change or reform in the rule or institution from which the command emanates.[196] Labuda argues, "the AU withdrawal strategy could well be a strategic mix of law and politics where the AU has made strategic use of legal arguments to reframe the political rhetoric surrounding ICC intervention on the continent."[197] That the AU withdrawal strategy "is a bargaining chip that African states can deploy if other outcomes are not achieved."[198]

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[189] *Nuclear Tests (Australia v France)*, Judgment of 20 December 1974, ICJ Reports (1974) 253; *Nuclear Tests (New Zealand v France)*, Judgment of 20 December 1974, ICJ Reports (1974) 457.

[190] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Jurisdiction and Admissibility, 26 November 1984, ICJ Reports (1984) 392.

[191] Draft Decision on the International Criminal Court, Doc EXCL/1006(XXX), African Union, Assembly of the Union, Twenty-Eighth Ordinary Session, 30-31 January 2017, Addis Ababa, para 8.

[192] Hans Kochler, '*Justice and Realpolitik: The Predicament of the International Criminal Court*' (n 85) 1.

[193] Patryk Labuda, *'The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?' EJIL: Talk!* 15 February 2017, available at: https:/www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/ accessed 17 August 2017.

[194] See UN Security Council, *Security Council resolution 1874 (2009) [on measures against the Democratic People's Republic of Korea in connection with its nuclear weapon tests]*, 12 June 2009, S/RES/1874 (2009).

[195] See European Union, Council Common Position of 11 June 2001 on the International Criminal Court (2011/443/CFSP) available at https://www.consilium.europa.eu/uedocs/cmsUpload/icc0en.pdf accessed 20 June 2017; European Commission, the Cotonou Agreement 2014, signed in Cotonou on 23 June 2000, revised in Luxembourg on 25 June 2005 Revised in Ouagadougou on 22 June 2010, art 11, available at http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf accessed 20 July 2017.

[196] See Thomas Franck, *The Power of Legitimacy Among Nations* (n 122) 151.

[197] See Patryk Labuda, *'The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics' (n 193)*.

[198] Ibid.

A careful perusal of the draft ICC Withdrawal Strategy reveals that instead of a collective action plan, the AU repeatedly affirms that withdrawal is a 'sovereign exercise' that 'has to be executed' in accordance with the "constitutional provisions of individual African states".[199] The ICC Withdrawal Strategy recognizes the provisions of the Vienna Convention on the Law of Treaties on the right of states to withdraw from a treaty, as individual states are allowed to implement their own withdrawal from the ICC in line with Article 127 of the Statute, as opposed to directing a collective withdrawal. The withdrawal strategy mainly contains 'political proposals' (essentially lobbying a variety of international criminal justice actors) and 'legal proposals' (amendments of the Rome Statute, UNSC reforms, recruitment of African staff to the ICC, capacity building, and ratification of the Malabo Protocol).[200]

5.2.1. State Practice: South Africa's attempted withdrawal from the Rome Statute

On 19 October 2016, South Africa filed a notice of its withdrawal from the ICC with the UN Secretary-General. The notice was issued without debate in South Africa's parliament. In *Democratic Alliance v Minister of International Relations and Cooperation,*[201] the Gauteng Division of the High Court of South Africa declared the move by the government to withdraw South Africa from the ICC as being both 'unconstitutional and invalid'. The High Court contended that a notice of withdrawal, on a proper construction of section 231 of the South African Constitution, "is the equivalent of ratification which requires prior parliamentary approval in term of section 231(2)".[202] The Supreme Court of Appeal of South Africa upheld the ruling.[203] A further appeal lodged by the South African government at the Constitutional Court has since been withdrawn.

Some have criticized the failure of the Gauteng High Court and the Supreme Court of Appeal of South Africa to recognize the AU constitutional supranational law characterized in the AU Directives to its member states parties "not to co-operate pursuant to the provision of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of Sudanese President Al-Bashir to the ICC" at its 13 African Union Summit held on 6 July 2009, and the *lex specialis* outcomes of the 12 October 2013 Extraordinary Session of the AU highest decision-making body, Assembly of Heads of State and Governments of the African Union, held in Addis Ababa, Ethiopia.[204]

For Chigara, "the AU Directive completely ruled out cooperation of African States with *lex specialis* international criminal law even where an African State was a Member State Party to the Rome Statute (1998) that established the ICC."[205] He argues that "the African Union (AU) had inaugurated anti-ICC constitutional supranational law and AU Directives that rendered *null and void* any ICC arrest warrants issued against a serving Head of an African State, including President Al Bashir of Sudan"[206] That "South Africa was contractually bound under Part VIII of its 'Host Agreement' with the Commission of the AU to ensure that all delegates attending the 25th AU Summit scheduled for 7–15 June 2015 were immune "from personal arrest or detention and from any official interrogation as well as from inspection or seizure of their personal baggage."[207] And that South Africa

[199] See African Union, Draft ICC Withdrawal Strategy, paras 8-10.

[200] See Patryk Labuda, *'The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?'* (n 193).

[201] North Gauteng High Court, *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53, 22 February 2017, available at http://www.saflii.org/za/cases/ZAGPPHC/2017/53.html, accessed 28 April 2017.

[202] Ibid, paras 46-47.

[203] See *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

[204] See African Union (2013) Decisions and declarations of the assembly of the union, extraordinary session of heads of states and government. Ext/Assembly/AU/Dec. 1-2. 12 October 2013

[205] See Benedict Abrahamson Chigara, *'The Administration of International Law in National Courts and the Legitimacy of International Law'* (n 36) 919.

[206] Ibid, 918.

[207] See Benedict A. Chigara, 'The Administration of International Law in National Courts and the Legitimacy of International Law' (n 36) 919.

had specific binding treaty obligations with the Commission of the AU having incorporated this agreement into South African Law via the Government Gazette No. 3886032.[208] He then submits that "the North Gauteng High Court's decline of possible expert illumination of applicable international law on the matter is troubling (as) it provoked the Government of South Africa to seek an immediate withdrawal from the ICC."[209]

South Africa's reason for withdrawal is that it was supposedly caught in a bind. On the one hand, it had to observe AU's call on its members to respect what it perceives as a sacrosanct customary international law principle of Heads of State immunity. On the other hand, its membership of the ICC requires it to arrest President Al-Bashir and surrender him to the Court, to contrary to the AU's directive. To escape this dilemma, the South African government chose to uphold the supranational *lex specialis* constitutional AU law over international law. South Africa assured that there was no cause for concern for African victims of mass atrocities since the African Court of Human and Peoples Rights would be reorganized through the Malabo Protocol to enable the African Court to prosecute international crimes in lieu of the ICC.

According to Du Plessis,[210] South Africa's assertion "is undermined by the fact that Heads of State and other senior African officials would have iron-clad immunity from prosecution before the proposed reorganized African Court".[211] That the process of withdrawal "was blinded by political considerations and legal miscalculations, which could have had grave consequences both for the Court and the reputation of South Africa".[212]

However, while calling on African States to continue with the massive support which they gave the ICC upon its inception in 2008, Human Rights Watch uncharacteristically acknowledged that "the ICC works in a global landscape where the disparity of political, economic, and military power is stark."[213] That "a number of the most powerful countries, including three permanent members of the UN Security Council – Russia, China, and the United States – and their allies have not joined the Court and have thus been able to avoid ICC scrutiny".[214] And that "the permanent members of the UN Security Council have used their veto privilege to block referral to the ICC of situations desperately in need of justice in countries that are not ICC members, including Syria".[215]

What with the 27 October 2017 withdrawal of Burundi from the ICC marking the first time a member State party will officially withdraw from the Rome Statute,[216] Namibia still insisting on withdrawing because it "supports the principled position of other African leaders for a collective withdrawal",[217] South Africa's domestic courts declaring its misguided withdrawal unconstitutional, and the Gambia announcing its intension to reverse its withdrawal from the ICC,[218] the question of the AU's call for a collective withdrawal from the ICC remains unresolved, even as South Africa's political will to withdraw from the Court appears not to have waned.

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[208] Ibid.

[209] Ibid, 921-924.
[210] See Max Du Plessis, '*Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga'*, (41) 254.

[211] The Malabo Protocol for the extension of the African Court's jurisdiction includes immunity for sitting heads of state and senior government officials. Article 46Abis provides that: 'No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'.

[212] See Max Du Plessis and Guenael Mettraux, 'South Africa's Failed Withdrawal from the Rome Statute: Politics, Law, and Judicial Accountability' (n 153) 1.
[213] Human Rights Watch, *Burundi: ICC Withdrawal Major Loss to Victims*, available at: https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims, accessed 27 August 2017.

[214] Ibid.

[215] Ibid.

[216] BBC News 'Burundi leaves International Criminal Court amid row', 27 October 2017, available at www.bbc.co.uk/news/world-africa-41775951 accessed 27 October 2017.
[217] See http://allafrica.com/stories/201702090569.html, accessed 20 July 2107.
[218] See http://www.news24.com/Africa/News/gambia-to-reverse-its-icc-withdrawal-20170209, accessed 20 July 2107.

Meanwhile, international criminal justice continues to oscillate on the pendulum of international, supranational and national politics whilst impunity reigns supreme in many regions of the world. What does this portend for the ICC? Will it go the way of the League of Nations which folded up when its members chose to ignore its mandate? Is there a way to make it work?

6. Amending The Dysfunctionality Of International Criminal Justice

In the preceding parts, with the ICC/AU tensed relationship in the light of the *Al-Bashir* case (2009) as a point of reference, this article has argued that the international criminal justice mechanism is dysfunctional. This final part considers possible options through which the dysfunctionality could be amended.

There is need for a better drafting of resolutions at the UNSC.[219] The *Al-Bashir* case has its origin from resolution 1593 which referred the Darfur situation to the ICC for investigation and possible prosecution of crimes against humanity and genocide. The effect of resolution 1593 and Article 13(b) referrals in relation to cooperation to arrest and surrender indicted persons to the ICC has elicited much debate. Some have argued that a referral by the UNSC under Chapter VII of the UN Charter automatically mandates member states of the UN to cooperate per force of Article 103. This was the position adopted by the ICC in the Article 87 proceedings against South Africa.

Conversely, others contend that the effect of such referrals on subsequent proceedings can only be determined with reference to "the specific resolution in question".[220] The ICJ appears to sanction this position in the *Case Concerning East Timor (Portugal v. Australia)*[221] when it held that UNSC resolutions must be interpreted with reference to their terms, with the language they are couched in, the discussions leading to their adoption. Du Plessis suggests that:

> If the Security Council is going to refer situations to the ICC involving a non-party and implicating a head of state … the Council ought to express itself clearly and unmistakably about the consequences of its referral for existing rules of international law … [there is] need for more precise drafting in future referrals to identify obligations regarding cooperation.[222]

The Court's interpretation of resolution 1593 as waiving the international customary law immunity of Al-Bashir is highly disputable and very difficult to justify considering the interpretation guidelines of UNSC resolutions set out by the ICJ in the *Kosovo Opinion*.[223]

Notwithstanding the brilliant arguments canvassed by Professor Akande[224] on why resolution 1593 should be read as stripping Al Bashir of his immunities, (which the ICC Pre-Trial Chambers II appears to have reproduced in its 6 July 2017 decision[225]), the UNSC is called upon to be explicit in future resolutions by confirming that indeed its intention is to remove the customary international law immunities of officials who are subject to the referral of a situation to the ICC.

Another option is for the AU to seek an Advisory Opinion. The AU should follow through its decision made in January 2012 at the Summit of the Assembly of the African Union held in Addis Ababa, Ethiopia wherein it directed the AU Commission to seek an advisory opinion from the ICJ on

[219] Max Du Plessis, 'Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga' (n 41) 257.

[220] See Max Du Plessis, 'Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga' (n 41) 257.

[221] See *Case Concerning East Timor (Portugal v Australia)* (1995) ICJ Report 90, para 32.

[222] Max Du Plessis, 'Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga' (n 36) 258.

[223] See Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141 (July 22) on the Interpretation of UN Security Council Resolution 1244 (1999).

[224] Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', (2012) 10 *Journal of International Criminal Justice*, 299-324.

[225] See Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa (n 1).

the immunities of state officials under international law. But, the AU Commission cannot itself seek an advisory opinion from the ICJ. The combined effect of Article 96 of the UN Charter and Article 65 of the Statute of the ICJ is that only organs of the UN or its specialized agencies may seek advisory opinions of the ICJ. For a request to be made, it would most likely have to come from either the UN General Assembly or the UNSC. It is unlikely that the UNSC would seek an advisory opinion on this question since it will amount to doing what it has thus far failed to do (to stop the case against Al-Bashir).[226] Any request would most likely emanate from the UN General Assembly, where African states might be able to muster greater support for an ICJ advisory opinion.[227]

The advisory opinion could address a broad range of legal issues such as (i) immunity before international courts under international law (although this was addressed obiter in the *Arrest Warrant* case, it might be further clarified); (ii) immunity under the Rome Statute, both generally and in respect of cooperation obligations on states and; (iii) the effect (if any) of UNSC resolutions referring matters to the ICC.[228] The ICJ might however, decline to exercise advisory jurisdiction on the question of the meaning of Article 98 of the Rome because under Article 119(1) of the Rome Statute, it is for the ICC to interpret the Statute. The AU should rather, concentrate its question on the meaning of resolution 1593 (2005) which is an act by a UN organ, of which the ICJ has jurisdiction.

Moreso, the protracted disagreement between African states and the ICC on the purport of Articles 27 and 98 of the Rome Statute could be referred to the ASP in line with Article 119(2) of the Rome Statute. By Article 119(2), any dispute arising from the interpretation and application of the Rome Statute, other than those relating to the judicial function of the Court, may be referred to the ASP. When presented with such a dispute, the ASP may seek to settle it by itself or make recommendations on further means of settling the dispute including referring the matter to the ICJ.[229] Such referral to the ICJ would likely raise the question whether the issue of state cooperation in the arrest of Al-Bashir relate to the judicial function of the Court or would it qualify as a dispute as described under Article 119(2) of the Rome Statute.

Furthermore, there is an urgent need for UN Security Council reforms. The ICC's intervention in Sudan has come to mirror AU's main concern about the skewed nature of power distribution within the UNSC and global politics generally.[230] It is inconsistent that the UNSC (including permanent members like the US, Russia and China that are not members of the Rome Statute) can proclaim that it is in the interest of peace and justice that a situation in a non-party state (like Sudan) requires referral to the ICC, impose obligations of cooperation with the ICC upon all UN member states (including non-state parties to the Rome Statute) which obligations otherwise override the immunities otherwise enjoyed by heads of state under international law, yet those member of the UNSC remain exempt from themselves cooperating in the arrest and surrender of such individuals.

Where a situation is to be referred to the ICC through a UNSC referral that explicitly removes immunities for international crimes, then all the members of the UNSC that decided on the referral (including non-members to the Rome Statute) should be similarly and expressly obliged to cooperate with the ICC in arresting high-standing individuals indicted by the Court for possible prosecution. There is therefore a need to decouple the ICC from the UNSC by amending Articles 13(b) and 16 of the Rome Statute.

As a result of what appears to be a legitimacy deficit on the part of the UNSC, many African and other developing countries perceive its activities as "a cynical exercise of authority by the five

[226] Dapo Akande, *'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?', EJIL: Talk!* 8 February 2012, available at: https://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/, accessed 1 August 2017.
[227] Ibid; Max Du Plessis, 'Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga', (n 41) 259.
[228] See Christopher Gevers, 'Africa's ICC Gripes Heading to the ICJ?' http://warandlaw.blogspot.co.uk/2012/02/africa-icc-gripes-heading-to-icj.html, accessed 1 August 2017; Dapo Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?' (n 226).
[229] See Rome Statute of the ICC (n 2) art 119.

[230] Max Du Plessis, 'Exploring Efforts to Resolve the Tension Between the AU and the ICC Over the Bashir Saga' (n 41) 264.

permanent members of the UN Security Council".[231] In view of this structural imbalance, it is apt to consider calls by the AU to make an African state a permanent member of the UNSC.

A further option is to enlarge the role of the Assembly of States Parties. The ASP is the key forum for ICC states parties to engage on issues and consider the concerns raised by the implementation of the Rome Statute. South Africa's indication that it was simultaneously seeking to approach the ASP while responding to the ICC's Article 87(7) non-cooperation proceedings suggests that it was seeking a parallel answer from the political body that is the ASP. Hence, there is a need to expand the role of the ASP to resolve potential disputes between the Court and states parties to the Rome Statute.

However, discussions and any solutions to be explored by the ASP must respect the independence of the Prosecutor and the Court, and the integrity of the Statute."[232] This is because exposing cases pending before the ICC to debates at the ASP could further disrupt the international criminal justice project if not well-handled.

It is high time that the Rome Statute is amended. There are amendment proposals from Kenya and South Africa pending before the ASP. South Africa and Kenya have called for amendments to the following articles of the Rome Statute: (i) article 27 on 'irrelevance of official capacity'; (ii) the preamble of the Rome Statute to allow for regional complementarity; (iii) Article 16 on the deferral of cases - to the effect that where the UNSC is unable to decide on a deferral request that it should be transferred to the UN General Assembly for a decision; (iv) Article 70 on 'offences against administration of justice' and; the (v) reduction of the powers of the Prosecutor.[233]

The proposed Article 16 amendment would give the UN General Assembly the power of deferrals in the event of inaction by the UNSC.[234] A possible legal obstacle to such an amendment is the question of authority as Article 16 relies on the UNSC's Chapter VII of the UN Charter mandate as the custodian of international peace and security.

There is also a need to amend Article 97(7) of the Rome Statute on non-cooperation proceedings to enable disputes between the Court and States parties to be referred to the either ASP for resolution, or to the UNSC for onward transmission to the ICJ in the form of an advisory opinion.

Recently, there have been calls for a reappraisal of the application of international law by national courts particularly where a national court is moved to determine a matter that is "simultaneously regulated by *lex specialis* International Criminal Law, emergent regional supranational law, customary international law and domestic law", so as to avoid "polluting the legitimacy of the international legal system generally by casually proceeding without taking great care on the question of applicable law."[235]

In a recent article, Professor Chigara forcefully argues that national courts, particularly "lower court judges of judicially evolving post-colonial States" should consider engaging "a specialist academician in the capacity of 'friend of the Court' to illuminate the applicable or contested principles of international law whenever they are called upon to adjudicate complex cases that invoke a variety of competing international, regional and domestic sources of law."[236]

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[231] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), 25.

[232] See Jonathan O'Donohue, '*The ICC and the ASP'*, in Carsten Stahn, (ed) *The Law and the Practice of the International Criminal Court* (OUP, 2015) 138.

[233] See African Union, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.334 (XVI), 30-31 January 2001.

[234] See African Union, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.334 (XVI), 30-31 January 2001.

[235] See Benedict A. Chigara, 'The Administration of International Law in National Courts and the Legitimacy of International Law' (n 36) 914-915.

[236] Ibid.

The applicability of this avant-garde call would not be without its challenges as the ICC and ICJ experience show that courts jealously guard their jurisdictions and would not want to be seen as being incapable of competently adjudicating matters pending before them. Nevertheless, it is worthy of consideration to trial the implementation of this novel idea in the light of the manifest misapplication of international law in the *Al Bashir* case (2015)[237] by the North Gauteng Division of the High Court of South Africa and later the Supreme Court of Appeal of South Africa (2016).

7. Conclusion

This article has demonstrated the dysfunctionality of international criminal justice which appears to be driven by selfish State interests, reciprocity, and the proclivity of influential stakeholders in international politics and diplomacy, rather than a genuine international attempt at fighting impunity and putting an end to the commission of egregious international crimes – war crimes, crimes against humanity and genocide. It has been shown that although the ICC does not operate under a direct mandate from the UNSC, its deference to the permanent members of UNSC has substantially eroded the legitimacy of the Court.

The ICC has been faced with the challenge of existential justification leading to its inconsistent and chaotic decisions on the question of Al-Bashir's immunities. There is also the struggle for jurisdiction between the national, the supranational and the universal jurisdictions which exposes the complex nature of international justice. The ICC has failed to acknowledge and recognize the AU's supranational jurisdiction, and this has stalled its mandate of bringing an end to impunity and human rights violations by bringing those suspected of having committed egregious international crimes to justice. It has also led to the diminishing of enthusiasm for the Court among African States.

If international criminal justice is to move forward, there is need to move beyond the absolutist terms and positions adopted by the opposing parties in the Al-Bashir debate. The AU would need to reconsider its exclusively political posture towards embracing international jurisprudence and the limited intervention by the Court. The ICC also needs to shelve its unilateral prosecutorial fundamentalism and recognize that there might be a need to arrange its interventions in a manner that does not ignore domestic political exigencies in the pursuit of justice in the wake of a violent conflict.

Notwithstanding the posturing of the ICC, President Al-Bashir has not been arrested eight years after the warrant for his arrest was issued, while President Kenyatta and William Ruto's trials have collapsed. These are clear evidence that the international criminal justice mechanism, as is presently constituted, is not working. Therefore, to inherit the benefits of international criminal justice, particularly in Africa, the issues and concerns presented by the *Al-Bashir* case (2009) need to be addressed in a serious, constructive and cooperative manner through honest dialogue.

It is important to consider some of the pending proposals for amendment to the Rome Statute on their merit. The ICC should dialogue with the AU to end the dispute between them as the AU's support is critical to the effectiveness of the ICC in Africa. Similarly, the AU member states should respect their treaty obligations under the Rome Statute. The ICC and the UNSC should balance the obvious need for security with that of justice in terms of expediency. They should not ignore domestic political exigencies in the pursuit of justice in the wake of a violent conflict. There is need for coordination between the ICC and other regional and domestic juristic mechanisms in the places of their intervention. The ICC and national courts should also consider the call to making use of international law professors who would act as specialized *amicus curiae* to illuminate the Court on complicated international law questions. Such specialized academicians would be given the opportunity of being examined by both the bench, the prosecution and the defence teams on thorny international law questions that may confront the Court in future proceedings.

[237] *The Southern Africa Litigation Centre* v. *The Minister of Justice and 11 Others,* 24 June 2015, High Court of South Africa, No. 27740/15.

Legitimate Restrictions to the Recognition of the Right to Strike under International Law

Fahad Faisal ALSARAWI

1. Introduction

The right to strike is recognized as a human right under the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[1] in addition to several regional human rights treaties.[2] Further recognition of the right to strike as a core-right of employment is provided by the International Labour Organization (ILO),[3] which was established in 1919 and operates since 1946 as a United Nations agency.[4]

The ILO specializes in defending global labour standards,[5] with the aim of advancing the "humane conditions of labour."[6] Accordingly, ILO Committees have considered the right to strike to be "an intrinsic corollary" of the right to collective bargaining,[7] and "one of the essential means available to workers and their organizations for the promotion and defence of their social and economic interests."[8]

Work strikes have been defined as "the collective and concerted stoppage of work or slow-down the pace of work by a group of workers, usually but not necessarily organized by a trade union, in consideration and promotion of an industrial dispute, in order to put pressure on an employer."[9]

The definition provides insight on the characteristics of work strikes. The first is that a work strike requires the intentional and deliberate withdrawal of labour. Therefore, external events leading to the stoppage of work, such as a natural disaster, do not fall under the scope of strikes.[10] Furthermore, the

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[1] United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, 16 December 1966, United Nations, Treaty Series, vol 993, p 3, Article 8 (1) (d).

[2] Council of Europe, *European Social Charter (ESC),* 18 October 1961, ETS 35; and (Revised), 3 May 1996, ETS 163, Article 6 (4); See also: European Union, *Charter of Fundamental Rights of the European Union(CFREU)*, 26 October 2012, 2012/C 326/02, Article 28; See also: Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948, Article 45 (c); See also: OAS, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*, 16 November 1999, A-52, , Article 8 (1) (b); See also: International Trade Union Confederation (ITUC), *The Right to Strike and the ILO: The Legal Foundations* (International Trade Union Confederation 2014) 51-52, 58 and 61-62.

[3] Bernard Gernigon, Alberto Odero and Horacio Guido, *ILO Principles Concerning The Right To Strike* (International Labour Organisation 2000) 7; See also: International Labour Organization (ILO), *Freedom of Association and Collective Bargaining*, General Survey of the Reports on the Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98), Report III (Part 4B), International Labour Conference (ILC), 81st Session, 1994 Geneva, Para 136.

[4] ILO, *Freedom of Association and Collective Bargaining* (n 3) Para 14; See also: ILO, 'About the ILO' (*ILO,* 2017) <www.ilo.org/global/about-the-ilo/lang--en/index.htm> accessed 1 July 2017.

[5] ibid.

[6] Bernard Gernigon, Alberto Odero and Horacio Guido, *Collective Bargaining: ILO Standards and the Principles of the Supervisory Bodies* (ILO 2000) 1-2; See also: ILO, Constitution of the International Labour Organisation, 1 April 1919, Preamble.

[7] ILO, *Freedom of Association and Collective Bargaining* (n 3) Paras 151 and 179; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, International Labour Office, Fifth (revised) Edition, 2006 Geneva, Para 523.

[8] ILO, *Freedom of Association and Collective Bargaining* (n 3) Paras 147-148, 152 and 164; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n 7) Para 522.

[9] Erika Kovacs, 'The Right to Strike in the European Social Charter' (2004-2005) 26 *Comparative Labor Law & Policy Journal* 445, 448.

[10] Ovunda V C Okene, 'The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law' (2007) 15 *African Journal of International and Comparative Law* 29, 29-31; See also: Bob Hepple, 'The Freedom to Strike and its Rationale' In: Bob Hepple, Rochelle le Roux and Silvana Sciarra, (eds.) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (Kindle edn, Franco Angeli Edizioni 2015) pp. 506-507.

withdrawal of labour must be concerted and aimed at placing pressure on an employer.[11] Accordingly, a prior agreement is necessarily required to exist between the workers who act as a collective unit. Nevertheless, while "parallel actions of isolated individuals" refusing to work do not constitute a work strike, it is unnecessary that the strike is organized by a trade union.[12]

Moreover, work strikes may occur in diverse forms. A complete work strike, where workers refuse to perform any work duties whatsoever until their demands are met or a mutual agreement is reached, is considered the most traditional form of work strikes.[13] However, workers may engage in other more complex types of strikes. A partial strike for example may be exercised through the withdrawal of labour for a limited number of hours during a working day,[14] which is considered just as effective as a complete withdrawal of labour, due to its disruptive effects on an industry or sector.[15] The "go-slow" method is also considered a form of partial strikes which does not involve any withdrawal of labour, instead workers perform their duties in a slow manner.[16]

Another form of strikes is the rotation strike, where in contrast to a general strike; workers do not withdraw their labour in a whole industry or sector.[17] Instead, rotation or selective strikes rely on splitting employees into different groups, where workers take turns in withdrawing their labour in specifically selected departments or areas of an industry or sector, while others continue performing their duties.[18] The success of such strikes depends on choosing strategic or key areas, where work stoppages would be most disruptive to the employers, while avoiding the consequences of an "all-out" strike.[19]

Other forms of strikes worth mentioning are sympathy or secondary strikes and political strikes.[20] The workers in the former type of strikes lack an immediate or direct connection with the objectives of the strike, instead they "come out in support of another strike" and are motivated by the aim of realizing the demands of other workers.[21] Political strikes on the other hand are those directed against the governments' policies, in the aim of achieving non-employment objectives.[22]

[11] Okene, 'The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law' (n 10); See also: Hepple (n 10).

[12] ibid.

[13] ibid. pp 525; See also: Halton Cheedle, 'Constitutionalizing the Right to Strike' In: Bob Hepple, Rochelle le Roux and Silvana Sciarra, (eds.) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (Kindle edn, Franco Angeli Edizioni 2015) Location 1760.

[14] Wiebke Warneck, 'Strike Rules in the EU27 and Beyond: A Comparative Overview' (2007) *European Trade Union Institute for Research, Education and Health and Safety* 1, 13.

[15] ILO, ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n 7), Para 586.

[16] Hepple (n 10) Location 525; See also: Cheedle (n 13); See also: Warneck (n 14).

[17] Ovunda V C Okene, 'The Right of Workers to Strike in a Democratic Society: The Case of Nigeria' (2007) 19 *Sri Lanka Journal of International Law* 193, 204; See also: Warneck (n 14); See also: Mario am Bundesarbeitsgericht, 'XIXth Meeting of European Labour Court Judges, National Reports: Strikes in The Public Sector' (ILO 2011) 1, 50.

[18] ibid 3; See also: Cheedle (n 13); See also: Warneck (n 14).

[19] Okene, 'The Right of Workers to Strike in a Democratic Society: The Case of Nigeria' (n 17); See also: Bundesarbeitsgericht (n 17) 50.

[20] ibid 3; See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 3) 14-16.

[21] ibid 15-16; See also: Paul Germanotta and Tonia Novitz, 'Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action' (2002) 18 *The International Journal of Comparative Labour Law and Industrial Relations* 67, 68; See also: Warneck (n 14), 8 and 13.

[22] ibid 13.

ILO Committees have acknowledged the legitimacy of the aforementioned types of strikes, with the exception of political strikes, which have been excluded from the scope of legitimate strike action.[23]

However, State practice has been inconsistent in this regard.[24] The regulation of the right to strike varies largely from one State to another[25] and in some cases significantly diverges from the jurisprudence provided by various UN and ILO Committees and the provisions of several international treaties as well.[26]

In France for instance the "Cour de Cassations" has determined that partial strikes are not afforded the constitutional and legal protection recognized for legitimate work strikes,[27] while similar positions have been adopted in Spain[28] and to a certain degree in Italy.[29] The rationale given for such positions is that "workers should not be able to draw all or part of their wages while taking action that disrupts the business."[30] In Germany, only work strikes seeking the conclusion of collective agreements are recognized.[31] In the UK strikes are degraded to a mere freedom rather than a fundamental right, as a strike may subject striking workers to tort claims.[32]
Furthermore, some Governments and employer representatives have attempted to dispute the existence of such a right[33] or declared their right not to recognize it.[34] Consequently, the right to strike remains surrounded by controversy stemming from contradicting points of view concerning an array of issues, beginning with the restrictions that may be applied on the right to strike all the way to the existence of such a right.

This study examines the recognition of the right to strike under international law and the boundaries of the right's exercise by analysing the limitations and restrictions that may be legitimately imposed on the right to strike. The study commences with the examination of the substantive international law provisions on the right to strike in order to determine the existence and extent of protection afforded to the right to strike. The provisions recognizing and protecting the right to strike shall be discussed, regardless of whether such recognition is explicitly declared or implicitly inferred. Furthermore, the boundaries of the exercise of the right to strike shall be identified by discussing the limitations and

[23] ILO, *Freedom of Association and Collective Bargaining* (n 3) Paras 165 and 168; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n 7) Paras 526, 529 and 534.

[24] ILO, *Freedom of Association and Collective Bargaining* (n 3) Paras 165 and 168; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n 7) Paras 526, 529 and 534.

[25] ILO, *Freedom of Association and Collective Bargaining* (n 3) Para 144.

[26] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 3) 49-45.

[27] Hepple (n 10) Location 525; See also: Cheedle (n 13).

[28] ibid.

[29] "Work-to-rule" strikes are not protected in Italy; See: ibid.

[30] Hepple (n 10) pp 525.

[31] Federico Fabbrini, 'Europe in Need of a New Deal: On Federalism, Free Market, and the Right to Strike' (2011-2012) 43 *Georgetown Journal of International Law* 1175, 1190; See also: Warneck (n 14) 32-33; See also: Kovacs (n 9) 449.

[32] Fabbrini (n 31) 1191-1192; See also: Warneck (n 14) 70-71.

[33] See the State Comments submitted on 16 July 2002 by the Government of Japan on the Concluding Observations (E/C 12/1/Add 67) adopted by the Human Rights Committee at its twenty-sixth session (13-31 August 2001) following its consideration of the second periodic report of Japan (E/1990/6/Add 21 and Corr 1) where Japan expressed its understanding that C87 does not include the right strike, and that not recognizing the right to strike should not be considered a breach of Japan's commitments due to its reservation on article 8 (1) (d) of the ICESCR, at: UN Committee on Economic, Social and Cultural Rights (CESCR), *Comments by State Party on Committee Concluding Observations: Japan*, 29 November 2002, E/C12/2002/12, 2, Para 2.

[34] See the reservations of the States of Japan and Kuwait on ICESCR, Article 8 (1) (d), Available at: United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Status of Ratification Interactive Dashboard: ICESCR, Kuwait, Declarations' (*UN OHCHR*, 2017) < indicators.ohchr.org/> accessed 4 July 2017.

restrictions that may apply on the practice of the right to strike. Such restrictions shall be identified through the jurisprudence of the relevant treaty committees, while further discussing the rationales and justifications behind such restrictions.

Chapter one focuses on the UN's efforts concerning the promotion and protection of the right to strike by identifying the treaties that protect the practice of such a right. Furthermore, the UN's approach regarding the extent of the right to strike shall be discussed in light of the jurisprudence of certain UN Committees.
Chapter Two analyses the ILO's effort to promote and protect the right to strike through the relevant ILO instruments and the permissible objectives of strikes. Furthermore, the limitations and restrictions that may be applied on the right to strike shall be discussed by viewing the jurisprudence of the relevant ILO Committees and the ILO case law. The latter may provide some insight on the domestic measures adopted by States in relation to strikes, in order to determine whether strikes are adequately protected under domestic law.

Moreover, in case of any limitations or prohibitions imposed on the right to strike, the alternative guarantees provided for workers in order to safeguard their interests shall be discussed. Finally, the chapter examines the sanctions that may be imposed on illegitimate strikes or violations committed during strikes. Chapter three focuses on the right to strike under European human rights instruments to determine the enforceability of the right to strike within Europe. The chapter will start by discussing the European Social Charter and its recognition of the right to strike. The discussion shall then move to the European Convention on Human Rights and the case law of the European Court of Human Rights. Finally, the chapter discusses the right to strike under the European Union by discussing the European Charter of Fundamental Rights and the relevant European Court of Justice case law. The coherence and compatibility of the aforementioned European human rights instruments shall be discussed, while further comparing the latter with the relevant UN and ILO instruments and Committees' jurisprudence. The study aims to identify the current issues surrounding the right to strike and where possible recommendations to resolve such issues could be made. The term work strikes is preferred over the term industrial action due to its precision, as the latter includes picketing and lock-outs which are excluded from the scope of the study.

2. The Right To Strike Under The Auspice Of The United Nations

2.1. The Right to Strike from a Human Rights Perspective

Several features distinguish the right to strike from other human rights. Initially, the right to strike is considered an individual right exercised collectively, as it can only be exercised by a group of workers. The right to strike is further considered a "means to an end" whereas other human rights such as the rights to life, food or education are targets by themselves.[35] Therefore, the legitimacy of work strikes is linked with the purposes pursued, and is only permissible insofar as they seek the protection of valid interests.

Moreover, human rights, such as the rights to life, water, freedom from forced labour or torture are considered "inalienable" and "non-derogable",[36] in the sense that they apply to everyone by virtue of their humanity.[37] Accordingly, States are prohibited from entering into agreements or adopting policies

[35] International Labour Organization (ILO), *Freedom of Association and Collective Bargaining*, General Survey of the Reports on the Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98), Report III (Part 4B), International Labour Conference (ILC), 81st Session, 1994 Geneva, Para 137; See also: Bob Hepple, 'The Freedom to Strike and its Rationale' In: Bob Hepple, Rochelle le Roux and Silvana Sciarra, *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (Kindle edn, Franco Angeli Edizioni 2015)pp. 758-760.

[36] Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 The American Political Science Review 303, 305-306; See also: Manisuli Ssenyonjo, 'Reflections On State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law' (2011) 15 *International Journal of Human Rights* 969, 978; See also: UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 15: The Right to Water, 20 January 2003, E/C 12/2002/11, Para 40.

[37] Ed Bates, 'History' In Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law* (2nd edn, Oxford University Press 2014)23; See also: International Trade Union Confederation (ITUC), *The Right to Strike and the ILO: The Legal Foundations* (International Trade Union Confederation 2014) 23.

which eliminate or reduce their commitments towards certain human rights.[38] The same does not apply to the right to strike,[39] as the exercise of the right to strike in general may be subjected to derogation in cases of acute national emergencies or during the duration of consensual collective agreements.[40]

Furthermore, the right to strike must be balanced with other human rights, to ensure that its exercise does not jeopardize the human rights of others, such as the rights to life or health, especially if the striking employees performed essential services in hospitals for example.[41] Accordingly, it may be necessary to observe strike action under the auspice of the UN to address the issue of whether such a right exists and may be considered a basic human right.

The Universal Declaration of Human Rights (UDHR) makes no mention of a human right to strike. However, the UDHR does declare the right of "everyone… to form and to join trade unions for the protection of his interests."[42] Similarly, the International Covenant on Civil and Political Rights (ICCPR), while not recognizing the right to strike in an explicit manner,[43] makes a statement regarding individuals' right to freedom of association, including the right to form and join trade unions for the protection of their interests.[44] The ICCPR provides guidelines for States regarding the limitations which may be imposed on the right to freedom of association by declaring that: "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."[45]

The provisions of Article 22 provide further exceptions concerning restrictions on the practice of such a right by members of the armed forces and police, which is due to the nature of their employment tasks,[46] as they affect the "external and internal security of the State."[47] Moreover, the absence of a provision recognizing the right to strike under the ICCPR is understood to be due to the categorisation of the right to strike as a socio-economic right while the ICCPR consists of rights belonging to the civil and political categories.[48] Consequently, the Human Rights Committee (HRC), which supervises States Parties' compliance with the ICCPR's provisions, is understood to dedicate its efforts regarding the right to freedom of association to non-governmental organisations or political parties, leaving "the workers' rights aspect of the freedom of association" to the Committee on Economic, Social and Cultural Rights (CESCR).[49]

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[38] Ssenyonjo (n 36) 990-991 and 998.

[39] Hepple, 'The Freedom to Strike and its Rationale' (n 35).

[40] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, International Labour Office, Fifth (revised) Edition, 2006 Geneva, Para 533; See also: Hepple, 'The Freedom to Strike and its Rationale' (n 35).

[41] ibid.

[42] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 23(4); See also: ITUC (n 37) 40.

[43] ibid 44; See also: Bob Hepple, 'The Right to Strike in an International Context' (2009-2010) 15 Canadian Labour & Employment Law Journal 133, 138; See also: Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29 (2) *International Journal of Comparative Labour Law* 199, 206 Footnote 22.

[44] UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations, Treaty Series, vol 999, p 171, Article 22(1); See also: ITUC (n 37) 44.

[45] UN General Assembly, *ICCPR* (n 44) Article 22(2); See also: ITUC (n 37) 44.

[46] UN General Assembly, *ICCPR* (n 44) Article 22 (2); See also: ITUC (n 37) 44.

[47] Roy J Adams, 'The Human Right of Police to Organize and Bargain Collectively' (2008) 9 *Police Practice and Research* 165, 167.

[48] Hepple, 'The Right to Strike in an International Context' (n 43) 138-139.

[49] ITUC (n 37) 45.

In *JB et al v Canada*,[50] a complaint was bought before the HRC inquiring whether an alleged breach of the right to strike may be bought before the HRC on the basis that the provisions of Article 22 should be understood to include a right to strike as part of the right to freedom of association.[51] The Committee held that the "communication is inadmissible." In reaching its decision the HRC provided that "the right to strike cannot be considered as implicit component of the right to form and join trade unions", since the right to strike is not expressly stated in the ICCPR, while no proposal of including a right to strike under the provisions of Article 22 was made during the drafting process, as opposed to Article 8 (1) (d) of the ICESCR.[52] Nevertheless, several members of the HRC expressed their disagreement with the HRC's latter position.[53]

However, the HRC's position seems to have taken a progressive turn towards recognizing a right to strike by commenting on State practice in relation to strikes. In a concluding observation issued by the HRC addressing Estonia's State report regarding public servants' right to strike, the HRC expressed its concern "that public servants who do not exercise public authority do not fully enjoy the right to strike."[54] The HRC further expressed the importance "that only the most limited number of public servants is denied the right to strike."[55] Such a recommendation infers that the right to strike formulates an integral part of the right to freedom of association incorporated under the provisions of the ICCPR, regardless of the absence of an expressive statement recognizing the right to strike under the latter's provisions.[56]

Accordingly, although the right to strike is not explicitly declared under the ICCPR, the HRC recognizes it as a human right and further protects it by commenting on State violations. The HRC's protection of the right to strike may be due to the interconnection between the latter and the right to freedom of association. However, the HRC established, within the context of its jurisprudence, that it is acceptable to prohibit certain employees, such as members of the police or administration of the State from exercising the right to strike.

2.1.1. The International Covenant on Economic, Social and Cultural Rights

The ICESCR is considered more extensive than the ICCPR in the aspect of "labour human rights".[57] Its provisions cover the rights to just and favourable work conditions,[58] while Article 8 declares the right to form and join trade unions,[59] in a manner similar to that declared under the ICCPR.[60] Under both Articles reference regarding the imposition of lawful restrictions on trade union rights is followed by a

[50] *J B et al v Canada*, CCPR/C/OP/1/D/118/1982, UN Human Rights Committee (HRC), 18 July 1986.

[51] Kevin Boyle and Sangeeta Shah, 'Thought, Expression, Association and Assembly' In Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 232; See also: ITUC (n 37) 44-45; See also: *J B et al v Canada* (n 50) Paras 1.2, 5.1 and 6.2.

[52] Boyle and Shah (n 51); See also: ITUC (n 37) 44-45; See also: *J B et al v Canada* (n 50) Paras 6.3-6.5.

[53] Rosalyn Higgins and Rajsoomer Lallah et al, 'Individual Opinion: Appendix Concerning the Admissibility of Communication No 118/1982 J B et al v Canada', In *J B et al v Canada* (n 50).

[54] ITUC (n 37) 45; See also: UN Human Rights Committee (HRC), *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Estonia*, 4 August 2010, CCPR/C/EST/3, Para 15.

[55] ITUC (n 37) 45; See also: UN HRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Estonia* (n 54).

[56] ITUC (n 37) 45.

[57] ibid 44.

[58] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, 16 December 1966, United Nations, Treaty Series, vol 993, p 3, Article 7.

[59] ibid Article 8 (1) (a).

[60] UN General Assembly, *ICCPR* (n 44) Article 22.

statement on the importance that States parties to the ILO C87 adopt legislative measures that coincide with the latter's provisions.[61]

Nevertheless, the ICESCR goes further than its equivalent Article under the ICCPR by declaring the human right to strike in an explicit manner,[62] as it provides that: "The States Parties to the present Covenant undertake to ensure:The right to strike, provided that it is exercised in conformity with the laws of a particular country."[63] The ICESCR goes on to declare that the latter provision "shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State."[64] However, no further explicit provisions that may be applied directly on the right to strike, nor its exercise are provided under the ICESCR. Furthermore, the CESCR, which is the UN supervisory body overlooking the implementation of the ICESCR,[65] has abstained from issuing an authoritative interpretation in the form of a general comment dedicated solely to the right to strike.[66] Therefore, it may be necessary that the right to strike is read together with other relevant provisions or general comments in order to comprehend its extent and boundaries under the ICESCR.

The CESCR addressed the right to strike under the recent General Comment on the Right to Just and Favorable Conditions of Work.[67] The CESCR provided that the right to strike is one of the "crucial means to introduce, maintain and defend just and favourable conditions of work."[68] Moreover, the CESCR addressed the right to strike indirectly in other general comments, beginning with the General Comment on the Nature of States Parties Obligations.[69] The latter includes the rights incorporated under the provisions of Article 8 among those deemed "capable of immediate application by judicial and other organs in many national legal systems."[70] Thus, the CESCR considers the right to strike eligible for immediate and full implementation in the majority of States in accordance with the general limitations clause declared under Article 4 of the ICESCR.[71] The latter provides that any limitations must be "determined by law" exclusively "for the purpose of promoting the general welfare in a democratic society",[72] and without further restrictions other than those declared under the provisions of Article 8.[73]

Furthermore, in the general comment concerning the domestic application of the ICESCR, the CESCR reaffirmed its position regarding the immediate enforceability of the right to strike "within the domestic

[61] UN General Assembly, *ICESCR* (n 58) Article 8 (1) (b) and (c); See also: UN General Assembly, *ICCPR* (n 44) Article 22 (2) and (3).

[62] ITUC (n 37) 40.

[63] UN General Assembly, *ICESCR* (n 58) Article 8 (1) (d).

[64] ibid Article 8 (2).

[65] ITUC (n 37) 42; See also: UN Office of the High Commissioner for Human Rights (OHCHR), 'CESCR: Introduction' (*UN OHCHR*, 2017) <www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> accessed 7 July 2017.

[66] The CESCR issues authoritative interpretations of the ICESCR provisions in the form of general comments; See: ibid; See also: ITUC (n 37) 42.

[67] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights),* 27 April 2016, E/C12/GC/23.

[68] ibid Para 1.

[69] ITUC (n 37) 43; See also: The International Justice Resource Center (IJRC), 'Economic, Social and Cultural Rights' (*IJRC*, 2017) <www.ijrcenter.org/thematic-research-guides/economic-social-and-cultural-rights-2/> accessed 14 July 2017.

[70] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 3: The Nature of States Parties' Obligations, 14 December 1990, E/1991/23, Para 5; See also: ITUC (n 37) 43.

[71] ibid; See also: IJRC (n 69).

[72] UN General Assembly, *ICESCR* (n 58) Article 4.

[73] IJRC (n 69).

legal systems of States parties."[74] Nevertheless, the CESCR provided a certain degree of flexibility or discretion for States in relation to the domestic measures which States may adopt to implement the rights enshrined in the ICESCR, as long as States apply all the means available at their disposal to give effect to such rights, including the right to strike.[75]

The CESCR further addressed strike action through several concluding observations when examining the reports of States parties to the ICESCR, where the CESCR focused on the domestic recognition and protection of the right to strike.[76] The CESCR addressed the question on the nature of strike action, particularly whether it should be considered a freedom or right, in its concluding observation addressing the UK. The CESCR explicitly expressed its opinion "that the current notion of freedom to strike, which simply recognises the illegality of being submitted to an involuntary servitude, is insufficient to satisfy the requirements of Article 8 of the Covenant."[77] Accordingly, the Committee views considering strikes a mere freedom as opposed to a right incompatible with the ICESCR's provisions.[78]

The significance of the latter resides in the difference between rights and freedoms. Freedoms provide individuals with the privilege or liberty of pursuing certain actions. However, while others do not have a right to stop them from practicing their freedom that does not necessarily result in a corresponding duty upon others not to interfere with the concerned individual's freedom. In contrast, rights substantially lead to a parallel duty upon others to refrain from any interference affecting individuals' ability to exercise their rights.[79] Therefore, in the context of strikes, considering strikes a freedom provides workers with the liberty to engage in strike action, however, although the employers do not possess a right to stop them from striking, they do not have a duty not to interfere with their freedom to strike. The latter enables employers to take measures that may discourage employees from striking, such as hiring permanent replacement workers or delaying periodic promotions. In contrast, a right to strike imposes a duty upon employers to refrain from any interference which may reduce or obstruct the workers' ability to engage in strikes, including the hiring of permanent replacements.[80]

Furthermore, the CESCR recommended the incorporation of the right to strike into domestic law.[81] The latter approach coincides with the provisions of the ICESCR providing that any restrictions imposed on ESC rights should only be "determined by law" and "solely for the purpose of promoting the general welfare in a democratic society."[82] The significance of such an approach resides in the nature of laws which possess certain characteristics that enable them to efficiently protect human rights. Moreover, laws go through stricter scrutiny, as opposed to other legal tools such as rules and regulations which may be surrounded by inferior safeguards. Additionally, linking such restrictions with the need to promote the general welfare in a democratic society protects ESC rights from repressive regimes seeking to justify unwarranted interventions or restrictions through false public welfare allegations.

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[74] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 9: The domestic application of the Covenant*, 3 December 1998, E/C 12/1998/24, Paras 4 and 10.

[75] ibid Para 3; See also: UN CESCR, *General Comment No 3: The Nature of States Parties' Obligations* (n 70) Paras 8-9.

[76] ITUC (n 37) 42-44.

[77] ibid 43; See also: UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 12 December 1997, E/C 12/1/Add 19, Para 23.

[78] ITUC (n 37) 43; See also: UN CESCR, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (n 77).

[79] Emily C M O'Neill, 'The Right to Strike: How the United States Reduces it to the Freedom to Strike and How International Framework Agreements Can Redeem it' (2011-2012) 2 (2) *Labor & Employment Law Forum* 199, 201-202 and 217-218 and 220.

[80] ibid 217-220.

[81] ITUC (n 37) 43; See also: UN CESCR, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (n 77) Para 11; See also: UN Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations: United Kingdom of Great Britain and Northern Ireland, 5 June 2002, E/C 12/1/Add 79, Paras 16 and 34.

[82] UN General Assembly, *ICESCR* (n 58) Articles 4 and 8(1)(a).

However, while some States consider strikes a freedom instead of a right, others have declared broad reservations on the right to strike. Kuwait for instance expressed its "right not to apply the provisions of Article 8, Paragraph 1 (d)."[83] The concluding observation addressing Kuwait's reservation reads: "Notwithstanding the fact that strikes have taken place in the State party, the Committee expresses concern that the right to strike is not protected by law and that the State party has maintained the reservation to Article 8, Paragraph 1 (d), of the Covenant. Based on information from the State party that strikes are not prohibited, the Committee calls on the State party to withdraw its reservation… and establish safeguards for the exercise of the right to strike."[84]

Moreover, in a previous concluding observation addressing Kuwait, the CESCR expressed its concern regarding legal limitations seeking to restrict the right to strike, requiring the liberalization of such limitations.[85] Similarly, when addressing the State reports of Estonia and Germany the CESCR expressed its concerns regarding domestic measures depriving public sector civil servants of the right to strike without differentiating between those that do not perform essential services from public sector employees performing essential services.[86] The CESCR urged both States to adjust their domestic measures to correspond with the provisions of the ICESCR, as the Committee views that such limitations may prejudice the exercise of the right to strike, in violation of the provisions declared under Article 8.[87] In addition, while not commenting on the legitimacy of imposing restrictions on strikes in essential public services, the UN Economic and Social Council inquired about the body designating such services as essential.[88]

Furthermore, the CESCR provided that domestic laws requiring the approval of a large number of trade union members before strike action may be initiated are unacceptable.[89] In several concluding observations the CESCR provided that penal codes which criminalize strike action are incompatible with the provisions of the ICESCR.[90] When addressing Morocco, the CESCR repeatedly recommended that the State removes the unwarranted restrictions imposed on the right to strike, while encouraging Morocco to ratify ILO C87.[91]

However, while reference to C87 and the importance of respecting its provisions may be adequate regarding matters concerning the right to form and join trade unions, it may be difficult to rely on C87 in the case of the right to strike, as challenges such as the one raised by Japan's Government may display. The latter claimed when addressing the CESCR that its reluctance to recognize the right of public sector employees to strike does not violate the provisions of C87, stating that: "ILO Convention No87 is not understood to deal with issues related to the right to strike, judging from its wording,

[83] UN, Treaty Series, vol 993, p 3, Chapter IV, 3, *Depositary Notification: ICESCR*, Kuwait: Declarations and Reservations, Available at: <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec> accessed 16 July 2017; See also: United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Status of Ratification Interactive Dashboard: ICESCR, Kuwait, Declarations' (UN OHCHR, 2017) < indicators.ohchr.org/ > accessed 16 July 2017.

[84] UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations on the Second Periodic Report of Kuwait*, 19 December 2013, E/C 12/KWT/CO/2, Para 21.

[85] UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Kuwait*, 7 June 2004, E/C 12/1/Add 98, Paras 18 and 38.

[86] ITUC (n 37) 42; See also: Swepston (n 43) 213; See also: UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Germany*, 12 July 2011, E/C 12/DEU/CO/5, Para 20; See also: UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Estonia*, 16 December 2011, E/C 12/EST/CO/2, Para 17.

[87] UN CESCR, *Concluding Observations: Germany* (n 86); See also: UN CESCR *Concluding Observations: Estonia* (n 86).

[88] ITUC (n 37) 44.

[89] UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Egypt*, 23 May 2000, E/C 12/1/Add 44, Para 18.

[90] UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Morocco*, 1 December 2000, E/C 12/1/Add 55, Para 46; See also: UN CESCR, *Concluding Observations: Egypt* (n 89) Paras 20 and 39.

[91] UN CESCR, *Concluding Observations: Morocco* (n 90) Paras 22, 41 and 46; See also: UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Morocco*, 4 September 2006, E/C 12/MAR/CO/3, Paras 13 (d) and 45; See also: ITUC (n 37) 43.

discussion at the negotiation, and interpretation. Therefore, it is not correct to claim that the prohibition of strikes for all public employees in Japan contravenes the ILO Convention No87."[92]

Accordingly, in light of the absence of an explicit mention of the right to strike under C87 it may be inefficient to simply refer to the importance of C87. However, such a conclusion should not be drawn before examining the ILO's jurisprudence and recognition of the right to strike. Nevertheless, the CESCR's jurisprudence, mainly provided by its concluding observations and various general comments, provides some insight on the CESCR's position regarding strikes. The CESCR clearly considers that criminal sanctions in response to strikes are unjustified. Furthermore, through ICESCR provisions, the need to limit strike action is acknowledged, namely in the case of members of the armed forces, police or the administration of the State. In addition, the CESCR acknowledged that restrictions may be imposed on the right of public sector employees performing essential services to engage in strikes. However, when addressing States, the CESCR views that only those performing essential services, designated by the concerned body to be as such, should be deprived from pursuing strike action. Finally, while the CESCR left a certain amount of discretion regarding the measures which States may adopt to implement the right to strike, it nevertheless, recommended the removal of barriers in the form of unwarranted restrictions that discourage workers from pursuing strike action.

Several conclusions may be drawn when observing the UN's position on the right to strike. The first being that the UN considers strike action a fundamental human right rather than a freedom. However, a general comment regarding the extent, practice and limitations of strike action is required from the CESCR in order to adequately safeguard the implementation of the right to strike, especially from unwarranted State interference. The latter requirement is due to the brief manner in which the right to strike is addressed in the ICESCR, which the CESCR compensates for by issuing concluding observations on States practice rather than a general comment.[93] Furthermore, the right to strike is deemed capable of immediate implementation. Although the provisions of Article 2(1) of the ICESCR allow States to limit the extent of such a right to be in accordance with its available resources and ability to enforce ESC rights, the latter provision proclaims the importance of taking gradual progressive steps towards the full implementation of ESC rights.

3. The Right to Strike and the ILO

3.1. Recognition of the Right to Strike by the ILO

The right to strike is not explicitly mentioned in the ILO Constitution, nor is it explicitly recognized as a right in any of the Conventions issued by the ILO.[94] Such absence has contributed to the lack of international standards that may be applied directly to protect the right to strike.[95] Nevertheless, strikes are mentioned under the Abolition of Forced Labour Convention of 1957, which declares the prohibition of using compulsory labour "as a punishment for having participated in strikes."[96] In addition, strike action is recognized as a right under the Voluntary Conciliation and Arbitration Recommendation.[97] Furthermore, the Resolution Concerning the Abolition of Anti-Trade Union Legislation in the States Members of the ILO of 1957 explicitly mentions the right to strike, requiring that Sates adopt "laws… ensuring the effective and unrestricted exercise of trade union rights,

[92] UN Committee on Economic, Social and Cultural Rights (CESCR), *Comments by State Party on Committee Concluding Observations: Japan*, 29 November 2002, E/C12/2002/12, 2, Para 2.

[93] ITUC (n 37) 42.

[94] Bernard Gernigon, Alberto Odero and Horacio Guido, *ILO Principles Concerning the Right to Strike* (International Labour Organisation 2000) 7; See also: Bob Hepple, 'The Right to Strike in an International Context' (2009-2010) 15 *Canadian Labour & Employment Law Journal* 133, 134; See also: Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29 (2) *International Journal of Comparative Labour Law* 199, 200 and 203; See also: Erika Kovacs, 'The Right to Strike in the European Social Charter' (2004-2005) 26 *Comparative Labor Law & Policy Journal* 445, 466.

[95] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94).

[96] ibid; See also: International Labour Organization (ILO), *Abolition of Forced Labour Convention No 105 (C105)*, 25 June 1957, Article 1 (d).

[97] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94); See also: ILO, *Voluntary Conciliation and Arbitration Recommendation No 92 (Ro92)*, 29 June 1951, Paras 4, 6 and 7.

including the right to strike."[98] Similarly, the Resolution Concerning Trade Union Rights and their Relation to Civil Liberties adopted in 1970 encourages taking further action "to ensure full and universal respect for trade union rights", while declaring the need to a pay particular attention "to the right to strike" amongst other rights.[99]

The absence of international standards issued by the ILO in the form of conventions and recommendations dedicated solely to the right to strike has not deterred the ILO from providing a framework governing the exercise of the right to strike. Substantially, issues regarding the restrictions that may be applied on the exercise of such a right are addressed in detail.[100] The latter is provided through the recommendations and opinions issued by the two ILO supervisory bodies setup to supervise the application of ILO standards; the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CoE).[101] The two Committees have established their jurisprudence regarding the right to strike on the basis of the provisions of the Freedom of Association and the Right to Organize Convention (C87), along with the provisions of the Right to Organize and Collective Bargaining Convention (C98), declaring that work strikes are a fundamental right belonging to workers and their organization.[102]

Moreover, C87 is currently ratified by 154 States out of a possible 187,[103] while C98 is ratified by 165 States.[104] However, the status of ratification may be considered less significant when observing the ILO's approach to conventions which it considers fundamental. The ILO Declaration on Fundamental Principles and Rights at Work provides that: "All members, even if they have not ratified the conventions in question have an obligation, arising from the very fact of membership in the organization, to respect, to promote and to realize… the fundamental rights, which are the subjects of these conventions."[105]

The first amongst the Conventions listed under the latter's provisions are the Conventions on Freedom of Association, Collective Bargaining and the Elimination of Forced Labour.[106] However, the right to strike's nature has induced debate regarding the very existence of such a right, as the opinions expressed by the Employers Group during the 101st International Labour Conference may display.[107]

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[98] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94).

[99] ibid.

[100] ibid.

[101] ibid 8-9; See also: Hepple (n 94).

[102] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 8-9; See also: Swepston (n 94) 203-204; See also: International Labour Organization (ILO), *Freedom of Association and Protection of the Right to Organise Convention 87 (C87)*, 9 July 1948, Articles 3, 8 and 10; See also: International Labour Organization (ILO), *Right to Organise and Collective Bargaining Convention 98 (C98)*, 1 July 1949.

[103] ILO, 'Ratification of Conventions: Ratifications of Co87: Freedom of Association and Protection of the Right to Organise Convention, 1948' (*ILO*, 2017) <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232:NO> accessed 20 July 2017.

[104] ILO, 'Ratification of Conventions: Ratifications of Co98: Right to Organise and Collective Bargaining Convention, 1949 (ILO, 2017) <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243:NO> accessed 20 July 2017.

[105] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 3; See also: International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1988, Article 2.

[106] ibid Article 2 (a) and (b).

[107] Swepston (n 94) 199-205; See also: Janice R Bellace, 'Back to the Future: Freedom of Association, the Right to Strike and National Law' (2016) 27 (1) *King's Law Journal* 24, 40-41; See also: Vilija Velyvyte, 'The Right to Strike in the European Union After Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15 *Human Rights Law Review* 73, 81.

Moreover, the Employers Group opposed the idea of an existing right to strike under C87's provisions,[108] which may have been encouraged by the absence of an explicit mention of the right to strike in the Conventions adopted by the ILO.[109] However, the adoption of ILO Conventions requires the participation and voting of the representatives of workers, employers and governments in the process.[110] Consequently, such absence is understood to stem out of the workers delegates' fear that the incorporation of a detailed right to strike may lead to further compromise from their part in the form of accepting stricter limitations imposed on strikes, leading to further labour rights' derogation.[111] Nevertheless, the CFA's and CoE's recognition of the right to strike has not been disputed in the International Court of Justice, which is "the only body with authority to make definitive interpretations of the ILO Constitution and of Conventions", according to the ILO Constitution.[112]

Moreover, C87 declares that: "Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.[113] The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."[114] Furthermore, C87 provides that "any organization of workers" which aims at "furthering and defending the interests of workers" shall fall under the scope of C87.[115] Accordingly, "furthering and defending the interests of workers" provides the basis through which the provisions of C87 would be deemed applicable to workers' organizations.[116] The latter provision implicitly excludes organisations aiming to achieve objectives other than the defence of workers' interests from the protection afforded to workers' organizations by C87's provisions.[117] The CFA further clarified that purely political demands "do not fall within the scope of the principles of freedom of association."[118] However, the CFA stated that "it is only insofar as trade union organizations do not allow their occupational demands to assume a purely political aspect that they can legitimately claim that there should be no interference in their activities."[119]

The CFA and CoE recognize the difficulty of differentiating between strikes of a purely political nature and those which are motivated by occupational, social or economic objectives, leading to a strike being deemed permissible according to ILO standards.[120] The difficulty is due to the overlapping between

[108] Jeffrey S Vogt, 'The Right to Strike and the International Labour Organisation' (2016) 27 *King's Law Journal* 110, 110-111.

[109] Hepple (n 94); See also: Swepston (n 94); See also: Bellace, 'Back to the Future: Freedom of Association, the Right to Strike and National Law' (n 107) 25.

[110] Swepston (n 94) 201.

[111] Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford University Press 2003) 118; See also: Hepple (n 94) 136-137; See also: Claudia Hofmann and Norbert Schuster, 'It ain't over 'til it's over: The Right to Strike and the Mandate of the ILO Committee of Experts Revisited' (2016) *International Labour Office and Global Labour University* 1, 21.

[112] Swepston (n 94) 203; See also: Bellace, 'Back to the Future: Freedom of Association, the Right to Strike and National Law' (n 107) 40; See also: ILO, Constitution of the International Labour Organisation, 1 April 1919, Article 37.

[113] ILO, *C87* (n 102) Article 3 (1).

[114] ibid Article 3 (2).

[115] ibid Article 10; See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 8.

[116] ibid 13.

[117] ibid 13-14.

[118] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, International Labour Office, Fifth (revised) Edition, 2006 Geneva, Para 528; See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 14.

[119] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 505; See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 14.

[120] ibid 14-15; See also: Kovacs (n 94); See also: International Labour Organization (ILO), *Freedom of Association and Collective Bargaining*, General Survey of the Reports on the Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98), Report III (Part 4B), International Labour Conference (ILC), 81st Session, 1994 Geneva, Para 165; See also: ILO, *Freedom of Association: Digest of*

both political and trade union activity notions, as a government's general policy may have far-reaching effects on the workers' occupational, social or economic conditions.[121] Accordingly, the CFA declared the legitimacy of strikes "where the demands pursued through strike action include some of an occupational or trade union nature and others of a political nature", leading to the legitimacy of strikes seeking to demonstrate governments' social or economic policies.[122] Similarly, the CoE considered that a general prohibition of secondary or sympathy strikes may "lead to abuse and that workers should be able to take such action provided the initial strike they were supporting was itself lawful."[123]

Therefore, the CoE and CFA view that in order for work strikes to be deemed permissible, their objectives should focus on defending or advancing the occupational, economic or social interests of workers.[124] Furthermore, both Committees view that the prohibition of strikes aiming to defend the aforementioned interests constitutes a violation of the provisions of C87[125] and C98[126] particularly workers' ability to "exercise freely the right to organise."[127] However, the ILO's recognition of the workers' right to defend their social or economic interests is not without limits.[128] Initially, Article 9 of C87 provides States with the discretionary authority of determining through national laws or regulations "the extent to which the guarantees provided for… shall apply to the armed forces and police."[129] Consequently, the CFA has not contested legislations prohibiting such workers from exercising the right to strike.[130] Furthermore, the CFA elaborated on the provisions of Article 8,[131] providing that governments possess the authority of restricting the exercise of the right to strike by public servants exercising authority in the name of the State, employees in essential services or during an acute national emergency.[132]

3.2. Restrictions On The Right To Strike

Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) Edition (n 118) Para 505.

[121] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 15; See also: Kovacs (n 94) 451.

[122] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 15; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 529.

[123] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 16; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 168; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 534.

[124] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* International Labour Office, 1996 Geneva, Para 493; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 165; See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 14-15

[125] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996 (n 124); See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 165; See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 14-15.

[126] Hofmann and Schuster (n 111) 21-22; See also: Janice R Bellace, 'The ILO and the Right to Strike' (2014) 153 (1) *International Labour Review* 29, 47-48.

[127] ILO, *C87* (n 102) Article 11.

[128] ibid Article 8 (1).

[129] ibid Article 9 (1); See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 17.

[130] ibid.

[131] ILO, *C87* (n 102) Article 8.

[132] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996 (n 124) Para 527; See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 17.

The CFA and CoE consider the right to strike "one of the essential means through which workers and their organizations may promote and defend their economic and social interests."[133] However, the CoE affirmed "that the right to strike cannot be considered as an absolute right: not only may it be subject to a general prohibition in exceptional circumstances, but it may be governed by provisions laying down conditions for, or restrictions on the exercise of this fundamental right."[134]
The restrictions explicitly recognized by the Committees apply generally in the duration of an acute national emergency. In addition, the restrictions apply specifically to workers exercising authority in the name of the State, those performing essential services and services of "public utility" or "fundamental importance." Accordingly, these restrictions shall be discussed in the following sections.

3.3. Acute National Emergency

The CFA stated that the occurrence of an acute national emergency justifies a general prohibition of strikes within the concerned State.[135] An acute national emergency may be due to a coup attempting to overthrow the constitutional government or in the form of "a serious conflict, insurrection or natural disaster in which the normal conditions for the functioning of society are absent."[136] Accordingly, the justification given for accepting a general suspension of the right to strike is the abnormal conditions which prevent the authorities from attending to their functions leading to "a state of emergency."[137] States are therefore provided with the discretion of suspending strikes where they see such measures necessary to maintain their ability to function adequately.

Nevertheless, due to the adverse consequences resulting from imposing a general suspension on the right to strike, the CoE determined that a general suspension can only be permitted "for a limited period of time and for the extent necessary to meet the requirements of the situation."[138] Therefore, the duration of a general suspension of the right to strike is linked to the state of emergency and when the latter ceases to exist the suspension must be withdrawn.

Furthermore, when examining a complaint submitted to the CFA alleging that the Turkish Government violated the workers' right to strike by issuing a decree to suspend a general strike on the basis of national security, the CFA provided a substantial protective guarantee to the right to strike.[139] The CFA declared that "responsibility for suspending a strike on the grounds of national security or public health should not lie with the Government, but with an independent body which has the confidence of all parties concerned."[140] The latter position prevents Governments from attempting to exploit a general suspension where its justification may be absent, by providing that a neutral trustworthy body should determine whether a strike should be suspended.

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[133] Tonia Novitz, 'The Internationally Recognized Right to Strike: A Past, Present, and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?' (2014) 30 (3) *International Journal of Comparative Labour Law* 357, 362-363; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 147; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 522.

[134] ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 151.

[135] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 24; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 570.

[136] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 24; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996 (n 124) Paras 528-530; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 198.

[137] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94)24; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 152.

[138] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 24.

[139] ILO, *Turkey (Case No 2303)* (2 October 2003), Committee on Freedom of Association: Report in Which the Committee Requests to be Kept Informed No 335, 2004.

[140] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 571; See also: ILO, *Turkey (Case No 2303)* (n 137) Paras 1376-1378.

Moreover, the CFA acknowledged that strikes in "transport companies, railways and the oil sector might disturb the normal life of the community." However, the CFA dismissed the idea that such strikes may cause a national state of emergency and therefore, similar strikes should be considered acceptable.[141] Accordingly, in a complaint alleging of a violation of public servants' right to strike by the Danish Government through the latter's imposition of statutory provisions extending collective agreements without the concerned workers' consent, the CFA held that the Government's conduct violates the workers' right to strike.[142]

Initially, it must be pointed out that the extension of collective agreements in such cases has the adverse implication of allowing authorities to legitimately terminate any industrial action, including work strikes, during the lifetime of such agreements.[143] The Danish Government's justification for taking such action was the adverse impact of the strike on the normal life of the general public, which may lead to a general state of emergency, due to the disruption of public transportation, particularly the transport of medicine.[144] The CFA determined that the disturbance of public transportation cannot be regarded as an adequate justification for violating the workers right to strike through the prohibition of recourse to strike action. Additionally, the CFA held that the disturbance of public transportation is excluded from the scope of strikes which may lead to an acute national emergency.[145] Thus, the Committee recommended that agreeing to setup a minimum services agreement is more suitable in such cases in order to restrict the negative impact of strikes on the general public's welfare, while maintaining the workers' ability to defend their legitimate interests.[146]

Accordingly, States are left with a certain amount of discretion regarding determining the necessity of suspending strikes during an acute national emergency. However, in light of the aforementioned cases, both Committees view that the latter exception should be applied narrowly and strictly. Such a position should ensure that the negative impacts of strikes do not jeopardize a State's security or its population's safety. The Committees' position further ensures that the right to strike is protected from violations justified through the broad application of the concept of national emergencies.

3.4. Public Servants Exercising Authority in the Name of the State

The CFA and CoE view that the right to strike may be restricted or even prohibited where the concerned employees are "public servants exercising authority in the name of the State."[147] However, both Committees agree that the notion of public servant differs from one State to another and therefore restricting or prohibiting such workers from engaging in strikes should be determined according to the functions or services which the latter employees perform. Such functions are necessarily required to provide public servants with an authority which is exercised in the name of the State.[148]

Consequently, an inclusive list of employees which may be considered public servants exercising authority in the name of the State has not been issued by the ILO. Nevertheless, the CFA provided

[141] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 637.

[142] ILO, *Denmark (Case No 1971)* (7 May 1998), Committee on Freedom of Association: Definitive Report No 317, 1999, Paras 46 and 59.

[143] ibid Para 55; See also: Bernard Gernigon, Alberto Odero and Horacio Guido, *Collective Bargaining: ILO Standards and the Principles of the Supervisory Bodies* (ILO 2000) 59-60.

[144] ILO, *Denmark (Case No 1971)* (n 140) Para 57.

[145] ibid Para 56.

[146] ibid Paras 57 and 61 (b).

[147] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 17-18; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996 (n 124) Para 534; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 574.

[148] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 18-19; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 572-580.

several examples of employees belonging to the latter category. The CFA determined that the employees of State ministries or similar government bodies, customs offices, "officials working in the administration of justice and of staff in the judiciary, may be subject to major restrictions or even prohibitions."[149] In contrast, when addressing complaints, the CFA determined that certain categories of public servants should not be deprived of the right to strike, as they do not exercise authority in the name of the State and that any prohibitions violate the provisions of C87. Among the workers belonging to the latter category are those employed "in State-owned commercial or industrial enterprises, oil, banking and metropolitan transport undertakings or those employed in the education sector, and… generally, those who work in State companies and enterprises."[150]

The former may display how the CFA and CoE distinguish public servants exercising authority in the name of the State from other employees, by accepting depriving such workers from a fundamental right. The distinction may be due to the nature or importance of the tasks assigned to such employees and their connection with a State's ability to function or even preserve its sovereignty. Nevertheless, both Committees have emphasized the importance of providing such public servants with alternative mechanisms capable of adequately guaranteeing the protection and defence of their valid occupational or socio-economic interests, to compensate for depriving them of the right to strike.[151]

3.5. Essential Services

The CFA and CoE adopted similar opinions regarding strikes in "essential services", stating that strikes may be restricted or even prohibited in essential services "in the strict sense of the term."[152] The CoE provided further clarification to the concept of essential services by defining them as "services whose interruption could endanger the life, personal safety or health of the whole or part of the population."[153]

An exhaustive list of what may be considered essential or non-essential services has not been issued by the ILO,[154] which is understood to be due to the dependence of what may or may not be considered essential "on the particular circumstances prevailing in a country."[155] Therefore, providing an exhaustive list may form an obstacle preventing States from adjusting to their distinct conditions, as a non-essential service in one State may be considered substantial in another. An example of such services may be presented when viewing the substantial need of island inhabitants for ferry services or a functional port, which would be considered of no significance to the populations of landlocked States.[156] Furthermore, the CoE provided that if a strike lasts for an extended period or "beyond a certain extent", its effects may transform what is regarded as a non-essential service into becoming

[149] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 17-19; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996 (n 124) Paras 537-538; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 578-579.

[150] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 18; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 577; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996 (n 124) Para 492.

[151] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 17.

[152] ibid 14-15, 17 and 20; See also: Swepston (n 94) 216; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Paras 159-160 and 179; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 541, 573 and 576.

[153] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 14-15 and 20; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 159. The definition was adopted later by the CFA; See: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 576 and 581.

[154] ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 159.

[155] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 20; See also ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 582.

[156] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 30; See also: Committee of Experts Collective Bargaining, 1994, Para 159; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 615-616.

essential, due the stoppages adverse impact on the health, safety or life of the whole or part of the population.[157]

The CFA reaffirmed the latter position when reaching its conclusions in a complaint submitted against the Colombian Government for its declaration of the illegality and prohibition of a strike resulting from a labour dispute with public refuse collection workers.[158] The CFA declared that although refuse collection is not considered essential according to ILO standards under normal circumstances, the extension of a strike in such services over a prolonged period or beyond a certain extent may endanger the "health or life of the population", leading to such services becoming essential.[159] Nevertheless, the CFA held that the former does not justify the Government's designation of such services as essential, leading to its prohibition of strikes in refuse collection, and that the "imposition of minimum services" is more suitable in such cases, while "deploring" the Colombian Government's approach to the dispute.[160]

Thus, the CFA views that the efficient approach to non-essential services becoming essential is through finding a balance between the legitimate rights of workers and meeting the general public's fundamental needs. Accordingly, imposing restrictions instead of prohibiting strikes altogether and depriving workers of their rights, while further meeting the essential needs of the general public by providing a minimum service which requires less workforce may be considered an adequate approach. Such a position provides States with a certain amount of discretion regarding the restrictions that may be applied on the right to strike in order to ensure the wellbeing of the general public.

Furthermore, such a flexible approach provides States with the ability to adapt to unique or unexpected circumstances in accordance with each States' distinct conditions. However, the CoE views that States should apply the essential services criteria in a "precise manner" and only where necessary. The CoE stressed that such an exception "would lose all meaning if national legislation defined these services in too broad a manner."[161] Consequently, the CoE declared that States should refrain from adopting exclusive lists of what may be considered essential services.[162]

Nevertheless, the CFA has designated several services including the hospital sector, electricity, water supply, telephone services and traffic control as essential services.[163] The CFA provided other examples of services it considers lacking the importance to fit the essential services category.[164] Such services include agricultural activities, transport services, ports, radio and television, the petroleum and education sectors and the mint.[165]

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[157] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 20; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 160.

[158] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 582; See also: ILO, *Colombia (Case No 1916)* (18 November 1996), Committee on Freedom of Association: Effect Given to the Recommendations of the Committee and the Governing Body Report No 313, 1999, Para 19; See also: ILO, *Colombia (Case No 1916)* (18 November 1996), Committee on Freedom of Association: Effect Given to the Recommendations of the Committee and the Governing Body Report No 338, 2005, Para 87.

[159] ILO, *Colombia (Case No 1916)* (18 November 1996), Committee on Freedom of Association: Report in which the Committee Requests to be Kept Informed of Development No 309, 1998, Paras 100-101.

[160] ibid Paras 100-104.

[161] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 21; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 159.

[162] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 22; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 159.

[163] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 20; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 585-586.

[164] Swepston (n 94) 216-217.

[165] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 20-21; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 587-588.

However, when observing State practice in relation to restrictions imposed on strikes on the basis of their essentiality an array of contradictions with both Committees' opinions may be cited. Initially, while the CFA acknowledged the possible serious long-term economic consequences of strikes, particularly in the petroleum sector, it does not consider economic harm to be a sufficient rationale to prohibit strikes.[166] The CFA adopted the latter opinion when examining a complaint submitted by the Norwegian Trade Union Federation of Oil Workers against the Norwegian Government.[167] The Trade Union alleged that the Government violated the workers' right to strike by issuing legislation which prohibits them from pursuing strike action, while further referring their labour dispute to compulsory arbitration.[168] The Norwegian Government justified its actions by stressing the crucial importance of the petroleum sector to the Norwegian economy.[169] In its conclusion, the CFA expressed that economic consequences do not fit the criteria of essential services in the strict sense of the term, as a stoppage in such services does not endanger the life, health or personal safety of the population.[170] Thus, the CFA held that the Norwegian Governments' conduct violated the workers right to strike, which according to the Committee forms an "essential means available to workers to defend their occupational interests."[171]

Similarly, the Syrian Government's conduct may be considered in clear violation of the CFA and CoE recommendations. Both Committees provided that any prohibition of the right to strike due to a service's importance should be applied only to essential services in the strict sense of the term, whereas Syrian legislation prohibits strikes in agricultural services, although the latter is clearly designated as a non-essential service.[172]

It is worth noting that the aforementioned violations have occurred in relation to strikes in services that do not fit the ILO's criteria of essential services. Nevertheless, such services are of substantial importance to maintain the normal living conditions of a population. The ILO's concept of essential services "in the strict sense of the term" seems to be directly aimed at protecting the rights to life[173] and health.[174]

Moreover, the latter concept may be applicable to protect other rights along with the aforementioned rights, such as the rights to food[175] and water[176] due to the impact of violating such rights on an individual's life or personal safety. However, several services that may impact various fundamental human rights are excluded from the scope of essential services.[177] Substantially, education and

[166] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 21.

[167] ILO, *Norway (Case No 1255)* (12 January 1984), Committee on Freedom of Association: Definitive Report No 234, 1984.

[168] ibid Paras 171 and 173.

[169] ibid Para 182.

[170] ibid Paras 190 and 192.

[171] ibid Paras 190 and 192 (a).

[172] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 20-21 and 54; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 160; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 541, 576 and 587.

[173] UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations, Treaty Series, vol 999, p 171, Article 6 (1).

[174] UN General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, United Nations, Treaty Series, vol 993, p 3, Article 12.

[175] ibid Article 11

[176] ibid Articles 11 and 12; See also: UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 15: The Right to Water (Articles 11 and 12 of the Covenant)*, 20 January 2003, E/C 12/2002/11.

[177] ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Paras 159-160.

transport services, although of crucial importance, are clearly designated as non-essential services.[178] Work stoppages in such services may have harmful implications on the right to education[179] or liberty of movement,[180] however, such rights remain deprived of the protection afforded to other rights by the concept of essential services.

Accordingly, it may be argued that the ILO's concept of essential services is inadequate, as some fundamental rights are not provided with sufficient protection against the adverse effects of strikes. Nevertheless, both the CFA and CoE have provided "intermediate concepts" to fill the void, by applying special measures to strikes in important services which do not fit the essential service criteria.[181] In the former's case the term is "services of fundamental importance",[182] while the CoE used the term "public utility services."[183]

3.6. Services of "Public Utility" or "Fundamental Importance"

The CoE provided that the concept of public utility permits States to establish a system of minimum services "rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term."[184] Such a system would aim to enable workers to exercise their valid rights, including the right to strike, while shielding individuals among the general public from the adverse consequences of strikes.[185] Thus, minimum services have been defined as "essential services reduced temporarily under certain conditions to enable industrial action."[186]
Moreover, a system of minimum services requires that a guaranteed "skeleton staff" is available to perform the tasks necessary to ensure that facilities or departments function and operate safely, without interruption in a manner that effects the basic needs of the general public.[187] Accordingly, identifying services of fundamental importance may depend on whether their interruption would "impact on the personal rights" of individuals.[188] The right to freedom of movement for example may be indirectly impacted by a strike in public transport services.[189] Similarly, a strike by school teachers may impact the students' right to education.[190] Therefore, minimum services would be suitable for public services

[178] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 588 and 621.

[179] UN General Assembly, *ICESCR* (n 172) Article 13; See also: Adré le Roux and Nalize Marais, 'Teacher Perceptions of their Ethical Responsibility: The Balancing of Rights' (2013) 10 (4) *Africa Education Review* 709, 710-711.

[180] UN General Assembly, *ICCPR* (n 171) Article 12 (1) and (2).

[181] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 22.

[182] ibid; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 606.

[183] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 22; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Paras 160 and 179.

[184] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 22; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Paras 159-160.

[185] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 22; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Paras 159-160.

[186] Dhaya Pillay, 'Essential Services: Developing Tools for Minimum Service Agreements' (2012) 33 (1) *Industrial Law Journal* 801, 807.

[187] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 23; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 162; See also: Carole Cooper, 'Strikes in Essential Services' (1994) 15 (5) *Industrial Law Journal* 903, 906-907.

[188] Tamara Cohen and Rochelle le Roux, 'Limitations of the Right to Strike in Public Sector and Essential Services' In Bob Hepple, Rochelle le Roux and Silvana Sciarra, *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (Kindle edn, Franco Angeli Edizioni 2015) Location 3000.

[189] ibid.

[190] le Roux and Marais (n 179); See also: Cristian Pérez Muñoz, 'Essential Services, Workers' Freedom, and Distributive Justice' (2014) 40 (4) *Social Theory and Practice* 649, 650 and 661; See also: Karin Calitz and Riana Conradie, 'Should Teachers Have the Right to Strike? The Expedience of Declaring the Education Sector an Essential Service' (2013) 24 Stellenbosch Law Review 124, 124-125.

excluded from the scope of essential services in the strict sense of the term, but nevertheless, provide for the basic requirements to maintain the regular living conditions of the population.[191]

The CFA provided that the establishment of minimum services in the case of strikes should only be possible in sectors that possess one of the following characteristics:
"(1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) public services of fundamental importance."[192]

The CoE further clarified that States may apply the concept of minimum services to essential services in the strict sense of the term but not the opposite.[193] Several examples of what may be considered services of fundamental importance have been provided by the CFA.[194] Such services include the railway transport sector,[195] ferry[196] and postal services,[197] national ports,[198] the petroleum sector, mint, banking services[199] and refuse collection.[200] The education sector is included amongst the services deemed to be of fundamental importance, making them eligible for the establishment of a system of minimum services.[201]

The latter position was adopted by the CFA when examining a complaint submitted against the Canadian Government,[202] due to its designation of the education sector as an essential service.[203] In its conclusion the CFA held that the Canadian Government should adopt legislative provisions ensuring that education sector workers are enabled to enjoy the right to strike.[204] However, principals and vice principals are excluded from the scope of employees that may exercise the right to strike.[205]

In another case, the CFA provided that workers' organizations should take part in the process of "determining the minimum services to be maintained and… number of workers providing them", along

[191] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 23; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 162.

[192] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 30; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 606; See also ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996 (n 124) Para 556.

[193] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 23; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 162.

[194] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 23; See also: Cooper (n 185) 904-905.

[195] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 617-619 and 621.

[196] ibid Para 615.

[197] ibid Para 622.

[198] ibid Para 616.

[199] ibid Para 624.

[200] ibid Para 623.

[201] ibid Para 625.

[202] ILO, *Canada (Case No 2173)* (7 February 2002), Committee on Freedom of Association: Report in which the Committee Requests to be Kept Informed of Development No 330, 2003, Para 305 (a) (i)-(ii)

[203] ibid Paras 251-251 and 297.

[204] ibid Para 305 (a) (i).

[205] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 558.

with the public authorities.[206] Moreover, the CFA provided that in the absence of an agreement between the parties "the establishment of minimum services… should be handled by an independent body" and not the concerned ministry.[207]

Furthermore, the CFA emphasised the importance of ensuring "that the scope of the minimum service does not result in strikes becoming ineffective in practice because of their limited impact."[208] The CoE further clarified that minimum services as a restriction on the right to strike "must be genuinely and exclusively" minimum. The latter may be achieved by allowing workers to reduce the operations and functions they perform to the level which is "strictly necessary to meet the basic needs of the population or the minimum requirements of the service."[209]

The reduction of operations and functions to such a level is considered necessary to avoid decreasing "the effectiveness of the pressure" being exercised by workers in defence of their valid interests through strikes.[210] Therefore, on the basis of the adequacy of the minimum set of services provided by the "skeleton staff" to meet the public's basic requirements; the other workers excluded from performing the minimum service are free to strike in defence of all the workers' interests, including those performing the minimum services.[211]

4. Compensatory Guarantees as an Alternative to Strikes

The CoE and CFA view that when workers are legitimately deprived of their fundamental right to strike, which affects their ability to defend their socio-economic or occupational interests, workers must be "afforded compensatory guarantees."[212] The compensatory guarantees recognized by the CoE and CFA are conciliation, mediation and arbitration.[213] Such guarantees aim to provide workers with alternative means capable of enabling them to defend their socio-economic or occupational interests, due to their inability to engage in strike action as a method of defending such interests.[214]

The CFA provided that the compensatory guarantees are required to be "adequate, impartial and speedy."[215] Similarly, the CoE emphasized the importance of providing the disputing parties with the opportunity "to participate in determining and implementing the procedure, which should furthermore

[206] ILO, *Canada (Case No 2173)* (n 200) Para 305 (a) (i); See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 31; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 559-560.

[207] ibid Para 606; See also: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 31; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996 (n 124) Para 561.

[208] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 31; See also ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 559-560.

[209] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 32; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 161.

[210] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 32; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 161.

[211] Calitz and Conradie (n 188) 129-130; See also: Cohen and le Roux (n 186) Location 3158.

[212] ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 164; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 573; See also: ILO, *Panama (Case No 1913)* (4 December 1996) Committee on Freedom of Association: Definitive Report No 309, 1998, Paras 306-307.

[213] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 24 and 26; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 164; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 596, 598 and 603.

[214] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 23.

[215] ibid 24-25; See also: Cooper (n 185) 917-918; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 551 and 596.

provide sufficient guarantees of impartiality and rapidity." Moreover, the CoE stated that "arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely."[216]

Furthermore, the CFA views that it is acceptable when domestic provisions require the exhaustion of conciliation, mediation or voluntary arbitration before recourse to strikes is deemed permissible.[217] Similarly, the CoE considered such provisions "compatible with article 4 of C98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective agreements."[218]

Moreover, once an agreement is reached between the disputing parties to refer their dispute to conciliation or arbitration for settlement, workers are "encouraged to abstain" from pursuing strike action during the course of conciliation or arbitration procedures.[219] Accordingly, the CoE stated that alternative dispute resolution methods must not be "complex or slow that a lawful strike becomes impossible… or loses its effectiveness" due to complicated procedures or unnecessary prolonged delays.[220]

However, a controversial issue addressed by both Committees is the compulsory referral of labour disputes, including strikes, to binding arbitration procedures.[221] The CFA considered compulsory arbitration acceptable provided that the disputing parties give their prior consent before the referral of the dispute to binding arbitration. Therefore, recourse to compulsory arbitration may be agreed upon through the terms of collective agreements, stipulating that in case any dispute arises it should be resolved through binding arbitration. In contrast, the parties may agree to refer their dispute to arbitration after the dispute has occurred.[222]

Moreover, recourse to compulsory arbitration has been extended to apply to cases where workers may be legitimately prohibited from exercising the right to strike. The latter extension provides that compulsory arbitration may be imposed without the concerned workers' consent in cases of strikes in essential services, public servants exercising authority in the name of the state or acute national emergencies.[223] Additionally, the CoE stated that compulsory arbitration may be imposed through a decision by the authorities if "the deadlock in bargaining will not be broken without some initiative on their part."[224]

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[216] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 24; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 164.

[217] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 25-26; See also: Eldira Xhafa, 'The Right to Strike Struck Down?: An Analysis of Recent Trends', (2016) Friedrich Ebert Stiftung Study 1, 7 <//library.fes.de/pdf-files/iez/12827.pdf> accessed 1 August 2017; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 551.

[218] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 20-21 and 54; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 171.

[219] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 26; See also: ILO, *Voluntary Conciliation and Arbitration Recommendation No 92 (Ro92)* (n 97) Paras 4 and 6.

[220] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 30; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 171.

[221] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 24 and 26-28; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 254; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 992.

[222] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 26-28; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 564.

[223] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 26-28; See also: ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 564 and 994.

[224] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 27-28; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 258.

Accordingly, in cases where the right to strike may not be subjected to restrictions, the CFA considers the imposed referral of labour disputes to binding arbitration at the authorities' own initiative without the concerned workers' consent unacceptable.[225] However, State practice has been inconsistent in this regard. Several legislations contradict the clear opinions provided by ILO Committees through the imposition of compulsory recourse to binding arbitration without the workers' consent in sectors that should be afforded the right to strike.[226] Examples of such provisions are presented through the legislations of both Romania and Spain, where public authorities possess the power of referring labour disputes to compulsory arbitration to avoid harming the "national economy."[227] Such provisions contradict the opinion adopted by the CFA providing that the economic consequences of a strike are an insufficient reason to justify prohibiting strikes, unless the life, health or personal safety of part of the population is at risk.[228]

Moreover, domestic provisions in Malta, Mali, Bolivia and Jamaica provide authorities with the discretion of referring strikes in general to compulsory arbitration as a means of ending strikes. While the formers' provisions do not specify which sectors may be subjected to such restrictions, Jamaica has expressed that compulsory arbitration may be imposed on strikes in non-essential services.[229] The latter provisions declaring the compulsory referral of labour disputes to binding arbitration in a broad manner provide Governments with a wide discretionary authority, which may be exploited to deter workers' from defending their valid interests through strike action.

According to the CoE such provisions are incompatible with "the principles of voluntary negotiation of collective agreements established in Convention no 98",[230] as the compulsory referral of disputes to binding arbitration strips collective bargaining from its voluntary nature. Furthermore, such procedures violate the workers' right to strike, due to the ILO Recommendation providing that strikes should end during arbitration procedures,[231] which nevertheless, states that none of its provisions should "be interpreted as limiting, in any way… the right to strike."[232]

A further issue is the variation between the timeframes recognized by national legislations in order for the referral of labour disputes to compulsory arbitration to be considered valid. Nicaragua for instance provided that strike durations exceeding a period of 20 days enable authorities to refer the dispute to compulsory arbitration, which has the effect of terminating the strike, whereas in Romania the period is 30 days.[233] Initially, while the CoE accepted the referral of labour disputes extending beyond a certain duration to compulsory arbitration, it has not specified or provided examples regarding the timeframe which should pass before considering the imposition of such measures acceptable.[234]

Abusing the concept of compulsory arbitration deprives the workers of a fundamental right, which undermines their ability to defend their socio-economic or occupational interests through strike action.[235] Therefore, the CoE should provide further guidelines or a minimum timeframe during which

[225] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 565-568.

[226] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 54.

[227] ibid 53; See also: Wiebke Warneck, 'Strike Rules in the EU27 and Beyond: A Comparative Overview' (2007) European Trade Union Institute for Research, Education and Health and Safety 1, 63.

[228] ILO, *Norway (Case No 1255)* (n 165) Paras 190 and 192 (a).

[229] For an extensive list of compulsory arbitration related violations; See: Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 52-54.

[230] ibid 27-28.

[231] ibid 54; See also: ILO, *Voluntary Conciliation and Arbitration Recommendation No 92 (Ro92)* (n 97) Para 6.

[232] ibid Para 7.

[233] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 52-53.

[234] ibid 27-28; See also: ILO, *Freedom of Association and Collective Bargaining*, 1994 (n 120) Para 258.

[235] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 568, 993-994 and 996.

States are required to refrain from referring labour disputes that have escalated into work strikes to compulsory arbitration. The latter may be necessary to ensure that strikes do not lose their "effectiveness" due to unnecessary procedures or insufficient timeframes.

5. Sanctions

The sanctions imposed against employees for pursuing a strike deemed illegal according to domestic legislation may be of a "criminal, civil, disciplinary and organizational nature."[236] Such sanctions may be imposed against workers individually in the form of dismissals, fines or prison sentences. In contrast, sanctions may be imposed on the trade union to which the striking employees belong, by cancelling or suspending a union's certificate of recognition for example.[237]
The CFA declared that "salary deductions for days of strike give no rise to objections from the point of view of freedom of association principles",[238] provided that the deduction's amount corresponds with the strike's duration.[239] However, the CFA views that a "grave violation of the principles of freedom of association" is committed when States impose sanctions on unions for leading a legitimate strike.[240] The CFA further provided that "no one should be penalized", dismissed or refused re-employment in connection with a legitimate strike,[241] as such actions constitute "a serious discrimination in employment and is contrary to C98."[242]

Furthermore, the CFA considers arrests or penal sanctions, including imprisonment, unacceptable where no offence is committed by the employees, other than the participation in an illegal but peaceful strike.[243] The latter implies that criminal sanctions, proportionate to the crimes committed, are acceptable where a strike ceases to be peaceful. However, in such cases the penalties are not imposed directly for striking, instead sanctions are imposed on offending workers for having committed distinct punishable offences.

Moreover, sanctioning employees for participating in strikes may be presented in forms other than dismissals, as the CFA emphasized that "protection against anti-union discrimination must cover not only dismissals but also any discriminatory measure… in particular, transfers, demotions and other detrimental acts."[244] Nevertheless, the CFA declared that "the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike."[245] Accordingly, the CFA considers the imposition of penalties, acceptable in the case of "violations of strike prohibitions which are themselves in conformity with the principles of freedom of association."[246] However, sanctions are required to be "proportionate to the offence or fault committed."[247]

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[236] Cooper (n 185) 919.

[237] Xhafa (n 215) 14-15 <library.fes.de/pdf-files/iez/12827.pdf> accessed 1 August 2017.

[238] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 642-645.

[239] ibid Para 647.

[240] ibid Paras 658-659.

[241] ibid Paras 660-661 and 663.

[242] ibid Para 661; See also: ILO, *Peru (Case No 2211)* (2 July 2002), Committee on Freedom of Association: Report in which the Committee Requests to be Kept Informed of Development No 334, 2004, Para 678; See also: ILO, *Colombia (Case No 2046)* (17 August 1999), Committee on Freedom of Association: Effect Given to the Recommendations of the Committee and the Governing Body Report No 338, 2005, Para 104.

[243] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 668 and 671-673.

[244] ILO, *Central African Republic (Case No 2056)* (10 September 1999), Committee on Freedom of Association: Report in which the Committee Requests to be Kept Informed of Development No 321, 2000, Para 137.

[245] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Para 667.

[246] ibid Para 668.

[247] ibid Paras 668 and 671-673.

An example of the latter approach may be observed when viewing the CFA's position in a complaint alleging of a violation of the right to strike due to the Panamanian Government's dismissal of striking employees in the air traffic control sector.[248] Initially, air traffic control is considered an essential service.[249] Additionally, the striking employees committed further offences by changing the radar system's passwords. Consequently, the CFA held that the Government's conduct cannot be disputed, as the employees' offences jeopardized the public's safety.[250]

In contrast, imposing severe or excessive fines, whether on employees individually, or their trade union, in the case of peaceful strikes may discourage them from defending their valid interests through strike action, leading to the abandonment of their rights.[251] Such intimidation may be observed when viewing the threats of an employer in the UK[252] in response to a trade union's[253] threat to strike. The former stated that disruptions in services shall be subjected to compensatory damages of 100 million Pounds per day. Consequently, the union decided to abandon its plans to initiate a strike out of fear that such severe sanctions would lead to its bankruptcy.[254] The CoE provided that by failing to provide adequate protection to employees seeking to protect their valid interests, the UK breached the principles of freedom of association.[255] This incident displays "a major abuse of power", due to the sanction's "strong repressive effect on the exercise of the right to strike", which discourages the majority of workers form pursuing strike action in defence of their legitimate interests.[256]

The CFA further provided that "final decisions concerning the illegality of strikes should not be made by the government", particularly where the latter is a party to the dispute.[257] Designating a neutral body with the authority to assess the legality of strikes provides a substantial guarantee to employees by preventing unwarranted State intervention seeking to obstruct the employees' ability to defend their valid interests through strikes. Furthermore, the CFA considers the intervention of the police in relation to strikes permissible only where such intervention seeks the maintenance of public order,[258] and is in proportion to the threat to public order.[259]

Accordingly, the CFA views that workers should be free to exercise their right to strike without being intimidated by unwarranted sanctions. Moreover, sanctions must target protecting the right of the public not to have their lives, health or safety endangered. In contrast, imposing sanctions as a method

[248] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 42; See also: ILO, *Panama (Case No 1913)* (n 210) Para 303.

[249] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 585-586.

[250] Gernigon, Odero and Guido, *ILO Principles Concerning the Right to Strike* (n 94) 42; See also: ILO, *Panama (Case No 1913)* (n 210) Para 305.

[251] Xhafa (n 215) 14-15.

[252] British Airways.

[253] British Airline Pilots' Association (BALPA).

[254] Bellace, 'The ILO and the Right to Strike' (n 126) 64-65; See also: Velyvyte (n 107) 95-96.

[255] Bellace, 'The ILO and the Right to Strike' (n 126) 64-65; See also: ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations,* General Report and Observations Concerning Particular Countries, Report III (Part 1A), International Labour Conference (ILC), 99th Session, 2010 Geneva, 208-209; See also: Novitz, 'The Internationally Recognized Right to Strike: A Past, Present, and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?' (n 131) 363; See also: Velyvyte (n 107) 95-96.

[256] Xhafa (n 215) 14-15 and 18-19.

[257] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO,* Fifth (revised) Edition (n 118) Paras 628-631; See also: ILO, *Congo (Case No 1870)* (28 February 1996), Committee on Freedom of Association: Report in which the Committee Requests to be Kept Informed of Development No 321, 1996, Para 143.

[258] ibid Paras 642-645.

[259] ibid Para 647.

of discouraging workers seeking to defend their interests from engaging in strike action violates the rights to freedom of association, organization and collective bargaining, incorporated under the provisions of C87 and C98.[260] The CoE's and CFA's interpretations of the latter Conventions have provided the basis through which the right to strike is recognized and protected by the ILO.

6. The Right to Strike

6.1. The European Social Charter (ESC)

The ESC is considered the first international treaty to explicitly recognize and protect the right to strike.[261] The ESC declares that: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake and recognise: the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."[262]

The first limitation on the right to strike provided by the ESC may be observed when viewing the latter provision, as strikes are subjected to obligations arising out of previous collective agreements.[263] Additionally, strikes are to be confined to conflict of interest disputes rather than conflicts of rights. Consequently, strikes concerning the existence, validity, interpretation or violation of collective agreements do not fall under the scope of the right to strike as recognized by the ESC.[264] The exclusion of rights disputes from the scope of acceptable strike action is due to the expectation of resolving such disputes through "recourse to adjudication by the relevant judicial or other body to resolve the dispute."[265]

In addition, a general prohibition on the exercise of the right to strike by all workers is possible according to the ESC only in times of "war or other public emergency threatening the life of the nation."[266] Accordingly, States are provided with the discretion to derogate from their obligations in a manner similar to that recognized by the ILO in cases of acute national emergencies and under similar conditions, provided that such derogation is proportionate to the extent of the public emergency.[267] Furthermore, the Committee which monitors States compliance with ESC provisions, the European Committee of Social Rights (ECSR),[268] provided that political strikes are excluded from the scope of Article 6, "which is designed to protect the right to bargain collectively."[269] Nevertheless, the ECSR provided that national legislations which only permit strikes aiming to secure the conclusion of

[260] Cooper (n 185) 928-929.

[261] International Trade Union Confederation (ITUC), *The Right to Strike and the ILO: The Legal Foundations* (International Trade Union Confederation 2014) 53-54; See also: Erika Kovacs, 'The Right to Strike in the European Social Charter' (2004-2005) 26 *Comparative Labor Law & Policy Journal* 445, 447; See also: Federico Fabbrini, 'Europe in Need of a New Deal: On Federalism, Free Market, and the Right to Strike' (2011-2012) 43 *Georgetown Journal of International Law* 1175, 1197.

[262] Council of Europe, *European Social Charter (ESC)*, 18 October 1961, ETS 35; and (Revised), 3 May 1996, ETS 163, Article 6 (4); See also: ITUC (n 259); See also: Kovacs (n 259).

[263] Council of Europe, *European Social Charter (ESC)* (n 260); See also: Kovacs (n 259) 448.

[264] ITUC (n 259) 56; See also: Kovacs (n 259) 447-449; See also: Council of Europe: European Committee of Social Rights (ECSR), *Digest of the Case Law of the European Committee of Social Rights*, 'Permitted Objectives of Collective Action', 1 September 2008, 56.

[265] International Labour Organization (ILO), 'Substantive Provisions of Labour Legislation: The Right to Strike' In: *Labour Legislation Guidelines*, (*ILO*, 2001), Disputes Over Rights <www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm#8> accessed 4 August 2017.

Kovacs (n 259) 447-449; See also: Council of Europe, *European Social Charter (Revised)* (n 260) Article F (1).

[267] Kovacs (n 259) 447-449; See also: Council of Europe, *European Social Charter (Revised)* (n 260) Article F (2).

[268] Council of Europe, 'The European Social Charter' (*Council of Europe*, 2017) <www.coe.int/en/web/turin-european-social-charter/european-committee-of-social-rights>accessed 5 August 2017.

[269] Kovacs (n 259) 450; See also: Council of Europe: European Committee of Social Rights (ECSR), *European Social Charter,* Conclusions II Statement of Interpretation on Article 6(4) 01/01/1968-31/12/1969, 1971.

collective agreements are incompatible with the ESC.[270] However, several European States have adopted domestic provisions, which contradict the ECSR's opinions. Both Germany and the Czech Republic only permit strikes targeting the conclusion of collective agreements. The Slovak Republic considers strikes unacceptable unless their aim is to conclude or modify collective agreements, while similar provisions were adopted in Iceland in relation to public servants.[271]

Moreover, the ECSR views that States have the discretion to regulate strikes, provided that restrictions are justified in accordance with the general limitations provisions under Article G,[272] which provides further guidance regarding restrictions imposed on strikes.[273] Article G declares that any restrictions imposed on rights must be "prescribed by law" and "necessary in a democratic society for the protection of the rights and freedoms of others" or the protection of "public interest, national security, public health or morals."[274]

Such a provision coincides with the aforementioned opinions expressed by the CFA and CoE concerning restrictions on the right to strike. Initially, not all public servants are to be subjected to restrictions according to the ECSR.[275] Only public servants performing tasks which significantly affect the "rights and values" provided under Article G may by subjected to restrictions.[276] Accordingly, while an exhaustive list of employees belonging to the latter category has not been issued by the ECSR, it is understood to include, inter alia, members of the armed forces, police, judiciary and other high ranking civil servants,[277] as the tasks performed by such employees substantially impact the public's interest, welfare or security.[278]
Furthermore, prohibiting strikes in services that are "essential to the community" is considered compatible with the ESC.[279] However, the ECSR views that where possible requiring the maintenance of minimum services may be more suitable, rather than imposing outright prohibitions on certain sectors in a broad manner.[280] Thus, the position adopted by the ECSR regarding the right to strike resembles the jurisprudence provided by the CFA and CoE without significant variations, even in relation to compulsory arbitration,[281] wage deductions,[282] and sanctions.[283]

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[270] Kovacs (n 259) 450; See also: Council of Europe: European Committee of Social Rights, *European Social Charter,* Conclusions II Statement of Interpretation on Article 6(4) (n 267); See also: ITUC (n 259) 57.

[271] Kovacs (n 259) 449.

[272] ITUC (n 259) 57; See also: *Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour "Podkrepa" and European Trade Union Confederation v Bulgaria (Decision on the Merits),* Complaint No 32/2005, Council of Europe: European Committee of Social Rights, 16 October 2006, Para 14.

[273] Council of Europe, *European Social Charter (Revised)* (n 260) Article G (1).

[274] ibid.

[275] Kovacs (n 259) 462-463; See also: Council of Europe: ECSR, *Digest of the Case Law of the European Committee of Social Rights* (n 262) 'Restrictions Related to Public Officials', 57.

[276] Kovacs (n 259) 463-464; See also: Council of Europe: ECSR, *Digest of the Case Law of the European Committee of Social Rights* (n 262) 'Restrictions Related to Public Officials', 57.

[277] Kovacs (n 259) 463-464.

[278] Kovacs (n 259) 463-464; See also: Council of Europe: ECSR, *Digest of the Case Law of the European Committee of Social Rights* (n 262) 'Restrictions Related to Public Officials', 57.

[279] Kovacs (n 259) 465; See also: Council of Europe: ECSR, *Digest of the Case Law of the European Committee of Social Rights* (n 262) 'Specific Restrictions', 56.

[280] Kovacs (n 259) 465-467; See also: Council of Europe: ECSR, *Digest of the Case Law of the European Committee of Social Rights* (n 262) 'Restrictions Related to Public Officials', 57.

[281] Kovacs (n 259) 465 and 469; See also: Council of Europe: European Committee of Social Rights, *European Social Charter,* Conclusions I Statement of Interpretation on Article 6(4) 01/01/1965 - 31/12/1967, 1969, Para 1 (f).

[282] Kovacs (n 259) 473-474; See also: *Confederation Francaise de l'Encadrement CFE-CGC v France (Decision on the Merits),* Complaint No 9/2000, Council of Europe: European Committee of Social Rights, 16 November 2001, Para 48.

[283] Council of Europe: European Committee of Social Rights, *European Social Charter,* Conclusions XVII 1 Denmark Article 6(4) 01/01/2001-31/12/2002, 2005.

6.2. The European Convention on Human Rights (ECHR)

The right to strike in not explicitly mentioned under the ECHR.[284] Article 11 of the ECHR may be considered the equivalent of Articles 21 and 22 of the ICCPR. The former protects the rights of everyone to freedom of assembly and association, "including the right to form and join trade unions for the protection of his interests",[285] while Article 11(2) provides guidelines for the imposition of restrictions on the aforementioned rights.[286]

Consequently, the European Court of Human Rights (ECtHR) initially refrained from extending the protection provided under Article 11 to the right to collective bargaining and specifically "its intrinsic corollary" the right to strike.[287] However, the ECtHR's position regarding strikes has progressively developed. The ECtHR established that Article 11 implicitly protects the right to collective bargaining, including the right to take collective action.[288] This position was declared by the ECtHR when examining the *Demir v Turkey* Case.[289]

Moreover, the Demir Case was bought before the ECtHR, by the applicants, a member and a president of a civil servants' trade union, alleging of violations to Articles 11 and 14 of the ECHR. The violations were a result of the Turkish Government's refusal to recognize the rights of civil servants to form trade unions, bargain collectively and enter into collective agreements.[290]

The ECtHR found that although the Government's intervention was "prescribed by law" and "pursued a legitimate interest", it was not "necessary in a democratic society", as it was not resorted to in response to a "pressing need."[291] Furthermore, the ECtHR rejected the Government's claims that its conduct was justified in accordance with Article 11(2), which permits limiting the rights enshrined under Article 11(1) in relation to members of the administration of the State.[292] The ECtHR held that the concerned municipal employees are not engaged in the administration of the State, and thus, should not be subjected to restrictions imposed on their right to form trade unions in defence of their interests.[293]

The latter position coincides with the views expressed by ILO Committees providing that not all public sector employees may have their right to collective bargaining restricted, as such limitations should only apply to those exercising authority in the name of the State or providing essential services. Accordingly, the ECtHR concluded that the right to collective bargaining is "one of the essential

[284] ITUC (n 259) 45; See also: Jeffrey S Vogt, 'The Right to Strike and the International Labour Organisation' (2016) 27 *King's Law Journal* 110, 118.

[285] ITUC (n 259) 45; See also: Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocols Nos 11 and 14*, 4 November 1950, ETS 5, Article 11 (1).

[286] ITUC (n 259) 45; See also: Council of Europe, *ECHR* (n 283) Article 11 (2).

[287] ITUC (n 259) 45; See also: Vilija Velyvyte, 'The Right To Strike In The European Union After Accession To The European Convention On Human Rights: Identifying Conflict And Achieving Coherence' (2015) 15 *Human Rights Law Review* 73, 75-77; See also: *National Union of Belgian Police v Belgium* (1979-80) Series A no 9, Council of Europe: European Court of Human Rights 27 October 1975, 1 EHRR 578, Paras 16-22 and 38-40; See also: *Schmidt and Dahlstrom v Sweden* (1979-80) Series A no 21, Council of Europe: European Court of Human Rights 6 February 1976, 1 EHRR 632, Paras 34-37; See also: Charles Barrow, 'Demir and Baykara v Turkey: Breathing Life into Article 11' (2010) 4 *European Human Rights Law Review* 419; See also: Fabbrini (n 259).

[288] ITUC (n 259) 46-47; See also: Velyvyte (n 285) 74-77; See also: Barrow (n 285).

[289] ITUC (n 259) 46-47; See also: Velyvyte (n 285) 74-77; See also: Barrow (n 285); See also: *Demir v Turkey* (2009) App no 34503/97, Council of Europe: European Court of Human Rights 12 November 2008, 48 EHRR 54.

[290] ibid Paras 14, 59 and 171; See also: Fabbrini (n 259) 1225.

[291] *Demir v Turkey* (n 287) Paras 116-127, 131 and 159-170; See also: Velyvyte (n 285) 77-79; See also: Fabbrini (n 259) 1226-1229.

[292] *Demir v Turkey* (n 287) Paras 13, 53, 97, 116-127 and 159-170.

[293] ibid Paras 97, 116-127, 131 and 159-170; See also: Fabbrini (n 259) 1226.

elements of the right to form and join trade unions for the protection of one's interests" and that unwarranted government interference with the former amounts to a violation of Article 11.[294]

The Demir Case may be considered a substantial precedence paving the way for the ECtHR towards embracing the right to strike.[295] The ECtHR's recognition of the latter and the extension of the protection provided by Article 11 towards strikes may have reached its peak in the subsequent Case of *Enerji Yapi-Yol Sen v Turkey*.[296]

In the Enerji Case, the applicant was a trade union for public servants involved in the fields of land registration, energy, infrastructure and motorway construction.[297] The applicant relied on Article 11 to submit the complaint to the ECtHR, as the allegations provided that the Turkish Government's conduct violated the workers' right to freedom of association.[298] The applicant alleged that such violations were inflicted by the Government's adoption of domestic measures that prohibit public servants from participating in a national strike, while further subjecting the participants to disciplinary sanctions.[299]

The ECtHR provided that the latter restrictions should not apply to all public servants[300] and that since the concerned employees were not members in the administration of the State, the Government's interference constituted a disproportionate restriction on their right to freedom of association.[301]

The Court further provided that the restrictions were incompatible with the provisions of Article 11(2), as they did not respond to a pressing social need,[302] while the imposition of disciplinary measures further obstructed the employees' from defending their trade union interests.[303] Thus, the ECtHR found that the Government's conduct was in violation of Article 11.[304]

In reaching its conclusion the Court relied on the explicit recognition of the right to strike under the ESC,[305] while further referring to the recognition provided by ILO supervisory bodies to the right to strike "as an inseparable corollary of the right to trade union association."[306] The ECtHR further acknowledged the latter's jurisprudence, providing that civil servants in principle should be able to strike with the exception of those exercising authority in the name of the State.[307]

Furthermore, the ECtHR substantially recognized that strikes represent an important aspect for trade union members in protecting their interests, as the former enables a trade union "to have its voice

[294] *Demir v Turkey* (n 287) Paras 153-154, 157 and 170; See also: Velyvyte (n 285) 79; See also: Fabbrini (n 259) 1227-1228.

[295] ibid 1223-1224 and 1229.

[296] ITUC (n 259) 8-9; See also: Velyvyte (n 285) 74-76; See also: *Enerji Yapi-Yol Sen v Turkey* App no 68959/01, Council of Europe: European Court of Human Rights 21 April 2009; See also: Fabbrini (n 259) 1229.

[297] *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 6; See also: Fabbrini (n 259) 1230.

[298] *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 17.

[299] Ibid Paras 9, 20 and 24; See also: ITUC (n 259) 47-48; See also: Fabbrini (n 259) 1230.

[300] *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 32.

[301] ibid Para 30; See also: Fabbrini (n 259) 1230-1231.

[302] *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 33; See also: Council of Europe, *ECHR* (n 283) Article 11 (2); See also: Velyvyte (n 285) 78.

[303] *Enerji Yapi-Yol Sen v Turkey* (n 294) Paras 9 and 20; See also: Velyvyte (n 285) 78.

[304] *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 31; See also: Fabbrini (n 259) 1230-1231.

[305] *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 21; See also: Fabbrini (n 259) 1230-1231.

[306] *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 24; See also: Fabbrini (n 259) 1230-1231.

[307] *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 34.

heard."[308] Thus, the ECtHR extended the scope of the ECHR to include the right to strike,[309] by recognizing that Article 11 may be applied to protect strikes.[310]

Accordingly, the protection afforded to strikes at the European level is enhanced through Article 11(2), which allows having the limitations that may be imposed on strikes to pass through the scrutiny provided by the strict exceptions declared under the latter Article. Moreover, restrictions imposed on strikes must be prescribed by law, in pursuit of a legitimate interest and in response to a pressing need in order to be considered necessary in a democratic society.[311]

Another significant Case is *RMT v UK*, where a complaint concerning the prohibition of sympathy strikes within the UK was bought before the ECtHR.[312] The latter provided that in light of the relevant international law instruments, including the ESC,[313] the jurisprudence of the ILO Committees[314] and State practice within the EU,[315] excluding sympathy strikes from the forms of industrial action protected under Article 11 of the ECHR would be inconsistent with Article 31 (3) (c) of the Vienna Convention.[316] Consequently, the ECtHR views that sympathy strikes should be deemed permissible, unless the restrictions imposed on sympathy strikes are in harmony with Article 11(2).[317]

Nevertheless, in *RMT v UK* the ECtHR concluded that the UK's prohibition of sympathy strikes was in conformity with Article 11, as it was prescribed by law, pursued a legitimate interest and was necessary in a democratic society.[318] Furthermore, the Cases of *Saime Ozcan v Turkey*[319] and *Urcan v Turkey*[320] involved the participation of public sector secondary school teachers in strikes in defence of occupational interests, which included the improvement of employment conditions.[321] In response to the teachers' participation in strikes, sanctions in the form of a financial penalty in the former Case, and a temporary ban from teaching in both Cases were imposed on the striking teachers.[322] Consequently, the ECtHR held that the imposed sanctions violated Article 11, as they were incompatible with the exceptions provided under Article 11(2).[323]

Similarly, in the Cases of *Karacay v Turkey*,[324] *Cerikci v Turkey*[325] and *Kaya and Seyhan v Turkey*,[326] which involved the participation of public servants in strikes, the ECtHR held that the imposition of

[308] ibid Para 24; See also: Federico Fabbrini, Fabbrini (n 259) 1230-1231.

[309] Velyvyte (n 285) 76 and 78.

[310] ITUC (n 259) 83-84.

[311] Velyvyte (n 285) 78.

[312] ITUC (n 259) 51-52; See also: *National Union of Rail, Maritime and Transport Workers v United Kingdom (RMT v UK)* (2015) App no 31045/10, Council of Europe: European Court of Human Rights 8 April 2014, 60 EHRR 10, Paras 14-16.

[313] ibid Paras 34 and 36-37.

[314] ibid Paras 26-33.

[315] ibid Paras 40-41.

[316] ITUC (n 259) 8-9; See also: *RMT v UK* (n 310) Para 76.

[317] ITUC (n 259) 51-53; See also: *RMT v UK* (n 310) Paras 75-79 and 83.

[318] ITUC (n 259) 53; See also: *RMT v UK* (n 310) Paras 79-105.

[319] *Saime Ozcan v Turkey* App no 22943/04, Council of Europe: European Court of Human Rights 15 September 2009.

[320] *Urcan v Turkey* App nos 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, Council of Europe: European Court of Human Rights 17 July 2008.

[321] ITUC (n 259) 49; See also: Velyvyte (n 285) 78.

[322] ITUC (n 259) 49; See also: Velyvyte (n 285) 78.

[323] ITUC (n 259) 49; See also: Velyvyte (n 285) 78; See also: *Saime Ozcan v Turkey* (n 317) Para 22.

[324] *Karaçay v Turkey* App no 6615/03, Council of Europe: European Court of Human Rights 27 March 2007.

unwarranted disciplinary measures such as formal warnings, constituted a breach of Article 11, due to their capability of discouraging employees from engaging in collective bargaining.[327] Therefore, as Velyvyte notes, "interference with the right to strike alone is considered to be a sufficient basis to trigger Article 11."[328]

The significance of extending the scope of the ECHR to protect the right to strike resides in the efficient implementation mechanisms afforded to the ECHR provisions.[329] Initially, the ECHR is safeguarded by superior enforcement and implementation mechanisms when compared to the ESC.[330] As Coomans notes, the ESC "does not recognize individual rights that are directly enforceable against the State. Although rights language is used, its provisions are framed as State obligations rather than individual rights."[331]

Moreover, under the ESC, States may select provisions they do not wish to accede to.[332] Furthermore, ESC provisions are not safeguarded by judicial complaint procedures in case of violations,[333] while individual complaints are only possible through the ESC's optional protocol. The latter requires distinct State ratification and is so far ratified or acceded to by 15 out of a possible 47 States.[334] However, even if an individual complaint was submitted before the ECSR on the basis of the optional protocol, the ECSR's role is to issue non-binding recommendations, which may be "ignored by the State with little cost."[335]

In contrast, the ECHR Articles are protected by the ECtHR's jurisdictional competence to examine allegations of ECHR Article violations, which is capable of discouraging abuse and awarding victims with just restitution, by issuing binding enforceable decisions. Therefore, the ECtHR's jurisdiction should contribute to ensuring the right to strike's enforceability within European States, while further safeguarding employees from unwarranted State intervention or arbitrary abuse.

Nevertheless, it may be necessary to acknowledge that although the ESC is safeguarded by inferior implementation mechanisms, it proved to be an important source of reference for the ECtHR.[336] The case law of the ECtHR may display the vital role of the ESC, along with ILO Committee opinions, in assisting the former when seeking to interpret the provisions of Article 11, leading to its extension to include the right to strike.[337]

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[325] *Cerikci v Turkey* App no 33322/07, Council of Europe: European Court of Human Rights 13 July 2010.

[326] *Kaya and Seyhan v Turkey* App no 30946/04, Council of Europe: European Court of Human Rights 15 September 2009.

[327] ITUC (n 259) 49-50; See also: Velyvyte (n 285) 78; See also: *Kaya and Seyhan v Turkey* (n 324) Paras 12, 24 and 30-31.

[328] Velyvyte (n 285) 79; See also: ITUC (n 259) 49-50.

[329] Velyvyte (n 285) 76.

[330] ibid; See also: Steven Greer, 'Europe', In Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 420; See also: Fabbrini (n 259) 1197-1198.

[331] Fons Coomans, 'Education and Work', In: Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 251.

[332] Greer (n 324); See also: Tonia Novitz, 'The EU and the Right to Strike: Regulation through the Back Door and Its Impact on Social Dialogue' (2016) 27 (1) *King's Law Journal* 46, 52.

[333] Greer (n 324).

[334] ibid; See also: Council of Europe, 'Chart of Signatures and Ratifications of Treaty 158 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints', (*Council of Europe*, 2017) <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=vkMi7Cnp> accessed 1/9/2017.

[335] Greer (n 324) 420-421; See also: Velyvyte (n 285) 76; See also: Federico Fabbrini, Fabbrini (n 259) 1197-1198.

[336] Velyvyte (n 285) 77-79.

[337] ITUC (n 259) 46-49 and 52; See also: *Enerji Yapi-Yol Sen v Turkey* (n 294) Para 24.

Accordingly, the right to strike is explicitly recognized by the ESC and further protected by the ECHR, through the explicit ECtHR decisions as displayed by its case law. However, the former may display the current issue surrounding the right to strike within Europe, which in certain aspects resembles the situation of the right to strike in an international law context under the auspices of the UN and ILO. The ESC recognizes the right to strike explicitly but does not provide binding decisions or authoritative resolutions to safeguard strikes. Similarly, the UN explicitly recognizes the right to strike, while a general comment or resolution providing interpretations and guidance remain absent.

On the other hand, the ECHR in a similar manner to C87 in particular, does not make an apparent mention of the right to strike. However, Article 11 of the former has been interpreted in a similar manner to Article 3 of the latter. Therefore, under both Conventions the protection provided for the right to freedom of association has been extended to include the right to strike, which in the former's case is enforceable through the binding decisions of the ECtHR.

6.3. The European Union (EU): The Charter of Fundamental Rights of the European Union (CFREU) and the Court of Justice of the European Union (CJEU)

The right to strike is "formally excluded" from the scope of the EU's legislative competence on social policy according to Article 153 of the Treaty on the Functioning of the European Union (TFEU).[338] Nevertheless, "strike action" is explicitly recognized under Article 28 of the CFREU, which closely resembles Article 6 of the ESC.[339] Article 12 of the former may be considered the equivalent of Article 11 of the ECHR, as it protects the right to freedom of association, including forming and joining trade unions for the defence of one's interests.[340]

Furthermore, the CJEU has acknowledged in its case law that the right to strike is a fundamental right that exists at the EU level.[341] Initially, such an acknowledgement has been established, in the context of CJEU jurisprudence, in the Viking Case,[342] and further reaffirmed in the Laval Case.[343] However, in both Cases the CJEU noted that "the exercise of the right to strike may non the less be subjected to certain restrictions."[344]

Moreover, the Viking Case concerned a private Finnish ferry services company, Viking Line,[345] and a Finnish trade union.[346] In response to Viking's plans to relocate its place of establishment, to Estonia, to reduce its wage expenditures, the former threatened to engage in strike action in coordination with its international partner,[347] in order to pressure Viking into abandoning its plans.[348] Consequently, the

[338] Novitz (n 330) 46, See also: Velyvyte (n 285) 81-82; See also: Fabbrini (n 259) 1194-1196; See also: European Union, *Consolidated version of the Treaty on the Functioning of the European Union (TFEU)*, 13 December 2007, 2008/C 115/01, Articles 153 (5) and 156.

[339] ITUC (n 259) 58-59; See also: Novitz (n 330) 52-53, See also: Velyvyte (n 285) 73-74; See also: Fabbrini (n 259) 1198; See also: European Union, *Charter of Fundamental Rights of the European Union (CFREU)*, 26 October 2012, 2012/C 326/02, Article 28.

[340] ITUC (n 259) 58-59; See also: Novitz (n 330) 53, See also: Velyvyte (n 285) 91; See also: European Union, *CFREU* (n 337) Article 12 (1).

[341] ITUC (n 259) 59-60 See also: Fabbrini (n 259) 1178; See also: Case C-438/05 *International Transport Workers' Federation (ITF) and the Finnish Seamen's Union (FSU) v Viking Line ABP (Viking)* [2007] ECR I-10806, Para 44; See also: Case C–341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767, Para 91; See also: Vogt (n 282) 121-122.

[342] Case C-438/05 *ITF and FSU v Viking* (n 339).

[343] Case C–341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* (n 339).

[344] ITUC (n 259) 60; See also: Velyvyte (n 285) 82; See also: Fabbrini (n 259) 1178-1180 and 1200-1201; See also: Case C-438/05 *ITF and FSU v Viking* (n 339); See also: Case C–341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* (n 339).

[345] Viking Line ABP (Viking) and its subsidiary OÜ Viking Line Eesti (Viking Eesti)

[346] The Finnish Seamen's Union (FSU)

[347] International Transport Workers' Federation (ITF)

Case was referred to the CJEU by the Court of Appeal of England and Wales.[349] The CJEU provided that the collective action pursued by the Union, in the form of a strike, was unjustified, as it prevented the company from exercising its freedoms of movement and establishment declared under Article 49 of the TFEU.[350]

A similar position was adopted by the CJEU in the Laval Case, which concerned sympathy strikes pursued by Swedish trade unions[351] against Laval,[352] a Latvian company, in support of a Latvian builders' trade union, both operating in Sweden.[353] The sympathy strikes pursued occupational and socio-economic interests, as they were in response to Laval's refusal to enter into a new Swedish collective agreement which increases the wages of its Latvian workers.[354] Although such demands fall under the scope of legitimate strike action recognized by the ILO, the CJEU held that the sympathy strikes were incompatible with Article 56 of the TFEU,[355] as it hindered Laval's exercise of its freedom to provide services.[356]

In reaching its decisions in both Cases, the CJEU provided restrictions that may be considered distinct from those recognized by ILO Committees. The CJEU provided that strikes must "be justified by on overriding reason of public interest", that strictly seeks the protection of workers' interests, which are further required to be "under serious threat."[357] Furthermore, strikes are required to be the last resort available to workers, provided that the measures taken by the workers are proportionate to the strikes' adverse impact on the freedoms of others.[358]

Accordingly, the CJEU seems to lean towards restricting the right to strike, or as Novitz notes "to negate access to industrial action" in order to protect the employers in exercising their economic or rather commercial freedoms.[359] The commercial freedoms that have been given greater protection by the CJEU are, as provided by the TFEU, the free movement of capital, workers, goods, services and freedom of establishment.[360] In light of the CJEU's case law, strikes are to be subjected to a proportionality test to view whether a strike leads to a limitation on the employers rights to freedom of movement and in such cases strikes are deemed unjustified.[361]

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[348] Fabbrini (n 259) 1198-1199; See also: Velyvyte (n 285) 82; See also: Case C-438/05 *ITF and FSU v Viking* (n 339) Paras 2 and 6.

[349] Fabbrini (n 259) 1198-1199; See also: Velyvyte (n 285) 82.

[350] Fabbrini (n 259) 1201-1202; See also: Velyvyte (n 285) 84; See also: Case C-438/05 *ITF and FSU v Viking* (n 339) Para 88; See also: European Union, *TFEU* (n 336) Article 49.

[351] Swedish Building and Public Works Trade Union "Byggnads", "Byggettan" and Swedish Electricians' Trade Union "Elektrikerna".

[352] Laval un Partneri (Laval).

[353] Velyvyte (n 285) 82-83; See also: Fabbrini (n 259) 1202-1203; See also: Case C–341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* (n 339) Paras 2 and 28.

[354] ibid.

[355] Fabbrini (n 259) 1205-1206; See also: Case C–341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* (n 339); See also: European Union, *TFEU* (n 336) Article 56.

[356] ibid.

[357] Fabbrini (n 259) 1201-1202; See also: Novitz (n 330) 56, See also: Velyvyte (n 285) 82; See also: ITUC (n 259) 59-60; See also: Case C-438/05 *ITF and FSU v Viking* (n 339) Paras 86-88 and 90.

[358] ibid.

[359] Novitz (n 330) 47 and 55-56.

[360] ibid 47 and 54; See also: ITUC (n 259) 59 Footnote 149.

[361] Novitz (n 330) 56.

Although both Cases concerned disputes between private parties, where no violations are committed through State intervention, the cases may influence governments towards adopting policies that are less protective of the right to strike.[362]

The position adopted by the CJEU in respect of strike restrictions may be considered at the very least in contradiction with not only the ILO Committees' jurisprudence and the more recent ECtHR case law, but with its own acknowledgement of strikes as a fundamental right.[363] The CJEU has set a new and less protective standard, where the commercial freedoms of employers are prioritized over fundamental labour rights. More specifically the workers' right to engage in industrial action in the process of collective bargaining is compromised.[364] To secure a free market in Europe, where "commerce can flow unhindered", the CJEU has undermined workers' ability to engage in industrial action.[365]

Consequently, the CoE has stated that "when elaborating its position on the permissible restrictions that may be placed on the right to strike it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services."[366] The CoE further stressed that the Viking and Laval judgements "created a situation where the rights under the Convention could not be exercised."[367]

Furthermore, although the Viking and Laval judgements arrived before the Demir and Enerji Cases,[368] the European Union, is obligated to accede to the ECHR according to the Treaty of Lisbon.[369] As an institution of the EU, the standards adopted by the CJEU should be in harmony with the ECHR provisions as interpreted by the ECtHR's case law.[370] Therefore, the CJEU should seek to adjust its position regarding the protection afforded to strikes at the European level,[371] as the current standards adopted by the CJEU are less protective and may contradict with those provided by both ILO Committees and the ECtHR.[372]

The incompatibility may be due to the imbalance between the protections afforded to economic freedoms and labour rights, where the former are secured at the latter's expense.[373] A suggestion that stands out is that the CJEU should adopt a "double proportionality test", which would seek to balance the right to strike with other economic or commercial freedoms.[374] Such a balance would be achieved by "assessing the proportionality of restrictions that labour rights impose on the exercise of economic

[362] Velyvyte (n 285) 93-94; See also: Fabbrini (n 259) 1210; See also: Sophie Robin-Olivier, 'Normative Interactions and the Development of Labour Law: A European Perspective' (2009) 11 *Cambridge Yearbook of European Legal Studies* 377, 394.

[363] Velyvyte (n 285) 74-75 and 92-94.

[364] Fabbrini (n 259)1199; See also: Novitz (n 330) 47 and 54.

[365] Fabbrini (n 259) 1178 and 1180.

[366] Velyvyte (n 285) 96; See also: ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations,* General Report and Observations Concerning Particular Countries, Report III (Part 1A), International Labour Conference (ILC), 99th Session, 2010 Geneva, 209.

[367] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations,* General Report and Observations Concerning Particular Countries, Report III (Part 1A), International Labour Conference (ILC), 100th Session, 2011 Geneva, 187.

[368] Velyvyte (n 285) 93-94.

[369] ibid 91; See also: Fabbrini (n 259) 1180; See also: European Union, *TFEU* (n 336) Article 6(2).

[370] Velyvyte (n 285) 91; See also: Fabbrini (n 259) 1178 and 1180; See also: European Union, *Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon*, 13 December 2007, 2008/C 115/01, Declaration on Article 6(2) of the Treaty on European Union.

[371] Velyvyte (n 285) 91; See also: Fabbrini (n 259) 1207-1208 and 1234-1235.

[372] ibid.

[373] Velyvyte (n 285) 96-97; See also: Novitz (n 330) 57-58.

[374] Velyvyte (n 285) 96-97; See also: Novitz (n 330) 57-58.

freedoms" while further having the CJEU examine the impact that the exercise of economic freedoms has on the ability of workers to exercise their right to bargain collectively.[375]

The latter approach is considered necessary to provide a certain degree of equilibrium between labour rights and economic freedoms, where limitations may be imposed on both.[376] Whether such an approach is capable of eradicating the possibility of having one of the aforementioned practices undermined by the other is yet to be determined.[377] However, what is currently possible to determine is that the CJEU's case law significantly deviates from ILO jurisprudence and the more recent ECtHR case law regarding restrictions imposed on strikes.[378] Such deviation came in the form of stricter restrictions imposed on the right to strike and a reduced level of protection afforded to workers seeking to defend and further their legitimate interests, as recognized by ILO standards. However, as Novitz notes it may no longer be satisfactory to "rely merely on ILO maintenance of these standards."[379] Therefore, a further suggestion would be to subject the right to strike, its exercise and particularly its restrictions to both transparent political debate and affective social dialogue, that further lead to an authoritative and binding convention or at least a resolution that sets the boundaries of the right to strike's exercise.[380]

A binding instrument is necessarily required to provide some essentially needed clarity regarding the limitations that may be imposed on the right to strike.[381] Such clarity would protect States by enabling them to secure their ability to function adequately during the course of strike action. It would further protect the general public from the adverse impact of strikes by ensuring that the satisfaction of their substantial requirements is not obstructed by strikes and more importantly that their essential needs are attended to. Furthermore, a binding instrument would protect a fundamental right, essential to workers in their quest to defend and advance their interests. Workers in particular may be in need of a binding instrument to safeguard the right to strike from further court decisions that contradict any progress achieved whether through ILO standards or ECtHR jurisprudence, leading to labour rights retrogression instead of advancing their protection.

7. Conclusion

The right to strike is recognized under international law as a fundamental human right belonging to workers as a means of defending and advancing their occupational, economic or social interests. Such recognition may be explicitly observed through the provisions of treaties such as the ICESCR, ESC and TFEU. In contrast, it may be implicitly inferred through Conventions such as C87 or the ECHR, which are understood to protect the right to strike by extending the protection afforded to the right to form and join trade unions to include strike action.

The international provisions directly applicable to the right to strike are expressed in a brief manner, while only providing few restrictions and limitations that may be imposed on the exercise of the right to strike. Such restrictions include the permissibility of prohibiting members of the armed forces or police from striking or the possibility of prohibiting strikes during a national emergency or war. Nevertheless, the extent of the right to strike is covered extensively through the jurisprudence of the concerned Committees such as the CESCR, ECSR, CoE and CFA when addressing complaints and issuing recommendations. Further recognition and protection are afforded to the right to strike by the case law of the ECtHR which enables the enforceability of a right to strike within European States by issuing decisions on State related acts that violate the provisions of the ECHR.

[375] Velyvyte (n 285) 97.

[376] ibid 97 and 99; See also: Novitz (n 330) 58.

[377] ibid 58-60.

[378] ibid 46.

[379] ibid 65.

[380] ibid 47.

[381] ibid.

Moreover, the jurisprudence of the mentioned institutions and Committees may be considered coherent and compatible with one another in respect of the extent of the right to strike and the restrictions that may be imposed on its practice. Initially, almost a consensus exists that purely political demands do not fall under the scope of legitimate work strikes.[382] Similarly, strikes may be prohibited in essential services or where the concerned employees are exercising authority in the name of the State, or in the case of European human rights instruments, members of the administration of the State. Furthermore, the latter instruments provided that strikes may be restricted due to their impact on the rights of others, which closely resembles the ILO Committees' approach to services of fundamental importance.

The aforementioned Committees and institutions seem to lean towards addressing the right to strike and particularly the restrictions that may be imposed on its practice on a case-by-case basis. Examining State interventions and issuing decisions or recommendations may be considered a sufficient approach, especially in light of the dependence of the extent of the right to strike on the diverse conditions prevailing in States which significantly vary from one State to another.

However, the Employers Group's attempt to dispute the existence of a right to strike under C87, in addition to attempts made by States such as Japan when addressing the CESCR and reservations similar to the one declared by Kuwait may challenge the efforts seeking to protect the workers' right to strike from violations. A further issue is the abuse of compulsory arbitration. A significant number of States have exploited the latter concept by utilizing it as a means of putting an end to strikes instead of using it in its correct context.[383] Compulsory arbitration should only be acceptable in situations where workers are legitimately deprived of the right to strike and are in need of an alternative guarantee to protect their interests or where a strike extends beyond a certain duration.[384] Nevertheless, such challenges may be resolved through reaching mutual agreements.

In contrast, the fundamental issue may be observed when viewing the case law of the CJEU. Although the CJEU acknowledged the right to strike,[385] it adopted distinct and less protective standards in respect of strike restrictions, which prioritise the economic freedoms of employers over the workers' right to strike. Initially, such standards form a substantial challenge to the extensive jurisprudence provided by the ILO, CESCR, ECSR and the more recent ECtHR case law. Such standards may further influence States towards imposing stricter unwarranted restrictions on strike action, leading to a situation where the right to strike "could not be exercised."[386]

Therefore, to overcome such challenges it may be necessary to issue a resolution or adopt a binding convention that provides an authoritative international framework governing the exercise of the right to strike. Such an instrument should seek to balance States' interests in functioning adequately during strikes and the necessity of shielding the rights of the general public from the consequences of strikes with the workers' right to strike, without having one interest unnecessarily undermined by the other.

The right to strike provides workers with the necessary "power to bargain effectively", especially in light of the imbalance of power between workers and employers.[387] As Bellace notes, without a right to

[382] Wiebke Warneck, 'Strike Rules in the EU27 and Beyond: A Comparative Overview' (2007) *European Trade Union Institute for Research, Education and Health and Safety* 1, 8.

[383] Bernard Gernigon, Alberto Odero and Horacio Guido, *ILO Principles Concerning the Right to Strike* (International Labour Organisation 2000) 52-54.

[384] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration of Social Justice for a Fair Globalization 2008, Report III (Part 1B), International Labour Conference (ILC), 101st Session, 2012 Geneva, Para 247.

[385] International Trade Union Confederation (ITUC), *The Right to Strike and the ILO: The Legal Foundations* (International Trade Union Confederation 2014) 59.

[386] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations,* General Report and Observations Concerning Particular Countries, Report III (Part 1A), International Labour Conference (ILC), 100th Session, 2011 Geneva, 187.

[387] ITUC (n 383) 16; See also: UN General Assembly, *Rights to Freedom of Peaceful Assembly and of Association*, 14 September 2016, A/71/385, Para 54; See also: Jeffrey S Vogt, 'The Right to Strike and the International Labour Organisation' (2016) 27 *King's Law Journal* 110, 112.

strike collective bargaining is reduced to "collective begging."[388] However, it remains necessary that workers compromise some aspects of their right to strike in order to reach a framework that appeases all the concerned parties and fundamentally shields the general public from any devastating consequences or irreversible harm caused by strikes.

[388] Janice R Bellace, 'Back to the Future: Freedom of Association, the Right to Strike and National Law' (2016) 27 (1) *King's Law Journal* 24, 44; See also: ITUC (n 383) 15; See also: Vogt (n 385) 112-113; See also: Sara Slinn, 'Structuring Reality So That the Law Will Follow: British Columbia Teachers' Quest for Collective Bargaining Rights' (2011) 68 *Labour / Le Travail* 35, 39.

Cyber Attacks and the Use of Force in International Law

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Abstract

The article examines if and when a cyber attack constitutes a use of force under Article 2(4) of the Charter of the United Nations (the UN Charter). It shows that those cyber attacks that result in consequences akin to consequences of non-cyber attacks reaching the level of the use of force constitute the use of force. It also shows that those cyber attacks that constitute a use of force may reach the level of an armed attack contained in Article 51 of the UN Charter if they are grave enough regarding their scale and effects. However, although non-physically destructive cyber attacks can constitute a use of force, only physically destructive cyber attacks such as resulting in death, injury or damage to property can constitute an armed attack. To distinguish cyber attacks that constitute the use of force from the prohibited intervention which has a lower threshold than the use of force, the article also examines when cyber attacks constitute a prohibited intervention. It argues that for a cyber attack to constitute a use of force under International Law, it must be attributed to a State.

1. Introduction

The ever-increasing effects of cyberspace on human life have led countries over time to deem this virtual space as a war domain alongside with land, sea and air. By virtue of technological developments in cyberspace, today, cyber attacks can cause troubles to countries as much as conventional uses of force.

This article examines if and when a cyber attack constitutes a use of force under Article 2(4) of the Charter of the United Nations (UN Charter).[1] It shows that although there is no binding international law which applies to cyberspace, states have agreed to subject existing international law to cyberspace and as a consequence cyber attacks. After applying existing law on the use of force to cyber attacks, the article finds that a cyber attack constitutes a use of force when it results in consequences which are comparable to consequences of a non-cyber attack amounting to a use of force. The best way to determine the question of when consequences of a cyber attack make it reach the level of the use of force is to evaluate them under the non-exclusive criteria (severity, immediacy, directness, invasiveness, measurability, military character, presumptive legitimacy and responsibility) of Schmitt and Tallinn Manual 2.0.[2] Under these criteria, although materially or physically destructive consequences such as death, injury and damage to property will make it easier to determine a cyber attack as a use of force, a cyber attack does not have to result in such to constitute a use of force.

The article also compares the use of force with a close concept to it which is 'armed attack' contained in Article 51 of the UN Charter.[3] A cyber attack that reaches the level of the use of force will constitute an armed attack if it is severe enough in scale and effects. However, in contrast to the use of force, in order for a cyber attack to constitute an armed attack it must also be physically destructive.

The article also examines, in the cyber context, the prohibition of intervention which has a lower threshold than the use of force with the aim of distinguishing those cyber attacks that constitute

[1] Charter of the United Nations, (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (The UN Charter) Article 2(4)

[2] Michael N. Schmitt, 'Cyber Operations and the *Jus Ad Bellum* Revisited' (2011) 56 Villanova Law Review 569, 576-577; Michael N. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, CUP 2017) Commentary to Rule 69, para 8-9

[3] The UN Charter, Article 51

'intervention' from 'use of force'. This also shows that falling out of the scope of the use of force does not make cyber attacks lawful since they may constitute a prohibited intervention.

Another area that this article considers is state responsibility for cyber attacks. Since the provision of the use of force is an inter-state regulation, in order for a cyber attack to constitute a use of force it must be attributed to a state. The article shows that assigning an act to an author in the cyber realm is more challenging than in the physical realm. If this technical challenge is tackled, then the problem is whether that author's act conducted in the cyber realm can be legally attributable to a state. In this respect, the article analyses the question of when a state is held responsible for a cyber attack conducted by an individual hacker or a hacktivist group.

In Part 1, the article gives the contours of the concept of 'cyber attack', which will matter in analysing cyber attacks under the use of force regime. Part 2 examines whether there is a binding international law which applies to cyber attacks. Part 3 analyses the principle of non-use of force. In particular, it examines how the notion of 'use of force' has been interpreted historically in order to show how that way of interpretation will affect the interpretation of cyber attacks under Article 2(4). Part 4 examines leading approaches, namely instrument-based, target-based and effects-based, for when a cyber attack constitutes a use of force or armed attack. Part 5 examines when a cyber attack constitutes a prohibited intervention. Finally, Part 6 examines when a state is held responsible for an internationally wrongful act conducted in cyberspace.

2. Characterization of 'Cyber Attack'

2.1. Definition

Defining 'cyber attack' will help determine whether this particular act conducted in cyberspace[4] constitutes a use of force or an armed attack which gives the right to self-defense in international law. In the literature and governmental publications, there is no consensus on the definition of 'cyber attack' and the related terminology.[5] In the dictionary, the word 'cyber', which is used as an adjective for many terms in the article, is defined as 'relating to or characteristic of the culture of computers, information technology, and virtual reality'.[6]

In the literature, definitions of 'cyber attack' are generally based on two categories: object-based definitions, which make reference to the target/object of the attack, and means-based definitions which make reference to the means through which the attack is conducted.[7] A definition of 'cyber attack' made by the US National Research Council (NRC), a non-governmental organization, is 'the use of deliberate actions—perhaps over an extended period of time—to alter, disrupt, deceive, degrade, or destroy adversary computer systems or networks or the information and/or programs resident in or transiting these systems or networks'.[8] This is an object-based definition, which focuses and explains in detail the object of the attack ('computer systems or networks …') while not mentioning the instrument or means through which it is conducted. A means-based definition is given in the UK's 5-year National Cyber Security Strategy 2016; a cyber attack is a 'deliberate exploitation of computer systems, digitally

[4] Cyberspace is 'a global domain within the information environment consisting of the interdependent network of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.' US Department of Defense, *DoD Dictionary of Military and Associated Terms* (July 2017), 60 <http://www.dtic.mil/doctrine/new_pubs/dictionary.pdf> accessed 3 August 2017

[5] For more extensive terminology and definitions, see Marco Roscini, *Cyber Operations and the Use of Force in International Law* (OUP 2016) 10-16

[6] Oxford English Dictionary, 'Cyber' <https://en.oxforddictionaries.com/definition/cyber> accessed 10 July 2017

[7] Reese Nguyen, 'Navigating Jus Ad Bellum in the Age of Cyber Warfare' (2013) 101 Cal. L. Rev. 1079, 1085

[8] National Research Council's Committee on Offensive Information Warfare, William A. Owens, Kenneth W. Dam, and Herbert S. Lin (eds) *Technology, Policy, Law, and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities* (National Academies Press 2009) 10-11 <https://www.nap.edu/read/12651/chapter/1> accessed 29 June 2017

dependent enterprises and networks to cause harm'.[9] It focuses the means ('deliberate exploitation of computer systems …') through which the attack is conducted. A more succinct and another means-based definition on which Russian and American experts achieved a consensus is that of 'an offensive use of a cyber weapon intended to harm a designated target'.[10] The term 'cyber weapon' in the definition refers to 'a software, firmware or hardware designed or applied to cause damage through cyber domain'.[11]

Nguyen argues that object-based definitions that focus on targets are not appropriate for assessing the legality of cyber attacks. This is because, as targets, computers or networks do not have a different legal status to other targets. For example, there is already no difficulty in determining the problem in international law in 'a missile attack against a computer facility'.[12] Besides, in the use of force context, important factors are ones such as 'scope, duration and intensity', and these factors make more sense for the instrument through which the force is used rather than the target of the attack.[13] Therefore, the usage of means-based definitions is more suitable for legal assessments.

In the literature, the term 'cyber attack' is also used interchangeably and synonymously with 'computer network attack' (CNA). Although they are generally used synonymously in the literature, the US Joint Chiefs of Staff's Cyber Operations Lexicon defines the two terms slightly differently. It defines the CNA as 'a category of fires employed for offensive purposes in which actions are taken through the use of computer networks to disrupt, deny, degrade, manipulate, or destroy information resident in the target information system or computer networks, or the systems/networks themselves.'[14] On the other hand, according to the Lexicon, apparently as a wider concept than CNAs, cyber attacks can be employed not only through computer networks but also other 'related networks or systems', and targets of cyber attacks are 'critical cyber systems, assets or functions'.[15]

Roscini observes that the term CNA and other terms including the expression 'computer network' have been removed from US governmental works in recent years.[16] Also, Roscini finds the term CNA 'misleading' because of its connotations, i.e. attacks can be aimed at not only the computer network but a particular computer itself in the network, or websites.[17] Therefore, in this article usage of the term 'cyber attack' instead of 'CNA' is preferred.

What is common among the abovementioned definitions of 'cyber attack' is that it is conducted with the intention of causing damage. In contrast to 'cyber attack', 'cyber exploitation', another subcategory of cyber operations together with 'cyber attack', is generally conducted to acquire confidential information available on or transferring through the system or network without damaging the functioning of the system or network.[18] Cyber exploitations are usually conducted for the purpose of

[9] UK Cabinet Office, *National Cyber Security Strategy 2016-2021* (2016) 74 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/567242/national_cyber_security_strategy_2016.pdf> accessed 29 June 2017

[10] James B. Godwin and others (eds), *The Russia-U.S. Bilateral on Cybersecurity – Critical Terminology Foundations, Issue 2* (EastWest Institute and the Information Security Institute of Moscow State University, 2014) 44 <https://ccdcoe.org/cyber-definitions.html> <https://dl.dropboxusercontent.com/u/164629289/terminology2.pdf> accessed 29 June 2017

[11] ibid 56

[12] Nguyen (n 7) 1087

[13] ibid 1089

[14] US Joint Chiefs of Staff, *Joint Terminology for Cyberspace Operations* (2011) 3 <http://www.nsci-va.org/CyberReferenceLib/2010-11-joint%20Terminology%20for%20Cyberspace%20Operations.pdf> accessed 12 June 2017

[15] ibid 5

[16] Roscini, *Cyber Operations* (n 5) 12

[17] Marco Roscini, 'World Wide Warfare – Jus ad bellum and the Use of Cyber Force' (2010) 14 Max Planck UNYB 85, 95-96

[18] National Research Council's Committee on Offensive Information Warfare (n 8) 11

espionage. The question of whether espionage (called 'cyber espionage' when conducted through cyber means) is legal or not under international law is debatable although it is prohibited under domestic laws.[19] A 'cyber exploitation', for example, can be conducted to gather intelligence from the adversary's system or to monitor the traffic in a network or a system which can lead to identify targets for future cyber attacks.[20]

2.2. Characteristics of Cyber Attacks

There are four characteristics of cyber attacks, namely, indirectness, intangibility, location and result, which help distinguish them from non-cyber attacks.[21] First, cyber attacks are generally *indirect*, that is, they can take advantage of a system to make a second actor or object produce the desired result, like disabling an air traffic control system.[22] In a fictional scenario, for example, a hacker penetrates an air traffic control system to create a phantom aircraft in the tracking display of a plane. The pilot, in order not to collide with the incoming aircraft seen in the tracking display, dives into another crowded air lane and in doing so collides with another plane.[23] Cyber attacks can also be *direct*, for example, an attacker who penetrates the command and control system of a dam can release billions of gallons of water.[24]

Second, the *target* of the cyber attack can be intangible if it is merely the information inside the system but not a physical entity or a piece of hardware connected to the computer system. The *weapon* of a cyber attack can also be intangible since a malicious piece of software, one of the abovementioned cyber weapons, need only take the form of computer code.[25]

Third, it is difficult to locate an attack due to current technology. Attackers can hide their identity or even route the attack through another server which may be located in another country,[26] thereby causing another entity to be blamed of being the perpetrator. This leads to the problem of attribution which is examined below. A problem also emerges with the location of the target of a cyber attack.[27] It is claimed that the target of a cyber attack does not have a geographical location since it is present in cyberspace and the law does not apply to cyberspace. However, it must not be forgotten that the targets of cyber attacks, i.e. data, reside in servers which are physical entities and geographically located in physical domains, i.e. within the boundaries of countries, and cyberspace needs servers to exist. Having a physical location makes cyberspace subject to law, sovereignty and jurisdiction.[28]

Fourth, results of cyber attacks can be varied. They may cause a wide variety of consequences, from mere inconvenience, for example, shutting off a government service or function, to devastating damage

[19] See for debates Katharina Ziolkowski, 'Peacetime Cyber Espionage – New Tendencies in Public International Law', in Katharina Ziolkowski (ed) *Peacetime Regime for State Activities in Cyberspace: International Law, International Relations and Diplomacy* (NATO CCD COE 2013) 430-443

[20] Herbert S. Lin, 'Offensive Cyber Operations and the Use of Force' (2010) 4 J. Nat'l Security L. & Pol'y 63, 68-69

[21] Heather Harrison Dinniss, *Cyber Warfare and the Laws of War* (CUP 2012) 65

[22] ibid 65-66

[23] Paul Marks, 'Air traffic system vulnerable to cyber attack' (*New Scientist*, 7 September 2011) <https://www.newscientist.com/article/mg21128295-600-air-traffic-system-vulnerable-to-cyber-attack/> accessed 3 August 2017

[24] Dinniss (n 21) 65

[25] ibid 67-68

[26] ibid 70-71

[27] ibid 71-72

[28] ibid; See also Wolff Heintschel von Heinegg, 'Legal Implications of Territorial Sovereignty in Cyberspace' in C. Czosseck, R. Ottis and K. Ziolkowski (eds), *2012 4th International Conference on Cyber Conflict* (NATO CCD COE 2012) 7-18; Nicholas Tsagourias, 'The Legal Status of Cyberspace' in Nicholas Tsagourias and Russel Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar, 2017) 13-29

to human life and property.[29] For example, a Chatham House report suggests that a cyber attack against a nuclear facility could trigger the release of a significant amount of radiation which is seriously harmful to human health.[30]

3. Different Forms of Cyber Attacks

Recent cyber attacks show that they take three main forms: distributed denial of service, feeding false information and penetrating a secure computer system or network.[31]

3.1. Distributed Denial of Service (DDoS)

These types of attacks are the most frequently conducted ones in recent times.[32] A DDoS attack floods a target, for example, a website, with multiple phony requests from botnets. A botnet consists of thousands of defenceless machines (for example, computers) around the world called bots hijacked by the attacker or attackers. Consequently, the target which is overwhelmed with phony requests becomes incapable of meeting legitimate requests.[33] For example, a DDoS attack aimed at a financial institution can prevent consumers from making online banking transactions by disrupting the website of the institution.[34] A well-planned DDoS attack can make a crucial asset inaccessible during a critical period.[35]

Estonia, one of the most wired countries in Europe,[36] witnessed a massive DDoS attack in 2007. The attacks were prompted by Estonia's removal of the Bronze Soldier, a Soviet war memorial in Tallinn which was seen by Estonians as a symbol of the Soviet occupation of the country but by Russians as a memorial to those who fought the Nazis in World War II.[37] Russia condemned its removal[38] and the DDoS attacks continued for three weeks. This is considered the first known occurrence of such an attack on a state. They targeted the websites of the presidency, the parliament, nearly all ministries, political parties, three big news institutions, two big banks and communication companies. Websites of these institutions, overwhelmed by tens of thousands of requests from all over the world, were shut down and could not serve the public. The country had to take defensive measures by closing down access to targeted websites from abroad in order to prevent DDoS attacks coming from abroad and at least keep websites open to domestic users.[39] Estonian officials stated that many of the attacks

[29] Dinniss (n 21) 72-74

[30] Caroline Baylon, Roger Brunt and David Livingstone, *Cyber Security at Civil Nuclear Facilities - Understanding the Risks* (Chatham House, The Royal Institute of International Affairs, September 2015) 6 <https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20151005CyberSecurityNuclearBaylonBruntLivingstoneUpdate.pdf> accessed 3 August 2017

[31] Oona A. Hathaway and others, 'The Law of Cyber-Attack' (2012) 100 Cal. L. Rev. 817, 837-839

[32] ibid 837

[33] National Research Council's Committee on Offensive Information Warfare (n 8) 95-96 7

[34] US Department of Homeland Security Science and Technology Directorate, 'Distributed Denial of Service Defense (DDoSD) Factsheet' (21 November 2016) <https://www.dhs.gov/sites/default/files/publications/FactSheet%20DDoSD%20FINAL%20508%20OCC%20Cleared.pdf> accessed 3 July 2017

[35] ibid

[36] Ian Traynor, 'Russia accused of unleashing cyberwar to disable Estonia' (*The Guardian*, 17 May 2007) <https://www.theguardian.com/world/2007/may/17/topstories3.russia> accessed 2 July 2017

[37] 'Estonia hit by 'Moscow cyber war'' (*BBC News*, 17 May 2007) <http://news.bbc.co.uk/1/hi/world/europe/6665145.stm> accessed 2 May 2017

[38] ibid

[39] Ian Traynor (n 36)

originated from Russia and some of them were from computer servers of Russian state agencies. Russia, however, denied any allegations of involvement in the attacks.[40]

Attributing an attack to a perpetrator is particularly difficult in a DDoS attack because of botnets which 'spin a web of anonymity around the real attacker or attackers'.[41]

3.2. Feeding False Information

These types of attacks, also called semantic attacks, do not target the operating system of a computer but the information inside the computer. They substitute the existing data with inaccurate or deceptive data.[42] Because the operating system under a semantic attack operates and looks correct to computer users,[43] they perceive the inaccurate information as accurate. Particularly in case of a semantic attack executed against a government website, a large proportion of the public can be misinformed in the way that attackers wish until the data are corrected.[44]

For example, on 24 May 2017, Qatari government news websites and their social media accounts were hacked and subsequently false reports quoting the Qatari emir calling Iran an 'Islamic power' and praising Hamas were planted. False reports have helped stir up ongoing disagreements in the region. Citing reports that appeared on websites, the Gulf countries, Saudi Arabia, the United Arab Emirates (UAE), Bahrain and Egypt, closed down all Qatari media immediately. Afterwards, the Gulf countries broke diplomatic and trade relations with Qatar. Allegedly, the UAE was behind the cyber attack. Whether the government itself executed the attack or used a proxy is not known. However, the UAE has denied allegations of involvement in the attack.[45]

Another example of a semantic attack occurred in Syria in 2007. It is claimed that Israel succeeded in its air strike against a nuclear reactor in Syria because of a preceding cyber attack. Israeli planes were not detected by Syria's air defence system thanks to a cyber attack which tricked Syria's air defence radar. Guards, seeing nothing unusual on their screens, which are fed with false information, did not detect the entrance of planes into Syrian airspace.[46]

In semantic attacks, attribution is not as problematic as other types of attacks because they generally accompany and assist kinetic attacks whose attribution is easier,[47] as happened in abovementioned Israeli air strike against Syria.

3.3. Penetrating a Secure Computer System or Network

Penetrating a secure computer network enables a variety of actions.[48] For example, in the Stuxnet attack, the function of the Iranian nuclear facility was disrupted after its computer network was

[40] 'Estonia hit by 'Moscow cyber war'' (n 37)

[41] Hathaway and others (n 31) 838

[42] Vida M. Antolin-Jenkins, 'Defining the Parameters of Cyberwar Operations' (2005) 51 Naval L. Rev. 132, 140

[43] Martin C. Libicki, *What Is Information Warfare?* (National Defense University 1995) 77

[44] Vida M. Antolin-Jenkins (n 42) 140

[45] Karen DeYoung and Ellen Nakashima, 'UAE orchestrated hacking of Qatari government sites, sparking regional upheaval, according to U.S. intelligence officials' (*The Washington Post*, 16 July 2017) <https://www.washingtonpost.com/world/national-security/uae-hacked-qatari-government-sites-sparking-regional-upheaval-according-to-us-intelligence-officials/2017/07/16/00c46e54-698f-11e7-8eb5-cbccc2e7bfbf_story.html?utm_term=.c8c41de8deb9> accessed 17 July 2017

[46] Matthew S. Cohen, 'Israel and the offensive military use of cyber-space' (*OUPblog*, 5 September 2016) <https://blog.oup.com/2016/09/israel-military-cyber-space/> accessed 4 July 2017

[47] Hathaway and others (n 31) 838

[48] ibid 839

penetrated.[49] This attack, which occurred in 2010, was caused by a piece of malware called 'Stuxnet' which infected computers all over the world but mainly in Iran. The malware was formulated to send nuclear centrifuges, which are spinning machines used in enriching uranium, out of control. This caused 1000 of 6000 centrifuges to break down. Consequently, Iran could not feed uranium into thousands of centrifuges for six days. Iran's nuclear proliferation program was significantly affected. The attack was allegedly the result of an American and Israeli collective effort.[50] It was also a semantic attack in part because the nuclear facility appeared to be operating correctly.[51] It is thought that the Stuxnet malware infected the system through a USB thumb drive.[52] This shows that cyber attacks are not necessarily only conducted via the Internet.

Another such attack was termed 'WannaCry'. This occurred in May 2017. The attack was executed with WannaCry ransomware which is a malicious software which locks files inside computers connected to the network it penetrates and demands a ransom to unlock the files. It has affected at least 200,000 organisations from 150 countries. In the UK, 47 National Health Service (NHS) trusts could not carry out operations and had to turn away patients at accident and emergency services.[53]

3.4. The Law Governing Cyber Attacks

The only treaty that is a primary source regulating cyber activities in international law[54] is the Council of Europe's Budapest Convention on Cybercrime 2001.[55] The treaty was also ratified by non-member states of the Council of Europe such as Australia, Canada, Chile, Israel, Japan and the US, with 55 the total number of ratifications.[56] It obliges state parties to take legislative and other measures in their domestic laws to prevent some cyber offences designated in the treaty from being committed. However, this article concerns cyber attacks conducted by states that can be evaluated under international law, not cyber offences or cyber crimes committed by individuals and prohibited under domestic regulations. It is argued that, being aware of the value of cyber attacks, states deliberately did not include governmental actions in the treaty to allow such attacks to continue.[57]

The UN put cyber security on the agenda in 1998 first time with a draft resolution, which was introduced by Russia and adopted without a vote in 1999.[58] Since then, there have been annual resolutions[59] calling on states to give their opinions and assessments of cyber security issues. There

[49] ibid

[50] William J. Broad, 'Report Suggests Problems With Iran's Nuclear Effort' (*The New York Times*, 23 November 2010) <http://www.nytimes.com/2010/11/24/world/middleeast/24nuke.html> accessed 5 July 2017; Ellen Nakashima, Joby Warrick, 'Stuxnet was work of U.S. and Israeli experts, officials say' (*The Washington Post*, 2 June 2012) <https://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAlnEy6U_story.html?utm_term=.c4d8b0129a66> accessed 5 July 2017

[51] Hathaway and others (n 31) 828

[52] David Kushner, 'The Real Story of Stuxnet' (*IEEE Spectrum*, 26 February 2013) <http://spectrum.ieee.org/telecom/security/the-real-story-of-stuxnet> accessed 18 July 2017

[53] Cara McGoogan, James Titcomb and Charlotte Krol, 'What is WannaCry and how does ransomware work?' (*The Telegraph*, 18 May 2017) <http://www.telegraph.co.uk/technology/0/ransomware-does-work/> accessed 11 July 2017

[54] Roscini, *Cyber Operations* (n 5) 19

[55] Council of Europe, Convention on Cybercrime, Budapest (opened for signature 23 November 2001, entered into force 1 July 2004) European Treaty Series - No. 185

[56] Council of Europe, 'Chart of signatures and ratifications of Treaty 185' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=0gmtXkkp> accessed 5 July 2017

[57] Hathaway and others (n 31) 863

[58] UNGA, 'Developments in the field of information and telecommunications in the context of international security' (4 December 1998) UN Doc A/RES/53/70

[59] UNGA Res 54/49 (1 December 1999), UNGA Res 55/28 (20 November 2000), UNGA Res 56/19 (29 November 2001), UNGA Res 57/53 (22 November 2002), UNGA Res 58/32 (8 December 2003), UNGA Res 59/61 (3 December 2004), UNGA

have also been annual reports[60] of the UN Secretary-General to the General Assembly containing opinions of member states on the issue. One of mandates of the General Assembly is to encourage 'the progressive development of international law and its codification'.[61] In this regard, these resolutions and reports that reflect the positions of states on the issue have been significant in the development of international law on cyber issues.

Also, following requests made by the General Assembly in these resolutions, a number of Groups of Governmental Experts (UN GGEs) on Developments in the Field of Information and Telecommunications in the Context of International Security were established under the auspices of the UN. The fourth UN GGE, consisting of 20 members including experts from China, Russia, the UK and the US, examined current and potential threats generated from the usage of information and communications technologies (ICTs) by states. It published its non-binding report (The GGE Report) in 2015.[62] Obviously, the report covers cyber attacks because 'information technologies' mentioned in the report may be used to conduct cyber attacks. This was clearly expressed in the definition of 'cyber attack' made in the Cyber Security Strategy for Germany 2011, which was given as 'an IT [information technology] attack in cyberspace directed against one or several other IT systems and aimed at damaging IT security'. [63] The GGE report recommends that states must avoid conducting internationally wrongful acts by using ICTs[64] and must not use non-state actors or allow its ICTs to be used by them to commit internationally wrongful acts.[65] The report also states that existing international law, particularly the UN Charter, applies to ICTs, and makes some recommendations for how to apply it to some issues such as state sovereignty and attribution of a wrongful act to a state.[66] However, the report does not suggest how to evaluate the issue of when a cyber attack constitutes an internationally wrongful act. An internationally wrongful act consists of two elements: first, the act must be conducted by a state; and second, the act must be in breach of an obligation of the state under international law.[67] 'Use of force', therefore, is an internationally wrongful act since it is a breach of Article 2(4) of the UN Charter by states.[68]

In 2015, as a step towards providing security and cooperation in cyberspace, member states of the Shanghai Cooperation Organization (SCO), which are China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan, submitted a letter annexed with the 'International code of conduct for information security' (Code of Conduct) to the UN Secretary-General to be circulated in the General

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Res 60/45 (8 December 2005), UNGA Res 61/54 (6 December 2006), UNGA Res 62/17 (5 December 2007), UNGA Res 63/37 (2 December 2008), UNGA Res 64/25 (2 December 2009), UNGA Res 65/41 (8 December 2010), UNGA Res 66/24 (2 December 2011), UNGA Res 67/27 (3 December 2012), UNGA Res 68/243 (27 December 2013).

[60] Reports since 2010 can be found at: UNODA 'Developments in the field of information and telecommunications in the context of international security' <https://www.un.org/disarmament/topics/informationsecurity/> accessed 6 July 2017

[61] The UN Charter, Article 13

[62] UNGA, 'Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security' (22 July 2015) A/70/174 (The GGE Report)

[63] Federal Ministry of the Interior, *Cyber Security Strategy for Germany* (February 2011) 14 <https://www.bsi.bund.de/SharedDocs/Downloads/EN/BSI/Publications/CyberSecurity/Cyber_Security_Strategy_for_Germany.pdf?__blob=publicationFile> accessed 29 June 2017

[64] The GGE Report (n 62) para 28(f)

[65] The GGE Report (n 62) para 28(e)

[66] ibid para 24-29

[67] ILC, 'Draft articles on responsibility of States for internationally wrongful acts', A/CN.4/SER.A/2001/Add.1, Yearbook of the ILC, Volume II, Part Two (2001) Article 2 7

[68] See the UN Charter, Article 2(4)

Assembly.[69] It revised the document which had been submitted on the same issue in 2011.[70] The Code of Conduct prohibits the usage of cyberspace 'to carry out activities which run counter to the task of maintaining international peace and security'[71] and 'interfere in the internal affairs of other States or with the aim of undermining their political, economic and social stability'.[72] By including political stability, it seems that the Code of Conduct takes a broad approach in prohibiting cyber attacks. Critics argue that this approach leads to a curb on political expression on the Internet[73] and conflicts with the view in Western Europe and the US that regulations curbing Internet freedom should be avoided.[74]

As seen above, there is lack of a binding, clear and substantive instrument that regulates cyberspace in international law. However, this does not render cyber attacks legitimate. Unlike other technological developments which are mainly removed from politics, cyber issues have always been at the centre of political debates.[75] The view states have agreed on is that existing international norms apply to cyberspace. For example, the US's 2011 International Strategy for Cyberspace published by the White House states that:

> The development of norms for state conduct in cyberspace does not require a reinvention of customary international law, nor does it render existing international norms obsolete. Long-standing international norms guiding state behavior—in times of peace and conflict—also apply in cyberspace. Nonetheless, unique attributes of networked technology require additional work to clarify how these norms apply and what additional understandings might be necessary to supplement them.[76]

Like the US, the UN GGE (whose view is stated above), the EU,[77] the North Atlantic Treaty Organization (NATO),[78] Russia,[79] China,[80] and the Asian-African Legal Consultative Organization (AALCO) consisting of 47 member states from Asia and Africa[81] are of the view that cyberspace issues

[69] UNGA, 'Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General' (13 January 2015) UN Doc A/69/723 (Code of Conduct)

[70] UNGA, 'Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General' (14 September 2011) UN Doc A/66/359

[71] Code of conduct (n 69) Article 2

[72] ibid Article 3

[73] Hathaway and others (n 31) 825

[74] ibid 865

[75] Tsagourias, 'The Legal Status of Cyberspace' (n 28) 14

[76] The White House, *International Strategy for Cyberspace* (May 2011) 9 <https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf> accessed 7 July 2017

[77] European Commission, *Cybersecurity Strategy of the European Union* (Brussels, 7 February 2013) 15 <http://www.eeas.europa.eu/archives/docs/policies/eu-cyber-security/cybsec_comm_en.pdf> accessed 8 July 2017

[78] NATO, 'Cyber Defence' (17 February 2017) <http://www.nato.int/cps/en/natohq/topics_78170.htm> accessed 8 July 2017

[79] The Ministry of Foreign Affairs of the Russian Federation, 'Doctrine of Information Security of the Russian Federation' (5 December 2016) (An unofficial translation in the Ministry of Foreign Affairs of the Russian Federation website) para 34(e) <http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/2563163> accessed 7 July 2017

[80] Li Zhang, 'A Chinese Perspective on Cyber War' (2012) 94 International Review of the Red Cross 801, 804

[81] The AALCO Secretariat, International Law in Cyberspace, AALCO/56/NAIROBI/2017/SD/S17 (2017) page 14 <http://www.aalco.int/Cyberspace%20Brief%202017%20final.pdf> accessed 27 August 2017; See for member states: AALCO Website, 'About Us' <http://aalco.int/scripts/view-posting.asp?recordid=1> accessed 27 August 2017

should be subjected to existing international law. Also, like the US, the EU's view[82] is that there is no need to produce a new international law instrument to regulate cyberspace. However, contrary to the US and the EU, the AALCO,[83] Russia[84] and China[85] are in favour of a new treaty to regulate cyberspace. To that end, Russia published a draft 'Convention on International Information Security'[86] in 2011. Similar to the SCO's Code of Conduct, one of the concerns seen in the draft convention is that 'the threat of the use of content for influence on the social-humanitarian sphere'.[87] This constitutes the basic difference between Russian and Western states which do not see the content as a threat and support free circulation of information on the Internet.[88]

Having stated that existing international law applies to cyberspace, on the issue of how to apply it the most extensive study is the 'Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations' (The Tallinn Manual 2.0). It was published in 2017 and supersedes the first edition in 2013.[89] The Tallinn Manual 2.0 was prepared by an International Group of Experts consisting of 19 legal experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence (NATO CCD COE), a think tank based in Tallinn, Estonia.[90] The cyber attacks that occurred in 2007 against Estonia expedited the establishment process of the NATO CCD COE.[91] The Tallinn Manual 2.0 consists of 154 rules, each of which is followed by a commentary. The points the experts disagreed on are highlighted in each commentary.[92] It is not an official document and does not reflect the views of the NATO CCD COE, its sponsoring states or NATO. It only reflects the academic views of the experts.[93] As it is a scholarly work, it is therefore a secondary source to help to determine international law.[94] The Tallinn Manual 2.0 covers two subjects of international law: the *jus ad bellum* which is the law of war governing the resort to the use of force, and the *jus in bello* which is the law of war governing issues which emerge once an armed conflict breaks out.[95] Therefore, this article will refer to the *jus ad bellum* issues in the Tallinn Manual 2.0.

As seen above, although there is no doubt that the existing legal norms apply to cyber attacks, how they are applied is hotly-debated by governments, organisations and commentators. The next part will examine how existing international law on the use of force applies to cyber attacks.

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[82] Cybersecurity Strategy of the European Union (n 77) 15

[83] The AALCO Secretariat, International Law in Cyberspace (n 81) page 14-15

[84] Doctrine of Information Security of the Russian Federation (n 79) para 19(e)

[85] Li Zhang (n 80) 804

[86] The Ministry of Foreign Affairs of the Russian Federation, 'Convention on International Information Security' (22 September 2011) <http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/191666> accessed 7 July 2017

[87] Keir Giles, 'Russia's Public Stance on Cyberspace Issues' 64-65 in C. Czosseck, R. Ottis and K. Ziolkowski (eds), *2012 4th International Conference on Cyber Conflict* (NATO CCD COE 2012) (Citing the quotation from a list prepared by the Institute of Information Security Issues of Moscow State University)

[88] ibid

[89] The Tallinn Manual 2.0 (n 2) pages 1-2

[90] ibid pages 1-2

[91] ibid page xxiii

[92] ibid page 4

[93] ibid pages 1-2

[94] See Statute of the International Court of Justice (Annex to the UN Charter (n 2)) (The ICJ Statute) Article 38(1)(d)

[95] The Tallinn Manual 2.0 (n 2) page 3

4. Cyber Attacks and the Use of Force

4.1. The Prohibition of the Use of Force

The starting point for any discussion on the use of force is Article 2(4) of the UN Charter which states that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'[96] This article is a general prohibition on the 'threat or use of force'. There are two exceptions to this prohibition in the UN Charter: Chapter VII which regulates actions which can be taken by the Security Council in the event of a 'threat to the peace, breach of the peace, or act of aggression' to restore the situation, and Article 51 in Chapter VII which regulates the right to individual and collective self-defence by states in the event of an armed attack.[97] Using force is legal in these two situations.

Article 2(4) prohibits the use of force by 'all members' in 'international relations'. That means that it only covers actions taken by a state against another state. Actions conducted only within a state are not in the scope of the provision.[98] Also, as inferred from the provision, in order for an action to constitute a use of force it must be attributed to a state. The attribution, which will be examined below, is problematic especially in the cyber context.

Article 2(4) prohibits the use of force 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. It is contested whether these two terms, 'territorial integrity' and 'political independence', restrict the scope of the article. Those interpreting the article narrowly argue that the provision only prohibits actions of seizing a territory or overthrowing a government provided that the action is consistent with the purposes of the UN Charter.[99] The dominant view is that these terms do not have a restrictive effect on the prohibition of the use of force. The phrase 'integrity', for example, is for prohibiting not only seizing a territory but also trespassing on a territory. Thus, most forms of uses of force are already covered by these terms. Any gaps are already filled by the term 'any other manner'.[100] The preparatory work of the UN Charter also shows that two terms do not aim to restrict the prohibition. In the preparation process of the UN Charter, smaller States wanted these terms to be inserted in order to emphasize the importance of 'territorial integrity' and 'political independence'.[101] Therefore, the provision is not limited regarding its scope and applies all uses of force. However, what is understood by 'force' is highly debatable and will be examined below.

The obligation on the prohibition of the use of force is beyond a treaty obligation. It also reflects customary international law as acknowledged by the International Court of Justice (ICJ) in the case concerning *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* case)[102] and by the International Law Commission (ILC) in a report on the law of treaties to the General Assembly.[103] Article 38 of the Statute of the International Court of Justice (ICJ Statute), which is generally

[96] The UN Charter Article 2(4)

[97] ibid Chapter VII

[98] Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma (ed), *The Charter of the United Nations - A Commentary, Volume I* (2nd edn, OUP 2002) 121

[99] Christine Gray, *International Law and the Use of Force* (2nd edn, OUP 2004) 29

[100] Randelzhofer, 'Article 2(4)' (n 98) 123

[101] See ibid

[102] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*) (Merits) Judgement, ICJ Reports 1986, p. 14, paras 187-190

[103] ILC, 'Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly' A/CN.4/SER.A/1966/Add.1, Yearbook of the ILC, Volume II (1966) 247

considered as listing sources of international law, defines customary international law as 'evidence of a general practice accepted as law'.[104] This phrase has two elements: 'state practice' which shows that the norm in question is settled among and practised consistently by states, and *opinio juris* which shows that the state practice is carried out in the belief that it is obligatory.[105] As expressed in Article 38 of the Vienna Convention on the Law of Treaties (VCLT), a rule of customary international law in a treaty binds not only state parties to the treaty but also third states.[106] Therefore, regardless of being the UN member, the prohibition on the use of force binds all states.

Article 2(4) was adopted in answer to the Second World War[107] in which conventional weapons such as missiles and tanks were used. The question is whether this article is applicable to novel problems such as cyber attacks which did not exist when the UN Charter was adopted in 1945. As already stated, existing international law applies to cyber issues. More specifically, Article 2(4) of the UN Charter is applicable to cyber attacks. This is because, as Gray states, the UN Charter provisions are 'dynamic rather than fixed',[108] which was confirmed by the ICJ in the *Nicaragua* case. The court stated that the UN Charter does not cover 'the whole area of the regulation of the use of force in international relations', and 'customary international law continues to exist alongside' the UN Charter.[109] Afterwards, the court assessed the issue of which actions in the case amounted to the use of force by interpreting customary international law.[110] The assessment of the court led to a new exception to the prohibition of the use of force, which demonstrates that the development of new norms is possible. Gray deduces from the judgment that the court appears to accept the possibility of making a 'dynamic interpretation' of the provisions on the use of force and self-defence, and that they are capable of change by state practice.[111] Therefore, Article 2(4) of the UN Charter can be adopted for novel problems like cyber attacks.

Additionally, in an advisory opinion, the ICJ stated that Articles 2(4), 51 and 42 'apply to any use of force, regardless of the weapons employed'.[112] Therefore, because the means, i.e. conventional weapons, employed in using force have not importance, cyber weapons and thereby cyber attacks can fall in the scope of the article.

4.2. The Notion of 'Threat of Force'

Article 2(4) prohibits 'threat of force' as well as 'use of force'. There is less debate on the meaning of 'threat of force' than 'use of force' in the literature. This is probably because there is no case concerning only 'threat of force' in state practice. Instead, the threat of force is generally preceded by the use of force; in such cases the main focus is always on the use of force issue.[113]

What is understood from 'threat' is pointed out by the ICJ in the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* as: 'The notions of "threat" and "use" of force … stand together in

[104] The ICJ Statute, Article 38(1)(b)

[105] Hugh Thirlway, 'The Sources of International Law' in Malcolm D. Evans (ed), *International Law* (4th edn, OUP 2014) 98-99

[106] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Article 38

[107] Gray, *International Law and the Use of Force* (n 99) 6

[108] ibid 7-8

[109] *Nicaragua* case (n 102) para 176

[110] ibid para 191-195

[111] Gray, *International Law and the Use of Force* (n 99) 7-8

[112] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, p. 226, para 39

[113] Randelzhofer, 'Article 2(4)' (n 98) 124

the sense that if the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal.'[114]

Therefore, if a state is threatened with an action, say a cyber attack, that would constitute a use of force if it was conducted, the threat would be illegal under Article 2(4) of the UN Charter.

Because the threat carries a coercive effect in its essence, it must be communicated explicitly or impliedly to the opposite side. If the threat is not communicated, it does not constitute a 'threat of force' under Article 2(4).[115] Therefore, merely infiltrating a cyber system of a state in order to execute at a later time an action that would constitute a use of force does not constitute 'threat of force' if the targeted state is not aware of the infiltration.[116]

4.3. The Notion of 'Use of Force'

The main problem is whether and when cyber attacks constitute 'force' under Article 2(4) of the UN Charter. Historically, there have been intense debates on the meaning of 'force'. The novel and unique characteristics of cyber attacks will revive these discussions. This section will first shed light on these past debates and then the next part will examine emerging theories on when cyber attacks amount to the use of force.

Historically, developing countries have claimed that the meaning of 'force' in Article 2(4) of the UN Charter encompasses political and economic coercions as well as armed force. In contrast, developed countries, interpreting the article narrowly, have been of the view that what must be understood from the 'force' is only 'armed force'.[117] The prevailing view is that 'force' in the article refers to armed force.[118] It is the complex structure and wording of Article 2(4) which gives rise to this discussion and necessitates interpretation.[119] Article 31 of the VCLT gives guidelines on interpretation techniques. Although the VCLT entered into force after the UN Charter, it applies to the UN Charter as well because it reflects customary international law.[120]

According to Article 31(1) of the VCLT, '[a] treaty shall 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'.[121] The ordinary meaning of 'force' is too broad to encompass economic and political coercion as well.[122] However, pursuant to Article 31(1) of the VCLT, the meaning of the term 'force' in Article 2(4) must be given in its context and in consideration of the UN Charter's object and purpose. The context includes a treaty's preamble.[123] In the UN Charter, 'force' was also referred to as 'armed force' several times. For example, the preamble of the UN Charter states that 'armed force shall not be used, save in the common interest'.[124] Additionally, Articles 41, 44 and 46 make reference to

[114] *Legality of the Threat or Use of Nuclear Weapons* (n 112) para 47

[115] Schmitt, 'Cyber Operations and the *Jus Ad Bellum* Revisited' (n 2) 572

[116] ibid

[117] Randelzhofer, 'Article 2(4)' (n 98) 118

[118] ibid 117

[119] Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 Michigan Law Review 1620, 1624

[120] Georg Ress, 'The Interpretation of the Charter' in Bruno Simma (ed), *The Charter of the United Nations - A Commentary, Volume I* (2nd edn, OUP 2002) 18

[121] VCLT, Article 31(1)

[122] Schachter (n 119) 1624

[123] VCLT, Article 31(2)

[124] The UN Charter, Preamble

only 'armed force'.[125] In particular, Article 44, in connection with the phrase 'to use force', explicitly makes reference to 'to provide armed forces'.[126] Thus, it is understood from the context that 'force' in Article 2(4) refers to 'armed force'. However, from the context, the opposite argument can also be made. Because the term 'armed force' is used expressly alongside the 'force' in the text of the UN Charter, 'force' is not limited to armed force.[127] Thus, the meaning of force derived from the context is not clear.

As stated above, pursuant to Article 31(1) of the VCLT, the meaning of 'force' must also be considered in light of the object and purpose of the UN Charter. The purpose of the UN Charter as stated in the first paragraph of the preamble is 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'.[128] The wars referred to in the purpose of the UN Charter are the First and Second World Wars in which armed force was used. This demonstrates that the drafters had actually wanted to ban war, not all types of coercion.[129]

Also, according to the VCLT, subsequent agreements, subsequent state practice and any relevant rules which concern and interpret the UN Charter must be regarded as the context of the use of force.[130] Thus, subsequent General Assembly resolutions – the Declaration on Friendly Relations,[131] the Definition of Aggression[132] and the Declaration on the Non-Use of Force[133] – which elaborate the UN Charter on the use of force and are generally regarded as customary international law or as interpretations of the UN Charter[134] will help interpret the 'force' contained in Article 2(4) of the UN Charter. Due to the fact that the Definition of Aggression, as stated in its preamble and Article 6, interprets the term 'act of aggression' contained in Article 39 of the UN Charter and should not be considered as affecting the scope of the use of force, it does not help in assessing the meaning of 'force' under Article 2(4).[135]

Declaration on Friendly Relations set out some principles including the prohibition of the threat or use of force and not to intervene in matters relating to the domestic jurisdiction of other countries. While the Declaration prohibits using military force when dealing with the prohibition of the use of force principle, under the principle of not to intervene in domestic affairs of other countries, it states that 'No State may use or encourage the use of economic political or any other type of measures to coerce another State'.[136] This demonstrates that economic and political coercion is considered under the

[125] ibid Articles 41, 44 and 46

[126] Ibid Article 44

[127] Roscini, *Cyber Operations* (n 5) 45

[128] The UN Charter, Preamble

[129] Roscini, *Cyber Operations* (n 5) 45

[130] VCLT, Article 31(3)

[131] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA 2625 (XXV) (24 October 1970) A/RES/25/2625 7

[132] Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974) A/RES/29/3314

[133] Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (18 November 1987) UN Doc A/RES/42/22 7

[134] Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D. Evans (ed) *International Law* (4th edn, OUP 2014) 619

[135] Randelzhofer, 'Article 2(4)' (n 98) 118; Definition of Aggression, Preamble and Article 6

[136] Declaration on Friendly Relations

prohibition of the non-intervention (examined below), not the prohibition of the use of force, and the notion of 'force' is limited to armed force.[137]

The Declaration on the Non-Use of Force also confirms this view. In Article 8 of the Declaration, economic and political coercion is linked to 'the subordination of the exercise of … sovereign rights' and securing 'advantages of any kind' from another state.[138] Although the Declaration prohibits economic and political coercion under the principle of non-intervention, it does not consider it as a use of force.[139]

Finally, according to the VCLT, preparatory works of the treaty are used as supplementary means of interpretation in order to confirm the meaning understood from the interpretation which is made according to Article 31 of the VCLT or to determine the meaning if it is still ambiguous.[140] During the drafting process of the UN Charter, the Brazilian government's proposal to extend the scope of Article 2(4) to economic coercion was rejected.[141] Therefore, the preparatory work of the UN Charter also strengthens the conclusion of the narrow interpretation of 'force'. Consequently, as the prevailing view also suggests, the term 'force' in the use of force provision refers to 'armed force'. Therefore, the endeavour to fit cyber attacks into the scope of Article 2(4) will focus on when cyber attacks amount to 'armed force'.

4.4. The Difference Between 'Use of Force' and 'Armed Attack'

Article 51 of the UN Charter gives a right to self-defence to the victim state in the event of an 'armed attack'.[142] As stated above, the right to self-defence is an exception to the prohibition of the use of force. Therefore, a state can resort to the use of force with the justification of self-defence if an armed attack occurs. However, a generally accepted definition of the term 'armed attack' does not exist.[143]

The ICJ suggests that there is a gap between the use of force and armed attack. In the *Nicaragua* case, the Court identified 'armed attack' as 'most grave forms of the use of force'.[144] An act must be evaluated with reference to its 'scale and effects'. 'A mere frontier incident', for example, does not amount to an 'armed attack' due to its scale and effects.[145] It is understood that if the gravity of the act is higher in accordance with its scale and effects, it will constitute an armed attack rather than a use of force. The Court, however, does not explain further how to measure this gravity of scale and effects although it did give some examples of the use of force and armed attack. To the Court, while 'assistance to rebels in the form of the provision of weapons or logistical or other support' does not constitute an armed attack, it may constitute a use of force.[146] Also, to the Court, while manoeuvring

[137] Randelzhofer, 'Article 2(4)' (n 98) 118

[138] The Declaration on the Non-Use of Force, Article 8

[139] Michael N. Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework' (1999) 37 Colum. J. Transnat'l L. 885, 907-908

[140] VCLT, Article 32

[141] See Randelzhofer, 'Article 2(4)' (n 98) 118

[142] The UN Charter, Article 51

[143] Albrecht Randelzhofer, 'Article 51' in Bruno Simma (ed), *The Charter of the United Nations - A Commentary, Volume I* (2nd edn, OUP 2002) 796

[144] *Nicaragua* case (n 102) para 191. This view is confirmed in *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgement) 6 November 2003, ICJ Reports 2003, p. 161, para 51 7

[145] *Nicaragua* case (n 102) para 195

[146] ibid

military ships near the border[147] or 'mere supply of funds to the contras'[148] does not amount to the use of force, 'arming and training of the *contras*' does.[149]

The importance of this distinction between the use of force and armed attack is that it is 'armed attack' which gives a right to self-defence not 'use of force'. Therefore, cyber attacks that only amount to 'use of force' must reach the level of an 'armed attack' to warrant the right to self-defence. In case such a cyber attack reaches the level of armed attack, the victim state can conduct a cyber attack that reaches the level of the use of force as self-defence, which would otherwise be illegal. As a basic principle of self-defence, in the use of force in self-defence the conditions of necessity and proportionality must be met.[150]

5. Main Approaches for Determining When Cyber Attacks Constitute the Use of Force or Armed Attack

Lack of treaty law and customary international law on the area of cyber attacks led commentators to analogize existing international law governing the use of force. Consequently, three leading approaches to analyse the question of when cyber attacks amount to the use of force or armed attack have emerged: instrument-based, target-based and effects-based. The instrument-based approach suggests that a cyber attack must be conducted with an instrument through which conventional military attacks are conducted. The target-based approach suggests that the target of the cyber attack must be a critical national infrastructure. Finally, the effects-based approach, the most widely supported one among commentators,[151] suggests that consequences of cyber attacks must be akin to consequences produced by kinetic attacks.

5.1. Instrument-based Approach

This approach focuses on the instrument, i.e. the weapon, through which the attack is conducted. In other words, the important factor to analyse the attack is its 'method of delivery'.[152] Under the instrument-based approach, in order for an action to constitute a use of force or armed attack, it must be employed with an instrument similar to which conventional armed forces are employed. Under this approach, therefore, it is unlikely that a cyber attack will ever amount to a use of force because it does not carry physical characteristics of traditional military weaponry.[153] To put it differently, because cyber weapons are elements of the virtual world (for example, a piece of malicious software is composed only from computer codes) and do not carry physical attributes of conventional weapons, cyber attacks do not constitute a use of force.

This approach can be drawn from the text of the UN Charter.[154] Article 39 of the UN Charter gives a right to the Security Council to 'determine the existence of any threat to the peace, breach of the peace,

[147] ibid para 227

[148] ibid para 228

[149] ibid

[150] Gray, *International Law and the Use of Force* (n 99) 120; See for how these conditions can be met in a cyber attack conducted as a response to an armed attack: Carlo Focarelli, 'Self-defence in Cyberspace' in Nicholas Tsagourias and Russel Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar, 2017) 273-275

[151] Hathaway and others (n 31) 847

[152] Michael Gervais, 'Cyber Attacks and the Laws of War' (2012) 30 Berkeley J. Int'l Law 525, 538

[153] Duncan B. Hollis, 'Why States Need an International Law for Information Operations' (2007) 11 Lewis & Clark L. Rev. 1023, 1041

[154] Nguyen (n 7) 1117-1118; Hathaway and others (n 31) 846

or act of aggression' and to take measures to maintain peace.[155] These measures are spelt out in Articles 41 and 42. On the one hand, while Article 41 identifies actions 'not involving the use of armed force' as 'complete or partial interruption … of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations', on the other hand, Article 42 identifies 'armed force' as actions which 'may include demonstrations, blockade, and other operations by air, sea, or land forces'.[156] This demonstrates that armed force is understood by the UN Charter as conventional military force.[157] This conclusion is also confirmed by the Definition of Aggression which defines the term 'aggression' contained in Article 39 as a broader term than 'armed attack' contained in self-defence provision, Article 51. The Definition qualifies invasions, bombardments or blockades as acts of aggression.[158] As seen, these are actions which require traditional military weapons as an instrument.[159] The narrow interpretation employed by the instrument-based approach, has in fact been employed historically by the prevailing view which distinguishes armed force from economic and political force.[160]

The instrument-based approach is lauded because of its simplicity in identifying an action as a use of force or not. Simply, if a traditional military weapon is not used in the attack, it does not constitute a use of force. However, this approach is criticized because it ignores the consequences of cyber attacks. This approach is unable to account for harms given by non-traditional military means, for example, cyber attacks.[161] A cyber attack can diminish electrical power grids, sabotage oil and gas pipelines and cause weapons systems to malfunction. Under this approach, a nation exposed to such cyber attacks cannot seek recourse to the right to self-defence under Article 51, and the Security Council cannot take measures to maintain peace under Article 39 merely because the weapon used was not a bomb but malicious software – a digital code.[162] Consequently, this approach has been rejected by most scholars because it defines 'armed attacks as dangerously outdated'.[163]

In a different view[164] that advocates the instrument-based approach in the literature, cyber attacks amount to the use of force in contrast to the abovementioned argument that cyber attacks do not constitute the use of force under this approach because cyber weapons bear no resemblance to military weapons. This view agrees that use of armed force under Article 2(4) of the UN Charter requires weapons. However, it sees non-military weapons, i.e. cyber weapons, as weapons which fall under Article 2(4) of the UN Charter. It evaluates the weapon according to its consequences. Because malware can also cause damage and death like armed weapons, it must be considered an instrument (weapon) of armed force. Indeed, although there is no binding definition, weapons are defined in

[155] The UN Charter, Article 39

[156] Ibid Articles 41 and 42

[157] Nguyen (n 7) 1117-1118; Hathaway and others (n 31) 846; From a different perspective of the interpretation of article 41, Hollis points out that the phrase 'other means of communication' actually does not only refer to person to person communication (for example, on the Internet) but it can refer also to the technical communication between an operating system of a computer and the infrastructure connected to that system. Thus, almost all cyber attacks could qualify as targeting this latter type of communication, and could be out of the category of 'armed force'. Hollis (n 154) 1041

[158] Definition of Aggression, Article 3

[159] Nguyen (n 7) 1117-1118; Hathaway and others (n 31) 846

[160] Roscini, *Cyber Operations* (n 5) 46-47

[161] Hathaway and others (n 31) 846

[162] Nguyen (n 7) 1119

[163] Hathaway and others (n 31) 846

[164] Roscini, *Cyber Operations* (n 5) 49-52

accordance with their physical consequences. For example, Black's Law Dictionary defines 'weapon' as 'an instrument used or designed to be used to injure or kill someone'.[165]

The issue of whether non-kinetic weapons like cyber weapons fall under Article 2(4) of the UN Charter was examined by Brownlie with the advent of chemical and biological weapons. He questioned whether the use of weapons 'which do not involve any explosive effect with shock waves and heat' contrary to traditional kinetic weapons falls under the prohibition of the use of force.[166] He argued that due to two reasons they also constitute the use of force. First, chemical and biological agencies are usually referred to as 'weapons' and as forms of 'warfare'.[167] Today, also, there is a tendency for some states to include cyber technologies in their military concept or to see cyberspace as cyberwarfare.[168] Secondly, and more importantly, Brownlie reasoned that chemical and biological weapons constitute the use of force because they 'are employed for the destruction of life and property' as traditional kinetic weapons.[169] As stated above, cyber weapons can also cause destruction of life and property. This different view on cyber attacks relies on Brownlie's reasoning also.[170] Consequently, however, under this kind of thought which classifies cyber weapons as armed forces because their consequences are similar to consequences of conventional military weapons, the difference between instrument-based approach and effects-based approach, which already evaluates cyber attacks with reference to their consequences, loses much of its significance.[171]

5.2. Target-based Approach

Target-based approach, also called 'strict liability' approach, assesses cyber attacks in terms of their targets. According to proponents of this approach, if a cyber attack targets the critical infrastructure of a country (not necessarily causing damage, simply penetrating the system is enough), it automatically constitutes a 'use of force' or 'armed attack', which triggers the right to self-defence, including anticipatory self-defence.[172] This approach reflects the significance of critical infrastructures to national security and the damaging consequences, which may result from cyber attacks against them.[173] Sharp argues that although espionage is a lawful act under international law, penetrating the critical infrastructure of a country can signal many activities (such as a pre-attack exploration or a step in the actual cyber attack) beyond mere espionage and be an indication of the hostile intent of the attacker. The technology of computers and the Internet allows the attacker to use force at the speed of light with a keystroke after penetrating the system. In the face of such a dangerous situation, existing law offers the right to anticipatory self-defence.[174] Although its legality is disputed,[175] anticipatory self-defence, as stated by US Secretary of State Daniel Webster in the 1836 *Caroline* case, is such a right, which arises when 'the necessity of that self-defence is instant, overwhelming and leaving no choice of

[165] ibid (Citing Bryan A. Garner (ed), *Black's Law Dictionary* (9th edn, Thomsan West 2009) 1730)

[166] Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 362

[167] ibid

[168] Roscini, *Cyber Operations* (n 5) 50

[169] Brownlie (n 166) 362

[170] Roscini, *Cyber Operations* (n 5) 49-52

[171] ibid 50

[172] Walter Gary Sharp, *Cyberspace and the Use of Force* (Aegis Research Corporation 1999) 128-132; Eric Talbot Jensen 'Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense' (2002) 38 Stan. J. Int'l L. 207, 228-231

[173] Nguyen (n 7) 1120

[174] Sharp (n 172) 128-130

[175] See Gray, 'The Use of Force and the International Legal Order' (n 134) 630

means, and no moment for deliberation'.[176] According to Sharp, therefore, the ability to use force or conduct an armed attack at the speed of light demonstrates that victim states should have the right to resort to anticipatory self-defence. This right, however, applies presumptively when critical infrastructure systems (not all government computer systems) which are so vital to the country, are targeted.[177] Also, as contained in the nature of self-defence, any use of force in anticipatory self-defence against these penetrations must be necessary and proportional.[178]

Which infrastructures are so vital or critical can be identified differently by states. For example, the US Congress in the National Cybersecurity and Critical Infrastructure Protection Act of 2014 designates critical infrastructures under 17 sectors as: chemical; commercial facilities; communications; critical manufacturing; dams; defense industrial Base; emergency services; energy; financial services; food and agriculture; government facilities; healthcare and public health; information technology; nuclear reactors, materials, and waste; transportation systems; water and wastewater systems; and finally such other sectors as the Secretary determines appropriate.[179] According to the Centre for the Protection of National Infrastructure, a governmental agency of the UK, there are 13 critical national infrastructure sectors in the UK: 'chemicals, civil nuclear communications, defence, emergency services, energy, finance, food, government, health, space, transport and water'.[180]

Like the instrument-based approach, the target-based approach is easy to apply to cases. If a cyber attack targets a critical infrastructure system, it will easily be classified as justifying the right to self-defence.[181] This approach has been praised because it is an effective deterrent since, given that even penetration of critical infrastructure will constitute an armed attack, the attacker, knowing that any attempt to attack it will warrant a response in self-defence by the victim state, may be inhibited from the action effectively.[182] However this approach has been criticized because it is 'dangerously overbroad'.[183] It classifies mere penetration, including cyber espionage, as an armed attack, or in other words, an act of war which warrants self-defence with conventional military weapons. Therefore, it can easily escalate the situation between states.[184] Like the instrument based-approach, this approach ignores the consequences of cyber attacks.

It seems unlikely that states will accede to the target-based approach because espionage, which gives the right to self-defence to the victim state under this approach, has been seen historically as permitted in state practice.[185]

5.3. Effects-based Approach

Effects-based approach also referred to as the consequence-based or consequentiality approach, assesses the cyber attack in accordance with its consequences. If the gravity of consequences caused by

[176] Randelzhofer, 'Article 51' (n 143) 803 (Citing the quotation from the *Caroline* case)

[177] Sharp (n 172) 129

[178] ibid 129

[179] National Cybersecurity and Critical Infrastructure Protection Act of 2014, 113th Congress, 2d Session, H.R.3696 (29 July 2014), Sec. 227

[180] Centre for the Protection of National Infrastructure, 'Critical National Infrastructure' <https://www.cpni.gov.uk/critical-national-infrastructure-0> accessed 21 August 2017

[181] Nguyen (n 7) 1120

[182] Jensen (n 172) 228

[183] Nguyen (n 7) 1120

[184] Matthew J. Sklerov, 'Solving the Dilemma of State of Responses to Cyber Attacks: A Justification for the Use of Force Active Defenses Against States Who Neglect Their Duty to Prevent' (2009) 201 Mil. L. Rev. 1, 58

[185] Nguyen (n 7) 1120-1121

a cyber attack is equivalent to the gravity of consequences caused by a kinetic attack, then the cyber attack constitutes 'use of force' or 'armed attack'.

Dinstein advocates the effects-based approach in the following way:

> From a legal perspective, there is no reason to differentiate between kinetic and electronic means of attack. A premeditated destructive CNA can qualify as an armed attack just as much as a kinetic attack bringing about the same-or similar-results. The crux of the matter is not the medium at hand (a computer server in lieu of, say, an artillery battery), but the violent consequences of the action taken. If there is a cause and effect chain between the CNA and these violent consequences, it is immaterial that they were produced by high rather than low technology.[186]

Schmitt, the best-known proponent of this approach, sees applying the instrument-based approach as 'prescriptive short-hand' to determine the position of cyber attacks in international law.[187] He acknowledges that the type of instrument – diplomatic, economic or military – has been historically used as the determinative factor for whether the action constituted the use of force or not.[188] The instrument-based approach, therefore, addresses a distinct and limited category (armed forces which directly cause injury, death or damage to property on the one hand, and economic and political coercion on the other). However, the use of force can emerge in other forms which do not result in physical damage or result indirectly.[189] Schmitt gives the example of the act of arming and training the contras which is categorized as a use of force in the *Nicaragua* case.[190] The threshold of the use of force, therefore, must lie somewhere between 'economic coercion' and 'use of armed force'.[191]

Consequently, to continue to evaluate cyber attacks in the existing framework of international law, it is necessary to shift this cognitive instrument-based approach since, like the use of force, cyber attacks may result in non-physical destructive effects as well as physical destructive effects. The best way to start evaluating cyber attacks is to look at the fundamental motivation of the traditionally accepted instrument-based approach, which is a consequence. In this respect, to evaluate cyber attacks, Schmitt offers a framework, which helps differentiate economic and political coercion from armed force.[192] This framework, which he revisited in an article over a decade later, consists of seven criteria.[193] These are factors which will likely influence states when they assess whether the cyber attack in question amounted to the use of force or not.[194] These seven criteria are:

1) Severity: While attacks resulting in physical damage to property or individuals alone will amount to a use of force, those giving minor inconvenience will not. Between these extremes, those affecting critical national interests more will be deemed more likely by states as a use of force. In this respect, 'scale, scope and duration' of consequences will play an important role in the assessment of severity. Severity, obviously, is the most important factor of the framework.

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[186] Yoram Dinstein, 'Computer Network Attacks and Self-Defense' in Michael N. Schmitt and Brian T. O'Donnell (eds), *Computer Network Attack and International Law* (Int'l Law Stud - 76, US Naval War College 2002) 103

[187] Schmitt, 'Computer Network Attack' (n 139) 913

[188] ibid 909

[189] ibid 913-914

[190] ibid; Nicaragua case, para 228

[191] Schmitt, 'Computer Network Attack' (n 139) 914

[192] ibid 914-915

[193] Schmitt, 'Cyber Operations and the *Jus Ad Bellum* Revisited' (n 2) 576-577

[194] ibid 575

2) Immediacy: States are more concerned about immediate consequences. For cases in which consequences emerge later, states find more opportunity to enter into the peaceful settlement of disputes.

3) Directness: If the chain of causation between the initial act and consequences is weak, states tend not to hold the attacker responsible. For example, while in economic coercion, which is not considered as the use of force, consequences are determined by factors such as market forces or access to markets which are connected to the initial act indirectly, in armed attacks results are directly connected to the initial act. Deaths or damages to property, for example, are a direct result of an explosion.

4) Invasiveness: The security of a targeted system makes the attacker focus his attention much more on penetration of the system. While in economic coercion, the act (e.g. cutting off trade with the target state) does not include any intrusion, in combat the act (e.g. crossing the border of the target state, which violates territorial sovereignty) includes intrusion. The invasiveness factor should be more carefully applied in the cyber domain. Although cyber exploitation (i.e. cyber espionage) is highly invasive since it requires intrusion into the system, it does not constitute the use of force.

5) Measurability: In cases in which consequences are identifiable or quantifiable, the attack is more likely deemed as the use of force. For example, in economic coercion, even if consequences (e.g. economic opportunity costs) suffer a great deal, they are not identifiable or quantifiable. In a military attack, however, even if consequences (e.g. one death, two destroyed buildings, etc) are minor, they are easily quantified and identified.

6) Presumptive legitimacy: A principle of international law, which can be drawn from *the Case of the S.S. "Lotus"*,[195] is that acts which are not prohibited explicitly are permitted. Therefore, because activities such as 'propaganda, psychological warfare or espionage' are not forbidden, they are presumptively legitimate when they are conducted through cyber means.

7) Responsibility: The law of state responsibility deals with the issue of when a state can be held responsible for an act. The closer the connection between the state and the act, the more probable other states will consider the act as a 'use of force' since acts of states carry more risk to international security.[196]

In sum, these criteria suggest that the more a cyber attack is severe, immediate, direct, invasive, measurable, not presumptively legitimate and attributable to a state, the more likely that it will be deemed as the use of force.

The Tallinn Manual 2.0 (whose preparation was led by Schmitt) also approves Schmitt's criteria for evaluating cyber attacks in the commentary of Rule 69 and adds one more factor, 'military character', to the criteria.[197] According to the 'military character' factor, if a cyber attack is conducted as a military operation, it is more likely that the cyber attack in question will be deemed as a use of force.[198] The Tallinn Manual 2.0 emphasizes that these criteria are not formal legal criteria. They are merely factors, which states would take into account in evaluation of a cyber attack[199] and are not exhaustive.[200]

The explanation made in the severity criterion that the more critical national interests are affected, the more likely states will deem cyber attacks as the use of force has been criticized. Ziolkowski argues

[195] *The Case of the S.S. "Lotus" (France v Turkey)* (Judgement) (7 September 1927) PCIJ Rep Series A No 10, pages 18-19

[196] Schmitt, 'Cyber Operations and the *Jus Ad Bellum* Revisited' (n 2) 576-577

[197] Tallinn Manual 2.0 (n 2) Commentary to Rule 69, para 8-9

[198] ibid Commentary to Rule 69, para 9

[199] ibid

[200] ibid Commentary to Rule 69, para 10

that Article 2(4) does not protect the national interests, which may include economic interests of a country, but rather physical security of a country and the population.[201] However, it is the national interests which make states consent or reject international legal regimes.[202] Also, although security reasons dominate the use of force regime, they are not exclusive.[203] Article 2 of the UN Charter which, among other things, regulates the use of force, states that States will act in pursuit of the purposes set out in Article 1.[204] These purposes are not only security issues but are, among other things, 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' and 'to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character'.[205] Also, it is the intensity of the national interest rather than the nature of it that matters according to the approach taken in the severity criterion.[206]

It is easy to determine a cyber attack resulting in deaths, injuries or damage to property as a use of force by way of analogy. However, other cases, which do not result in deaths, injuries or physical damage, are not so clear.[207] A benefit of these criteria is that they also help assess these less clear cases which do not result in physical destruction but may still constitute the use of force.

Schmitt applies these seven criteria to find out whether the Estonian cyber attacks, which is one of these less clear cases since it did not result in deaths, injury or physical damage, amounted to a use of force or not. He states that in the Estonian case the DDoS attacks severely damaged government functions and services. They cut public access to these services and caused economic turmoil. They also affected Estonian daily life negatively. They were immediate and, in terms of causing a lack of confidence in the government, were long-term and widespread. The attacks were direct regarding the interference in the distribution system of public services. They were invasive since they targeted some systems which were supposed to be secure. However, they do not meet the measurability criteria since they were not quantifiable because they were denial of service but not data destruction. The attacks were beyond mere political and economic coercion, which cannot be considered as a use of force and presumptively legitimate, because they intentionally targeted and disrupted government functions. Taking together these DDoS attacks as a single attack, they arguably reached the level of the use of force, and if it could be attributed to Russia under international law, the international community would deem it as a violation of the use of force prohibition.[208]

Nguyen, who criticizes the effects-based approach and these criteria, finds Schmitt's criteria 'malleable' because they can lead the Estonian case to be framed differently. To prove his claim, he applies his own interpretation of these criteria to the Estonian cyber attacks and finds that they did not constitute a use of force contrary to Schmitt's finding.[209] However, Schmitt admits that his criteria are 'imprecise', thereby giving states a grey area to determine a cyber attack as a use of force or not. This grey area issue, however, will probably be resolved in the future with state practice in favour of

[201] Katharina Ziolkowski '*Ius ad bellum* in Cyberspace – Some Thoughts on the "Schmitt-Criteria" for Use of Force' in C. Czosseck, R. Ottis and K. Ziolkowski (eds), *2012 4th International Conference on Cyber Conflict* (NATO CCD COE 2012) 302

[202] Michael N. Schmitt, 'The 'Use of Force' in Cyberspace: A Reply to Dr Ziolkowski' in C. Czosseck, R. Ottis and K. Ziolkowski (eds), *2012 4th International Conference on Cyber Conflict* (NATO CCD COE 2012) 316

[203] ibid

[204] ibid; The UN Charter, Article 2

[205] ibid; The UN Charter, Articles 1(2) and (3)

[206] ibid

[207] Tallinn Manual 2.0 (n 2) Commentary to Rule 69, para 8

[208] Schmitt, 'Cyber Operations and the *Jus Ad Bellum* Revisited' (n 2) 577

[209] Nguyen (n 7) 1123-1124

determining these attacks as uses of force because of an ever-increasing intensity and severity of cyber attacks.[210]

As for 'armed attack' contained in Article 51 of the UN Charter, Schmitt argues that the term 'armed' clearly implies a kinetic military force in contrast to the phrase 'use of force'. The feature of not necessarily being kinetic gives an interpretive latitude to the use of force. The seven criteria were a result of this latitude. To apply effects-based approach to resolve whether a cyber attack constitutes an armed attack or not, consequences which the term 'armed' imply must be taken into account. In essence, an armed operation causes death, injury or physical damage to property. Hence, by way of analogy, in order for a cyber attack to constitute an armed attack, its effects must be physically destructive like the effects of an armed operation.[211]

However, the experts who prepared the Tallinn Manual 2.0 were not on the same page on this issue. According to some experts, 'it is not the nature (injurious or destructive) of the consequences that matters, but rather the extent of the ensuing effects'.[212] This division is illustrated in a hypothetical cyber attack which targets a major international stock exchange and consequently causes the market to crash. Those of the view that cyber attacks must be physically destructive in order to constitute an armed attack are not satisfied that the mere financial loss in this scenario is enough to qualify the attack as an armed attack. Others who look for the ensuing effects of the cyber attack, however, are of the opinion that such a catastrophic effect which caused the market to crash is enough to qualify this cyber attack as an armed attack.[213]

To distinguish cyber attacks amounting to armed attack from ones amounting to use of force, the Tallinn Manual 2.0 applies 'scale and effects' test. Rule 71 (concerning self-defence) states that, 'Whether a cyber operation constitutes an armed attack depends on its scale and effects'.[214] The Tallinn Manual 2.0 draws its test from the *Nicaragua* case.[215] However, because the parameters of the test of scale and effects are not explained further in the *Nicaragua* case, it is not settled the level of gravity needed for an attack to reach the threshold of an armed attack by surpassing the threshold of the use of force. As a consequence of this unsettled issue, while all members of the International Group of Experts who prepared the Tallinn Manual 2.0 found the Stuxnet cyber attack which resulted in physical destruction of nuclear centrifuges as a use of force, they were divided on whether it amounted to an armed attack or not.[216]

Dinstein gives some examples of cyber attacks which are severe enough to reach the level of armed attack as:

> Fatalities caused by loss of computer-controlled life-support systems; an extensive power grid outage (electricity blackout) creating considerable deleterious repercussions; a shutdown of computers controlling waterworks and dams, generating thereby floods of inhabited areas; deadly crashes deliberately engineered (e.g., through misinformation fed into aircraft computers), etc.[217]

[210] Schmitt, 'Cyber Operations and the *Jus Ad Bellum* Revisited' (n 2) 578

[211] ibid 588

[212] Tallinn Manual 2.0 (n 2) Commentary to Rule 71, para 12

[213] ibid

[214] ibid Rule 71

[215] ibid Commentary to Rule 71, para 7; Nicaragua, para 195

[216] ibid Commentary to Rule 71, para 10

[217] Dinstein (n 186) 105

Although proponents of the effects-based approach commonly analyse cyber attacks with reference to consequences, they are divided on the issue of which consequences will qualify a cyber attack as a use of force or armed attack. In one of the different versions of the effects-based approach, some commentators suggested that only cyber attacks that produce injury, death or damage to property will be considered as the use of force which may reach the threshold of the armed attack that triggers the right to self-defense.[218] Under this version, cyber attacks, which are devastating but not physically or materially damaging, will constitute neither the use of force nor armed attack. As mentioned above, some experts who prepared the Tallinn Manual 2.0 were also of this view only for the part of the armed attack. In contrast to this version, according to Sharp and other experts who prepared the manual, devastating cyber attacks which result in *physical or non-physical* consequences may constitute the use of force that may produce consequences severe enough to reach the level of an armed attack that triggers the right to self-defense.[219]

Alternatively, some commentators, even though they suggest that injury, death or damage to property are only consequences that will qualify a cyber attack as a use of force or armed attack, claim that cyber attacks not physically or materially damaging but that significantly disrupt critical national infrastructures also may be regarded as the use of force or armed attack.[220]

The preferred framework of this article is based on the criteria of Schmitt and the Tallinn Manual. In the absence of a treaty and customary international law on the issue, these criteria are the most appropriate way to reflect the existing international law governing the use of force. There may be grey areas that allow states to consider a non-physically destructive cyber attack either as a use of force or not. However, this is because the existing law it reflects is established when the cyber technology does not exist and falls short in determining cyber attacks.

Contrary to strict effects-based approaches that deem only cyber attacks resulting in injury, death or physical damage as the use of force, a benefit of these criteria is that it takes into account non-physical destructive effects. Due to technology, some non-physically destructive effects of cyber attacks may be more devastating than physically destructive effects of kinetic attacks. Consider, for example, a kinetic attack that demolishes the building of a stock exchange and a cyber attack which targets the computer system of that stock exchange and consequently paralyzes the economy of a nation. Non-physical effects of the latter are much devastated than the physical effects of the former. Under these criteria, the latter will constitute a use of force.

As suggested by some commentators, it is true that critical national infrastructures are of the utmost importance to countries and those cyber attacks that significantly disrupt them are severe enough for countries to consider these attacks as the use of force. However, it is unnecessary to make such a restriction (critical infrastructure or not), and critical infrastructures can be categorized very widely since it is at states' discretion to determine which infrastructure is critical or not, which means it may lose its meaning by being determined so broadly. The severity criterion among the abovementioned criteria is comprehensive enough to cover these attacks as the use of force, and not so restrictive as to exclude other consequences which may be brought about by cyber attacks which target objects other than critical national infrastructures but still affect the national interests. In particular, DDoS attacks which can target many institutions without discriminating targets whether they are critical national infrastructure or not can nevertheless affect the critical national interests.

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[218] Daniel B. Silver, 'Computer Network Attack as a Use of Force under Article 2(4) of the United Nations Charter' in Michael N. Schmitt and Brian T. O'Donnell (eds), *Computer Network Attack and International Law* (Int'l Law Stud - 76, US Naval War College 2002) 85; Russel Buchan, 'Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions?' (2012) 17 J Conflict & Security Law 211, 217 and 219; Dinniss (n 21) 74; Hathaway and others (n 31) 848

[219] Sharp (n 172) 134

[220] Katharina Ziolkowski, 'Computer Network Operations and the Law of Armed Conflict' (2010) 49 Mil. L. & L. War Rev. 47, 74; Nicholas Tsagourias, 'Cyber Attacks, Self-defence and the Problem of Attribution' (2012) 17 J Conflict & Security Law 229, 231; Roscini, *Cyber Operations* (n 5) 52-63 and 74-75

Although cyber attacks which significantly disrupt critical national infrastructures but do not result in physical consequences may amount to a use of force, they will not amount to an armed attack. As an analogy, as stated above, since it is death, injury and damage to property that are the consequences of an armed operation, only cyber attacks resulting in such will be qualified as an armed attack. It is existing international law which does not allow these cyber attacks to be deemed as armed attacks. However, as Schmitt stated, in the face of ever-developing cyber technology, state practice will probably emerge that counts devastating cyber attacks resulting either in non-physical or physical damage as armed attacks which justify the use of force in self-defense.[221]

6. Cyber Attacks Short of the Use of Force: The Prohibition of Non-Intervention

Cyber attacks not amounting to the use of force or armed attack may still be unlawful since they may fall into the scope of the prohibition of non-intervention. The principle of non-intervention 'is part and parcel of customary international law'[222] and prohibits 'all States or groups of States to intervene directly or indirectly in internal or external affairs of other States'.[223] The principle encompasses, *a fortiori*, the prohibition of the use of force.[224] The ICJ states that 'a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely', such as 'political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.'[225] Similarly, the Declaration on Friendly Relations, whose principles on non-intervention are customary international law,[226] states that: 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'[227] As seen, there are two conditions in order for an act to constitute an unlawful intervention: first, the act must be coercive, and second, the injured state must be coerced on matters which it has a right to decide freely arising from sovereign rights.

Buchan argues that these two conditions were met in the Estonian cyber attacks. Although he does not consider that the Estonian cyber attack amounted to a use of force since it did not result in death, injury or damage to property, contrary to the abovementioned view of Schmitt, he considers it as unlawful under the principle of non-intervention. He argues that DDoS attacks regarding their severity and duration were enough to reach coercion. Coercion was intended to force the Estonian government to relocate the Soviet war memorial. Obviously, making decisions on relocation of a statue or memorial are among sovereign rights, that is, the free choices of any government. Consequently, therefore, since the cyber attack coerced Estonia to change its policy on which it has a right to decide freely, the cyber attack was a violation of sovereignty and also a violation of the prohibition of non-intervention.[228]

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[221] Michael N. Schmitt, '"Attack" as a Term of Art in International Law: The Cyber Operations Context' in C. Czosseck, R. Ottis and K. Ziolkowski (eds), *2012 4th International Conference on Cyber Conflict* (NATO CCD COE 2012) 288-289

[222] *Nicaragua* case (n 102) para 202

[223] ibid para 205

[224] ibid para 205; Declaration on Friendly Relations

[225] *Nicaragua* case (n 102) para 205

[226] ibid

[227] Declaration on Friendly Relations; Declaration of Friendly Relations repeats the basic principles of Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res XX (21 December 1965) A/RES/20/2131; The principle of non-intervention is reaffirmed in Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res 36/103 (9 December 1981) A/RES/36/103 7

[228] Buchan (n 218) 226-227

As stated above, the intervention is prohibited both in internal and external affairs of other states. The Tallinn Manual 2.0 gives examples of these two situations. If a cyber attack is conducted to change electronic ballots in an election held in another country and consequently manipulates the election results, it will be an unlawful intervention in the internal affairs of a state.[229] However, in this example, although the majority of experts agree that the state is coerced even if the state is not aware of the cyber attack that allowed a candidate to gain a seat without enough votes to deserve it, a minority do not accept it as coercion as they note that there must be an element of pressure, that is, the state must know that it was compelled to act contrary to its will.[230] In terms of intervening in external affairs, the Manual gives the example that if a cyber attack is conducted to change the electronic communications between a state's Ministry of Foreign Affairs and its negotiators who are in diplomatic talks with another state to compel the former state to abandon talks, it will be an unlawful intervention in the external affairs of a state.[231] However, according to the minority view that argues that a compelled state must know it was compelled, this example will also not constitute intervention.[232]

Moreover, as stated above, the intervention is prohibited whether it is conducted directly or indirectly. The Declaration on Friendly Relations, under the principle of non-intervention, prohibits states from becoming involved in acts such as assisting, fomenting, inciting or tolerating armed activities that aim to overthrow the regime of another State or interfere in civil strife in that State.[233] The Tallinn Manual 2.0 states that intervening indirectly can occur in the cyber context as well. For example, supplying cyber weapons to a non-state actor who is involved in an insurgency against a government will breach the prohibition of non-intervention.[234] Furthermore, providing cyber weapons and training to an organised armed group that conducts cyber attacks against a country will constitute a use of force as long as that assistance enables the group's cyber attacks to amount to a use of force, given that arming and training the contras constituted a use of force in the *Nicaragua* case.[235]

As stated above, the remedy for a victim state exposed to a cyber attack which constitutes an armed attack is to use force as self-defence which would otherwise be illegal. As for a state exposed to a cyber attack which constitutes an unlawful use of force or an unlawful intervention, the remedy is countermeasures. According to the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (2001) (Articles on State Responsibility), a state exposed to an internationally wrongful act can take countermeasures against the responsible state to induce that state to abide by its obligations.[236] Countermeasures cannot be taken in a way that will cause the injured state to refrain from the obligation of not to use force under the UN Charter.[237] That is, the countermeasure taken by the injured state must be under the threshold of the use of force. Other conditions set out in Articles on State Responsibility such as proportionality or necessity must also be met.[238]

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[229] Tallinn Manual 2.0 (n 2) Commentary to Rule 66, para 2

[230] ibid Commentary to Rule 66, para 25

[231] ibid Commentary to Rule 66, para 16

[232] ibid Commentary to Rule 66, paras 16 and 25

[233] Declaration on Friendly Relations

[234] Tallinn Manual 2.0 (n 2) Commentary to Rule 66, para 23

[235] ibid Commentary to Rule 66, para 4; *Nicaragua* case (n 102) para 228

[236] ILC, 'Draft articles on responsibility of States for internationally wrongful acts', A/CN.4/SER.A/2001/Add.1, Yearbook of the ILC, Volume II, Part Two (2001) (Articles on State Responsibility) Article 49(1)

[237] ibid Article 50(1)(a)

[238] See Articles on State Responsibility, Part 3, Chapter 2; See for how these conditions can be met when conducting a cyber attack as a countermeasure: Michael N. Schmitt '"Below the Threshold" Cyber Operations: The Countermeasures Response Option and International Law' (2014) 54 Virginia Journal of International Law 697, 714-730

7. State Responsibility and Attribution

As stated above, Article 2(4) of the UN Charter which prohibits the use of force and the norm of customary international law which prohibits intervention in internal or external affairs of other states concern relations between states. Therefore, an act must be attributed to a state in order to constitute these unlawful acts.

Attribution is more challenging in the cyber domain than in the physical domain. There are three characteristics of cyberspace which make assigning a cyber attack to an author difficult.[239] First, attackers can easily hide their identity in cyberspace and remain anonymous. Second, in multistage cyber attacks, thousands of computers that belong to different people in different countries, which are hacked before the attack starts, may be used in the attack. Third, the quickness of operations in the cyber domain.[240] These features of cyberspace show that it is insufficient only to succeed in tracking the source of the attack, i.e. the computer from which the attack originated.[241] The real mastermind behind the attack may be operating in a different location, even in another country.

Although there is a difficulty in identifying the perpetrator of an attack, progress has been made in technical attribution.[242] A digital forensic investigation can produce similar substantial results as a conventional criminal forensic investigation. Just as certain criminals in the physical domain use particular types of weapons and ways of stalking victims or methods to conduct their activities secretly, certain hackers in the digital domain use particular cyber weapons, internet platforms or ways of spoofing.[243] These technical clues play a vital role in the investigation of a cyber attack.[244]

Assuming that this technical challenge is tackled and the attacker is identified, then the question, which arises, is whether the action of this attacker can be legally attributed to a state and thus that state can be held responsible. The situations in which a state is held responsible are set out in the ILC's Articles on State Responsibility. According to Articles 4 and 5, a state is responsible for acts conducted by its organs or by its persons and entities which although are not organs are nonetheless 'empowered by the law of that state to exercise governmental authority' provided that they act in that capacity in the particular case.[245] In this respect, states will be responsible for acts conducted by cyber units of their armies or intelligence agencies.[246] For example, the UK will be responsible for acts conducted by the Joint Forces Cyber Group[247] of its army or by the National Cyber Security Centre[248] of its intelligence service.

As understood from the ICJ judgments, states are not only responsible for acts conducted by *de jure* organs but also *de facto* organs. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide* case), the ICJ, by citing the court's

[239] Nicholas Tsagourias, 'Cyber Attacks, Self-defence and the Problem of Attribution' (n 220) 233

[240] ibid

[241] ibid

[242] Peter Margulies, 'Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility' (2013) 14 Melb. J. Int'l L. 469, 504

[243] ibid

[244] ibid

[245] Articles on State Responsibility, Articles 4 and 5

[246] Roscini, *Cyber Operations* (n 5) 34; Tallinn Manual 2.0 (n 2) Commentary to Rule 15, para 1

[247] The British Army Website, 'CRHQ (Royal Signals)' <http://www.army.mod.uk/signals/25296.aspx> accessed 14 August 2017

[248] National Cyber Security Centre's Website, 'About Us' <https://www.ncsc.gov.uk/about-us> accessed 21 August 2017

views in the *Nicaragua* case, stated that if an entity is acting in 'complete dependence' of a state, that state will be responsible for acts conducted by that entity even though that entity is not established according to the internal law of the state.[249]

According to Article 7 of Articles on State Responsibility, a state is responsible for acts conducted by organs of the state or persons and entities empowered by the state even if they exceed their authority or act contrary to instructions when they act in their official capacity.[250] Thus, if a member in the cyber unit of an army conducts an unlawful cyber operation without being instructed so, the state will still be responsible against the victim state.[251] However, since the attacker must be in his official capacity when conducting the act, purely private acts such as exploitation of access to a cyber infrastructure to conduct criminal activity for private gains cannot be attributed to the state.[252]

Traditionally, the usage of governmental assets such as tanks and warships in a conflict has been an almost irrefutable indication that the state that owns these assets is responsible for acts emanating from them since no person could access them other than state organs.[253] The cyber realm, however, has changed this paradigm. Hackers can easily access governmental cyber infrastructures and conduct operations from them.[254] Furthermore, by 'spoofing', such as impersonating some entities or IP addresses of entities, real attackers can create the impression that an innocent state or an organisation is behind the attack.[255] It appears that due to these concerns, among its recommendations on how to apply international law in cyberspace, the abovementioned UN GGE Report states that:

> [T]he indication that an ICT activity was launched or otherwise originates from the territory or the ICT infrastructure of a State may be insufficient in itself to attribute the activity to that State. The Group noted that the accusations of organizing and implementing wrongful acts brought against States should be substantiated.[256]

According to Article 8 of Articles on State Responsibility, a state is not only responsible for acts conducted by its organs or persons and entities that are empowered by the governmental authority but also responsible for acts conducted by a person or group of persons when they act 'on the instructions of, or under the direction or control of' that state.[257] In this Article, the ILC follows the approach of the ICJ in the *Nicaragua* case.[258] The court decided that in order to hold the US responsible for acts conducted by the contra rebels, it must be proved that the US 'had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed'.[259] The court found 'the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation'[260] was insufficient to

[249] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, paras 391-393; *Nicaragua* case (n 102) paras 109 -110

[250] Articles on State Responsibility, Article 7

[251] Tallinn Manual 2.0 (n 2) Commentary to Rule 15, para 6

[252] ibid Commentary to Rule 15, para 7

[253] ibid Commentary to Rule 15, para 13

[254] ibid

[255] ibid Commentary to Rule 15, para 15

[256] The GGE Report (n 62) para 28 (f)

[257] Articles on State Responsibility, Article 8

[258] James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm D. Evans (ed) *International Law* (4th edn, OUP 2014) 456

[259] *Nicaragua* case (n 102) para 115 (emphasis added)

[260] ibid

show the effective control of the US over the contras. Under the effective control test of the ICJ, for example, supplying malware to a non-state actor will not make the supplier state responsible for operations conducted by the non-state actor.[261] However, this does not mean that the state is not violating international law.[262] This act of the state (supplying malware) *per se* will violate the prohibition of non-intervention as stated above.

However, in the *Prosecutor v Duško Tadić* case (*Tadić* case), the International Criminal Tribunal for the former Yugoslavia (ICTY) did not find the effective control test of the ICJ 'persuasive' on the grounds that the test does 'not seem to be consonant with the logic of the law of state responsibility'[263] and is 'at variance with judicial and state practice'.[264] It therefore adopted a less restrictive test, the overall control test.[265] The ICTY argued that the situation for individuals on the one hand, and organised and hierarchically structured groups on the other, must be distinguished.[266] Overall control over such groups is sufficient to attribute their acts to the state.[267] However, overall control over individuals is not sufficient; a state must have 'issued specific instruction' to the individual to be held responsible.[268] A 'State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity'.[269] In addition, the state does not have to 'issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law'.[270] Therefore, a state has overall control over a group when that state has a 'general influence' on the group and its activities.[271] For example, if a state provides technical and other support to and organizes the activities of a hacktivist group, that state will be responsible for a cyber attack conducted by the hacktivist group even if the involvement of the state is not proven for the specific act.[272]

The ICJ, however, reaffirmed its effective control test and criticized the overall control test of the ICTY in the *Genocide* case.[273] The court argued that the ICTY's finding broadens 'the scope of State responsibility' too much and Article 8 of Articles on State Responsibility which states that a state is responsible if it gives instructions, provides directions or exercises effective control, reflects customary international law.[274] Consequently, the court found that 'the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility'.[275]

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[261] Tallinn Manual 2.0 (n 2) Commentary to Rule 17, para 8

[262] ibid Commentary to Rule 17, para 9

[263] *Prosecutor v Duško Tadić*, Appeals Chamber Judgement, ICTY, Case No IT-94-1-A, 15 July 1999, para 116

[264] ibid para 124

[265] ibid paras 115-137

[266] ibid para 120

[267] ibid

[268] ibid para 118

[269] ibid para 131

[270] ibid para 130

[271] Tsagourias, 'Cyber Attacks, Self-defence and the Problem of Attribution' (n 220) 238.

[272] ibid.

[273] *Genocide* case (n 249) paras 402-406

[274] ibid para 406.

[275] ibid.

It is argued that the overall control test, which is more flexible and less restrictive, is more suitable for cyber attacks given the technical challenges to identify the perpetrator in cyber attacks and should be adopted 'as part of a future international regime' for cyber issues.[276] Under the effective control test, which is more restrictive, victim states may not receive justice even in a worst-case scenario.[277] Under the overall control test, for example, if only the Russian incitement behind the Estonian DDoS attacks was proven, it would be sufficient to hold Russia responsible.[278]

However, with the same reasoning, Roscini argues that due to the clandestine nature and identification problems of cyber attacks, the effective control test instead of the overall control test should be adopted, as it would prevent states being 'frivolously and maliciously' accused of cyber attacks.[279] Also, Roscini argues that the ICTY applies the overall control test to organized and hierarchically structured groups but such cyber groups do not exist yet (groups such as 'RBN' (Russian Business Network) and 'Anonymous', for example, are unorganized and non-hierarchical). Therefore, the discrepancy between the arguments of the ICTY and the ICJ do not have a bearing on cyber attacks; the effective control test will continue to apply to them.[280]

According to Article 11 of Articles on State Responsibility, a state is also responsible for acts which it acknowledges and adopts.[281] However, it is unlikely that a state will acknowledge and adopt a cyber operation since it is exactly the advantage of cyber attacks for their authors to stay anonymous and thus to escape from responsibility by hiding behind the principle of plausible deniability.[282]

Finally, a state is also responsible, as stated in the *Corfu Channel* case, when it breaches its 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[283] This obligation is articulated as the 'due diligence principle' in the Tallinn Manual 2.0.[284] If a hacktivist group conducts a cyber attack by using the cyber infrastructure or computer system that belongs to or is located in the territory of a state, that state will be in breach of the due diligence principle if it does not take 'necessary or reasonable' steps to prevent such an attack (for example, by cutting the internet access of the group).[285]

However, in such cases, the cyber attack conducted by a non-state group is not 'imputed' to the state. In other words, the state is not responsible for the specific cyber attack but is responsible for breaching the due diligence principle.[286] Therefore, because that cyber attack is not attributed to the state, that cyber attack will not constitute a use of force. On the other hand, other cyber attacks conducted by non-state actors, which have already been explored in this section, will constitute the use of force because they are attributed to a state.

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[276] Scott J Shackelford and Richard B Andres, 'State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem' (2011) 42 Geo J Int'l L 971, 987-988.

[277] ibid 993

[278] ibid 992.

[279] Roscini, *Cyber Operations* (n 5) 38.

[280] ibid

[281] Articles on State Responsibility, Article 11

[282] Roscini, *Cyber Operations* (n 5) 39-40

[283] *Corfu Channel case (UK v Albania)* Judgment, 9 April 1949, ICJ Reports 1949, p. 4, page 22

[284] See the Tallinn Manual 2.0 (n 2) Rules 6 and 7

[285] Roscini, *Cyber Operations* (n 5) 40

[286] ibid; Schmitt '"Below the Threshold" Cyber Operations' (n 238) 709

8. Conclusion

This article has examined if and when a cyber attack amounts to a use of force. It showed that although challenges of cyber technology were not the concern of drafters of Article 2(4) of the UN Charter when it was adopted, existing international law, particularly Article 2(4) on the use of force, applies to cyber attacks. Since there is no binding international document which helps evaluate when a cyber attack constitutes a use of force, in the literature an attempt has been made to determine this by way of analogy with existing norms in international law. Among the three leading approaches which emerged as a consequence of this effort, the effects-based approach, which deems a cyber attack as a use of force if the consequences of the attack are akin to consequences of a kinetic attack constituting the use of force, is the most suitable approach. For a state, the bottom line for an action is its consequences, regardless of the means through which the action is conducted. In this respect, applying the criteria established by Schmitt and Tallinn Manual 2.0 to cyber attacks will show when a state will deem a cyber attack as a use of force. A use of force is distinguished from an armed attack with the scale and effects test of the ICJ. However, those not physically or materially destructive cyber attacks will not constitute an armed attack although they may constitute a use of force.

If a cyber attack is not severe enough, particularly if it does not meet the criteria of Schmitt and Tallinn Manual 2.0, it constitutes a prohibited intervention if it coerces a state to change its policy on which the state has the right to decide freely.

In order for a cyber attack to constitute an internationally wrongful act, it must be attributed to a state. Traditionally, if an unlawful action emanated from a state asset such as warships and tanks, that action has been attributed to the state who owns the asset since it has been thought that without state permission it is almost impossible to use such assets. However, cyber technology has changed this paradigm. Since hackers can easily access state-owned cyber infrastructures and mount cyber attacks from them without the knowledge and permission of the state, the mere indication that the cyber attack emanated from a state asset does not make that state necessarily responsible. Cyber attacks conducted by individual hackers or *hacktivist* groups are attributable to a state if the state has effective control over the individual or group.

Larissa van den Herik, (ed.) Research Handbook on UN Sanctions and International Law (2017, Edward Elgar Publishing) 544 pp. Paperback
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Stephen MAGINN

This book is a collection of essays, which gives an overview of the use and function of UN sanctions, from conception to present day. The book looks at the legitimacy and authority of the UN Security Council, and in some cases, other state and supranational organisations such as the European Union; to implement sanction regimes.

The authors also look at the obligations of member states and other organisations such as International financial organisations like the WTO. There are various case studies throughout the chapters, which provide insight into the role and effect of sanctions on each of the various actors participating in or in receipt of sanction throughout history. Throughout, there is a detailed analysis of the magnitude of effects sanctions regimes have had on international law and how that continues to be shaped.

Chapter 2 looks at the need for and use of countermeasures and argues whether or not allowing third party countermeasures would contribute to strengthening the international rule of law. It looks at procedural conditions which countermeasures are subject to of which there are a few. For example, countermeasures may not affect fundamental human rights norms and must be proportional to the initial wrong. The chapter discusses how this is often hard to quantify and so the use of countermeasures remains highly controversial.

Chapter 3 continues with a discussion of the conditions in which countermeasures may be used, revealing that the UN currently utilizes sanctions to address six general categories of threats to international peace and security; armed conflict, WMD proliferation, illegal change of government, governance of resources and protection of civilians. In this chapter we follow the evolution of sanctions from being comprehensive to target and the author discusses the effectiveness of the two types of sanctions regimes.

Part 2 of this handbook discusses the functions of UN sanctions starting with Chapter 4 in which the author looks at the move towards thematic sanctions against individuals as part of counter-terrorism strategies. Post 9/11, the Security Council (hereby SC) has developed from a body addressing security threats to a body developing criminal and security policy. We follow this evolution by looking at the landmark 1267 sanctions regime, which included any individual or group associated with Al Qaeda or the Taliban anywhere in the world.

Chapter 5 looks at UN counter-proliferation sanctions and international law by looking at various economic sanctions imposed by the SC over the past 25 years. The author uses the cases of Libya, North Korea, Iran and Iraq and introduces the concept of Unilateral State Sanctions, primarily by the US and EU, being used to supplement UN Sanctions and the legality of this in light of the principle of Economic Non-coercion.

Chapter 6 introduces sanctions as a human rights instrument and humanitarian law device. The author discusses the appropriateness of using sanctions as thematic resolutions to thematic issues and explains that the SC has developed greater activism in this respect over the past two decades. There is a debate as to whether or not the SC is overreaching in its mandate in this regard.

Chapter 7 focuses specifically on UN natural resources sanctions regimes beginning with the first such regime imposed on Southern Rhodesia (Resolution 232) in 1966. The reader is introduced to the concept of sanctions regimes targeting organisations and creating obligations for industry within a state, with focus on diamonds in a number of African States.

Part 3 of this handbook focuses on the design and procedure which governs UN sanctions. Chapter 8 looks at design through the interplay with informal arrangements and standards, which act as tools of global governance. We see how the SC can work within and alongside these arrangements such as with the Financial Action Task Force, but the author also argues the potential of jeopardizing fundamental principles and structures of international law, such as sovereign equality and state consent.

Chapter 9 discusses the value of transparency in public decision-making and looks at the link between legitimacy and transparency. The publicity principle assumes a connection between a public institution and a constituency or 'public' with which it interacts and which therefore ensures its effectiveness. The author assesses Security Council authority, by looking at whether or not it can be considered a public institution and to what extent the public therefore interacts with it and ensures its effectiveness.

Chapter 10 continues the discussion relating to procedural governance and fair process. We return to the 1267 regime first discussed in chapter 4 and look at how the intense academic and civil society criticism of this regime draws attention to the idea of fair process. Later on, we see state and judicial intervention, with the Federal Court in Canada describing the regime as 'untenable under the principles of international human rights law.'[1] The result, which is discussed further, is the introduction of a review mechanism in Resolution 1904 (2009), which established the independent Office of the Ombudsman. The chapter concludes with an overall assessment and review of this process.

Chapter 11 of this handbook looks at the importance of timing in Sanction regimes and specifically at termination policies. The reader learns that UN Sanction termination procedures usually follow one of three models; sunset clauses, a commitment to review (sometimes subject to conditions) and those with no expiry date. The author discusses how terminations policies are integral to the overall effectiveness. She looks at the arguments for and against temporary, longer and indefinite sanction before concluding the chapter with a review of 41 UNSC resolutions and their terminations clauses.

Part 4 of this handbook is dedicated to the concept of interplay between UNSC regimes and other regimes, first touch upon in chapter 8. This begins in chapter 12 with a look at UN sanctions and International Financial Institutions (IFIs), particularly whether or not these institutions are under a legal obligation to adhere to and implement UN sanctions regimes. There is an examination of the legal arguments regarding the primacy of UNSC resolutions versus the constitutional obligation of IFIs to remain politically neutral.

Chapter 13 continues this discussion with a case study of the World Trade Organisation (WTO). Central to the WTO system is the General Agreement on Tariffs and Trade 1994 (GATT), which prohibits WTO members from imposing discriminatory restrictions on imports of other members. This poses an issue because sanctions are by nature exactly that, a discriminatory restriction on imports.

Chapter 14 discusses the impact of sanctions on arbitration. It looks at the legal issues which flow from the applicability of sanctions regimes on arbitration. The author highlights that arbitrators and arbitrational institutions may be personally bound by the provisions of sanctions imposed. This is subject to interpretation of the particular wording of the law governing the regimes and will depend on the law of the seat of arbitration.

In Chapter 15, the impact of economic sanctions on contracts between private operators is examined. The purpose is to offer some solutions to issues faced by domestic courts and arbitral tribunals when one party to a contractual dispute claims that it should be freed from its obligations on the ground that their performance is prohibited by an economic sanctions programme. This is provided by looking at the characterization of economic sanctions from a private law perspective followed by a look at the effects of obligations on private operators under international law instruments.

Chapter 16 is titled the prosecution of sanction busters. It explores two themes of practical importance for the prosecution of sanctions busters in criminal courts and their resulting complications. Firstly, which crimes to charge and secondly, the effects of annulment of sanctions on procedural grounds for prosecutions of violations prior to that annulment.

The fifth and final part of this handbook on UN Sanctions and International Law looks at regional perspectives, beginning in chapter 17 and a look towards regional organizations and an analytical framework. The study analyses the issues at stake from three perspectives: (i) Member

[1] *Abderlrazik v Minister of Foreign Affairs and Attorney General of Canada* [2009] FC 580.