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Editorial

Dear Readers,

Our current issue engages with a range of different fields of international law: Economic and Social Rights Jurisprudence, Fragmentation of International Law, Military Intervention on Request and various contributions regarding the topic of our focus section: Regionalism in International Law.

This Issues first article, which is written by *Caroline Omari Lichuma* focuses on the reaction of the European Court of Human Rights to the myriad crisis which affect the European continent. 'Of Dark Clouds and Their Silver Linings: Crisis as Opportunity in the Economic and Social Rights Jurisprudence of the European Court of Human Rights' focuses on the Economic and Social Rights jurisprudence of the court.

'Missed Communications and Miscommunications: International Courts, the Fragmentation of International Law and Judicial Dialoge' is our second article and discusses the issue of fragmentation of international law, which is caused by different international courts deciding similar issues. *Francis Maxwell* considers different scenarios and points to the consequences caused by this phenomenon.

Chiara Redealli, in her article 'Military Intervention on Request in *Jus Ad Bellum* and *Jus In Bello* and the question of recognition of governments' investigates the topic of foreign interventions in internal conflicts upon request from a *jus ad bellum* and *jus in bello* point of view. She examines the lawfulness and classification of such interventions from the point of view of both realms.

The second part of this Issue is formed by a focus-section regarding regionalism in International Law. The focus section is made up of four articles, which have their roots in the conference 'Regionalism in International Law' held in Paris

in 2020. The conference was organized by *Mads Andenas, Emanuel Castellarin*, *Johann Ruben Leiss*, and *Paolo Palchetti*. We are grateful for this fruitful collaboration.

The focus section's first article, 'Interpretation and application of the ECHR: between universalism and regionalism', serves as the introduction to our focus-section and is written by *Mattias Guyomar*. He explores the tensions between universalism and regionalism, which arise through the protection of human rights by the European Court of Human Rights in particular.

This is followed by 'Is the International Law Commission Taking Regionalism Seriously (Enough)?', written by *Janina Barkholdt.* The article examines the International Legal Commission's approach to regionalism. It analyses the inherent tensions, that naturally arise and examines the possible consequences of the ILC's more recent projects. Finally, two challenges arising from regional plurality are defined and addressed.

The authors *Dan Yao* and *Mingzhe Zhu* offer insight into the way, in which the Belt and Road Initiative can be understood as a regional approach to international law from a Global South perspective. Their article 'Dynamic Belt and Road Initiative and the Global South's Approach to Sustainability' also employs two case studies to explore the influence of local situations to the formation of rules.

In the last article of our focus-section and issue, *Lucas Carlos Lima* and *Loris Marotti* investigate the relationship between peremptory norms of international law (*jus cogens*) and regionalism. 'An Unlikely Duo? Regionalism and Jus Cogens in International Law' explores two different ways in which relations between regionalism and jus cogens can be explored and ends with a case study of the judicial practice of IACtHR with regards to this topic.

We would like to thank our authors and the Editorial-, Advisory-, Scientific Advisory- and Native Speaker Board for their work and patience in the last two years. We are also thankful for all the loyal readers that continue to support us despite recent holdups and delays.

The Editors

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Of Dark Clouds and Their Silver Linings: Crisis as Opportunity in the Economic and Social Rigths Jurisprundence of the European Court of Human Rights

Caroline Omari Lichuma*

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Abstract

We live in a world in crisis.
These crises are experienced globally, regionally, by individual States and mostly by individuals themselves. Despite our differences, we are all united by crisis. However, adopting a regional outlook, this paper focuses on Europe, which, like much of the rest of the world, has in recent times been buffeted by multiple crises ranging from the financial and economic crisis that begun in 2008, to the climate change crisis, to the migrant and refugee crisis, to the Brexit crisis, to the COVID-19 pandemic that has rocked the entire globe.
In times of crisis, it is commonplace to turn to legal and institutional frameworks in the hopes of finding some reprieve. Within Europe, one such institution is the European Court of Human Rights (ECtHR). This Court, also known as the Strasbourg court, was established in 1959 under Article 19 of the European Convention on Human Rights (ECHR). Despite its primarily Civil and Political Rights (CPRs) mandate, the ECtHR has in numerous cases proven to be fertile ground for planting the seeds of Economic and Social Rights (ESRs) protection,[1] which is/was inevitable, given the widely accepted indivisible, interdependent and interrelated nature of all human rights, whether CPRs or ESRs.[2]
The ECtHR explicates that "the Convention is a living instrument which […] must be interpreted in the light of present-day conditions."[3] In the present day conditions of numerous crises that have only exacerbated the already precarious conditions of numerous vulnerable rightsholders in the family of European States, the question then becomes what jurisprudential trends, prospects and pitfalls exist for the ECtHR in its dynamic interpretation of the ECHR to include ESRs. In seeking answers to this question, this paper analyzes the ESRs jurisprudence of the ECtHR with the intention of illuminating how the Court has, and ought to utilize its institutional role as an enforcer of human rights in general and ESRs in particular in the quest to mitigate the effects on rightsholders, of the crises being experienced within Europe. At the heart of this inquiry lies the assertion that in line with the ECtHR's ESRs jurisprudence thus far, which evinces a willingness on the part of the Court to vindicate ESRs in order to bring these rights to life for the vulnerable rightsholders who

1 I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018), 1.
2 *The Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23, 12 July 1993.
3 *Tyrer v. The United Kingdom*, ECtHR Application No. 5856/72, Judgment of 25 April 1978, para. 31.

need them the most,[4] the myriad crises currently plaguing Europe continue to create opportunities for the ECtHR to craft a principled and consistent ESRs jurisprudence while simultaneously respecting the margin of appreciation enjoyed by the respective European States.

This paper does not analyze State responses under Article 15 of the ECHR, which specifically allows the High Contracting Parties to derogate from their obligations under the Convention in times of war or other public emergency threatening the life of the nation. Rather, the analysis will be restricted to the ESRs jurisprudence of the ECtHR in times of the specific crises outlined below and where the States in question have not made an Article 15 derogation.

The paper will proceed in three parts. Part A will give a brief overview of how the ECtHR has vindicated ESRs through its interpretation of the primarily CPRs found in the ECHR. Part B will thereafter briefly analyze three specific crises that have shaped the more recent ESRs jurisprudence of the Court: the financial and economic crisis, the migrant and refugee crisis and the COVID-19 pandemic. Finally, Part C will offer some tentative recommendations on the way forward, arguing that while some progress has been made by the ECtHR in centering ESRs as a very necessary part of its response to contemporary European and global crises, the battle is far from won.

Key Words:
European Convention on Human Rights (ECHR); European Court of Human Rights (ECtHR); Economic and Social Rights (ESRs); Crisis

4 E. Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', 2 *Erasmus Law Review* (2009) 4, 397.

A. Reading Between the Lines: How the ECtHR has Developed a Robust ESRs Jurisprudence from the Primarily CPRs Provisions of the ECHR

I. Background

The key treaty internationally for the protection of ESRs is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which catalogues a number of ESRs including rights such as right to work, right to social security, right to highest attainable standard of health, right to adequate housing and right to education.[5] These rights are more or less also provided for in the European human rights system within the ambit of the European Social Charter[6] as well as (through the interpretation of) the ECHR.[7] In fact, these two latter instruments precede the ICESCR which only came into force in 1966, while the ECHR came into force in 1953, and its European Social Charter counterpart in 1965 (with the revised 1996 version entering into force in 1999).

The scope of this paper will be limited to an analysis of ESRs protection only under the ECHR as well as its pertinent protocols. This restriction is justified by the fact that the jurisdiction of the ECtHR extends only to matters concerning the interpretation and application of the ECHR and any applicable additional protocols.[8] Applications to the Court may be made either by State parties[9] or by persons, non-governmental organizations or groups of individuals who claim to be victims of violations.[10] The European Social Charter and its implementation mechanisms are therefore excluded from the assessment that follows.

With the exception of its First Protocol (Article 1 and 2 of which concern the right to property and the right to education), it is widely accepted that at first glance, a strict reading of the ECHR discloses a preoccupation with CPRs[11]

5 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 6-8 [ICESCR].

6 *European Social Charter* (Revised), 3 May 1996, 163 ETS 1, 2-3 [ESC].

7 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 5 ETS 5, 6, 8 (*as amended by Protocols Nos. 11, 14 and 15*) [ECHR].

8 *Ibid.*, Art. 32.

9 *Ibid.*, Art. 33.

10 *Ibid.*, Art. 34.

11 Palmer, *supra* note 4, 398; Leijten, *supra* note 1, 1; C. O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights', 5 *European Human Rights Law Review* (2008), 583.

reminiscent of the rights contained within the International Covenant on Civil and Political Rights (ICCPR).[12] The Court itself has even on occasion reiterated the fact that "although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights."[13] Specifically, Section 1, articles 2–15 of the ECHR enumerate the following rights: the right to life (Article 2); the prohibition of torture (Article 3); the prohibition of slavery and forced labour (Article 4); the right to liberty and security (Article 5); the right to a fair trial (Article 6); the right to be free from punishment without law (Article 7); the right to respect for private and family life (Article 8); the freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); the right to marry (Article 12); the right to an effective remedy (Article 13); the prohibition of discrimination (Article 14) and derogations in time of emergency (Article 15).

Nevertheless, in spite of these prima facie CPRs provisions and despite the obvious hurdles of crafting common standards for the protection of ESRs in member states with very different cultural, political and socio-economic histories as well as current realities, the ECtHR should be lauded for its evolutionary interpretation of certain provisions of the ECHR to uphold and implement ESRs. A brief caveat is necessary at this point. Despite the Court's acknowledgement that the ECHR is a living instrument, there is only so much the ECtHR can do in vindicating ESRs. The Court does not have carte blanche to always implement ESRs, and instead must find a way to strike "the right balance between providing effective individual rights protection and deferring to the national authorities whose (democratic) decisions – especially in a field like social policy – need to be respected."[14]

II. ESRs Protection Under Specific ECHR Provisions

1. Article 2 and a Right to Health?

As already mentioned above, Article 2 of the ECHR provides that "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his

12 *International Covenant on Civil and Political Right*, 16 December 1966, 999 UNTS 171 [ICCPR].

13 *N v. The United Kingdom*, ECtHR Application No. 26565/05, Judgment of 27 May 2008, 17, para. 44.

14 Leijten, *supra* note 1, 1.

conviction of a crime for which this penalty is provided by law. Even though the Court has received its fair share of criticism for not venturing too far from an "orthodox conception of 'life protection' aimed at protecting individuals against unlawful killings in the traditional contexts of national security and policing,"[15] it is necessary to point out that the ECtHR has exhibited a willingness to expand the interpretation of this provision to include ESRs such as the right to health in certain circumstances.

In one case against Romania, the Court confirmed the possibility of imposing a positive obligation on States to prevent violations of the right to life capable of including under the scope of Article 2 the right to health, and finding a violation of this right where there was a failure by the State to provide adequate medical care to Mr. Câmpeanu, a mentally disabled and HIV positive man, who lived his entire life in the hands of the State authorities having been abandoned at birth.[16]

In another case, this time against Turkey, the ECtHR acknowledged the possibility of Article 2 being implicated where "the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally,"[17] even though the Court considered it unnecessary to examine "the extent to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care."[18]

The Court has also conceded that the right to life may be infringed in situations where an applicant claims that the denial of a refund for the full price of life-saving medication violated Article 2 even though the applicant in this case was ultimately unsuccessful.[19] A successful application was however raised in another similar case, where the ECtHR held that Romania had violated Article 2 by failing to provide life-saving cancer medication to the applicant's father (even after being ordered to do so by the national courts) resulting into his deterioration and eventual death.[20] The Court even stressed that "the acts

15 Palmer, *supra* note 4, 409.

16 *Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania*, ECtHR Application No. 47848/08, Judgment of 17 July 2014, 50-53, para. 134-144.

17 *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment of 10 May 2001, 54, para. 219.

18 *Ibid.*

19 *Nitecki v. Poland*, ECtHR Application No. 65653/01, Judgment of 21 March 2002, 4-6, para. 1-3.

20 *Panaitescu v. Romania*, ECtHR Application No. 30909/06, Judgment of 10 April 2012, 8-11, para. 27-38.

and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2."[21]

2. Article 3 and the Rights to Housing and Health?

Article 3 of the ECHR provides in absolute terms that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The ECtHR has clarified that the ill treatment prohibited here "is that which attains a minimum level of severity."[22] The assessment of what constitutes this minimum is relative and depends on all the circumstances of the case. Where a State fails to treat persons with dignity in relation to their basic needs such as shelter, it is possible for this right to be successfully invoked. For instance, in a case against Romania where the applicants' homes had been destroyed, resulting into them living in a severely overcrowded and unsanitary environment for ten years, the Court found that there had been an interference with the applicants' human dignity which amounted to degrading treatment and thus a breach of Article 3.[23]

Article 3 has also been successfully relied upon within the (very specific and extreme) context of a State party's obligation to provide for the elementary health and welfare needs of individuals in their jurisdictions. In a case against the United Kingdom, where the applicant suffered from AIDS and challenged the proposal by the UK government to deport him to his country of origin which had a low standard of healthcare and where treatment for AIDS sufferers was virtually non-existent, the ECtHR concluded that the proposed deportation amounted to a violation of Article 3.[24] This case must however be understood within its special and urgent context: the applicant was in the final stages of his illness and potentially would even have lacked a hospital bed in his country of origin. The Court was clear that the circumstances in the instant case were exceptional and that aliens who are supposed to be expelled from a Contracting State's territory are not entitled to remain there for the sole purpose of continuing to benefit from medical, social or other forms of assistance.[25] In fact, in a number

21 *Ibid.*, 9, para. 28.

22 *Pretty v. United Kingdom*, ECtHR Application No. 2346/02, Judgment of 29 April 2002, 31, para. 52.

23 *Moldovan and Others v. Romania*, ECtHR Application Nos. 41138/98 and 64320/01, Judgment of 12 July 2005, 25, para. 113-114.

24 *D v. The United Kingdom*, ECtHR Application No. 30240/96, Judgment of 2 May 1997, 15, para. 53-54.

25 *Ibid.*, 15, para. 54.

of subsequent and similar cases[26] the Court failed to find a violation. In one 2008 case against the United Kingdom with broadly similar facts, the applicant was a foreign national diagnosed as being HIV positive and was facing deportation, the ECtHR held that there were no exceptional circumstances justifying a finding of a violation of Article 3 of the ECHR. The Court was of the opinion that "[…] the applicant is not, however, at the present time critically ill. The rapidity of the deterioration which she would suffer and the extent to which she would be able to [obtain] access [to] medical treatment, support and care, including help from relatives, must involve a certain degree of speculation […]".[27]

3. Article 8 and the Right to Housing?

This Article provides that "Everyone has the right to respect for his private and family life, his home and his correspondence" and has been primarily associated with the right to housing. More specifically, these situations have involved questions of the legitimacy of interference rather than of the State's failure to provide housing. In a case against Italy where the applicant complained that local authorities both evicted him and subsequently failed to provide him with accommodation adequate to his illness, the Court reiterated that although Article 8 does not create a right to a home, a State nevertheless retains certain responsibilities in respect of housing needs.[28] Even though the applicant in this instance was unsuccessful, the ECtHR was adamant that "a refusal to provide [housing] assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual."[29]

In a case against the United Kingdom concerning the forced eviction of a family of gypsies from a local authority caravan site, the ECtHR held that "the serious interference with the applicant's rights under Article 8 requires […] particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be

26 *S.C.C. v. Sweden*, ECtHR Application No. 46553/99, Judgment of 15 February 2000, 6-10, para. 1-3 ; *Bensaid v. The United Kingdom*, ECtHR Application No. 44599/98, Judgment of 6 January 2001, 11, para. 41.

27 *N v. The United Kingdom*, *supra* note 13, 18, para. 50.

28 *Marzari v. Italy*, ECtHR Application No. 36448/97, Judgment of 4 May 1999, 8-9, para. 1.

29 *Ibid.*

regarded as correspondingly narrowed."[30] In finding a violation of Article 8 the Court ruled that the eviction of the applicant and his family was not done in compliance with the required procedural safeguards and consequently could not be regarded as justified by either a pressing social need or as proportionate to the legitimate aim being pursued.

4. Articles 6 and 14 and the Rights to Social Security and Housing?

Article 6 on the right to a fair trial and Article 14 on the prohibition of discrimination have been argued to be capable of providing for ESRs only incidentally, or "[…] as a by-product. They do not protect substantive socio-economic interests; rather, the protection of these interests flows from ensuring procedural safeguards or combating discrimination".[31]

In two separate 1986 cases, one against The Netherlands[32] and the other against Germany[33] the ECtHR opened the door for the protections under Article 6 to extend to the area of social security benefits.[34] The former case involved a complainant's right to health insurance allowances while the latter dealt with the right to a widow's supplementary pension on the basis of compulsory insurance against industrial accidents. Soon thereafter, in a case against Italy, the Court confirmed that "[…] today the general rule is that Article 6 para. 1 (art. 6-1) does apply in the field of social insurance".[35] This position was reiterated in a case against Switzerland where the Court held that "Article 6 para. 1 does apply in the field of social insurance, including even welfare assistance".[36]

With reference to Article 14 on the other hand, discriminatory actions by States may sometimes result into violations of ESRs. However, the Court has stressed that this Article "complements the other substantive provisions of the Convention and its protocols. It has no separate existence, since it has effect

30 *Connors v. The United Kingdom*, ECtHR Application No. 66746/01, Judgment of 27 May 2004, 26, para. 86.

31 Leijten, *supra* note 1, 42.

32 *Feldbrugge v. The Netherlands*, ECtHR Application No. 8562/79, Judgment of 29 May 1986.

33 *Deumeland v. Germany*, ECtHR Application No. 9384/81, Judgment of 29 May 1986.

34 *Feldbrugge v. The Netherlands*, *supra* note 32, 9, para. 27; *Deumeland v. Germany*, *supra* note 33, 17, para. 61.

35 *Salesi v. Italy*, ECtHR Application No. 13023/87, Judgment of 26 February 1993, 5, para. 19.

36 *Schuler-Zgraggen v. Switzerland*, ECtHR Application No. 14518/89, Judgment of 24 June 1993, 11, para. 46.

solely in relation to the 'rights and freedoms' safeguarded by those provisions".[37] In one case against France,[38] the ECtHR held that the difference in treatment with respect to entitlements to social benefits between French nationals and other foreign nationals was not based on any objective and reasonable justification and was thus a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. Similarly, in a case against the United Kingdom, the Court confirmed that while there is no right under Article 8 of the Convention to be provided with housing, "[…] where a Contracting State decides to provide such benefits, it must do so in a way that is compliant with Article 14".[39]

5. Article 8 and the Right to Water?

The ECtHR has recognized the possibility of a right to access safe drinking water and sanitation existing under the ECHR. In a 2020 case against Slovenia, the applicants, Slovenian nationals of Roma origin, claimed violations of Article 3, Article 8 and Article 14 as a result of the Slovenian government's failure to provide adequate access to drinking water and sanitation to the Roma community.[40] Unfortunately, the Court ruled against the applicants finding that Slovenia enjoys a wide margin of appreciation in socio-economic matters and that "[…] the level of realization of access to water and sanitation will largely depend on a complex and country-specific assessment of various needs and priorities […]",[41] However, despite this setback, this case holds promise for the present discussion on ESRs because even though the ECtHR may have closed the door on an explicit right to water, it nevertheless cracked open a window of possibility, by holding that even though access to safe drinking water is not overtly protected by Article 8 of the ECHR, "a persistent and long-standing lack of access to safe drinking water can therefore, by its very nature, have adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home within the meaning of Article 8".[42]

37 *Koua Poirrez v. France*, ECtHR Application No. 40892/98, Judgment of 30 September 2003, 10, para. 36.

38 *Ibid.*, 12-13, para. 49-50.

39 *Bah v. The United Kingdom*, ECtHR Application No. 56328/07, Judgment of 27 September 2011, 16, para. 40.

40 *Hudorovič and Others v. Slovenia*, ECtHR Application Nos. 24816/14 and 25140/14, Judgment of 7 September 2020, 25, para. 106.

41 *Ibid.*, 38, para. 144.

42 *Ibid.*, 30, para. 116.

6. Article 1 Protocol No. 1 and the Rights to Housing and Social Security?

This provision is titled *protection of property* and provides for the right of every natural or legal person to the peaceful enjoyment of his possessions. The term *possessions* has been expansively interpreted to include specific ESRs in certain instances. For example, in one case the ECtHR included the housing rights of internally displaced persons within the meaning of the term possessions in light of the applicant's continued possession of a cottage for more than 10 years as well as the authorities' manifest tolerance.[43] Additionally, where an individual has an assertable right under domestic law to a welfare benefit, the ECtHR has also confirmed that such an interest is capable of protection within the ambit of Article 1 of Protocol No. 1.[44]

III. Conclusion

The analysis in the preceding section II was carried out with the intention of illuminating the different possible avenues for ESRs to be read into the CPRs provisions of the ECHR. As is apparent, it is impossible to say that certain ESRs (whether right to housing, or water, or health or social security) will always be read into the various ECHR provisions. At the end of the day the circumstances of each individual case will dictate the outcome. Despite this uncertainty however, what the jurisprudence clearly highlights is the fact that despite the CPRs origins of the Convention, it is safe to say that the ECHR, and by extension the ECtHR, protects both CPRs and ESRs. In fact, as early as 1979 the Court explicitly stated that,

> "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation;

[43] *Saghinadze and Others v. Georgia*, ECtHR Application No. 18768/05, Judgment of 27 May 2010, 27, para. 108.

[44] *Stec and Others v. The United Kingdom*, ECtHR Application Nos. 65731/01 and 65900/01, Judgment of 12 April 2006, 14, para. 43, 53.

> there is no water-tight division separating that spherefrom the field covered by the Convention".[45]

This is a view that has been reaffirmed by the Court in numerous subsequent cases. For instance, in one 2005 case the ECtHR reiterated that,

> "whilst the convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature.The mere fact that an interpretation of the convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention".[46]

In these ESRs cases however, the ECtHR faces the difficult and often delicate task of trying to balance the protection of individual rights on the one hand, against the democratic decisions of national authorities on the other without overstepping its mandate or facing accusations of overreach. These difficult choices are only magnified in the face of crisis, where the various national authorities put in place measures to deal with whatever crisis is being faced.

Before delving into the ESRs jurisprudence of the ECtHR in the context of crises, it is necessary to highlight one final concern at this introductory point that may help to clarify the often hesitant approach of the Court in ESRs cases. A parallel can be drawn between the protection of ESRs at the domestic/national level and the protection of ESRs at the regional level through the ECtHR. Specifically, within the domestic context, concerns have been raised about the proper role of courts in adjudication of ESRs. There is a fear that the judicial protection of ESRs raises separation of powers concerns by requiring the judiciary to venture into the realm of constitutional tasks more properly the domain of the elected branches. Such tasks include *inter alia*, resource allocation decisions and matters of policy.[47]

45 *Airey v. Ireland*, ECtHR Application No. 6289/73, Judgment of 9 October 1979, 11-12, para. 26.

46 *Stec and Others v. The United Kingdom*, ECtHR Application Nos. 65731/01 and 65900/01, Decision on Admissibility of 6 July 2005, 14, para. 52.

47 P. O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (2012), 2.

Turning now to the ECtHR, the Court's operation has to be understood within the context of

> "[…] the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities […] and their margin of appreciation in guaranteeing and protecting human rights at [the] national level".[48]

Consequently, as a result of this margin of appreciation doctrine the ECtHR must navigate between "[…] ensuring effective fundamental rights protection while at the same time taking a deferential stance towards member states".[49] Because "[…] the way a state shapes its welfare policies lies at the heart of its democratic prerogatives, and involves a plethora of budgetary and other interests […]",[50] if in enforcing ESRs the Court issues far reaching judgements that encroach upon the democratic decisions of national authorities, tensions may arise. These concerns may partly explain the ECtHR's well-founded hesitance to find violations in all ESRs cases that may involve questions of redistribution of public resources within a State.

B. ESRs in a Time of Crises: Situating the ESRs Jurisprudence of the ECtHR Within the Context of Specific Crises

I. The Global Financial and Economic Crisis

1. Contextualizing the Crisis

2008 was a defining year for Europe and the rest of the world. What began in the United States as a meltdown of the real estate and then the banking sector, quickly metamorphosed into a financial crisis of global proportions that catalyzed ramifications throughout the world.[51] Despite the varied responses of

48 Council of Europe, *Brussels Declaration, Adopted at the High-Level Conference on the "Implementation of the European Convention on Human Rights, Our Shared Responsibility."* (last visited 27 March 2015), 1, available at https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf

49 Leijten, *supra* note 1, 214.

50 *Ibid.*

51 Council of Europe Commissioner for Human Rights, *Safeguarding Human Rights in Times of Economic Crisis* (2013), 7.

different governments in a bid to contain the effects of the crisis, the world entered into a period of economic recession[52] and in multiple countries human rights were the sacrificial lamb offered upon the altar of fiscal austerity measures and macro-economic discipline.

Fiscal austerity measures typically fall into the following categories, each with its own unique consequences for the enjoyment of human rights, "severe cuts to social expenditure, regressive tax hikes, pension and other social welfare reforms, and the stripping away of labour rights protections".[53] In many Council of Europe member States, public social spending was the primary target of austerity measures. This occurred

> "[…] through wage bill cuts or caps, especially for education, health and other public sector workers, the rationalisation of social protection schemes, the elimination or reduction of subsidies on fuel, agriculture and food products, stricter accessibility conditions for a number of social benefits, and other cuts to education and health-care systems".[54]

Reforms of the tax regime were also a major part of the austerity tool kit as governments sought to reduce budget deficits experienced as a result of the economic crisis. In addition, many governments engaged in labour reforms that had the effect of eroding collective bargaining powers, easing dismissals, slowing or reversing salary adjustments to inflation and altering other employment protection regulation in a questionable bid to drive business development.[55]

As a result of the implementation of these austerity measures the enjoyment of both CPRs and ESRs was severely curtailed. Unsurprisingly, already vulnerable and marginalised groups of people were hit disproportionately hard, compounding the already pre-existing patterns of discrimination in the political, economic and social spheres. The Council of Europe Parliamentary Assembly even criticized the austerity measures implemented by some member States pointing out that

52 S. Verick & I. Islam, 'The Great Recession of 2008-2009: Causes, Consequences and Policy Responses', *IZA Discussion Paper* (2010) 4934, 5.

53 I. Saiz & L. Holland, 'Under the Knife: Human Rights and Inequality in the Age of Austerity', *5 State of Civil Society Report* (2016), 148.

54 Council of Europe Commissioner for Human Rights, *supra* note 51, 16.

55 International Labour Organization (International Institute for Labour Studies), "World of Work Report 2012: Better Jobs for a Better Economy" (2012), 35-36.

> "[…] the restrictive approaches currently pursued, predominantly based on budgetary cuts in social expenditure, may not reach their objective of consolidating public budgets, but risk further deepening the crisis and undermining social rights as they mainly affect lower income classes and the most vulnerable categories of the population".[56]

Human rights should always be respected and upheld by all States, even in (and especially in) times of crises.

> "Periods of financial dire straits […] should not be seen as emergency situations that automatically entail the curtailment of social and economic rights and the deterioration of the situation of vulnerable social groups. On the contrary, such periods of time should be viewed by states as windows of opportunity to overhaul their national human rights protection systems and reorganise their administration in order to build or reinforce the efficiency of national social security systems, including social safety nets that should be operational when necessary".[57]

Where States fail in their obligations in this regard, it becomes necessary to turn to courts such as the ECtHR for vindication of rights.

2. The ECtHR and Cases Relating to Austerity Measures

Since the onset of the financial and economic crisis and the subsequent European sovereign debt crisis, the ECtHR has had multiple occasions to render judgements on the difficult questions that arise when austerity measures are argued to unjustifiably impact the enjoyment of ESRs. The cases in this section were selected on the basis of their reference both to austerity measures within the context of the financial and economic crisis, as well as ESRs as conceptualized in Part A above. Most of these cases primarily challenged the austerity measures on the basis of the protection of property provision under Article 1 Protocol No. 1 of the ECHR which provides that "every natural or legal person is entitled to

56 PA Resolution 1884 of 26 June 2012, 'Austerity Measures – a Danger for Democracy and Social Rights'.

57 N. Muižnieks, `Report by Commissioner for Human Rights of the Council of Europe, Following his Visit to Spain from 3 to 7 June 2013´ (2013), available at https://rm.coe.int/16806db80a (last visited 3 February 2022), 10, para. 38.

peaceful enjoyment of his possessions".[58] By and large these applications opposed the reduction of pensions and other social security benefits in the wake of the financial crisis.

a. Cases Where the Application was Found to be Inadmissible

This paper posits that despite the ECtHR's willingness to vindicate ESRs in times of financial crisis, the jurisprudence appears to indicate that in these situations the Court gives States a wider margin of appreciation to deal with the crisis, and consequently only issues judgements favorable to the applicants in exceptional situations as will be further elaborated upon in Part C.

In one 2013 case against Greece, the applicants alleged that the austerity measures introduced by the Greek government in response to the financial crisis violated their rights under Article 1 of Protocol No. 1 (among others).[58] These measures included reductions in the remuneration, benefits, bonuses and retirement pensions of public servants, with a view to reducing public spending. The ECtHR held that the restrictions introduced by the legislation in question should not be considered as a deprivation of possessions as was claimed by the applicants. Rather this was a justifiable interference with the right to peaceful enjoyment of possessions. The Court stressed that the "[…] adoption of the impugned measures was justified by the existence of an exceptional crisis without precedent in recent Greek history"[59] and that there is "[…] no reason to doubt that [,] in deciding to cut public servants' wages and pensions [,] the legislature was acting in the public interest".[60]

In another 2013 case, this time against Portugal, the ECtHR rendered a judgement very similar to the one in the Greek case above. Here, the applicants alleged that the cuts imposed on certain pension entitlements as part of austerity measures under the Portuguese State budget of 2012 were a violation of their rights under the ECHR.[61] Ruling against the applicants the Court held that the complaint was inadmissible by reason of being manifestly ill-founded since the applicants had not been made to bear an excessive and disproportionate burden. Again, the Court emphasized that "the cuts in social security benefits provided by the 2012 *State Budget Act* were clearly in the public interest within

58 *Koufaki and ADEDY v. Greece*, ECtHR Application Nos. 57665/12 and 57657/12, Judgment of 7 May 2013, 9, para. 20.

59 *Ibid.*, 12, para. 37.

60 *Ibid.*, 13, para. 41.

61 *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, ECtHR Applications Nos. 62235/12 and 57725/12, Judgment of 8 October 2013, 10, para. 12.

the meaning of Article 1 of Protocol No. 1". They also reiterated that "Like in Greece, these measures were adopted in an extreme economic situation, but unlike in Greece, they were transitory".[62]

In a case against Romania, the applicants were retired court officials who raised a challenge to the recalculation of their pension payments which resulted into the reduction of their overall pension because of the elimination of the state-funded non-contributory portion from the total.[63] This was a consequence of the enactment of Law no. 119/2010 which intended to maintain a balanced State budget at a time of economic crisis. Relying on Article 6 and Article 14, the applicants complained of a breach of the principle of legal certainty as a result of the conflicting decisions of the courts of appeal in Romania, some of which had upheld claims brought by people in an identical position to them. In ruling against the applicants, the ECtHR held that the present case did not involve any discrepancy in the practice adopted by the courts in similar situations, but rather the application of clearly defined statutory provisions to circumstances that varied according to the applicants' personal situation. In addition, the Court pointed out that it had deemed acceptable a period of two years, or even longer, of divergent practice by national courts before a mechanism was introduced to ensure consistency.[64]

In a 2015 case against Portugal the complaint was based on the reduction of retirement pensions pursuant to the implementation of austerity measures in Portugal.[65] One such measure was the extension of the application of an already existing extraordinary solidarity contribution (CES) to include pensioners receiving a gross amount of EUR 1,350 and later even EUR 1,000. The applicant alleged that these measures had breached her right to protection of property under Article 1 of Protocol No. 1. The ECtHR declared the application inadmissible as being manifestly ill-founded. The Court held that though there was an interference with the right in question it had clearly been done in the public interest since the measures intended to reduce public spending and achieve medium term economic recovery had been adopted in an extreme economic situation as a transitory measure. The Court also noted that the applicant had not herself suffered a substantial deprivation of income.

62 *Ibid.*, 13, para. 26.

63 *Frimu and four other applications v. Romania*, ECtHR Application Nos. 45312/11, 45581/11, 45587/11 and 45/588/11, Judgment of 13 November 2012, para. 29.

64 A.M. Rosu, *The European Convention on Human Rights in Times of Economic Crisis and Austerity Measures* (2015), 36.

65 *Da Silva Carvalho Rico v. Portugal*, ECtHR Application No. 13341/14, Judgment of 1 September 2015, 10, para. 25.

A similar holding of inadmissibility on the grounds of the claim being manifestly ill-founded was made in a case against Lithuania.[66] The case arose after the reduction of welfare benefits during the economic crisis in Lithuania. Here, the applicant was a former officer of the prison's department who complained that her service pension had been reduced by 15% when new legislation was in force in Lithuania between January 2010 and December 2013. The challenge was based on Article 1 Protocol No. 1 and Article 14. The ECtHR declared the application inadmissible and held that the State had not failed to strike a fair balance between the applicant's fundamental rights and the general interest of the community. The Court further stressed that there was no indication that Ms. Mockienė had had to bear an individual and excessive burden at a time of serious economic difficulties faced by Lithuania during the global financial crisis.

In a 2018 decision against Italy the ECtHR again declared the application inadmissible observing that the legislature had been obliged to intervene in a difficult economic context.[67] The legislative decree in question, that reformed the uprating of State pension payments for 2012 and 2013, had sought to provide for redistribution in favor of lower pensions while preserving the sustainability of the social welfare system. The Court found that the effects of the reform were not so severe that the applicants` rights under Article 1 Protocol No. 1 had been violated.

b. Cases Where a Finding of Violation was Rendered

In two cases, both against Hungary,[68] applications were made to the ECtHR against a Tax Act adopted by the Hungarian Parliament introducing a new retroactive tax on certain payments to public sector employees whose employment had been terminated. The Hungarian government argued that the tax was justified because "in the midst of a deep world-wide economic crisis, additional burdens should be borne not only by the State but also by other market participants"[69] and that "a wide margin of appreciation should be left

66 *Mockienė v. Lithuania*, ECtHR Application No. 75916/13, Judgment of 27 July 2017, 4, para. 15.

67 *Aielli and Others v. Italy*, ECtHR Application Nos 27166/18 and 27167/18, Judgment of 10 July 2018.

68 *N.K.M. v. Hungary*, ECtHR Application No. 66529/11, Judgment of 14 May 2013; *R. Sz. v. Hungary*, ECtHR Application No. 41838/1, Judgment of 2 July 2013.

69 *Ibid.*, 12, para. 27.

to the national authorities in this respect".[70] The Court however found that the impugned provisions violated Article No. 1 of Protocol No. 1 and could not be justified by the legitimate public interest relied upon by the government. The Court was particularly concerned by the fact that the measures complained of entailed an excessive and individual burden on both applicants, and could therefore not be reasonably proportionate to the aim sought to be realized.

II. The Migrant and Refugee Crisis

1. Contextualizing the Crisis

In 2015 and 2016 Europe experienced its largest migration crisis since the Second World War.[71] The year 2015 was even described as "a year of unprecedented forced displacement"[72] precipitated by ethnic violence, armed conflict, civil war and persecution all around the world.[73] In that year alone European Union States reported that 1,255,600 individuals registered as first time asylum seekers, a number more than double that of the previous year,[74] with over a third of the total registering in Germany alone.[75] To put these numbers into perspective, a comparison can be made with the approximately 335,290 applications received in 2012, 431,090 received in 2013 and 626,960 received in 2014.[76] A vast majority of the asylum seekers who sought refuge in the European

70 *N.K.M. v. Hungary*, *supra* note 68, 12, para. 28.

71 V. Modebadze, 'The Refugee Crisis, Brexit and the Rise of Populism: Major Obstacles to the European Integration Process', 5 *Journal of Liberty and International Affairs* (2019) 1, 92.

72 M. Fullerton, 'Refugees and the Primacy of European Human Rights Law', 21 *UCLA Journal of International Foreign Affairs* (2017) 1, 45, 46.

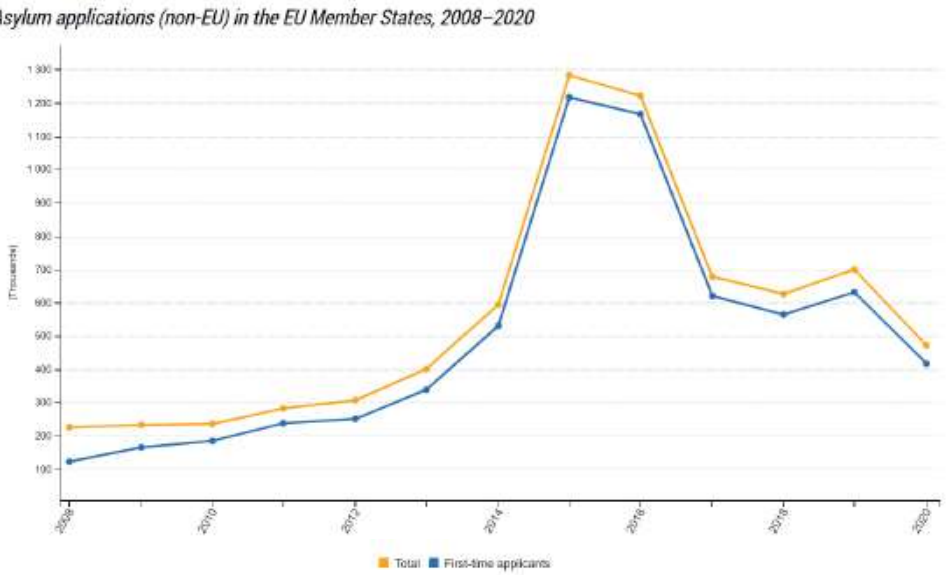
73 UNHCR, 'Global Trends: Forced Displacement in 2015' (2016), available at https://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html (last visited 27 September 2021).

74 Eurostat, 'Asylum in the EU Member States', Eurostat News Release 44/2016 (2016), available at https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6 (last visited 27 September 2021).

75 *Ibid.*

76 European Parliament, 'A Welcoming Europe? Evolution of the Number of Asylum Seekers and Refugees in the EU' (2019), available at https://www.europarl.europa.eu/infographic/welcoming-europe/index_en.html#filter=2019 (last visited 27 September 2021).

States originated from Syria, Afghanistan and Iraq.[77] Most of these people made their way into Europe by crossing the Mediterranean Sea, specifically departing from Turkey and arriving in Greece.[78]



Source: Eurostat[79]

Refugees arriving in Europe have to contend with two overlapping legal regimes: the Council of Europe regime (including the ECHR and the case law developed by the ECtHR) as well as the European Union regime (pertinent regulations and directives as well as the *EU Charter of Fundamental Rights*). In light of this paper's already articulated sole focus on the ESRs jurisprudence of the ECtHR through its enforcement of the ECHR, the analysis in section 2 below will be restricted to the protection given to refugees within the ambit of the ECHR. Unlike the EU regime which expressly guarantees a right to

77 P. Connor, 'Number of Refugees to Europe Surges to Record 1.3 million in 2015' (2016), available at https://www.pewresearch.org/global/2016/08/02/1-asylum-seeker-origins-a-rapid-rise-for-most-countries/ (last visited 27 September 2021).

78 Fullerton, *supra* note 72, 50.

79 Eurostat, 'Asylum applications (non-EU) in the EU Member States, 2008-2020' (2021), available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics (last visited 20.01.2022).

asylum,[80] the ECHR does not contain such a right. However, as demonstrated by the jurisprudence of the ECtHR refugees and asylum seekers have been able to secure certain ESRs protections of the ECHR despite this absence.

2. The ECtHR and Cases Relating to the ESRs of Migrants and Asylum Seekers

Even before the 2015 migrant and refugee crisis the ECtHR had occasion to deal with a number of cases potentially touching upon the ESRs of migrants and asylum seekers. The most common avenue for the burgeoning of the ESRs of migrants and asylum seekers is the expansive interpretation of Article 3 of the ECHR to include the living conditions of migrants and asylum seekers. While living conditions is a broad term, I argue that it is broad enough to encompass ESRs. This is in line with Article 25 (1) of the *Universal Declaration of Human Rights* (UDHR) which recognizes that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family" and which goes on to identify elements of this right to include ESRs such as food, clothing, housing, medical care as well as necessary social services. The cases in this section were selected on the basis of their explicit mention of both the migrant/refugee crisis and ESRs as conceptualized as a part of living conditions.

a. Cases Where a Finding of Violation was Rendered

In a seminal 2011 case against Belgium and Greece,[81] the ECtHR for the first time examined the compatibility of the then *Dublin II* Regulations (a European Union law that determines which EU State is responsible for the examination of an asylum application) with the ECHR. In this case, the applicant, an Afghan asylum seeker, entered the European Union through Greece and then traveled to Belgium where he applied for asylum. Pursuant to the *Dublin II* regulation, Greece was held to be the responsible member State for his asylum application, resulting into his transfer to Greece by the Belgian authorities. Consequently, the applicant faced detention in what he described as appalling conditions, before living on the streets without any material State support. He alleged violations of Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment or punishment) and/or Article 13 (the right to

[80] *Charter of Fundamental Rights of the European Union* of 14 December 2007, OJ 2007 C 303/01, Article. 18.

[81] *M.S.S. v. Belgium and Greece*, ECtHR Application No. 30696/09, Judgment of 21 January 2011.

an effective remedy). The Court found a violation of Article 3 by Greece due to numerous factors including poor living conditions and a violation by Belgium for exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece. Pertinent to the discussion at hand, on the ESRs of migrants and asylum seekers, is the reiteration of the ECtHR that Article 3 cannot be interpreted as obliging the European States to provide everyone within their jurisdiction with a home[82] or to give refugees financial assistance to enable them to maintain a certain standard of living.[83] However, the Court went on to acknowledge that "the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered positive law"[84] and that considerable importance should be attached to "the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection".[85]

After *M.S.S.*, the ECtHR found Greece liable for violations of Article 3 in four other complaints involving the poor living conditions of asylum seekers. In three of these cases[86] the judgments of the Court borrowed heavily from the findings in the *M.S.S.* case. Here, the Court highlighted the limited availability of facilities in Greece to receive and house tens of thousands of asylum seekers and also noted the practical obstacles for these asylum seekers to access the labour market. The fourth case[87] was a little different from the others because it concerned an unaccompanied minor. While finding violations partly based on the living conditions of the applicant after his release from detention, the Court also emphasized the applicant's vulnerability as an unaccompanied minor who was illegally present in an unfamiliar foreign country.

In a 2012 case against Italy[88] the applicants (11 Somalian and 13 Eritrean nationals) travelling from Libya had been intercepted at sea by the Italian authorities and sent back to Libya. The Court found the State liable for two

82 *Chapman v. United Kingdom*, ECtHR Application No. 27238/95, Judgment of 18 January 2001, 27, para. 99.

83 *Tarakhel v. Switzerland*, ECtHR Application No. 29217/12, Judgment of 4 November 2014, 42, para. 95.

84 *M.S.S. v. Belgium and Greece*, *supra* note 81, 51, para. 250.

85 *Ibid.*, 51, para. 251.

86 *F.H. v. Greece*, ECtHR Application No. 78456/11, Judgment of 31 July 2014; *AL.K. v. Greece*, ECtHR Application No. 63542/11, Judgment of 11 March 2015; *Amadou v. Greece*, ECtHR Application No. 37991/11, Judgment of 4 February 2016.

87 *Rahimi v. Greece*, ECtHR Application No. 8687/08, Judgment of 5 July 2011.

88 *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment of 23 February 2012.

violations of Article 3 because the applicants had been exposed to the risk of ill treatment in Libya and of repatriation to Somalia or Eritrea. Specific to the discussion on ESRs, the Court was concerned about "many cases of torture, poor hygiene conditions and lack of appropriate medical care".[89] Interestingly, and unlike the cases arising out of the financial and economic crisis in Section I above, the ECtHR stressed that the existence of the refugee crisis and its attendant burden on States did not absolve them from their obligations under Article 3. The Court observed:

> "[…] that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. It does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis […]. It is particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe. However, having regard to the absolute character of the rights secured by Article 3, that cannot absolve a State of its obligations under that provision".[90]

As highlighted in Section I above, the ECtHR appeared willing to give States a higher margin of appreciation where challenges on the basis of Article No. 1 of Protocol No. 1 were made to State actions in times of exceptional financial crisis. In the case of the refugee crisis however, even though the Court acknowledges the exceptional difficulties faced by States in this regard, the ECtHR stresses that where absolute rights such as Article 3 are involved the margin of appreciation given to States is correspondingly narrower.

In one 2016 case against Russia[91] the ECtHR again found a violation of Article 3 of the ECHR in the context of migrants' poor living conditions. The applicants were a heavily pregnant Georgian woman together with her four young children, who were compelled to leave Russia because of their illegal presence. In the course of their exit they were detained for two weeks during which period they lived in very poor conditions with no assistance from the

89 *Ibid.*, 35, para. 125.
90 *Ibid.*, 35, para. 122.
91 *Shioshvili and Others v. Russia*, ECtHR Application No. 19356/07, Judgment of 20 December 2016.

Russian authorities. The Court emphasized the vulnerable condition of the applicants in the context of the mother's pregnancy, the young age of the children and the limited resources at their disposal.[92]

In July 2020[93] the Court found France liable for violations of Article 3 of the ECHR on the basis of the poor living conditions experienced by homeless asylum applicants as a result of the failures of the French authorities. The application concerned 5 asylum seekers (although one applicant, G.I. dropped out of the proceedings and his case was struck off the list) who complained that they had been unable to receive the material and financial support which they were entitled to as asylum seekers under French law. As a result they had been compelled to live in inhuman and degrading conditions for several months: sleeping rough, no access to sanitary facilities, having no means of subsistence and constantly being in fear of being attacked or robbed. The ECtHR held for three of the applicants (N.H., K.T. and A.J.) such living conditions combined with the lack of an appropriate response from the French authorities had exceeded the severity threshold required for Article 3 of the ECHR to be violated. For the fourth applicant S.G. the Court held that his circumstances did not reach the severity threshold because he had received a temporary allowance after only 63 days as compared to 95, 131 and 90 days respectively for the other applicants mentioned above.

b. Cases Where the Application was Found to be Inadmissible

In a 2016 case against Italy[94] which concerned the migration journey of three Tunisian applicants, the ECtHR was called upon to decide on a number of issues including whether the applicants had suffered inhuman and degrading treatment, on the basis of the living conditions experienced by them, during their detention on the Island of Lampedusa and on board two ships moored in Palermo harbor. The Court found that there had been no violation of Article 3 of the ECHR given the short duration of confinement. Interestingly, the Court held that "the applicants, who were not asylum seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured

92 *Ibid.*, 14, para. 83.

93 *N.H. and Others v. France*, ECtHR Application Nos 28820/13, 75547/13 and 13114/15, Judgment of 2 July 2020.

94 *Khlaifia and Others v. Italy*, ECtHR Application No. 16483/12, Judgment of 15 December 2016.

traumatic experiences in their country of origin".[95] The Court also stressed that "they belonged neither to the category of elderly persons nor to that of minors".[96]

A noteworthy case against the Netherlands[97] provided the ECtHR with an opportunity to highlight situations where the poor living conditions of an asylum seeker would not be capable of amounting to a violation of Article 3. In this case the applicant was a failed asylum seeker squatting in an indoor car park who complained that he had been forced to live in inhuman conditions. The Court was emphatic that the applicant was not entitled to any social assistance in the Netherlands. Differentiating this case from the *M.S.S.* one, the Court elaborated that "unlike the applicant in *M.S.S.* who was an asylum-seeker, the applicant in the present case was at the material time a failed asylum-seeker under a legal obligation to leave the territory of the Netherlands."[98] The relevant authorities has not shown ignorance towards the applicant's situation: He was granted a four week grace period after the final rejection of his asylum application during which time he retained his right to reception benefits, he had the option of applying for reception benefits at a centre where his liberty would be restricted, the Netherlands had set up a special scheme providing for the basic needs of irregular migrants. In these circumstances the State had not violated its obligations under Article 3.

c. Cases Involving ESRs of Migrants and Asylum Seekers Outside the Context of Living Conditions

Other than in the context of living conditions of asylum seekers and persons due to be removed from the territory of a State, the ECtHR has also dealt with ESRs of migrants and asylum seekers primarily through the anti-discrimination provision of Article 14.[99] Where a Contracting State decides to provide social benefits, it must do so in a way that does not contravene Article 14.

> "A State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programs, public

95 *Ibid.*, 67, para. 194.
96 *Ibid.*
97 *Hunde v. Netherlands*, ECtHR Application No. 17931/16, Judgment of 5 July 2016.
98 *Ibid.*, 16, paras 55-56.
99 ECtHR, 'Guide on the Case-law of the European Convention on Human Rights – Immigration' (2020), available at https://echr.coe.int/Documents/Guide_Immigration_ENG.pdf (last visited 27 September 2021).

> benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certaincircumstances, justifiably differentiate between different categories of aliens residing in its territory."[100]

In this case against Bulgaria however, the applicants argued that the requirement for them to pay school fees for their secondary education was unjustified and thus contrary to Article 14 of the ECHR in conjunction with Article 2 of Protocol No.1. The Court agreed that in the specific circumstances of this case (the applicants were not living in Bulgaria unlawfully, the authorities had no substantive objection to their remaining in Bulgaria and had no serious intention of deporting them, the applicants had not tried to abuse the Bulgarian educational system, they were fully integrated in Bulgarian society and spoke fluent Bulgarian) the requirement for the applicants to pay fees on account of their nationality and immigration status was not justified and thus there had been a violation of the pertinent provisions.

III. The COVID-19 Pandemic

1. Contextualizing the Crisis and State Responses

Coronavirus disease (COVID-19), which is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) was first identified in December 2019 in Wuhan, China.[101] On 11th March 2020 the World Health Organization (WHO) declared the coronavirus (COVID-19) outbreak a global pandemic[102] and urged States to implement urgent measures to deal with the virus. Since then, and for almost a year now, European States (and indeed, States all around the world) have adopted and implemented numerous measures in an effort to counter the pandemic and to cope with increasing pressures on their respective public health systems. The most common measures implemented across the board include cancellations of mass gatherings; closure of public

100 *Ponomaryovi v. Bulgaria*, ECtHR Application No. 5335/05, Judgment of 21 June 2011, 15, para. 54.

101 WHO, 'Listings of WHO's Response to COVID-19' (2020), available at https://www.who.int/news/item/29-06-2020-covidtimeline (last visited 27 September 2021).

102 WHO, 'Director-General's opening remarks at the media briefing on COVID-19' (2020), available at https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited 27 September 2021).

spaces such as restaurants, entertainment venues and other non-essential shops; closure of educational institutions; stay at home recommendations for both the general population as well as for particularly vulnerable groups; mandatory use of protective masks in public spaces including public transport; and also recommendations for teleworking or home office rather than physical presence at workplaces.[103]

Inevitably, some of these measures have interfered with the enjoyment of human rights and will eventually be challenged first, in national courts and subsequently at the ECtHR. For instance, lockdown requirements can be argued to clash with and restrict a number of fundamental liberties under the ECHR, in particular freedom of movement and freedom of peaceful assembly. The right to family life may also be implicated due to restrictions on movement of persons.[104] In fact, the ECtHR has already had occasion to hear and finally determine one such case brought against Romania[105] where the applicant challenged the lockdown imposed by the Romanian government from 24 March to 14 May 2020 to tackle the COVID-19 pandemic and which entailed restrictions on leaving one's home. The Court ruled against the applicant holding that the level of restrictions on his freedom of movement could neither be equated with house arrest nor deemed to constitute a deprivation of liberty within the meaning of Article 5 (1) of the Convention.

Within the specific sphere of ESRs, questions are also likely to arise about the scope of positive State obligations under the right to health within the context of a pandemic. This could include concerns about the sufficiency of health care facilities available in a State and how access to them is controlled, access to personal protective equipment and access to and distribution of vaccines.

2. The ECtHR and ESRs Dimensions of COVID-19 Regulations

It is too early to engage in any meaningful and comprehensive assessment of the ECtHR jurisprudence on COVID-19. Undoubtedly, in the coming months and years the Court will have more opportunities to rule on the human

103 European Centre for Disease Prevention and Control, 'Data on Country Response Measures to COVID-19' (2021), available at https://www.ecdc.europa.eu/en/publications-data/download-data-response-measures-covid-19 (last visited 27 September 2021).

104 S. Jovičić, 'COVID-19 Restrictions on Human Rights in the Light of the Case Law of the European Court of Human Rights', 21 *ERA Forum Journal of the Academy of European Law* (2021) 4, 545.

105 *Cristian-Vasile Terhes v. Romania*, ECtHR Application No. 49933/20, Judgment of 13 April 2021.

rights impacts of the various measures implemented by European States in combatting the pandemic.[106] Some applications have already been made to the Court.[107]

Thus far however, only one ESRs case[108] has been decided by the Court on the COVID-19 measures. Here, the applicant unsuccessfully invoked Articles 2 (right to life), 3 (the prohibition of torture), 8 (right to respect for private life) and 10 (freedom of expression) of the ECHR, challenging the French government's response to the outbreak of the coronavirus. Specifically, rather than complaining about how the measures interfered with the various ECHR rights and freedoms, the focus here was based on omissions of the State in the management of the COVID-19 crisis. Invoking the positive obligations of the State, the applicant alleged a violation of the right to life of the French population because of the limitations on access to diagnostic tests, prophylactic measures and certain treatments. He also alleged a violation of the privacy of people who die alone from the virus.[109]

It is noteworthy for the present discussion that the ECtHR interpreted the applicant's complaint in terms of the right to health. The Court held that while the right to health is not one of the rights guaranteed under the ECHR, States nevertheless have a positive obligation to take the necessary measures to protect the life and physical integrity of persons within their jurisdiction, including in the field of public health. However, the Court did not go further to decide on whether the State had failed to fulfill these positive obligations because the application was found to be inadmissible.[110] The application was considered to amount to an actio popularis and the applicant could not be regarded as a victim of the alleged violation within the meaning of Article 34 of the ECHR. In particular, he had failed to provide any information about his own condition and had failed to explain how the alleged shortcomings of the French authorities might have affected his health and private life.[111]

106 K. Zehtsiarou, 'COVID-19 and the European Convention on Human Rights' Strasbourg Observers Blog (2020), available at https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/ (last visited 27 September 2021).

107 *Toromag, S.R.O. v. Slovakia and Four Other Applications*, ECtHR Application No. 41217/20, communicated on 5 December 2020.

108 *Le Mailloux v. France*, ECtHR Application No. 18108/20, Judgment of 5 November 2020.

109 *Ibid.*, 2, para. 7.

110 *Ibid.*, 3, para. 9.

111 *Ibid.*, 3, para. 10.

While only time will reveal the direction that the ECtHR's COVID-19 jurisprudence will take, this paper speculates that various dimensions of the ESR to health are likely to be front and centre in these future cases. One potentially provocative issue that may arise in this regard is the question of compulsory COVID-19 vaccinations and whether the imposition of such an obligation by States would amount to a violation under the ECHR. Even though the jury is still out on this question, the recent judgment in the case against the Czech Republic[112] offers some useful insights into how the ECtHR is likely to approach questions of compulsory vaccinations. Here, the Court observed that compulsory vaccination, as an involuntary medical intervention, represents an interference with physical integrity and thus concerns the right to respect for private life protected by Article 8.[113] However, the Court affirmed that the Czech policy in question pursued the legitimate aim of protecting health as well as the rights of others and reiterated that "healthcare policy matters come within the margin of appreciation of the national authorities"[114] and in this case the margin should be a wide one.

C. The Way Forward: the Lingering Potential of the ESRs Jurisprudence of the ECtHR to Mitigate the Effects of Crises on Individuals

I. Some Reflections on the ESRs Jurisprudence of the ECtHR in Times of Crises

Despite the dark clouds that loom when crises abound, there are some silver linings to be found in these situations. Like many courts, the ECtHR is reactive rather than proactive. It cannot take up a case on its own initiative, and is only capable of exercising jurisdiction where complaints or applications concerning alleged violations of the ECHR by a State party to the convention are submitted to it by aggrieved applicants. This paper posits that in times of crises, even more than usual, individual rights are likely to be violated as States grapple with new problems and how to resolve them. State responses in these situations have the potential to inadvertently or otherwise expose already vulnerable groups to additional hardship, thereby creating more instances where rightsholders

112 *Vavřička and Others v the Czech Republic*, ECtHR Applications Nos 47621/13, 3867/14, 73094/14, 19306/15, 19298/15 and 43883/15, Judgment of 8 April 2021.

113 *Ibid.*, 58, para. 263.

114 *Ibid.*, 63, para. 280.

may claim violation and seek recourse in both national courts and (thereafter) supranational courts such as the ECtHR. For instance, it has been argued that the global financial and economic crisis together with the increased acceptance of ESRs in general, has led to an increased number of ESRs complaints and proceedings at the ECtHR.[115]

As illustrated by the analysis in Part B above, since the commencement of both the financial and economic crisis as well as the migrant and refugee crisis (and even before that), the ECtHR has shown its willingness to intervene in certain situations and hold States liable for ESRs violations under the ECHR. However, there is no consistent or uniform practice that can be gleaned from the jurisprudence. The Court's case law is largely characterized by incremental, case by case reasoning.[116]

While this is unsurprising given the interaction between the ECtHR and national authorities in light of the margin of appreciation doctrine, and the Court's judicial role that requires a focus on "individual redress rather on general lawmaking,"[117] it is nevertheless disappointing that the ECtHR has thus far failed to "tackle social rights issues according to a coherent theory of adjudication, instead of having recourse to case-by-case solutions that lack comprehensive reasoning."[118] The Court has even been criticized for promising more than it is willing or able to deliver: "the ECtHR's interpretation generally allows prima facie protection of economic and social interests, but eventually these are frequently outbalanced by other (general) interests."[119] Is it fair to accuse the Court of "talking the talk but not walking the walk"? Clearly, the ECtHR finds itself between a rock and a hard place. "There is an inherent tension between this reality of indivisibility (of CPRs and ESRs) on the one hand, and, on the other, the need for the Court to draw the line somewhere with regard to its competence to deal with social rights."[120]

Despite these concerns, and on the basis of the cases reviewed in Part B above, this paper tentatively proposes that the ECtHR is likely to find violations

115 Leijten, *supra* note 1, 81.

116 *Ibid.*, 81.

117 *Ibid.*

118 V. Mantouvalou, 'Work and Private Life: Sidabras and Dziautas v. Lithuania', 30 *European Law Review* (2005) 1, 573, 584.

119 Leijten, *supra* note 1, 81.

120 E. Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights', in D. Barak-Erez & A. M. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (2007), 135, 165.

of ESRs under the ECHR in times of crisis when the following criteria are present in any given case:

The jurisprudence in Part B reveals that the ECtHR is likely to find ESRs violations of the ECHR by State parties whenever the actions implemented by the national authorities result into the imposition of an excessive burden on the applicant. This has been held in *Koufaki and Adedy v. Greece* and reiterated in *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* as well as in *Da Silva Carvalho Rico v. Portugal* and *Mockienė v. Lithuania*. The existence of precisely this kind of unacceptable excessive burden on the individual applicants formed part of the reasoning behind findings of violations in *N.K.M. v.Hungary* as well as in *R.Sz. v. Hungary*. The question of what constitutes an excessive burden or not is basically one that requires the court to balance individual interests against the public interest. As elaborated upon in one case,

"Any interference must also be reasonably proportionate to the aim sought to be realized. In other words, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden."[121]

Another recurring theme militating in favor of findings of ESRs violations is the vulnerability of the applicant. This concept of vulnerable groups was first introduced in 2001, in a case against the United Kingdom[122] to refer to the Roma minority. Since then the term has been extended to numerous different groups including persons with mental disabilities, people living with HIV and asylum seekers.[123] Although each case is assessed on the basis of its individual merits, the ECtHR has recognized that some applicants are in need of special protection because they belong to inherently vulnerable groups. For instance, in the *M.S.S.* case the Court stressed that it "must take into account that the applicant, being an asylum seeker was particularly vulnerable because of everything he had been through..."[124] and the fact that considerable importance must be attached to the applicant's status as "a member of a particularly underprivileged and vulnerable

121 *Koufaki and ADEDY v. Greece*, *supra* note 60, 6, para. 32.

122 *Chapman v. United Kingdom*, ECtHR Application No. 27238/95, Judgment of 18 January 2001.

123 L. Peroni & A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights convention Law', 11 *International Journal of Constitutional Law* (2013) 4, 1057.

124 *M.S.S. v. Belgium and Greece*, *supra* note 83, 47, para. 232.

population group in need of special protection."[125] Such vulnerable groups may be minorities who have been systematically subjected to ill-treatment, or special groups such as minors as was the case in *Rahimi v. Greece*, pregnant women as was the case in *Shioshvili and Others v. Russia*, disabled persons or the elderly. In Juxtaposition, in situations where the Court finds that the applicant does not belong to a vulnerable group, the chances of a finding of violation are correspondingly lower as was the case in *Khlaifia and Others v. Italy*.[126]

The ECtHR has continuously stressed that the ECHR does not impose any obligations upon State parties to provide any particular ESRs. However, where a State chooses to provide ESRs, this must be done in a way that does not unjustifiably violate the prohibition against discrimination. For instance, the Court has confirmed that "although Article 1 Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme it must do so in a manner compatible with Article 14."[127] A similar holding was made in the context of the right to housing under Article 8.[128] Thus, where a State has undertaken to provide a particular benefit to the population generally, and fails to provide it to a particular applicant without reasonable justification, the Court is likely to find an ESRs violation as was the situation in *Ponomaryovi v. Bulgaria* concerning the right to education, and outlined in greater detail in Part B above.

Conversely, the cases analyzed in Part B also seem to suggest that there are certain factors likely to reduce the willingness of the ECtHR to find ESRS violations even in times of crisis. These include:

1. The Exceptionality of the Crisis Situation

This paper, rather provocatively, argues that when first confronted with a crisis situation the ECtHR is reluctant to find violations by State parties to the ECHR, whether or not these States make an Article 15 derogation. This may be partly attributed to the acceptance that in times of crisis there is a need for swift action which reduces the time available for deliberation, thus a wider margin of appreciation is likely to be given to States. In numerous cases, in issuing a finding of no violations, the Court emphasized the exceptional circumstances facing the State in question. For instance, in *Koufaky and ADEDY v. Greece* the

125 *Ibid.*, 51, para. 251.
126 *Khlaifia and Others v. Italy*, *supra* note 96.
127 *Stec and Others v. The United Kingdom*, *supra* note 44, 15, para. 55.
128 *Bah v. United Kingdom*, *supra* note 39, 16, para. 40.

Court highlighted the existence of an exceptional crisis without precedent in recent Greek history. Similarly, in *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, the Court reiterated that "these measures were adopted in an extreme economic situation." These sentiments were subsequently echoed in *Da Silva Carvalho Rico v. Portugal, Mockienė v. Lithuania*, as well as in *Aielli and Others and Arboit and Others v. Italy*. However, despite the willingness of the Court to widen the margin of appreciation in light of exceptional crisis situations, this paper additionally posits that this depends on the legal basis of the violation claimed. On one hand, where the right in question is non-absolute in nature (for example, the right to property under Article 1 Protocol No. 1) and therefore capable of limitation where the necessary requirements are met, the Court is unlikely to find violations so long as the State's actions were justifiable in light of the exceptional context. On the other hand, where the right in question is an absolute right such as the right to be free from inhuman and degrading treatment and punishment under Article 3, the exceptionality of the situation will not allow any justifications for violations as was the case in *Hirsi Jamaa and Others v. Italy*.[129]

2. The Transitory Nature of the Measures Implemented

Additionally, the cases surveyed suggest that in making a final decision on whether violations exist or not, the ECtHR assesses the duration of the impugned measures. Where these measures were only temporary or transitory the Court is likely to render a finding of no violation as was the case in *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* as well as in *Da Silva Carvalho Rico v. Portugal*. A similar holding was made in a case against Lithuania[130] where the Court found that given the temporary nature of the measure implemented the State had not overstepped its margin of appreciation. On the contrary, the longer the duration of interference with the applicants' ESRs the more likely the Court is to find a violation under the ECHR.

II. Some Concluding Thoughts

The ECtHR is undoubtedly equal to the task of protecting ESRs especially in times of crisis. However, as has already been alluded to in preceding sections of this article, there appears to be a mismatch between how much the Court

[129] *Hirsi Jamaa and Others v. Italy*, *supra* note 90.

[130] *Savickas v. Lithuania*, ECtHR Application No. 66355/09, Judgment of 15 October 2013, 24, para. 94.

seems willing to do in the vindication of ESRs and how much it has actually done through its jurisprudence. This paper has sought to begin a conversation on the potential role that ESRs within the ECHR have to mitigate the effects of crises on rightsholders. The intention has been to analyze the prospects and challenges of ESRs implementation by the ECtHR in times of crisis.

What is apparent is that the Court has a rich "crisis jurisprudence" that will undoubtedly keep growing as more and more cases touching on the various different crises currently plaguing Europe (and the World) are decided upon. However, there is a need for the ECtHR to be more deliberate and consistent in its reasoning in these cases in order to develop a principled jurisprudence and safeguard itself from attacks that its approach "has been flawed by a deep-seated reluctance[…]to define appropriately the parameters of its own adjudicative role in shaping the normative content of resource-intensive rights through the development of the values and principles embodied in the ECHR."[131]

Even though in certain instances States enjoy a wide margin of appreciation, and "unless it is arbitrary or unreasonable, the legislator's dec ision at a time of crisis falls within this latitude",[132] it is necessary for the ECtHR to utilize its unique position to more boldly uphold ESRs within Europe generally, and more particularly in times of crises. Dark clouds do not last forever, in times of crisis it is still possible for the ECtHR to remain a ray of hope.

131 Palmer, *supra* note 4, 399-400.

132 L. Sicilianos, 'The European Court of Human Rights at a Time of Crisis in Europe', SEDI/ESIL Lecture at the European Court of Human Rights (2015), available at https://esil-sedi.eu/wp-content/uploads/2018/04/Sicilianos_speech_Translation.pdf (last visited 27 September 2021).

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Missed Communications and Miscommunications: International Courts, the Fragmentation of International Law and Judicial Dialogue

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Abstract

The increase in the number of international judicial bodies has led to different international courts deciding similar issues of international law. There is the real possibility that these international judicial bodies, not subject to the supervision of a common appeal court, may rule differently on similar questions before them. While this fragmentation of decision-making may undermine the coherency and certainty of the international legal system, it may in some cases be in the interests of the international community, including where divergences in decision-making are the result of specialized regimes or where there is progressive development of the law. So that fragmentation is limited to what is beneficial and necessary for the international community, it is essential that international judicial bodies are in open and structured dialogue with one another. This analysis considers three scenarios of overlapping decision-making, over the course of the lives of two sets of international courts: the International Court of Justice, and the international criminal courts and tribunals. It also considers the recent decision of the International Criminal Court with respect to Palestine and the Court's refusal to weigh in on questions of general international law, in apparent departure from the previous three examples. It is submitted that these examples demonstrate that insufficient attention is given by these international judicial bodies to the issue of judicial dialogue and its importance. This may undermine the legitimacy of the system and introduce the risks of fragmentation without its benefits.

KEY WORDS: fragmentation, international law, international court, international criminal law, judicial dialogue, customary international law

A. Introduction

Unlike the domestic or national sphere of law, the international sphere has no single legislative body to pronounce international law and organize jurisdiction of the many judicial bodies.[1] There is no hierarchy of international laws, with the exception of the supremacy of obligations under the *United Nations Charter*.[2] The international judicial bodies that purport to interpret international law are decentralized, not bound by precedent, and not under the supervision of a court of appeal.[3] They have complex overlapping domains of influence.[4] They can arrive at their own interpretations of international law, which may be inconsistent with those of other organs that are concerned with similar issues in these overlapping domains.[5]

Such features of the international legal system may cause fragmentation in the application of the law: two or more international judicial bodies dealing with the same legal or factual issue, and arriving at contradictory decisions.[6] A related area of possible fragmentation is institutional: the competence of different judicial institutions interpreting and applying international law, as well as their "hierarchical relations" with one another.[7] Both of these types of fragmentation will be considered. This analysis will not consider what is sometimes referred to as "substantive fragmentation", which is the "splitting up of the law into

1 B. Simma, 'Universality of International Law from the Perspective of a Practitioner', *European Journal of International Law* (2009) 265, 270.

2 S. Linton & F.K. Tiba, 'The International Judge in an Age of Multiple International Courts and Tribunals', 9(2) *Chicago Journal of International Law* (2009) 407, 416.

3 P. Webb, *International Judicial Integration and Fragmentation* (2015), 195 [Webb, 'International Judicial Integration'].

4 F. Pocar, 'The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law?', in H.P. Hestermeyer *et al.* (eds), *Coexistence, Cooperation and Solidarity* (2011), 1705.

5 E. Kasotti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface', 8(2) *European Journal of Legal Studies* (2015) 21, 34.

6 Webb, *International Judicial Integration*, *supra* note 3, 6. Webb called this type of fragmentation "decisional fragmentation". This was excluded from consideration in the International Law Commission's famous 2006 report on fragmentation. See *Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, 30–1, paras 47–8 [ILC, 'Report of the Study Group'].

7 *Report of the Study Group*, *supra* note 6, 13, para. 13.

highly specialized 'boxes' that claim relative autonomy from each other",[8] and the differences between them.

This analysis begins in Section B by considering the interests of the international community in international judicial bodies minimizing fragmentation in decision-making. It is posited that fragmentation is a development that is value-free, or neither inherently good nor bad.[9] Broadly speaking, the international community requires that decision-making be coherent. However, it also requires that international judicial bodies resolve disputes according to the specialized regimes giving them jurisdiction. Relatedly, what is termed 'fragmentation' may in fact be a departure in decision-making that contributes to a progressive development of the law according to the changing needs of the international community. Balancing these interests requires dialogue between the international judicial bodies.

In sections C, D, E and F, the analysis considers whether these sometimes conflicting interests are upheld by the International Court of Justice (ICJ) and the international criminal courts and tribunals – primarily, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC). The ICJ adjudicates disputes between States, while the criminal courts adjudicate prosecutions of individuals for certain international crimes. Although their subject matter jurisdictions never overlap, they may interpret the same rules.[10] They may also consider similar factual scenarios. For example, both courts have been seized with allegations of genocide perpetrated against Rohingya Muslims at the Myanmar-Bangladesh border. These examples of international courts have been chosen because they embody conflicting goals of the international legal system. In the case of international criminal courts and tribunals, this is to ensure that perpetrators of international crimes are made accountable in the event that States Parties do not or cannot do this themselves, while in the case of the ICJ, it is to settle legal disputes between States. Nevertheless, it will be shown that international criminal courts and tribunals must frequently consider jurisdictional and substantive issues concerning States in their assessment of individual criminal liability, while the ICJ must consider

8 *Ibid*.

9 F. Zelli & H. van Asselt, 'The Institutional Fragmentation of Global Environmental Governance: Causes, Consequences, and Responses', 13(3) *Global Environmental Politics* (2013) 1, 3.

10 R. van Alebeek, 'The Judicial Dialogue Between the ICJ and International Criminal Courts on the Question of Immunity', in L. van den Herik & C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (2012) 93, 93 [Van Alebeek, 'The Judicial Dialogue'].

the behavior of individuals in order for it to determine or advise on the legal entitlements of States.

Specifically, four examples of institutional overlap between the ICJ and the international criminal courts and tribunals will be considered. Section C considers the law of immunities and its application in circumstances where heads of State and State officials are accused of 'core crimes' of crimes against humanity, war crimes, or genocide. Section D examines the methods by which the ICJ and the international criminal courts ascertain whether internal conflicts involving proxy actors are international. Section E explores allegations of genocide being considered by the ICJ and the ICTY in respect of similar factual scenarios, being the conflicts in Bosnia and Herzegovina and in Croatia in the 1990s. Section F examines the recent decision by the ICC Pre-Trial Chamber with respect to the ICC's territorial jurisdiction in Palestine, its refusal to assess a question of general international law, and its brief reference to the ICJ's advisory opinion with respect to the wall constructed by Israel in the Occupied Palestinian Territory.

These decisions will be described and analyzed. What is at issue is not so much the correctness of the relevant decision. Rather, it is whether the decision differs from that of another judicial body and how well the judicial body manages its overlaps with another judicial body in making its decisions, in light of the interests of the international community in coherency of decision-making. This article will also consider whether the relevant decision examines the role of the judicial body itself in interpreting the international law applicable to its particular treaty.

It is submitted that the first two examples are cases of fragmentation of legal principles, where the ICJ on the one hand and international criminal courts and tribunals on the other have each adopted and then reaffirmed interpretations of the law that conflict with each other, and exhibited differing views of their respective institutional purposes. The third example is highly instructive, but for different reasons. It is submitted that the ICJ was overly deferential to the findings of the ICTY and inadequately contextualized them, likely because the case at hand concerned facts and issues of international criminal law, perceived to be the expertise of the ICTY. It is a counter-example, and it is not an isolated one, given that the situation in Myanmar-Bangladesh is also currently being considered by the ICC and ICJ. The fourth and final example is a very recent development of the ICC's self-assessed institutional purpose, with respect to interpreting general international law, and in addition to this, the ICC's decision furthers the insufficient contextualization of ICJ advisory opinions that are evidenced in the other examples.

What emerges from these four examples is not fragmentation as a problem. Rather, reconciling the four examples reveals two more fundamental issues:

i. There is a shortage of structured dialogue between the courts. At times, courts ignore relevant decisions of other courts, while at other times they are overly reliant on each other's findings. In both cases, decisions are insufficiently contextualized; and
ii. There are significant disagreements about the institutional role of the courts – that is:
    a. whether the ICJ is paramount;
    b. whether the international criminal courts and tribunals have a lawmaking role outside of international criminal law; and
    c. whether holdings of either should be confined to their unique context and not relied upon in new contexts.

Given the importance of structured judicial dialogue, the absence of such dialogue risks producing the negative effects of fragmentation, being inconsistency and arbitrariness in decision making, without its positive effects, being plurality and adaptability of the law to the changing needs of the global community.

All of the issues in these examples are directly or indirectly being considered by the ICJ and the international criminal courts to this day. Immunities for Heads of State and for State officials from prosecution for international crimes will likely continue to come before international courts, including the ICC. The classification of conflict as *international* will be relevant for conflicts involving States exerting a degree of control over armed groups located in the territory of another State. The ICC and the ICJ are likely to once again consider identical factual scenarios, as the treatment of the Rohingya people in Myanmar is currently before both the ICJ and the ICC. Finally, it is entirely possible that the ICC will be seized by a Prosecutor who is seeking to investigate crimes perpetrated in a territory controlled by a nascent State or quasi-State entity.

The examples considered here are not dated to their context, but rather are illustrative of the continued potential for ruptures in dialogue. Resolving these issues is of great importance to the certainty and legitimacy of the international legal system.[11] This analysis hopes to contribute to an emerging acceptance

[11] *Legitimacy* is used in this article to refer to what Cohen *et al.* have called "sociological legitimacy", sometimes referred to as "descriptive legitimacy". Cohen *et al.* define

of fragmentation in international systems as an inevitable consequence of the international treaty-based legal system,[12] but this analysis argues that fragmentation must be managed by judicial dialogue in order for its negative effects to be mitigated. It may not be the existential threat previously conceived, but this does not justify inattention to its occurrence.

B. Fragmentation and the Interests of the International Community

For many, the concept of fragmentation has a negative connotation. There are a number of interests in long-term consistency between the decisions of different institutions.[13] Generally, like cases should be treated by judicial bodies alike, so that subjects of the law are treated equally.[14] Where decisions on similar issues are not consistent with one another and not explained by distinction of issues, the decision-making is or appears to be arbitrary. Arbitrariness or the perception of arbitrariness undermines the legitimacy of

sociological legitimacy as "perceptions or beliefs that an institution has such a right to rule" and which might be measured by the levels of support that a judicial body enjoys from its constituents. They contrast sociological legitimacy with normative legitimacy, the latter being "concerned with the right to rule according to predefined standards": H.G. Cohen *et al.*, 'Legitimacy and International Courts – A Framework', in N. Grossman *et al.* (eds), *Legitimacy and International Courts* (2018) 1, 4. As Follesdal observes, most international judicial bodies acquire the right to rule upon a State providing consent to their jurisdictions, meaning a State's perception of an international court's authority is important to its acceptance of that court's jurisdiction and the enforcement of its interpretations: A. Follesdal, 'The Legitimacy of International Courts', 28(4) *Journal of Political Philosophy* (2020) 476, 481. Legitimacy is to be contrasted with legality, which is the "conformity or nonconformity of a body politic […] with the legal rules that regulate its establishment": A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', 25 *Leiden Journal of International Law* (2012) 491, 492.

12 See e.g. C. Kreuder-Sonnen, 'After fragmentation: Norm collisions, Interface Conflicts, and Conflict Management', 9(2) *Global Constitutionalism* (2020) 241; B. Faude & F.G. Kreul, 'Let's Justify! How Regime Complexes Enhance the Normative Legitimacy of Global Governance', 64 *International Studies Quarterly* (2020) 431; S.A. Benson, 'Fragmentation or Coherence? Does International Dispute Settlement Achieve Comprehensive Justice', 3(1) *International Journal of Public Administration* (2020) 77.

13 Webb, *International Judicial Integration*, *supra* note 3, 6.

14 ILC, *Report of the Study Group*, *supra* note 6, 18, 19, 100, paras 55, 491.

a judicial institution, especially where there is no appeal court supervision.[15] It may also undermine the strength of the belief of the international community in the existence in the norm.[16] A legitimacy deficit in a judicial institution is all the more devastating on the international plane, as international judicial bodies rely on State governments for enforcement of their decisions.[17] Differing interpretations of similar legal principles can engender doubt over the existence or survival of international law as a whole, or lead to the rejection of treaties by international actors.[18] Inconsistent decisions of international judicial bodies also create uncertainty and unpredictability, as international actors are unclear about how the law will be interpreted in their circumstances and how to comply with these interpretations.[19] Further, national courts are sometimes required to interpret and apply international law, and inconsistency in the formulations of international judicial bodies breeds confusion in these domestic settings. These considerations all point to the conclusion that there must be some constraint in the plurality of decision-making in international courts.[20]

Uncertainty of interpretation of the law has particular consequences for criminal defendants. This is especially so for differing interpretations among international criminal courts and tribunals, but also between the collective international criminal court and tribunal system and other judicial bodies such as the ICJ who interpret international criminal law doctrines. International criminal law enshrines the principle of legality, which is that specific crimes and punishments be established legally and allow actors to perpetrate acts with

15 G. Guillaume, 'Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly' (26 October 2000). Where a State perceives that the interpretation of one judicial body differs to that of another judicial body for similar subject matter, the "claims to legitimate authority" to interpret the law by either or both body may be doubted by States: Cohen *et al.*, *supra* note 11, 20–1.

16 Simma, *supra* note 1, 279.

17 Kasotti, *supra* note 5, 35.

18 P.-M. Depuy, 'A Doctrinal Debate in the Globalisation Era: On the Fragmentation of International Law', 1(1) *European Journal of Legal Studies* (2006) 25, 33.

19 P. Webb, 'Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide', in L. van den Herik & C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (2012) 117, 148 ['Binocular Vision'].

20 G. McIntyre, 'The Impact of a Lack of Consistency and Coherence: How Key Decisions of the International Criminal Court Have Undermined the Court's Legitimacy', 67 *Questions of International Law* (2020) 25, 26 [McIntyre, 'Lack of Consistency and Coherence'].

certainty as to their legal consequences.[21] Gallant also argues that the principle of legality affects legitimacy of the law, as actors who have certainty over what is forbidden are likely to view the law as deserving compliance.[22] Of course, strict requirements for certainty about a law's application are necessarily tempered by some expectation that qualifications or evolved meanings will be discerned by judicial officers when interpreting the law so that the margins of a law can be ascertained in dealing with cases at its boundaries, so the law can have effect in a range of situations that were not anticipated by the drafters, and so that the law progressively develops to stay abreast of social changes and maintains its relevance to a rapidly evolving system.[23] Nevertheless, the principle of legality is particularly important for criminal law as this area of law more than others is attempting to shape human behavior, impose behavioral values, imprint a strong condemnation of behavior, and enforce severe consequences of loss of freedom and property.[24] If two judicial bodies have differences of interpretation of laws which have criminal consequences, actors face uncertainty which has the undesirable effect of undermining these purposes.

21 K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2008), 15.

22 *Ibid*., 23.

23 A. Bufalini, 'The Principle of Legality and the Role of Customary International Law in the Interpretation of the ICC Statute', 14(2) *Law & Practice of International Courts and Tribunals* (2015) 233, 235; J. Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method From Chaos?', in S. Darcy & J. Powderly, *Judicial Creativity at the International Criminal Tribunals* (2011) 17, 18–20; M. Frulli, 'The Contribution of International Criminal Tribunals to the Development of International Law: The Prominence of *Opinion Juris* and the Moralization of Customary Law', 14 *The Law and Practice of International Courts and Tribunals* (2015) 80, 82–3; J. Nicholson, 'Strengthening the Effectiveness of International Criminal Law through the Principle of Legality', 17 *International Criminal Law Review* (2017) 656, 672. Schabas points out that the process of negotiations by "diplomats qua legislators" can produce texts such as the Rome Statute that are "riddled with inconsistencies, compromises, lacunae and 'constructive ambiguities'": see W. Schabas, 'Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals', in J. Doria *et al.* (eds), *The Legal Regime of the International Criminal Court Essays in Honour of Professor Igor Blishchenko* (Brill Nijhoff, Leiden, 2009) 75, 101. Former Judge of the ICTY David Hunt has argued that a "general lack of precision" of international criminal law has required judges to give the body of law the "precision expected from a body of criminal norms": see David Hunt, 'The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges' (2004) 2 *Journal of International Criminal Justice* 56, 58–60.

24 Gallant, *supra* note 21, 16–17.

However, fragmentation in decision-making may simply reflect the unique institutional context of an international court. Generally, international judicial bodies are established by treaty or by international organizations themselves created by treaties, and there is significant diversity in the content and members of these treaties.[25] It should be remembered that a treaty is often the result of a *bargain* between a limited number of States, each of which may have conflicting objectives.[26] A treaty can be a relatively self-contained legal regime, providing its own specialized definitions of legal terms and embodying a unique "mission".[27] It may give a unique (often limited and specialized) mandate to an international court in response to new needs of the international community.[28] Moreover, it may be to the benefit of the international community that specialized judicial bodies are able to decide matters in their area of expertise efficiently.[29]

Nevertheless, even the most specialized international legal instruments do not operate in vacuums.[30] Treaties are interpreted with reference to a wider body of international law, and their interpretation may even change as this wider body of law changes.[31] Indeed it is this general international law, that is, general customary law and general principles of law recognized by civilized nations, which gives treaties their force and validity.[32] Specialized regimes are not cut off from principles of interpretation of international obligations, and more specifically legal concepts such as *legal title*, *nationality* or *acquiescence* lose sense and recognition to subjects of the law if there is no common understanding of their meaning.[33] Indeed, international courts and experts are at pains to point

25 ILC, *Report of the Study Group*, *supra* note 6, 10f., para. 15.

26 *Ibid*., para. 34.

27 Y. Shany, 'One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?', in O.K. Fauchald & A. Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (2014) 15, 18–19, 25–27.

28 C. Stahn & L. van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?', in L. van den Herik & C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (2012) 21, 33; Kassoti, *supra* note 5, 30.

29 L.E. Popa, *Patterns of Treaty Interpretation as Anti-Fragmentation Tools: A Comparative Analysis With a Special Focus on the ECtHR, WTO and ICJ* (2018,) 22.

30 T. Treves, 'Fragmentation of International Law: The Judicial Perspective', 27 *Agenda Internacional* (2009) 213, 220.

31 M. Andenæs & E. Bjorge, 'Introduction: From Fragmentation to Convergence in International law' in M. Andenæs and E. Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (2015), 4.

32 ILC, *Report of the Study Group*, *supra* note 6, 46, 55, paras 208, 254.

33 Depuy, *supra* note 18, 32.

out that the conceptualization of international law as detached specialist fields is neither helpful nor principled; rather there are underlying connections and unities in these diverse fields.[34] Moreover, it is argued that the process of legal interpretation and reasoning should bridge disparate fields of law and ensure that particular laws are conceptualized as part of a wider human purpose.[35]

Fragmentation of legal interpretation may be a symptom of healthy plurality in legal interpretation. Legitimate differences in interpretation may exist.[36] The relative lack of hierarchy in the international system permits exploration, and allows courts to collectively contribute ideas to the body of general international law.[37] In theory, this can lead to improvements in legal doctrines, as a greater range of legal ideas are considered and oversights by one institution are corrected by itself or other institutions,[38] and judicial "cross-fertilisation" allows ideas rooted in one tradition to contribute to creative development in another.[39] Law should be allowed to grow, and adapt to the changing needs of the international system.[40] It is often the failures of existing institutions to meet a challenge that give rise to treaties and new judicial bodies, and an insistence on harmony and consistency in interpretation may at times be unreasonable adherence to the *status quo*.[41] In this regard, divergences in legal interpretation may catalyze "progressive development of the law".[42]

However, this process of improvement of judicial interpretation presupposes that there is dialogue between courts, so that different interpretations can be openly debated, and convergences or clarified differences can be reached.[43] Dialogue here refers to an institution's receptiveness to the decisions of other courts, and structured discussion, evaluation and application or rejection of them.[44] It is an acknowledgement by courts that they do not operate in isolation and must actively engage with relevant decisions of other courts; if relevant

34 Andenæs & Bjorge, *supra* note 31, 6.
35 ILC, *Report of the Study Group*, *supra* note 6, 15, para. 35.
36 Stahn & van den Herik, *supra* note 28, 51.
37 J.I. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals', 31(4) *New York University Journal of International Law and Politics* (1999) 697, 700.
38 *Ibid*.
39 Popa, *supra* note 29, 24.
40 Pocar, *supra* note 4, 1722.
41 M. Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553, 577-8.
42 Simma, *supra* note 1, 279.
43 Pocar, *supra* note 4, 1722.
44 Webb, *International Judicial Integration*, *supra* note 3, 177; Kasotti, *supra* note 5, 35.

decisions of other courts are not accepted, there must be convincing reasons provided for such a departure.[45] This dialogue leads to greater (long-term) coherence.[46] The interpretations of the law that give improved expression of the law and its purpose by their technical qualities and sensitivity to the needs of the time should prevail.[47] However, if they are ignored by other judicial bodies then they will not prevail.

These interests of the international community in coherency, specialized decision-making and plurality are in a tense but dependent relationship with each other. Judicial dialogue ensures that these interests are balanced with one another. Ultimately, it will be argued that the legitimacy of international law depends not necessarily on eliminating fragmentation, but rather on institutions taking each other into account, resolving conflicts in a transparent way, and contributing to both general principles of law and forms of hierarchy between institutions.[48]

C. Immunities

The position of international law for centuries has been that incumbent high-ranking representatives of States enjoy immunity from civil and criminal jurisdiction in other States ("personal immunity" or immunity *ratione personae*).[49] This immunity is said to derive from the status of the particular official and the position that they occupy, as well as the functions of the State that the individual is required to exercise in that position.[50] It is enjoyed by senior officials, including the head of State, head of government and Minister for Foreign Affairs, in respect of acts committed in a private or official capacity.[51] It is only enjoyed during the term of office.[52]

45 P. Webb, 'Scenarios of Jurisdictional Overlap Among International Courts', 19(2) *Revue Québécoise de Droit International* (2006) 277, 284; A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *European Journal of International Law* (2007) 649, 662-3 [The *Nicaragua* and *Tadić* Tests Revisited].

46 Webb, 'Binocular Vision', *supra* note 19, 134.

47 Treves, *supra* note 30, 226.

48 Andenæs & Bjorge, *supra* note 31, 2-3.

49 R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 4th ed. (2019), 508.

50 R.A. Kolodkin, *Preliminary Report on Immunity of State Officials From Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/601, 29 May 2008, 37 para. 78.

51 ILC, *Report of the International Law Commission: Sixty-Fifth Session (6 May–7 June and 8 July–9 August 2013)*, UN Doc. A/68/10, 66.

52 *Ibid.*, 66–7.

Separately, State officials also enjoy immunity for acts carried out in an official capacity ("functional immunity" or immunity *ratione materiae*).[53] It is enjoyed by all "State officials", defined by the Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction as a person "who acts on behalf and in the name of the State, […] whatever the position the person holds in the organization of the State".[54] It is only enjoyed in respect of acts performed in an official capacity, not in a private one.[55] The primary justification for functional immunity is usually based on the principle of the sovereign equality of States (*par in parem non habet imperium*), and the concern to prevent one State from bringing suit indirectly against another State by means of bringing a suit against the latter State's official .[56]

These rules of immunities are predominantly the result of customary international law.[57] Treaty regimes in this area are highly specific.[58]

The rise of individual criminal responsibility for violations of international law has challenged these doctrines. In 1945, the four main Allied powers signed the *London Agreement*, and in the annexed Charter article 7 provided that an "official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".[59] The International Military Tribunal sitting in Nuremberg considered the "principle of international law"

53 S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case', 13 *European Journal of International Law* (2002) 877, 882.

54 C.E. Hernández, *Third Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/673, 2 June 2014, 50, para. 144.

55 C.E. Hernández, *Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/686, 29 May 2015, 10–12, paras 27–33.

56 *Ibid*., 45, para. 102.

57 R.A. Kolodkin, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/631, 10 June 2010, para. 7(a); U. Owie, 'The Special Court for Sierra Leone and the Question of Head of State Immunity in International Law: Revisiting the Decision in Prosecutor v. Charles Ghankay Taylor', in C. Eboe-Osuji and E. Emeseh (eds), *Nigerian Yearbook of International Law 2017* (2018).

58 Webb, *International Judicial Integration*, *supra* note 3, 63.

59 This was not the first time States prepared a treaty that sought to centre criminal responsibility on State officials notwithstanding the effect of personal or functional immunity. Following WWI, the Treaty of Versailles contained article 227 which levelled responsibility at Kaiser Wilhelm II for "a supreme offence against international morality and the sanctity of treaties", however the refusal of the Netherlands to extradite the former German leader meant that the effect of this clause on traditional immunity was never tested: see Y. Simbeye, *Immunity and International Criminal Law* (2016), 232–4. *The Charter of the International Military Tribunal for the Far East* prepared by General

that representatives of a State are protected from personal responsibility when they carry out an act which is an 'act of State', and the Tribunal held that such a principle "cannot be applied to acts which are condemned as criminal by international law".[60] The Tribunal also found that individuals have international duties that "transcend the national obligations of obedience imposed by the individual State", meaning individuals who are in breach of laws of war cannot benefit from immunity even when acting "in pursuance of the authority of the State", if the State authorizes action that is "outside its competence under international law".[61] These two holdings would be the basis for Nuremberg Principle III as formulated by the International Law Commission.[62] The UN General Assembly never formally adopted these principles, but invited member States to present observations on them and requested the ILC to take them into account when drafting a code of offences against the peace and security of "mankind".[63]

These rulings by the International Military Tribunal made in the context of criminal prosecutions for core international crimes rulings were highly influential for subsequent judgments that State officials cannot avoid accountability for core international crimes.[64] They brought to the surface a conflict between two different purposes of international legal regimes: on the one hand making accountable those responsible for international crimes and

Douglas MacArthur provided in article 6 that an "official position" cannot of itself "free such accused from responsibility for any crime with which he is charged".

60 *France v. Göring*, Judgment and Sentence, 22 IMT 203 (1946), paras 245–248. This holding was later accepted by the International Military Tribunal for the Far East: see 'International Military Tribunal for the Far East, Judgment of 12 November 1948', in J. Pritchard & S.M. Zaide (eds), *The Tokyo War Crimes Trial*, Vol. 22, 48, 413, 48, 439. It was later applied by the Supreme Court of Israel when that Court found that "there is no basis for the [act of State] doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of 'crimes against humanity' (in the wide sense)": *Attorney-General of Israel v. Eichmann*, Judgment, Supreme Court of Israel (1968) 36 *International Law Reports* 277, 309–11, para. 14.

61 *France v. Göring*, *supra* note 60, para. 249.

62 "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law." See ILC, *Report of the International Law Commission to the General Assembly, Second Session*, UN Doc. A/CN.4/34, 1950 at 375.

63 See GA Res. 488(V), UN Doc. A/RES/488(V), 12 December 1950. The draft code would be completed in 1954, but its adoption would be postponed for many decades: see R. Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2014), 269.

64 Pedretti, *supra* note 63, 252.

gross human rights violations, and on the other hand allowing States and their officials to enjoy "sovereign equality and freedom of action" in the international sphere and avoiding infringement of this enjoyment.[65] This is no mere matter of judicial discourse and perception.

I. International Criminal Tribunal Decisions on Immunity

It would be some time after the judgments in Nuremberg and Tokyo that an international court would be tasked with adjudicating the criminal responsibility of State officials again. The United Nations Security Council adopted resolutions 827 (1993) and 955 (1994) which established, respectively, the ICTY and the International Criminal Tribunal for Rwanda (ICTR). These resolutions adopted the ICTY Statute and the ICTR Statute. Article 6(2) of these statutes provided that the official position of an accused person "shall not relieve such person of criminal responsibility", while article 29 required all States to cooperate with the respective Tribunals.

In the ICTY case of *Prosecutor v. Blaškić*,[66] the Appeals Chamber acknowledged the "general rule" of functional immunity weighing in favor of a finding of personal immunity, but stated that there was an exception for individuals accused of core international crimes.[67] Such persons "cannot invoke immunity from *national or international* jurisdiction even if they perpetrated such crimes while acting in their official capacity".[68] Interestingly, the Appeals Chamber was enquiring into "general principles and rules of customary international law relating to State officials" when making this ruling,[69] rather than interpreting international criminal law or the ICTY Statute specifically. In *Prosecutor v. Milošević*,[70] the incumbent head of State Slobodan Milošević was indicted and arrested, notwithstanding any personal immunity that he might have enjoyed. The ICTY Trial Chamber held that ICTY Statute article 7(2) "reflects a rule of customary international law", referring to several international

65 S.M.H. Nouwen, 'Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities', 78(3) *Cambridge Law Journal* (2019) 596, 610; Simbeye, *supra* note 59, 88–9.

66 ICTY Appeals Chamber, Case No. IT-95-14, 29 October 1997.

67 *Prosecutor v. Blaškić*, Judgment, Case IT-95-14, 29 October 1997, para. 41 ('*Blaškić*') (emphasis added).

68 *Ibid*.

69 *Ibid*.

70 *Prosecutor v. Slobodan Milosevic*, Decision on Preliminary Motions, Case No. IT-99-37-T, 8 November 2001.

legal instruments and two cases in support of this proposition.[71] Similarly in *Kambanda v. Prosecutor*,[72] the ICTR indicted, arrested and convicted (by guilty plea) the former Rwandan Prime Minister Jean Kambanda. The conviction was rendered despite the fact that the former Prime Minister may have benefited from functional immunity for acts that he perpetrated while he held office.

II. The ICJ Considers Immunity

The ICJ considered immunities from prosecution for core international crimes in the case *Arrest Warrant of 11 April 2000* (*DRC v. Belgium*) ('*Yerodia*').[73] In 2000, Belgium requested the extradition of the then-Minister for Foreign Affairs for the Democratic Republic of the Congo (DRC), Mr Abdulaye Yerodia Ndombasi, for alleged war crimes and crimes against humanity perpetrated in 1998. The DRC sought a declaration from ICJ that Belgium should annul the warrant, on the ground that the warrant violates the obligations of customary international law to extend "absolute inviolability and immunity from criminal process of incumbent foreign ministers" to the DRC. A majority of the Court decided that it was "unable to deduce from [State practice] any form of exception" to the rule for personal immunity of incumbent Ministers for Foreign Affairs, even where such officials were suspected of having perpetrated war crimes or crimes against humanity.[74] Jurisdictional immunity was "procedural", while criminal responsibility was "a question of substantive law", and immunity did not exonerate the individual from responsibility.[75] The majority declared that Belgium was required to cancel the warrant.

The first ambiguity in this decision concerned functional immunity. The ICJ majority stated that once the minister left office, a State could prosecute

71 *Prosecutor v. Milošević*, Decision, Case No. IT-99-37-T, 8 November 2001, paras 28–33. See also *Prosecutor v. Karadžić*, 16 May 1995, para. 23; *Prosecutor v. Furundžija*, Case No. IT-95-17/1, 10 December 1998, para. 140 for similar rulings.

72 *Prosecutor v. Kambanda*, Judgment and Sentence, Case No. CTR 97-23-S, 4 September 1998.

73 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3 [Yerodia].

74 *Ibid*. Judge van den Wyngaert and Judge Al-Khasawneh did not agree with the opinion of the majority with respect to immunity for war crimes and crimes against humanity. See Dissenting Opinion of Judge van den Wyngaert, para 25; Dissenting Opinion of Judge Al-Khasawneh, para 8(b). Judge Oda did not agree with the majority opinion on procedural grounds and did not consider the issue of immunity: see Dissenting Opinion of Judge Oda, para 16.

75 *Ibid*., para. 60.

that former minister for "acts committed during that period of office *in a private capacity*".[76] It did not refer to acts committed "in a public capacity" and did not state that international crimes are "private" acts. Thus, the judgment implies that functional immunity for public acts persists after the official leaves office, even if such acts are war crimes and crimes against humanity.[77] Many commentators have asserted that this position does not reflect international law, arguing that international law does not extend functional immunity to former officials who perpetrated core international crimes in a public or private capacity.[78] It contradicts the rulings in the tribunal cases set out above. Yet the ICJ majority did not refer to any of the ICTY and ICTR cases, which it is argued are relevant to the issue of State practice and in which rulings were made on the issue of customary international law with respect to immunities. This absence of reference was notwithstanding the reference by the ICJ majority to the ICTY and ICTR Statutes. Contrary to the view of the ICJ majority that the ICTY and ICTR Statutes did not reveal an exception to immunity under customary

76 *Ibid*., para. 61 (emphasis added).

77 In *Yerodia*, the relevant State official was suspected by Belgium of having committed war crimes and crimes against humanity. However, there is no reason why the Court's logic concerning acts committed in a public capacity would not extend to other core international crimes of similar seriousness, such as genocide or torture. To prove a crime of torture under the Convention Against Torture, it must be shown that the relevant act was perpetrated by a public official or other person "acting in an official capacity". The ICJ in *Yerodia* did elsewhere consider the House of Lords decision *R v. Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte (No. 3)* [1993] 2 All ER 97, which was a case concerned with arguments of head of State immunity from national prosecution for torture under the Convention Against Torture. States Parties to the Genocide Convention are required to punish persons committing acts of genocide regardless of their status: see *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, Art. IV.

78 See e.g. H. van der Wilt, 'Immunities and the International Criminal Court', in T. Ruys, N. Angelet & L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (2019) 595, 596; A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13(4) E*uropean Journal of International Law* (2002) 853, 868–70; R. van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials', 59(1) *Netherlands International Law Review* (2012) 5, 22; H. King, 'Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute', 4 *New Zealand Journal of Public International Law* (2006) 269, 274; A. S. Galand, 'Judicial Pronouncements in International Law: The *Arrest Warrant Case Obiter Dicta*', in L. Vicente & H.–W. Micklitz (eds), *Interdisciplinary Research: Are We Asking the Right Questions in Legal Research*, EUI Working Paper LAW 2015/04, 1, 7; Wirth, *supra* note 53, 888. Cassese further observes that core international crimes are "seldom" committed in a private capacity: see 868.

international law for national prosecutions, the ICTY Appeals Chamber ruled that such an exception existed.[79] The ICJ majority did not provide reasons for not considering these decisions.

The second ambiguity arose from the *obiter* statement of the ICJ majority that:

> "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VI1 of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'".[80]

It does not follow from the phrase '*certain* international criminal courts, *where they have jurisdiction*' (emphasis added) that immunity is removed for *all* international courts.[81] This was not a blanket permission to international courts to prosecute. However, the ICJ majority did not specify which types of international courts could avoid the barrier of immunity and did not specify the reasons why they could do so, an omission that would prove unfortunate.[82]

Further, the ICJ majority extracted one paragraph of the *Rome Statute* relevant to the issue of immunities. At the time of the ICJ decision, the *Rome Statute* was signed but it would only enter into force three months following the decision. Despite extracting article 27(2), the ICJ majority does not specify whether leaders of *non-State Parties* to the *Rome Statute* enjoy immunity,[83]

79 *Blaškić*, *supra* note 67, paras 41–2. See Section C(I) above.

80 *Yerodia*, *supra* note 73, 25-26, 26-27, para. 61.

81 W. A. Schabas, *An Introduction to the International Criminal Court* (2017), 62; van Alebeek, 'The Judicial Dialogue', *supra* note 10, 106 ['An Introduction to the ICC'].

82 Van der Wilt, *supra* note 78, 598.

83 Van Alebeek, 'The Judicial Dialogue', *supra* note 10, 106.

and does not consider article 98 of the Rome Statute which preserves some immunities.[84] These issues would trouble the ICC much later.[85]

In the 2012 case *Jurisdictional Immunities of the State (Germany v. Italy)*,[86] after many of the cases set out below, the ICJ doubled down on the opinion of the ICJ majority in *Yerodia* without referring to these cases. It maintained that the law of immunity was procedural in nature, and that functional immunity prevented the exercise of jurisdiction by States, notwithstanding the peremptory nature of the substantive rules alleged to have been breached.[87]

III. Special Court for Sierra Leone

Unlike the ICTY and ICTR, the Special Court for Sierra Leone (SCSL) was a criminal tribunal established by a treaty between the UN and Sierra Leone. Nevertheless, its Appeals Chamber considered that it was an "international criminal court".[88] Article 6(2) of the *Statute of the Special Court for Sierra Leone* provided that the official position of any accused person "shall not relieve such person of criminal responsibility nor mitigate punishment".

President Taylor of Liberia was indicted by the SCSL for core international crimes. Taylor argued he was protected by personal immunity. The Appeals Chamber decided that sovereign equality does not prevent a head of State from being prosecuted before an international criminal court, and that accordingly article 6(2) was not in conflict with any "peremptory norm of general international law" for immunity.[89] Although it referred to *Yerodia*, the Appeals Chamber did not refer to the other reasons for personal immunity provided by the ICJ in that case for personal immunity, including the need for State representatives to travel freely, but rather placed significant weight on paragraph 61 of *Yerodia* extracted above.[90] It did not engage fully with that decision.

84 Schabas, *An Introduction to the ICC*, *supra* note 81, 62.
85 For these issues, see Section C(IV).
86 *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, ICJ Reports 2012, 99.
87 *Ibid*., para. 95.
88 *Prosecutor v. Taylor*, Decision, SCSL AC, SCSL-2003-01-1, 31 May 2004, paras 36–37, 42 [*Taylor*].
89 *Ibid.,* paras 52–3.
90 Cryer et al, *supra* note 49, 528.

IV. ICC

On 31 March 2005, following concerns about alleged grave human rights violations in Darfur, the UN Security Council adopted resolution 1593. This resolution referred the situation in Darfur to the ICC Prosecutor. It also determined that, *inter alia*, "the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the *Rome Statute* have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully".

In 2009 and 2010, the ICC Pre-Trial Chamber authorized two warrants for the arrest of Omar al-Bashir for core international crimes, despite the fact that he was a sitting President of Sudan at the time of the issuing of those warrants.[91] The ICC Registry then issued requests to States Parties to arrest and surrender President al-Bashir. Pursuant to article 89(1) of the *Rome Statute*, States Parties are required to comply with requests for arrest and surrender, while pursuant to articles 87(1) and 87(7), States Parties are required to comply with requests for States Parties to cooperate with the Court. This is subject to article 98, which provides that the ICC cannot require a State Party to "act inconsistently" with its obligations under international law to respect State or diplomatic immunity of a third State, unless the third State provides a waiver of that immunity. This effectively means that the Court cannot require a State Party to arrest the official of a non-State Party where to do so would require the State Party to violate the immunity of an official of the non-State Party.[92]

91 *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Warrant of Arrest, ICC-02/05-01/09-1 (Pre-Trial Chamber I), 4 March 2009; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest, ICC-02/05-01/09-95 (Pre-Trial Chamber I), 12 July 2010. Similarly, after the UN Security Council referred the situation in Libya to the ICC Prosecutor, the Pre-Trial Chamber I also issued a warrant of arrest for Muammar Gaddafi: *Prosecutor v. Muammar Gaddafi*, Warrant of Arrest, ICC-01/11-13 (Pre-Trial Chamber I), 27 June 2011. This was despite the fact that Gaddafi was the head of State of Libya at the time of the issuing of the warrant. However, the case against Muammar Gaddafi was terminated by the Prosecutor upon his death on 22 November 2011 before it could progress.

92 See *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, 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, ICC-02/05-01/09-302 (ICC Pre-Trial Chamber II), 6 July 2017, para. 82. This is notwithstanding article 27(2) of the *Rome Statute*, which provides that immunities attaching to an official position shall not bar the Court from exercising its jurisdiction.

Following the issuing of the warrants, President al-Bashir travelled to the territories of a number of States Parties to the *Rome Statute*. None of these States Parties effected an arrest of President al-Bashir. The Pre-Trial Chambers considered the failure to arrest by some of these States Parties, and in each of these cases decided that the failure of the respective State Party to arrest President al-Bashir was a breach of article 87(7) of the *Rome Statute*.[93] The Pre-Trial Chambers justified this decision under various grounds. In the case of Malawi, Pre-Trial Chamber I held that "customary international law creates an exception to head of State immunity when international courts seek a head of State's arrest for the commission of international crimes".[94] For Chad, Pre-Trial Chamber I dismissed a defense that Chad was required to cooperate with a position of the African Union not to arrest President al-Bashir, which Chad argued exempted it from its obligations under article 98(1) of the *Rome Statute*.[95] For the Democratic Republic of the Congo, Pre-Trial Chamber II held that the Security Council resolution *requiring* Sudan to "cooperate fully" with the ICC "implicitly waived" the immunity of President al-Bashir.[96] For Jordan and South Africa, Pre-Trial Chamber II determined that the Security Council resolution

93 See e.g. *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr (Pre-Trial Chamber I), 12 December 2011, para. 47 [*Malawi*]; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, 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 (Pre-Trial Chamber I), 13 December 2011) [14] [*Chad*]; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, ICC-02/05-01/09-309 (Pre-Trial Chamber II), 11 December 2017) para. 50 [*Jordan*]; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, 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 or Omar Al-Bashir, ICC-02/05-01/09 (Pre-Trial Chamber II), 6 July 2017, para. 123 [*South Africa*]; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, 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 (Pre-Trial Chamber II), 9 April 2014 para. 34 [*DRC*].

94 *Malawi*, *supra* note 93, para. 43.

95 *Chad*, *supra* note 93, paras 12–13.

96 *DRC*, *supra* note 93, para. 29.

worked to render applicable to Sudan the terms of the *Rome Statute*, and that accordingly article 27(2) of the *Rome Statute* prevented States Parties from raising immunities under a treaty-based regime as justifying a failure to arrest Sudan's head of State.[97]

Jordan appealed the ruling of the Pre-Trial Chamber II that it was in non-compliance with the *Rome Statute*. In considering the legality of the al-Bashir warrants *vis-à-vis* personal immunity, the Appeals Chamber could have dismissed the issue on the basis that a Security Council resolution required Sudan to "cooperate fully" with the ICC and waive the immunity of its head of State,[98] and followed the reasoning of Pre-Trial Chamber II with respect to the Democratic Republic of the Congo.

However, the Appeals Chamber went further. Despite the fact that counsel had not argued the issue before it,[99] the Chamber stated that:

> "immunity has never been recognised in international law as a bar to the jurisdiction of an international court. […] the pronouncements of both the Pre-Trial Chamber in the *Malawi* Decision and of the Appeals Chamber of the Special Court for Sierra Leone [in the *Taylor* case] have adequately and correctly confirmed the absence of a rule of customary international law recognising Head of State immunity before international courts in the exercise of jurisdiction."[100]

The Appeals Chamber referred to *Yerodia* as "specific" recognition by the ICJ that head of State immunity did not prevent the ICC from investigating or issuing a warrant of arrest against a "Head of State", apparently whether of a State Party or otherwise.[101] Yet the ICJ majority in the relevant passage (extracted in Section C(II)) had merely referred to article 27(2) of the *Rome Statute* and had

97 *Jordan*, *supra* note 93, paras 33, 37–39 ; *South Africa*, *supra* note 93, para. 107.

98 *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr (Appeals Chamber), 6 May 2019, para. 149 [*Al Bashir*].

99 See e.g. *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Final Submissions of the Prosecution following the Appeal Hearing, ICC-02/05-01/09-392, 28 September 2018, para. 5.

100 *Situation in Dafur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgement in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, 06 May 2019, 57, para. 113.

101 *Ibid.,* para 102. The Appeals Chamber's use of the term "Head of State" in this passage was unqualified.

indicated that the State official could be subject to the criminal proceedings of an international courts "where they have jurisdiction". Although this extract of the ICJ majority opinion could have benefited from greater specificity, it does not provide direct support for the proposition that heads of any State may be prosecuted by the ICC because of article 27(2), nor for the proposition that any international court may prosecute a head of State because no rule of customary international law prohibits it. Further, as mentioned above, the ICJ majority had not in its decision considered the complicated jurisdictional issues associated with the ICC and *non*-States Parties, which are not directly bound by the *Rome Statute*.[102]

V. Fragmentation?

There is fragmentation on the issue of immunities. It exists firstly for functional immunity: whether States or international courts can prosecute acts committed by State officials in an official capacity, including where they are serious international crimes.[103] The ICJ indicates that functional immunity applies, while international criminal courts and tribunals indicate otherwise.

Secondly, fragmentation exists in relation to whether international courts can prosecute the incumbent heads of non-States Parties, for core international crimes.[104] The ICJ indicates that "certain international criminal courts" may prosecute heads of State "where they have jurisdiction", referring to examples of legal instrument provisions, but that no national court may do so. The international criminal courts and tribunals indicate that no rule of customary international law recognizes the "existence" of head of State immunity for international courts investigating or prosecuting heads of States,[105] and that the ICJ ruling provides a measure of support for this reasoning, at least in respect of the ICC. Some of the international criminal tribunal decisions above even extended this disavowal of immunity for national prosecutions. The legal implications of two or more

102 Where nationals of a non-State Party perpetrated core international crimes on the territory of a State Party (*Rome Statute* article 12(2)(a)), or where the UN Security Council refers a situation in a non-State Party to the ICC (article 13(b)), the nationals of that non-State Party may be subject to the jurisdiction of the ICC. However, the ruling of the Appeals Chamber which cites the ICJ majority decision in *Yerodia*, *supra* note 73, extends beyond these situations.

103 King, *supra* note 78, 273.

104 Nouwen, *supra* note 65, 611.

105 See e.g. *Al Bashir*, *supra* note 98, para. 113.

States jointly establishing an "international criminal court" to prosecute a head of another State are unclear.[106]

Thirdly, there is confusion over the implications of *jus cogens* violations for immunities.[107] In the *Yerodia* case, ICJ Judge ad hoc Van den Wyngaert criticized her judicial colleagues for their "brevity" and "minimalist approach", and considered that the majority of the Court "disregards" the recent movement for individual accountability for core international crimes.[108] Indeed, Schabas also calls the ICJ majority's discussion on immunities and international criminal law "rather laconic".[109] It cannot be said that it was limited by the facts before it, as it showed a readiness to make *obiter dicta* statements.

What is disquieting is not only the confusion, but this minimalism: the lack of principles governing the relations *between* the courts. There is firstly an almost total absence of engagement by the ICJ with ICTY case law, despite the latter institution being an international criminal tribunal. Similarly, the international criminal courts cite the ICJ authority (alongside the ICTY authorities) in support of a ruling that international courts *per se* may exercise jurisdiction over heads of State. A careful reading of the ICJ decision shows that the judgment does not go so far, or at least it is not so clear on this point. It is argued that there is a lack of care given by these courts to the decisions made by other courts, and insufficient deliberation over the relationship between them.

The ICC took a bold (legally unnecessary) step in *Al Bashir*, without explaining this decision *vis-à-vis* a ruling from the ICJ that was relevant to the issue. In so doing, the ICC not only confused the legally necessary path to its decision, but exposed itself to the criticism of its States Parties, on whom it depends for enforcement of its decisions.[110] Indeed, the African Union has since initiated a "non-cooperation policy towards the ICC" and signaled by resolution an intention to seek an ICJ advisory opinion on immunities of State officials.[111]

106 See *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, ICC-02/05-01/09-397-Anx1-Corr (Appeals Chamber), in which a majority of the Appeals Chamber defined "international criminal court" as "an adjudicatory body that exercises jurisdiction at the behest of two or more states".

107 Stahn & van den Herik, *supra* note 28, 78.

108 *Yerodia*, *supra* note 73, 153, 154 (Dissenting opinion of Judge ad hoc Van den Wyngaert).

109 Schabas, *An Introduction to the ICC*, *supra* note 81, 61.

110 D. Guilfoyle, 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis', 20(2) *Melbourne Journal of International Law* (2020) 401, 438 [Guilfoyle, 'Lacking Conviction'].

111 S.–D.D. Bachmann & N.A. Sowatey-Adjei, 'The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice to Strengthen

This issue has exacerbated deficits of legitimacy and trust, and the confusion may have contributed to the refusal by some African States to comply with the Court's exhortations for arrest and surrender.[112]

VI. The Future of Immunities

An ICJ opinion on this issue may help "pave the way for convergence" and bolster legitimacy.[113] However, this is not a surety. The ICC public information service has noted in response to a question about a possible request for an ICJ advisory opinion that: "it is for each court to pronounce on the limits of its own jurisdiction. No international court may purport to circumscribe the jurisdiction of another international court".[114] This is a further indication of a lack of principles about engagement with other court decisions, and of differences in opinion as to jurisdiction. States Parties to the *Rome Statute* may be in the difficult position of fearing a referral of a case by a United Nations member to the ICJ should they effect an arrest, and fearing an ICC disciplinary hearing if they do not. If the lack of dialogue continues, this will not be resolved.

The issues extend beyond African States. In the ICC Prosecutor's request for authorization to investigate crimes perpetrated by members of the *Tatmadaw*, the Myanmar military forces, the Prosecutor argued that: "the potential case(s) against senior members of the *Tatmadaw*, other Security Forces and other Myanmar authorities would be admissible under the complementarity criterion".[115] In its evidence, the Prosecutor referred to Senior General and *de facto* head of State of Myanmar, Min Aung Hlaing, alleging his Facebook posts

International Criminal Justice?', 29(2) *Washington International Law Journal* (2020) 247; Assembly of the African Union, *Thirtieth Ordinary Session: Decisions, Declarations and Resolution*, Assembly Doc. AU/Dec.665-689(XXX), 29 January 2018. Such a request would require a UN General Assembly majority in order for the question to come before the ICJ. In such an event, the ICJ would consider whether to provide the advisory opinion, although it has never refused before: Bachmann and Sowatey-Adjei 268.

112 Van der Wilt, *supra* note 78, 610.

113 J. Petrovic, D. Stephens and V. Nastevski, 'To Arrest or not to Arrest the Incumbent Head of State: The Bashir case and the Interplay between Law and Politics', 42(3) *Monash University Law Review* (2016) 740.

114 International Criminal Court, 'Questions and Answers', ICC-PIOS-Q&A-SUD-02-01/19_Eng, May 2019, available at: https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf. (last visited 8 June 2021).

115 'Request for Authorisation of an Investigation Pursuant to Article 15', *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-7 (Pre-Trial Chamber III) 4 July 2019, para. 235. See also paras 6, 272.

and public comments "condon[ed], if not encourag[ed], the commission of crimes".[116] These are indications that the Prosecutor may in the future seek the arrest and prosecution of another head of a non-State Party. If General Hlaing becomes subject of a warrant and the *Al Bashir* decision by the Appeal Chamber is followed by later ICC chambers, the saga may repeat itself. In such a case, the ICC risks suffering from further non-cooperation by States Parties, and it is no exaggeration to say that this may undermine the legitimacy of not only international judicial bodies but also of international criminal law.[117]

D. Classifying Conflict *International*

A further illustrative example of fragmentation of international law lies in relation to the thorny issue of classifying a conflict as *international*. In the situation of a State grappling with internal rebel military groups in a conflict, where a foreign State is providing assistance to those rebel groups, the question of whether this conflict is *international* is of particular importance for the ICJ and the international criminal courts and tribunals, especially the ICC.

I. ICJ

The issue arose for the ICJ in the *Nicaragua* case, where the Court was required to consider whether the degree of control exercised by the United States over *Contra* rebel groups in Nicaragua was such that the alleged violations perpetrated by the *Contras* were the legal responsibility of the United States.

The ICJ decided that the conflict would be an international one if it was proven that the United States had "effective control" over the rebel group's operations in the course of which violations were committed.[118] This appears to require proof that the outside State had "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law", acts which were physically perpetrated by the rebel group.[119] The ICJ was clear to distinguish

116 *Ibid.,* para. 195.

117 D. Guilfoyle, 'The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar', 73(1) *Australian Journal of International Affairs* (2019) 2, 5; G. McIntyre, 'The ICC, Self-created Challenges and Missed Opportunities to Legitimize Authority over Non-states Parties', *Journal of International Criminal Justice* (2021) 1 [McIntyre, 'The ICC'].

118 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 64, para. 115 [Nicaragua].

119 *Ibid*.

this from control in a general sense over the rebel group, and to distinguish this from significant or "decisive" financing, organizing, training and supplying of the non-State group by the United States, both of which were insufficient on their own to establish the requisite degree of effective control.[120] This test is very difficult to meet, and was not met in the *Nicaragua* case.

In fact, the ICJ set down an alternative test to establish the responsibility of the United States for actions of the *Contra* rebel groups in Nicaragua. This was the strict control test, which required that the relationship between the United States and the group perpetrating the relevant acts was "so much one of dependence on the one side and control on the other" that this group should be equated with an "organ" of the United States government or as acting on its behalf.[121] If a group is acting on behalf of a foreign State, it is far less controversial than for the first test to consider the conflict as *international*. However, this degree of control was not proven in the *Nicaragua* case.

II. ICTY

The ICTY had in its earlier years relied on principles propounded in the *Nicaragua* case, however as it developed its own body of jurisprudence, it shifted its reference to its own case law.[122] In assessing Duško Tadić's criminal responsibility for grave breaches of the Geneva Convention as an individual, the Appeals Chamber had to consider whether the conflict *within* Bosnia and Herzegovina in the 1990s between the State and the Army of Republika Srpska was *international*. Specifically, it was tasked with considering what degree of control exercised by the Federal Republic of Yugoslavia over the Army of Republika Srpska was required for the conflict in Bosnia and Herzegovina to be considered international in nature.

The ICTY Appeals Chamber was careful to acknowledge that the *Nicaragua* test related to State responsibility (that of the US), not individual responsibility (that of a member of the rebel military group).[123] However, it stated: "What is at issue is not the distinction between the two classes of responsibility. What is at issue is a *preliminary* question: that of the conditions

120 *Ibid*., 64, para. 114. This formulation is similar to the test that would be adopted by the ICTY (discussed below).

121 *Ibid*., 62, para. 109.

122 A.Z. Borda, 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals', 14(2) *Melbourne Journal of International Law* (2013) 608, 623.

123 *Prosecutor v. Tadić*, Judgment, IT-94-1-A, 15 July 1999, para. 101 [*Tadić*].

on which under international law an individual may be held to act as a de facto organ of a State."[124]

The Appeals Chamber made it clear that it was ruling on the general question of legal imputability of the acts of non-State groups, rather than a question specific to individual criminal responsibility.[125] It stated its findings relied on such "general rules", as international humanitarian law did not provide criteria.[126] After a comprehensive analysis of the *Nicaragua* judgment, the ICTY Appeals Chamber concluded that the ICJ "effective control" test was not persuasive.[127] It ruled the Prosecutor was required to prove that a foreign State had "overall control" of the non-State military group for the conflict to be international.[128] This required proof that the foreign State was involved in "coordinating or helping in the general planning" of the group.[129] However, it was not necessary to prove that the particular activities of the group were "specifically imposed, requested or directed" or instructed by the outside State,[130] which was required by the *Nicaragua* test.

As an aside, the Appeals Chamber considered that where the relevant non-State group was a single individual or a group that was not "military organized", it was necessary to prove that the foreign State issued specific instructions to commit the particular act to the individual or group.[131]

An appeal in a later ICTY case considered firstly whether the ICTY was bound by the ICJ's *Nicaragua* case precedent, and secondly whether it was undesirable for two international courts to have "conflicting decisions on the same issue".[132] In answer to the first issue, the Appeals Chamber held that while it was necessary to take into consideration other decisions of international courts, it could arrive at different conclusions after careful consideration and was not

124 *Ibid*., para. 104 (emphasis added).

125 *Ibid*.

126 *Ibid.,* para. 105.

127 *Ibid*., paras 102–120.

128 *Ibid*., paras 120; 131. It should be noted that for individuals or groups not organized into military structures that are engaged to perform illegal acts on another State's territory, the ICTY adopted the effective control test: *Tadić*, *supra* note 123, paras 118, 141.

129 *Ibid*., para 131.

130 *Ibid*., paras 122, 131.

131 *Ibid.,* para. 137. Important to this distinction between military groups and non-military groups was the fact that the former are "organised and hierarchically structured" and so group members are unlikely to act on their own but subject to the authority of the head: see para. 120.

132 *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Judgement, IT-96-21-A, 20 February 2001, para. 21 [*Čelebići*].

bound by the decisions of the ICJ.[133] It did not explicitly address the second issue, beyond affirming the interests in "consistency, stability, and predictability" of interpretation and the importance of considering the "general state of the law in the international community" in its rulings.[134] The Appeals Chamber confirmed that the "overall control" test was the applicable criteria for determining the existence of an international armed conflict.[135]

III. Return to the ICJ

In the *Bosnia v. Serbia* case, the ICJ decided to reaffirm the *Nicaragua* test of "effective control" as being necessary for a State to be legal responsible for the acts of non-State groups.[136] Important to this discussion is not the divergence, but the reasons given for it, and the dialogue between it and the ICTY judgments. The ICJ stated that the ICTY was not called upon to rule on questions of State responsibility, "since its jurisdiction is criminal and extends over persons only".[137] Although "utmost importance" was attached to the ICTY's legal and factual findings on criminal liability of the accused before it, the situation was not the same for "issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it".[138]

The ICJ declined to resolve the issue of two different tests, as it was not necessary to decide the *Bosnia v. Serbia* case.[139] It noted that there did not necessarily need to be the same test for characterizing a conflict for issues of State responsibility and for individual criminal responsibility.[140] Yet it also criticized the "overall control" test as being unsuitable for stretching "almost to breaking point" the nexus between a State's organs and its international responsibility.[141]

133 *Ibid*., para. 24.
134 *Ibid*.
135 *Ibid*., para. 26.
136 *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, 43, 208, paras 399–400 [*Bosnia v. Serbia*].
137 *Ibid.,* para 403.
138 *Ibid*.
139 *Ibid.,* para 404.
140 *Ibid.,* para 405.
141 *Ibid.,* para 403.

IV. The ICC Weighs in

The principles in *Tadić* have been relied upon in subsequent rulings of the ICC, including in the case of *Prosecutor v. Lubanga*. The Prosecutor in that case had referred to the ICJ ruling, submitting that the difference between the *Tadić* test and the *Nicaragua* test was explicable by the difference in their purposes: State responsibility and individual responsibility.[142] Notwithstanding these submissions, the Trial Chamber simply stated that: "As regards the necessary degree of control of another State over an armed group acting on its behalf […] the 'overall control' test is the correct approach".[143] For this issue, it did not refer at all to the ICJ jurisprudence and the purview of its jurisdiction. Further, the absence of specification and the phrasing used makes it unclear whether its test is confined to individual criminal responsibility only, or whether it could also apply to State responsibility.[144] In effect, it did not engage with the ICJ decision in form or substance.

V. Fragmentation?

Going to the first fundamental issue described above, the ICTY engaged in a comprehensive analysis of the ICJ test and considered it unpersuasive.[145] This practice is to be encouraged. The point is not so much that its test differed from that of the ICJ, but that it was challenging long-held consistency and preferences.[146]

However, the ICJ did not respond to this analysis of its previous judgment. Rather, the ICTY judgment was sidelined by the ICJ because of "the criminal responsibility (institutional) context" in which it lay.[147] The ICJ did not assail the ICTY judgment on its merits (issues of "state practice and judicial precedent"),

142 *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Closing Brief, ICC-01/04-01/06-2748-Red (Trial Chamber I), 1 June 2011, 22, para. 39.

143 *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06-2842 (Trial Chamber I), 14 March 2012, 246–8, para. 541.

144 M.J. Ventura, 'Two Controversies in the Lubanga Trial Judgment of the ICC', in S. Casey-Maslen (ed.), *The War Report: 2012* (2013) 473, 490.

145 *Tadić*, *supra* note 123, paras 102–120.

146 Koskenniemi & Leino, *supra* note 41, 566-7.

147 K.N. Trapp, 'Of Dissonance and Silence; State Responsibility in the *Bosnia Genocide* Case', 62 *Netherlands International Law Review* (2015) 243, 247.

but rather dismissed its relevance due to differences in institutional context.[148] Ventura criticizes the ICJ for not analyzing the reasons why the imputability of acts is dependent on context: "whether there is anything inherent in the respective contexts that serves to modify or negate the relevant rule of international law".[149] Put another way, the ICJ failed to engage with the underlying normative framework in *Tadić*.[150]

For its part, the ICC subsequently did not refer to the ICJ case law, despite receiving submissions on this issue by advocates. It did not attempt to address the issue of differing tests. The earlier ICJ refusal to engage in dialogue certainly did not encourage it to do so. Writing in 1999, Charney feared that without dialogue, "centrifugal forces" of specialized court mandates would push courts further and further away from other courts.[151] This is borne out in this example.

The second fundamental issue concerning jurisdiction of courts is also evidenced in this example. Arguably an international court charged with applying a body of law has inherent jurisdiction to apply rules belonging to other bodies of international law *incidenter tantum*.[152] If true, the ICTY had jurisdiction to rule on questions of general international law for the purpose of applying its primary rules, or at least it considered itself to have such jurisdiction. It is submitted that the ICC also did so in respect of immunities in the *Al Bashir* case. Contrary to what is implied in the ICJ's reasoning in *Bosnia v. Serbia*,[153] the ICTY knew it was interpreting a matter of general international law (even italicizing the point). The ICJ disagreed, without referring to the relevant extracts or even fully analyzing the point. The ICJ did not give consideration to the "single, unified" nature of international law, which it has acknowledged elsewhere.[154]

To be sure, the ICJ was in a difficult position, as the ICTY had developed jurisprudence based on the 'overall control' test, and overruling this legal principle may have had undesirable consequences for the ICTY's previous cases

148 Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited', *supra* note 45, 663; Ventura, *supra* note 144, 489.

149 Ventura, *supra* note 144, 488.

150 Trapp, *supra* note 147, 246.

151 Charney, *supra* note 37, 706.

152 Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited', *supra* note 45, 661.

153 Stahn & van den Herik, *supra* note 28, 76.

154 See e.g. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation*, Judgment, ICJ Report 2012, 324, 394 para. 8 (Declaration of Judge Greenwood).

and its overall legitimacy.[155] Its permanent status and the consequent tendency for caution may have reduced its willingness to pronounce on controversial legal questions.[156] Nevertheless, it is submitted that it should have done more to discuss the ICTY's role in general international law, with reference to its judicial reasoning, and manage their interrelationship.

There is a lack of clarity about the role of the two tests, but the fission is deeper: the dialogue between the courts on this issue is fractured and piecemeal, and there is no direct and clear communication about the role of the institutions themselves, their jurisdiction and how they are to consider each other. Goldstone and Hamilton have posited that this is at least in part a result of the absence of "formal and enforced guidelines" to govern the interrelationship between the ICJ and the criminal courts.[157]

E. Alleged Violations of the Genocide Convention

When a matter squarely within the realms of international criminal law is considered by another court, it will be shown the ICJ response has been different to the previous examples, and arguably can be labelled as overly deferential.

I. The ICJ's Examination of Previous ICTY Proceedings

In 1993, the ICJ was requested by Bosnia and Herzegovina to consider whether Serbia had violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In 1999, Croatia did likewise. In both cases, the ICJ was considering law and facts in the context of international criminal law, much of which was being exhaustively examined by the ICTY at the same time.

There were similar rulings by the ICJ and the ICTY with respect to controversial legal issues: for example, the law of complicity,[158] the distinction between ethnic cleansing and genocide,[159] and the requirement to prove a specific

155 R.J. Goldstone & R.J. Hamilton, '*Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', 21 *Leiden Journal of International Law* 95 (2008) 102-3, 111; Stahn and van den Herik, *supra* note 28, 75.

156 Webb, *International Judicial Integration*, *supra* note 3, 149.

157 Goldstone & Hamilton, *supra* note 155, 103.

158 M. Milanovic, 'State Responsibility for Genocide: A Follow-Up', 18(4) *European Journal of International Law* (2007) 669, 682.

159 *Bosnia v. Serbia*, *supra* note 137, para. 190; *Prosecutor v. Krstić*, Trial Judgment, IT-98-33, 2 August 2001, 196–7, para. 562.

genocidal intent to destroy the targeted group in addition to the requirement to prove intent to commit the underlying act.[160]

The ICJ noted that it was required to make its own determinations of facts relevant to the law it was applying.[161] Notwithstanding, it did very little independent fact-finding, but rather in both cases referred extensively to the legal and factual findings of the ICTY.[162]

In the *Bosnia v. Serbia* case, the ICJ analyzed the weight it would attach to findings made at various stages of the ICTY proceedings,[163] which is a careful way to mitigate the problems of using evidence from separate proceedings.[164] The ICJ stated that findings of fact made at trial were "highly persuasive".[165]

However, the evidence tendered in the ICTY was not without its problems, and by adopting the findings without appropriate qualifications, the ICJ arguably furthered these issues. The ICTY had no way of collecting evidence without the consent of the former Yugoslav. States.[166] Most infamously, Serbian defense council meeting minutes were redacted in the ICTY hearings as part of an agreement between the Prosecutor and Serbia, and although in the *Bosnia v. Serbia* case the ICJ had the power to require Serbia to produce the non-redacted versions, it did not do so.[167] It effectively relied on the ICTY's limited evidence rather than the possibility of obtaining more comprehensive evidence itself.

Further, the ICJ concluded that the massive killings in an area outside of Srebrenica were not accompanied by the requisite specific intent. For this ruling, it gave weight to the fact that those convicted of genocide by the ICTY were not found by the ICTY to have "acted with specific intent".[168] However, in the appeal of the acquittal of Goran Jelisić for the crime of genocide, the Appeals Chamber considered that the evidence "could have provided the basis for a reasonable Chamber to find beyond a reasonable doubt that the respondent had the intent to destroy the Muslim group in Br-ko", and found that the verdict by the Trial

160 *Bosnia v. Serbia*, *supra* note 137, para. 148; see also *Prosecutor v. Popović*, Judgment, IT-05-88-T, 10 June 2010, para. 808, in which the ICTY Trial Chamber affirmed this ICJ *Bosnia v. Serbia* ruling.

161 *Bosnia v. Serbia*, *supra* note 136, para. 212.

162 A. Gattini, 'Evidentiary Issues in the ICJ's Genocide Judgment', 5 *Journal of International Criminal Justice* (2007) 889, 899.

163 *Bosnia v. Serbia*, *supra* note 136, paras 214–220.

164 Webb, 'Binocular Vision', *supra* note 19, 145.

165 *Bosnia v. Serbia*, *supra* note 136, para. 223.

166 M.A. Hoare, 'A Case Study in Underachievement: The International Courts and Genocide in Bosnia-Herzegovina', 6(1) *Genocide Studies and Prevention* (2011) 81, 85.

167 Goldstone & Hamilton, *supra* note 155, 108.

168 *Bosnia v. Serbia*, *supra* note 136, paras 277, 354.

Chamber in respect of the charge of genocide "does not pass the approved standard for acquittal".[169] However, a majority of the Appeals Chamber declined to order a retrial in the circumstances of the case. This is hardly support for the ICJ's contention that the requisite intent was not found in that case, even if one only considers the intent of Mr Jelisić and not the other actors involved in those crimes. The ICJ answered the crucial question of whether genocide had been committed with the requisite intent in one paragraph, in reliance on the lack of convictions for in the ICTY, without recording in the judgement a rigorous independent assessment of the source evidence.[170]

II. Fragmentation?

It has been argued that, in considering whether genocide occurred, it was *inappropriate* for the ICJ to draw inferences about whether genocide took place based on a lack of finding of genocide in the ICTY. This was because the ICTY, with limited resources, was concerned with whether a (relatively small) set of persons were each individually responsible for acts of genocide.[171] Its inquiries were not directed towards whether a single, cumulative crime of genocide had been committed.[172] The Tribunal was never determining whether genocide occurred at a particular location or time, but whether an individual was responsible for a particular act.[173] Meanwhile, the ICJ was required to consider

169 See *Prosecutor v. Jelisić*, Appeal Judgment, Case No. IT-95-10-A, 5 July 2001, paras 66–72. In *Miolsević*, the Trial Chamber made a finding that a joint criminal enterprise comprising the Bosnian Serb leadership had an aim and intention to destroy the Bosnian Muslim population in some of the relevant areas: *Prosecutor v. Miolsević*, Decision on Motion for Judgement of Acquittal, Case No. IT-02-54-T, 16 June 2004, paras 246, 288–9. The charge of genocide was not before the respective Trial Chambers presiding over the *Tadić* and *Krnojelac* cases, which as stated above may indicate genocide was not perpetrated by those particular defendants at the relevant time periods, but is not strong support for the proposition that the specific intent was absent in *all* agents or officers, especially as the respective Trial Chambers were not required to consider this issue. Additionally, Gattini points out that the requisite intent for an accomplice charged with complicity in genocide was not settled: see Gattini, *supra* note 162, 896, fn. 33.

170 A. Seibert-Fohr, 'The ICJ Judgment in the Bosnian Genocide Case and Beyond: A Need to Reconceptualize?', in C. Safferling & E. Conze (eds), *The Genocide Convention: Legal and Historical Reflection 60 Years after its Adoption* (2010) 245, 252 citing *Bosnia v. Serbia*, *supra* note 137, paras 361, 367.

171 Goldstone & Hamilton, *supra* note 155, 105.

172 Gattini, *supra* note 162, 902.

173 Goldstone & Hamilton, *supra* note 155, 105.

the cumulative impact of different acts committed over a large area by a number of perpetrators, many of whom were not identifiable.[174]

Legally-speaking, there are firmly established "structural and substantial differences" between individual criminal responsibility for genocide, and State responsibility for genocide, especially in relation to intent.[175] There are differences in standard of proof.[176] Considered in light of the ICJ's efforts to distinguish individual criminal responsibility from State responsibility in the same judgment for the issue of classifying conflict *international* (discussed above),[177] this reliance on the ICTY findings without contextualizing such findings in their legal regime becomes, with respect, even more difficult to understand. This is especially so given what was submitted in the previous Section D, about the readiness of the ICJ to dismiss an international criminal court's findings because of the latter's distinct legal regime.

What is troubling was also the ICJ's dependence on the ICTY's *lack* of finding. The ICJ seemed to give weight to the lack of conviction for genocide where the accused died before the proceedings finished,[178] or where indictments were pending.[179] Further, the ICJ considered that the decision of the Prosecutor not to include a charge of genocide was significant in assessing whether genocide occurred.[180] This is controversial, as when the particular context of a Prosecutor's decision not to charge is analyzed, it may reveal a plea agreement, resource constraints, or lack of *mens rea* evidence for the individual concerned, none of which are relevant to the ICJ proceedings on State responsibility.[181] The ICJ did not attempt to inquire into such contextualization. The ICJ placed reliance on similar material in the *Croatia v. Serbia* case.[182] However, its comments in this respect have been criticized as being "ambiguous" and "nebulous", and the degree to which its own findings and those of the ICTY were used is not delineated.[183]

174 I. Gillich, 'Between Light and Shadow: the International Law Against Genocide in the International Court of Justice's Judgment in *Croatia v. Serbia* (2015)', 28(1) *Pace International Law Review* (2016) 117, 139.

175 *Ibid*.

176 Webb, 'Binocular Vision', *supra* note 19, 143.

177 See Section D above.

178 *Bosnia v. Serbia*, *supra* note 136, paras 374(e), 374(f).

179 *Ibid*., paras 374(g).

180 *Ibid*., paras 217; 374.

181 Goldstone & Hamilton, *supra* note 155, 106.

182 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, I.C.J. Reports 2015, 3, 75-76, 128, paras 187, 440.

183 Gillich, *supra* note 175, 140-1.

Schabas has opined that the ICJ "took an exceedingly deferential approach" to the ICTY's findings, and adopted "virtually uncritically" its findings in fact and holdings in law, despite apparent inconsistencies in the body of ICTY case law.[184] He interprets this as an acknowledgement of the ICTY's expertise on issues of fact and law within international criminal law.[185] Indeed, the main instance of ICTY–ICJ divergence in this case was in relation to the ICTY's ruling on a general international law issue, namely, State responsibility for the actions of non-State groups as a component of classifying a conflict as *international*.[186]

However, it is submitted that this case is further evidence of the problems of judicial dialogue and misapprehension of the ICTY's institutional mandate. The ICJ methodology with respect to its reliance on the ICTY's findings and holdings required greater clarity and transparency.[187] The ICJ perceived the ICTY to be pronouncing on matters of international criminal law. It behaved in the opposite manner to what has been described in sections above: it was uncritical in adopting many of the ICTY's findings and holdings.

When considering *legal* issues relating to genocide, such as distinctions between ethnic cleansing and genocide, or the requirement to prove specific intent, the ICJ made an effort to engage with the jurisprudence of the ICTY and ICTR and produce a coherent set of rules.[188] This was reciprocated in the ICTY Trial Chamber's subsequent judgment in *Prosecutor v. Popović*,[189] in which the Trial Chamber attempted in its judgement on legal issues to justify such findings with reference to both the ICTY jurisprudence and the *Bosnia v. Serbia* case on the status of customary international law during the Yugoslav wars,[190] the requirement to prove specific genocidal intent,[191] the definition of targeted group,[192] the examples of acts causing serious bodily or mental harm,[193] the finding that forcible transfer does not *per se* constitute a genocidal act,[194]

184 W.A. Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', 2(2) *Genocide Studies and Prevention* (2007) 101, 113.
185 *Ibid*.
186 See Section D.
187 Gattini, *supra* note 162, 903; Goldstone and Hamilton, *supra* note 155, 111.
188 Schabas, *supra* note 184, 109–110.
189 *Prosecutor v. Vujadin Popovic*, Judgment, IT-05-88-T, 10 June 2010 [*Popović*].
190 *Ibid*., para. 807, fn 2911.
191 *Ibid*.. para. 808, fn 2913.
192 *Ibid*., para. 809, fn 2916.
193 *Ibid*., para. 812, fn 2925.
194 *Ibid*., para. 813, fn 2926.

the meaning of "destroy" in customary international law,[195] and the extent of targeting of a group that is required for genocide to be made out.[196]

Nevertheless, when considering factual issues of whether the relevant elements were proven in the Bosnian and Croatia cases, it is submitted that the ICJ was overly reliant on the findings of the ICTY, and it is in this sense that it failed to contextualize the findings of another international court.

III. The Future of This Issue

If this conclusion is accepted, such considerations are concerning for the reason that both the ICJ and the ICC are presently seized of proceedings in respect of the situation in Myanmar and of alleged acts committed by members of the Myanmar military *Tatmadaw* and other State security forces against the Rohingya people. What was described above for *Bosnia v. Serbia* and *Croatia v. Serbia* may recur if cases concerning allegations of crimes against the Rohingya progress through their respective fora.

On 11 November 2019, The Gambia filed a written application with the Registry of the ICJ. Similar to Bosnia and Herzegovina's and Croatia's allegations against Serbia, The Gambia alleges that "acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group" constituted violations of the Genocide Convention.[197] Such alleged violations include committing genocide, attempting to commit genocide, incitement to commit genocide, failing to prevent genocide, and failing to punish genocide.[198] It appears that the impugned acts are alleged to have been perpetrated after the commencement of "clearance operations" targeting Rohingya villages on 9 October 2016, which lasted until at least May 2019.[199] The ICJ indicated a number of provisional measures to Myanmar to prevent both future acts and the destruction of evidence, and it considered that for these provisional measures, it had *prima facie* jurisdiction and that the case should not be removed from its list.[200] On 20 January 2021, Myanmar filed preliminary objections to the

195 *Ibid*., para. 822, fn 2943.

196 *Ibid*., para. 831, fn 2968.

197 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings, 11 November 2019, General List No 178, para. 2.

198 *Ibid*., para. 111.

199 *Ibid*., paras 48, 100.

200 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of Provisional Measures, 23 January 2020, ICJ Reports

jurisdiction of the Court, the nature of which have not been disclosed to the public.[201] This issue as to jurisdiction may forestall consideration of the merits of the claim for 12 to 24 months.[202]

Meanwhile, on 4 July 2019, the Prosecutor of the ICC requested Pre-Trial Chamber III to authorize an investigation into the "Situation in Bangladesh/ Myanmar". The request was for

> "authorisation to investigate crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh, and which occurred within the context of two waves of violence in Rakhine State on the territory of neighbouring Myanmar, as well as any other crimes which are sufficiently linked to these events".[203]

The Prosecutor relied on the aforementioned violence attending the "clearance operations" from October 2016 to March 2019,[204] but made a case for crimes against humanity to justify the investigation "without prejudice to other possible crimes" which might be revealed by the investigation,[205] including genocide.[206]

2020, 3, 16 paras 37–38.

201 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, International Court of Justice, General list No 178, 28 January 2021.

202 Global Justice Centre, 'Q&A: Preliminary Objections in The Gambia v. Myanmar at the International Court of Justice' (2021), available at https://www.globaljusticecenter.net/files/20210203_ICJpreliminaryObjections_QA.pdf (last visited 18 February 2022).

203 Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 115, 11-12, para. 20.

204 *Ibid*., 14-15, para. 27.

205 *Ibid*., 40, para. 75; This was accepted by the Pre-Trial Chamber III: see *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation, ICC-01/19-27 (Pre-Trial Chamber III), 14 November 2019, 50, para. 111 [*Bangladesh/Myanmar*, Decision].

206 'Request for Authorisation of an Investigation Pursuant to Article 15', *supra* note 115, 11-12, para. 20, fn 33: The Pre-Trial Chamber III determined that the Prosecutor's investigation was to be limited to crimes "where at least one element of the crime occurred on the territory of Bangladesh"; *Bangladesh/Myanmar*, Decision, *supra* note 205, 52-53, para. 120. However, the ICC Elements of Crimes contemplate "systematic expulsion from homes" as possibly constituting genocide: see International Criminal Court, *Elements of Crimes*, Doc No. ICC-PIDS-LT-03-002/11_Eng (2011), 3, fn. 4.

Both of these proceedings are nascent. Further, there are differences between them. The international criminal law proceedings concern the individual criminal liability of officials and agents of Myanmar, while the ICJ proceedings concern the alleged violation of the Genocide Convention by the State. However, this was also the case for the proceedings concerning Serbia, and if the latter are an indication of the treatment by the respective courts of parallel proceedings, there is reason to believe that unless a clear and consistent basis for treating findings made in other fora is laid down, problems associated with insufficient contextualization of findings made in other courts will continue to affect the international legal system.

F. Palestine and the General International Law of Statehood

The final example to be considered concerns, it is submitted, a recent decision by the ICC to retreat from its previous convictions about its role in interpreting general international law. In considering the *Situation of Palestine*, the Court was seized with complicated questions about its role in determining, or refraining from determining, questions of general international law. ICC Pre-Trial Chamber I avoided what is argued to be a necessary consideration of the meaning of "State" under general international law. In doing so, it contributed to ambiguity about its role in deciding questions of general international law, when this decision is considered alongside previous examples of this analysis.

The issue being considered here is not the heavily debated question of whether Palestine currently fulfils the criteria for statehood under international law. Rather, what is being considered in this section is how the ICC considers its role in interpreting or applying the body of law outside the *Rome Statute*, through the example of the statehood question.

I. The ICC Refuses to Interpret General International Law

The ICC may only exercise jurisdiction over a situation if:

1. an accused person is a national of a State Party to the *Rome Statute* (*ratione personae* jurisdiction);[207] or
2. an accused person is a national of a State, which is not a State Party to the *Rome Statute*, but which has nevertheless accepted the jurisdiction of the ICC by lodging a declaration with the Registrar of the ICC (*ratione personae* jurisdiction);[208] or
3. an accused person perpetrates certain crimes on a territory of a State Party to the *Rome Statute* (*ratione loci* jurisdiction);[209] or
4. an accused person perpetrates certain crimes on a territory of a State, which is not a State Party to the *Rome Statute*, but which has nevertheless accepted the jurisdiction of the ICC by lodging a declaration with the Registrar of the ICC (*ratione loci* jurisdiction);[210]
5. if the United Nations Security Council refers a situation to the ICC Prosecutor.[211]

Israel has never been a State Party to the *Rome Statute*, and the United Nations Security Council has never referred any situation in Israel or Palestine to the ICC Prosecutor. Accordingly, if any crimes under the *Rome Statute* were perpetrated by individuals in the territory of the Gaza Strip, the West Bank or East Jerusalem, the only basis on which the ICC could exercise jurisdiction over such crimes would be if Palestine was a State Party to the *Rome Statute* or if it validly accepted the jurisdiction of the ICC.[212]

207 *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 12(2)(b), 2187 UNTS 90 [Rome Statute].

208 *Ibid*., Arts 12(2)(a) and (3).

209 *Ibid*., Art. 12(2)(a).

210 *Ibid*., Arts 12(2)(b) and (3).

211 *Ibid*., Art. 13(b).

212 A further (unlikely) exception is where a dual national commits a crime under the Rome Statute, and one of the nationalities of that person is that of a State Party to the Rome Statute: see Y. Ronen, 'ICC Jurisdiction Over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities', in C. Meloni & G. Tognoni (eds), *Is There a Court for Gaza?* (2012), 469, 473.

On 4 December 2012, the United Nations General Assembly adopted Resolution 67/19 which, *inter alia*, reaffirmed the right of Palestinian people to "self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967". Resolution 67/19 also afforded to Palestine "non-member observer State status in the United Nations". [213]

On 1 January 2015, the Government of Palestine lodged with the Registrar of the ICC a declaration under article 12(3) of the *Rome Statute* which purported to accept the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". The following day, on 2 January 2015, the Government of Palestine purported to accede to the *Rome Statute* pursuant to article 125(3) of the *Rome Statute*, by depositing its instrument of accession with the UN Secretary-General. On 22 May 2018, Palestine referred the Situation in the State of Palestine to the ICC Prosecutor pursuant to article 13(a) and article 14 of the *Rome Statute*.

On 22 January 2020, the Prosecutor submitted a request that initiated the proceedings subject of this analysis. Having already completed some of the investigation of alleged crimes perpetrated in the Occupied Palestinian Territory, the Prosecutor sought to ensure the "soundest legal foundation" to her work and requested that the ICC Pre-Trial Chamber "rule on the scope of the Court's territorial jurisdiction in the situation in Palestine", specifically whether the ICC could exercise jurisdiction under article 12(2)(a) of the *Rome Statute* over crimes perpetrated in the Occupied Palestinian Territory.

Article 12(2) of the *Rome Statute* provides that:

(2) the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

In its determination of the issue, the Pre-Trial Chamber decided that the ICC had criminal jurisdiction with respect to the situation in Palestine pursuant to article 12(2)(a), on the basis that the State of Palestine was a State Party to the

213 GA Res. 67/19, UN Doc. A/RES/67/19, 4 December 2012, Arts 1 & 2.

Rome Statute.[214] Further, it decided that the territorial scope of such jurisdiction extended to Gaza, and the West Bank including East Jerusalem.[215]

Of interest for this analysis is the Pre-Trial Chamber's examination of the role of the ICC in interpreting general international law. In the *Palestine* decision, the Pre-Trial Chamber made a clear declaration that the ICC could not rule on the question of the status of statehood under general international law:

> "[G]iven the complexity and political nature of statehood under general international law, the Rome Statute insulates the Court from making such a determination, relying instead on the accession procedure and the determination made by the United Nations General Assembly. *The Court is not constitutionally competent to determine matters of statehood that would bind the international community. In addition, such a determination is not required for the specific purposes of the present proceedings or the general exercise of the Court's mandate.* As discussed, article 12(2)(a) of the Statute requires a determination as to whether or not the relevant conduct occurred on the territory of a State Party, for the sole purpose of establishing individual criminal responsibility. Such an assessment enables the Prosecutor to discharge her obligation to initiate an investigation into the present Situation, which would eventually permit the Court to, in accordance with the Statute, exercise its jurisdiction over persons alleged to have committed crimes falling within its jurisdiction."[216]

This refusal to consider the issue of statehood with respect to Palestine could constitute a retreat from the path taken in previous cases by the ICC and other international criminal courts. As discussed above, in *Al Bashir* the ICC Appeals Chamber went further than requested by the parties and purported to make a determination under customary international law with respect to immunities of heads of State.[217] In that case, it decided not only that immunity did not protect President al-Bashir from prosecution, but that customary

214 *Situation in the State of Palestine*, Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-143 (Pre-Trial Chamber I), 5 February 2021, 49-50, paras 109–112 [ICC, *Palestine*].

215 *Ibid*., 51, para. 118.

216 *Ibid*., 48-49, para. 108 (emphasis added).

217 Al Bashir, *supra* note 98, 57-58, para. 113.

international law did not protect *any* head of State from prosecution before "international courts".[218] The Appeals Chamber did not need to do so to decide the case before it. Similarly, as set out in Section D(IV), the ICC in *Lubanga* continued an interpretation of *international* that diverged from that of the ICJ. In the *Palestine* decision, the Pre-Trial Chamber was at pains to avoid determining issues under general international law, even when such issues were raised in alternative argument by the Prosecutor.[219] Certainly, there is no requirement for the ICC chambers to follow previous decisions.[220] Nevertheless, discordance on the fundamental question of a court's powers of interpretation is concerning, and may be deleterious for the "normative force" of its decisions.[221]

As part of its reasoning in the *Palestine* decision, the Pre-Trial Chamber appeared to accept that the Court is not competent to determine matters of "statehood that would bind the international community", and in that same passage it referred to the *Rome Statute* "insulat[ing]" the Court from being required to determine matters of "general international law". The majority considered that the object and purpose of the *Rome Statute*, and the purpose of the ICC, were confined to adjudicating matters of individual criminal responsibility.[222] The Pre-Trial Chamber I referred to the earlier decision of Pre-Trial Chamber III on Article 19(3) of the ICC Statute in relation to the alleged deportation of Rohingya persons from Myanmar, in which Pre-Trial Chamber III had asserted that "[t]he territoriality of criminal law […] is not an absolute principle of international law and by no means coincides with territorial sovereignty".[223] However, it is difficult to see how the word "territory" in article 12(2) of the *Rome Statute* could otherwise be defined. To extend criminal jurisdiction beyond territorial sovereignty may undermine the "overriding principle" of State sovereignty and the importance of State consent that is assumed and respected by the *Rome Statute*,[224] and the delegated jurisdiction adopted by the accession procedure of

218 *Ibid*.

219 See *Situation in the State of Palestine*, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ICC-01/18-12 (Pre-Trial Chamber I), 22 January 2020, 74, para. 136.

220 *Rome Statute*, *supra* note 207, Art. 21(2).

221 McIntyre, 'Lack of Consistency and Coherence', *supra* note 20, 29.

222 ICC, *Palestine*, *supra* note 214, 48, para. 108.

223 *Ibid*., 30, para. 62.

224 See e.g. B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2004), 73–74. It would also complicate the view that the authority of the ICC is limited to that which is delegated to it by States: see McIntyre, The ICC, *supra* note 117.

the *Rome Statute*, which requires that a State accept the ICC's jurisdiction before its nationals or territory are subject to it. On this point, the Pre-Trial Chamber recognized that the Court's jurisdiction extended to the territorial boundaries as recognized in Resolution 67/19 of the United Nations General Assembly.[225]

Article 12(2) refers to a State which becomes a party, rather than a "State Party". As Professor Shaw QC submitted in his observations to the Pre-Trial Chamber for the Palestine decision, the term "State" is not defined under the *Rome Statute*, and as such, it is arguable that "there is no authority for the proposition that the Court may exercise jurisdiction […] with regard to a state defined other than on the accepted basis of international law".[226] In contrast, examining the ICTY Rules of Procedure and Evidence, State is defined in Rule 2(A) as a "State Member or non-Member of the United Nations", the Federation of Bosnia and Herzegovina and the Republic Srpska, or a "self-proclaimed entity de facto exercising governmental functions, whether recognized as a State or not".[227] These Rules were drafted by the judges of the ICTY pursuant to article 15 of the ICTY Statute, which expressly authorized the judges to adopt rules of procedure and evidence relating to the conduct of proceedings.

This lack of definition of "State" in the Rome Statue was certainly noted by the Pre-Trial Chamber. Nevertheless it determined that:

> "The word 'following' [in article 12(2)] connects the reference to 'States Parties to this Statute' contained in the chapeau of article 12(2) of the Statute with *inter alia* the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute. In more specific terms, this provision establishes that *the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute must, in conformity with the chapeau of article 12(2) of the Statute, be interpreted as referring to a State Party to the Statute. It does not, however, require*

225 See ICC, *Palestine*, *supra* note 214, 51, paras 116-118.

226 See *Situation in the State of Palestine*, Amicus Curiae of Professor M.N. Shaw QC, ICC-01/18-75 (Pre-Trial Chamber I), 16 March 2020, 7-8, para. 11; also *Situation in the State of Palestine*, Amicus Curiae of Professor R. Badinter et al., ICC-01/18-97 (Pre-Trial Chamber I), 17 March 2020, 5-8, paras 5-10 for similar views that the term "State" in article 12(2)(a) of the *Rome Statute* is defined with reference to principles of general international law in the absence of any special meaning to the word. See e.g. *Situation in the State of Palestine*, Amicus Curiae of R. Heinsch & G. Pinzauti, ICC-01/18-107 (Pre-Trial Chamber I), 16 March 2020 for different views.

227 *ICTY Rules of Procedure and Evidence*, IT/32/Rev.50, 8 July 2015, rule 2(A).

> *a determination as to whether that entity fulfils the prerequisites of statehood under general international law.*"[228]

However, the chapeau of article 12(2) does not only refer to States who "are Parties", but also States who *otherwise* "have accepted the jurisdiction of the Court". This distinction adopted by the *Rome Statute* indicates that the word "State" in article 12(2)(a) *should not* be interpreted as only referring to a State Party to the Statute but also a State which accepts the jurisdiction of the Court, even if it is not a party to the Statute. The word "State" in article 12(1) and article 12(2) is not confined in its meaning to State Party.

On a strict reading of articles 12(1) and 12(2), it would appear that being a "State" is a necessary precondition to becoming a "State Party", and thus a jurisdictional issue for the Court. If this is so, the question then becomes how one defines "State". Quigley argues that only States have the capacity to confer jurisdiction over acts committed within their territory on the ICC.[229] The ICC does not have "original, universal jurisdiction".[230]

This is so under the *Rome Statute*, along with acts that are perpetrated by a national of a State Party, or acts in a situation that the UN Security Council refers to the ICC. If this view is accepted, then in the absence of definition under the terms of the *Rome Statute*, the only basis on which statehood can be

228 ICC, *Palestine*, *supra* note 214, 40, paras 92-93 (emphasis added).

229 J. Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue' in C. Meloni and G. Tognoni (eds), *Is There a Court for Gaza?* (2012), 429, 431. Quigley argues that, on the separate question of whether Palestine fulfils the criteria of statehood under international law, the answer is "yes". Ash responds to this argument with an opposing view: see R.W. Ash, 'Is Palestine a 'State'? A Response to Professor John Quigley's Article, "The Palestine Declaration to the International Criminal Court: the Statehood Issue"', in C. Meloni & G. Tognoni (eds), *Is There a Court for Gaza?* (2012), 441. Ash however agrees that statehood is an essential pre-condition to an entity granting jurisdiction to the ICC over territory: *Ibid*., 442. See also *Situation in the State of Palestine*, Amicus Curiae of T.F. Buchwald & S.J. Rapp, ICC-01/18-83 (Pre-Trial Chamber I), 16 March 2020, 20, 27 in which the authors argue that the drafting context of article 12 of the Rome Statute "strongly supports the conclusion that the drafters presumed that a 'State' would need to have the ability under international law to delegate the relevant territorial jurisdiction to the Court with respect to the relevant case". The only exception is jurisdiction upon UN Security Council referral. They argue that this is not the case with respect to Palestine and as a result, the ICC does not have jurisdiction for acts committed in this territory: see *Ibid*., 27.

230 See Y. Ronen, 'ICC Jurisdiction Over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities' in C. Meloni & G. Tognoni (eds), *Is There a Court for Gaza?* (2011) 469, 491.

determined is the basis of general international law. This is perhaps why it is sometimes said that the ICC is no normal criminal court, but an institution that will sometimes be called upon to determine "fundamental issues of general public international law".[231]

This is also salient for the later consideration by the Pre-Trial Chamber of article 125(3) of the *Rome Statute*. Article 125(3) provides that "[t]his Statute shall be open to access by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations". In the *Palestine* decision, the Pre-Trial Chamber determined that a resolution adopted by the UN General Assembly "renders an entity capable to accede to the Statute pursuant to article 125 of the Statute".[232] However, as the European Centre for Law and Justice submitted to the Pre-Trial Chamber, it is arguable that these functions are administrative and not determinative of statehood.[233] Further, a State may under article 12 of the *Rome Statute* "[accept] the jurisdiction of the Court", and in this scenario the procedure of accession is irrelevant.

II. The Future of the Statehood Issue

It is suggested that the facts giving rise to the *Palestine* decision are not unique. It is not difficult to imagine a case in which an embryonic nation developing into statehood is subject to occupying forces. In such cases, not only are atrocities imaginable but so is the incapacity to prosecute. One such example is the situation in Western Sahara, a territory which was a Spanish colony until 1975.[234] The United Nations General Assembly and the ICJ have

231 A. Zimmermann, 'Palestine and the International Criminal Court Quo Vadis?: Reach and Limits of Declarations under Article 12(3)', 11 *Journal of International Criminal Justice* (2013) 2, 303, 329; see also Buchwald & Rapp, *supra* note 229, 17–19.

232 Palestine, *supra* note 214, 42, para. 97; see also *Situation in the State of Palestine*, Amicus Curiae of Professor R. Falk, ICC-01/18-77 (Pre-Trial Chamber I), 16 March 2020, 9, para. 7.

233 *Situation in the State of Palestine*, Amicus Curiae of European Centre for Law and Justice, ICC-01/18-70 (Pre-Trial Chamber I), 13 March 2020, 8-9, para. 8; see also Buchwald & Rapp, *supra* note 229, 8-10 in relation to the administrative role of the Secretary-General, who is the treaty depositary of the *Rome Statute*.

234 Khoury argues that there are some similarities between the situations of Palestine and Western Sahara, although the latter has not achieved the renown of the former. This is perhaps owing to the unity of the Arab public concerning Palestine and the widespread significance of Jerusalem to this public. See R. B. Khoury, 'Western Sahara and Palestine: A Comparative Study of Colonialisms, Occupations, and Nationalisms', 1 *New Middle Eastern Studies* (2011). For a history of recent political events in Western Sahara, see M. Porges, 'Western Sahara and Morocco: Complexities of Resistance and Analysis' in L.

opined that the Saharawi people in the Western Sahara territory have a right of self-determination, and the Western Sahara has been listed as a non-self-governing territory by the General Assembly since 1963.[235] Commentators have categorized the presence of Moroccan forces in the Western Saharan territory as occupation, and have indicated that there is a strong possibility that human rights violations and even core international crimes have been perpetrated by these forces against Saharawis in that territory.[236] Approximately 84 United Nations member States have recognized the Sahrawi Arab Democratic Republic which controls a proportion of the Western Sahara territory, although 38 of these States have since cancelled or suspended this recognition,[237] while only the United States has formally recognized Morocco's right to sovereignty over the territory.[238] Morocco is not a State Party to the *Rome Statute*, which means that if a government authority purporting to represent the Saharawi attempts to accede to the *Rome Statute*, an investigation into alleged core international crimes would depend on the ICC's judgment as to its statehood.

de Vries, P. Englebert & M. Schomerus (eds), *Secessionism in African Politics* (2019), 127. See also I. Fernández-Molina & M. Porges, 'Western Sahara' in G. Visoka, J. Doyle & E. Newman (eds), *Routledge Handbook of State Recognition* (2019), 376, an edited volume that considers other examples of limited statehood recognition, including for Palestine, Taiwan, Kosovo, Somaliland, Abkhazia and South Ossetia, and Transdniestria and Northern Cyprus.

235 See *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, 68 para. 162. See also P. Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara', 52 *Israel Law Review* (2019) 1, 3.

236 See e.g. H. Sántha, Y.L. Hartmann & M. Klamberg, 'Crimes Against Humanity in Western Sahara: The Case Against Morocco', *Juridisk Publikation* (2010) 2, 175; P.P. Leite, 'Independence by Fiat: A way out of the Impasse – the Self-determination of Western Sahara, with Lessons From Timor-Leste', 27 *Global Change, Peace & Security* (2015) 3, 361, 362. Smith argues that senior Moroccan officials may have perpetrated the crime of aggression in Western Sahara: see J.J. Smith, 'A Four-Fold Evil? The Crime of Aggression and the Case of Western Sahara', 20 *International Criminal Law Review* (2020) 3, 492.

237 See Universidade de Santiago de Compostela, *SADR Recognitions*, available at https://www.usc.es/en/institutos/ceso/RASD_Reconocimientos.html (last visited 19 February 2022).

238 J. Kestler-D'Amours, 'US recognised Morocco's Claim to Western Sahara. Now what?', *Al Jazeera* (online), 11 December 2020, available at https://www.aljazeera.com/news/2020/12/11/us-recognised-moroccos-claim-to-western-sahara-now-what (last visited 19 February 2022). Most States adopt a neutral position as to the status of Western Sahara: 'United States Recognizes Morocco's Sovereignty Over Western Sahara', 115 *American Journal of International Law* (2021) 2 , 318, 320.

A similar situation may also arise where there is a dispute as to the legitimate government of a territory, and one body purports to accept the jurisdiction of the ICC under article 12(3). As set out above, Myanmar is not a State Party to the *Rome Statute*, notwithstanding that some of its nationals may be subject to an investigation owing to crimes allegedly perpetrated on the territory of the State Party Bangladesh. Nevertheless, on 21 August 2021, the Myanmar National Unity Government (NUG) published a statement on its Twitter account setting out that it had accepted the jurisdiction of the ICC with respect to crimes perpetrated on Myanmar territory.[239] The statement asserts that the NUG's Acting President Duwa Lashi La "lodged a declaration with the registrar of the ICC, accepting the Court's jurisdiction with respect to international crimes committed in Myanmar territory since 1 July 2002". The statement further asserts that "[t]he declaration was lodged in accordance with article 12(3) of the Statute of the International Criminal Court, which enables a State not party to the Rome Statute to accept the exercise of jurisdiction of the Court".

The NUG is composed of elected representatives of the National League for Democracy, which won the 2020 general election, as well as representatives of other political parties and who are independents. However, the State Administration Council which is a military body led by Senior General Min Aung Hlaing is the *de facto* government of the State at this time, and on 1 August 2021 it announced that it would assume the role of caretaker government of Myanmar until at least August 2023 under state of emergency laws.[240] It remains unclear whether the caretaker government will be recognize by the United Nations as the legitimate government of Myanmar.[241] If the Office of the Prosecutor decides to widen its current investigation to alleged crimes perpetrated *within* the territory of Myanmar, the NUG's declaration purportedly lodged with the registrar appears to require the ICC to determine whether the NUG is a "State" within the meaning of article 12(3).

239 @NUGMyanmar (National Unity Government Myanmar) (Twitter, 21 August 2021, 1:22am AEST) https://twitter.com/NUGMyanmar/status/1428739347717648389, archived at https://perma.cc/V2KP-4C7P.

240 H. Beech, 'Top Myanmar General Says Military Rule Will Continue Into 2023', *New York Times* (August 2021), available at https://www.nytimes.com/2021/08/01/world/asia/myanmar-state-emergency.html (last visited 19 February 2022).

241 C. Lynch, R. Gramer & J. Detsch, 'U.S. and China Reach Deal to Block Myanmar's Junta From U.N.', *Foreign Policy* (13 September 2021), available at https://foreignpolicy.com/2021/09/13/yanmar-united-nations-china-biden-general-assembly/ (last visited 19 February 2022).

Although the ICC purported in the *Palestine* decision to confine its role to a determination of the "question of jurisdiction set forth in the Prosecutor's Request",[242] to do this arguably required a determination of statehood under general international law. Certainly such determinations are very complicated, and there are few more legally and politically complicated factual scenarios against which to consider this issue than the Israeli-Palestinian context. However, the Pre-Trial Chamber was quick in its decision to point out that not only is it required to make legal determinations quite apart from their political consequences,[243] but that any situation in which core crimes under the Rome Statute are alleged will be a situation in which "political issues are sensitive and latent", and that "the judiciary cannot retreat when it is confronted with facts which might have arisen from political situations and/or disputes".[244]

If one accepts the interpretative logic above, then the unwillingness of the ICC to consider the meaning of "State" under principles of general international law indicates a refusal to interpret general international law, when in truth there is a good argument that it is required to do so in order to determine the limits of its jurisdiction. Such a refusal is to be contrasted with the aforementioned decisions in *Al Bashir* and *Lubanga*, in which the respective ICC Chambers clearly considered that they could interpret matters of customary international law to a degree beyond what was strictly necessary to resolve the disputes before them, and in a way that could be used by other Chambers confronted with a different dispute or set of facts. If so, this demonstrates a discordance within the ICC about its role in interpreting international law.

The Pre-Trial Chamber in the *Palestine* decision concludes with an emphatic declaration that the determination is "without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court's jurisdiction".[245] In this case, the ICC was at pains to clarify that it would not rule on questions of general international law, but rather was concerned with the terms of the *Rome Statute* and the criminal responsibility of individuals. Nevertheless, it is submitted that it is difficult to understand what the "jurisdiction" of the Court might be without a consideration of the meaning of "State" in article 12,[246] and more generally, a refusal to consider issues of general international law. The role of the ICC to adjudicate individual

242 ICC, *Palestine*, *supra* note 214, 29, para. 60.
243 *Ibid*., 28, para. 57.
244 *Ibid*., 27, para. 55.
245 *Ibid*., 50, 58, paras 113, 130.
246 Buchwald & Rapp, *supra* note 229, 17-18.

criminal responsibility is clear, but as the previous examples demonstrate, in the international system this necessarily includes consideration of issues affecting States and sovereignty that are not strictly limited to the terms of the *Rome Statute*.

III. ICC Consideration of ICJ Decisions

Lastly, the ICC Pre-Trial Chamber in *Palestine* did make reference to decisions of the ICJ in this refusal to interpret general international law.

As mentioned, the ICC in *Palestine* considered that article 12(2) did not "require a determination as to whether that entity fulfils the prerequisites of statehood under general international law". In a footnote to this conclusion, the Pre-Trial Chamber stated: "For example, in its advisory opinions on the Kosovo Declaration of Independence and the Wall, the International Court of Justice refrained from determining whether Kosovo or Palestine were 'States' under public international law."[247]

It is submitted that this is not a completely accurate summary of those respective cases, and it omitted important legal context to those decisions. This is a continuation of the tendencies described in previous sections for international courts and tribunals to omit appropriate contextualization of the decisions of the ICJ.

In the case *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* ('*Kosovo Declaration* Advisory Opinion'),[248] the question put by the UN General Assembly to the ICJ was simply: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The question did not ask about the statehood of Kosovo, or the legal consequences of its declaration of independence.[249] In essence, it is not that the ICJ refrained from determining the question of Kosovan statehood. It is rather that the ICJ was not asked to make this determination, that the question put to the ICJ was very specific, and that the ICJ decided not to reformulate the scope of the General Assembly's request to the ICJ.

247 ICC, *Palestine*, *supra* note 214, 40, para. 93, fn 266 (citations omitted).

248 *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403.

249 *Ibid*., 423, paras 49-51.

In the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('*Wall* Advisory Opinion'),[250] the ICJ did not strictly speaking make a determination of the statehood of Palestine, and such a question was not put to it. However, it is arguable that this conclusion was essential to, or else implicit in, its reasoning. The ICJ was asked by the UN General Assembly: "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law […]?". The ICJ considered Israel's argument that the wall was not annexation but was a temporary measure "to enable it effectively to combat terrorist attacks".[251] However, without dismissing this argument, the ICJ determined that the construction of the wall could have the effect of "prejudg[ing] the future frontier between Israel and Palestine" and providing a means by which Israel could "integrate the settlements and their means of access", which the Court considered "would be tantamount to *de facto* annexation".[252] Further, the ICJ opined that "[t]he existence of a 'Palestinian people' is no longer an issue".[253]

As in the *Kosovo Declaration* Advisory Opinion, the ICJ in the *Wall* Advisory Opinion was not asked whether Palestine was an independent State. Nevertheless, in likening the construction on the wall by Israel as "tantamount to *de facto* annexation", a prejudgment of future borders between Israel and Palestine, and a violation of the right to self-determination held by Palestinian people, it is arguable that the ICJ was required to reason that the title to the West Bank territory lay with the Palestinian entity.[254] The omission by the ICC Pre-Trial Chamber in *Palestine* to deal with this issue in citing the ICJ's advisory opinion for avoidance of a determination of statehood raises the issues highlighted in other sections above.

Meanwhile, the ICC Pre-Trial Chamber in *Palestine* also referred to the opinion in the ICJ's *Wall* Advisory Opinion that the rights of the Palestinian people "include the right to self-determination", and that the right to self-determination is "owed *erga omnes*".[255] This informed the Pre-Trial Chamber's opinion that "the right to self-determination amounts to an 'internationally

250 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136.
251 *Ibid*., 50, para. 116.
252 *Ibid*., 52, para. 121.
253 *Ibid*., 50-51, para. 118.
254 Zimmermann, *supra* note 231, 327.
255 ICC, *Palestine*, *supra* note 214, 52-54, paras 120-121.

recognised human [right]' within the meaning of article 21(3) of the [Rome] Statute".[256]

G. Conclusion

The multiplicity of international judicial bodies presents both opportunities and problems. Which category fragmentation of judicial opinion falls into depends on its circumstances. It may merely reflect the existence of different branches of law (standard in domestic law) and the unique institutional context of these branches. In fact, fragmentation may be inescapable.[257] There is not necessarily an issue with diverging opinions of international courts, provided that relevant decisions from other courts are carefully considered and placed in their judicial context, so that unnecessary fragmentation may be minimized and greater certainty about judicial principle is provided. Attentive consideration and respect of other relevant judgments ensures stability of international law.[258] It is essential that differences in interpretation are clearly explained with reference to the conflicting view.[259] As Steer points out, the goal is not a unified system, but rather a system that is "self-aware of the concurrently existing plural legal spaces, and of the process by which these spaces interact".[260]

Unfortunately, the examples provided show that there is no clear methodology of the international courts in addressing these issues. This is politically and legally problematic.

The ICJ rarely cites external jurisprudence, which limits dialogue.[261] It sometimes ignores relevant international criminal court approaches, or rejects them based on the institutional context of criminal law. When a sophisticated international judicial body analyses general international law relevant to its case, it is thought that the ICJ should engage with this discussion,[262] not deny that the discussion is necessary. Further, if the ICJ does not refer to the relevant rulings of other courts, it is possible that those courts may refer less to relevant rulings of the ICJ. This was observable for the effective control or overall

256 *Ibid*., 55, para. 122.
257 Report of the Study Group, *supra* note 6, para 493.
258 Treves, *supra* note 30, 234, 252.
259 Kasotti, *supra* note 5, 35.
260 C. Steer, 'Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law', in E. v. Sliedregt & S. Vasiliev, *Pluralism in International Criminal Law* (2014), 39, 62.
261 Webb, *International Judicial Integration*, *supra* note 3, 193; Simma, *supra* note 1, 287.
262 Trapp, *supra* note 147, 248.

control issue. Notwithstanding the ICC Prosecutor's submission concerning the distinction between the ICJ test and the ICC and ICTY test, the Trial Chamber completely ignored the ICJ's ruling on this issue in its judgement. Rather than a beneficial pluralism and interlocking jurisprudence, there is a confusing array of contradictory opinions.

There is room for improvement for the other courts as well. In some areas of the law, the criminal courts and tribunals have not contextualized the ICJ's relevant judgments, such as for immunities or for the statehood question, or have not referred to them at all, as for the control test. The ICTY in relation to *Nicaragua* was a notable exception.

On the other hand, when required to consider a factual scenario and a criminal law issue almost identical to those dealt with by international criminal courts and tribunals, the ICJ was overly deferential to the latter and did not sufficiently contextualize their findings. When considered alongside the other two examples, what emerges is not a problem of fragmentation, but a lack of structured cooperation between judicial international organizations.[263] The interactions between them are chaotic and unregulated.[264] A measured balance of these different approaches is required.

Finally, there is an apparent lack of agreement between the courts on each other's institutional purpose. In the first two examples of immunities and characterization of conflict as international, the ICJ did not consider the criminal courts to have much of a role outside of criminal law issues, while the criminal courts considered themselves as authorities on questions of general international law. Further indications were that the criminal courts did not consider that the ICJ could rule on their jurisdiction, as shown in the recent immunities cases. In contrast, for criminal issues, the ICJ arguably delegated much of its role to the ICTY. In the fourth example of the *Palestine* decision, the ICC emphatically refused to consider an issue of general international law, in circumstances it was arguably called upon to adjudicate on one such question in order to define its jurisdictional limits with respect to quasi-State entities.

As Judge Bennouna observed extrajudicially, comity between courts does not prevent improving processes of recognition, and giving greater attention to the relationship between different jurisdictions and conflicts between them.[265]

263 Kasotti, *supra* note 5, 31.

264 Van Alebeek, 'The Judicial Dialogue', *supra* note 10, 110.

265 M. Bennouna, 'How to Cope with the Proliferation of International Courts and Coordinate Their Action' in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2011) 287, 290.

Firstly, when the judgments of other courts are referenced, it is essential that the context that these other judgments were adjudicating is fully explicated. It is hazardous and confusing to cite such other judgments when they provide only partial or qualified support for the relevant proposition. Secondly and conversely, it is important to ensure that the deliberation of another court on a similar legal issue is not omitted. When a well-respected international judicial body provides its interpretation of a legal issue, it is important that a subsequent judicial body considering a similar issue engages with the ruling of that court, accepting or dismissing its relevance or correctness with detailed reasoning. Such an approach is collaborative and in fact improves the second judicial body's judgment by ensuring it is responsive to a multiplicity of situations that come or will come before the court. Moreover, it is expected in a rapidly evolving international system that a ruling by another judicial body made many years prior may have less relevance today, but this is no justification to ignore it. Thirdly, there needs to be coordination within and between judicial bodies over the role of each judicial body in interpreting customary international law and non-specialized legal terms. At present, separate judicial bodies and even differently constituted chambers within the same judicial body display contrasting views on this question. There may be a place for the ICJ to lead this coordination as a court of general jurisdiction and one that was established under the widely-ratified UN Charter.[266]

The ICTY Appeals Chamber majority judgment in *Tadić* is a rare example set out above that displays these approaches.[267] The ICJ, in dismissing this interpretation as being confined to issues of criminal responsibility and not to issues of "general international law", displayed insufficient respect for other international judicial authority and insufficient acknowledgement of the pluralist nature of the international legal system. A later international criminal court, the ICC, would then ignore the ICJ's ruling completely, notwithstanding attempts by the Prosecutor in submissions to reconcile the differing tests of the two judicial bodies.

The relationships between the (sometimes overlapping) legal regimes of the international system are still in the process of being clearly defined and require inter-court cooperation. Resolving these issues is of singular and pressing

266 Shany, *supra* note 27, 31; Milanovic, *supra* note 158, 693.

267 See *Tadić*, *supra* note 123, paras 115–145 in which the majority analyse the *Nicaragua* test and explain with detailed reasons why they believe this test "does not appear to be persuasive".

importance to the certainty and legitimacy of the international legal system.[268] Avoiding them will only allow them to fester.[269]

[268] Guilfoyle, 'Lacking Conviction', *supra* note 110, 438.
[269] Ventura, *supra* note 144, 491.

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Military Intervention on Request in *Jus ad Bellum* and *Jus in Bello* and the Question of Recognition of Governments

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Abstract

Over the past decades, foreign interventions in internal conflicts upon the request of host governments have turned into a common practice. These instances have proved to be particularly challenging both from a *jus ad bellum* and a *jus in bello* point of view. On the one hand, it is often unclear whether the intervention is lawful; on the other hand, the classification of these armed conflicts is equally problematic. In both cases, the key to answer these questions is the identification of the organ capable of speaking on behalf of the state: who is the government? Considering the pivotal relevance of the identification of the government both in *jus ad bellum* and *jus in bello*, it is crucial to determine the criteria for identifying the authority capable of issuing a valid invitation. This article seeks to clarify these criteria. Ultimately, it will demonstrate that *jus ad bellum* and *jus in bello* reach different conclusions on the matter and it will argue that this should not be the case.

A. Introduction

Over the past decades, foreign interventions in internal conflicts upon the invitation of host governments have become common practice. These instances have proved to be particularly challenging both from a *jus ad bellum* and *jus in bello* point of view. On the one hand, it is often unclear whether the intervention is lawful; on the other hand, the classification of these armed conflicts is equally problematic. In both cases, the key to answering these questions is the identification of the organ capable of speaking on behalf of the state: who is the government? Under *jus ad bellum*, the intervention will be lawful and will not violate the ban on the use of force and the principle of non-intervention in the internal affairs of the state only if the invitation came from the government, i.e. the authority capable of speaking on behalf of the state. Under *jus ad bellum*, whether the intervention took place with the consent of the government determines crucial consequences for the classification of the conflict.

Considering the pivotal relevance of the identification of the government both in *jus ad bellum* and *jus in bello*, it is therefore crucial to determine how to identify the authority capable of issuing a valid invitation. Nevertheless, international law does not provide certain criteria to this end. The overwhelming majority of States follow the Estrada doctrine, an approach propounded by the Mexican Foreign Secretary Genaro Estrada in 1930, whereby States recognize other States, not governments:

> "The Mexican Government shall issue no declaration in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism when they decide, favourably or unfavourably, as to the legal qualifications of foreign regimes."[1]

[1] B. R. Roth, *Governmental Illegitimacy in International Law* (1999), 137. See also P. C. Jessup, 'The Estrada Doctrine', 25 *The American Journal of International Law* (1931) 4, 719, 723; S. D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments,' in G. H. Fox & B. R. Roth (eds), *Democratic Governance and International Law* (2000), 123, 567.

This means that, as soon as an entity is recognized as a State, "it exists regardless of internal changes of power and crises".[2] Nevertheless, there are instances when identifying the *de jure* government is necessary and cannot be avoided, notably when a rebel group takes power, controls most of the country, and proclaims itself as the new government. In light of the central relevance of the identification of the government both in *jus ad bellum* and *jus in bello*, it is therefore essential to determine the criteria to identify the authority capable of issuing a valid invitation.

The aim of this article is to clarify the criteria to identify the entity capable of speaking on behalf of the State. Ultimately, it will demonstrate that *jus ad bellum* and *jus in bello* reach different conclusions as to the criteria for identifying the government capable of issuing an invitation, it will explain why this triggers key challenges, and it will therefore argue that there is a need to have common criteria regarding the identification of the government capable of consenting to a foreign intervention. Notably, Part I will focus on foreign interventions upon invitation from a *jus ad bellum* point of view; Part II will analyze the criteria for the recognition of governments under *jus in bello*; Part III will draw conclusions based on this analysis and will argue in favour of having common criteria.

It is important to remember that *jus ad bellum* and *jus in bello* are traditionally separated and independent under international law. International humanitarian law (IHL) applies regardless of whether the use of force was lawful in the first place. Nevertheless, according to the majoritarian view whether a foreign military intervention in a non-international armed conflict (NIAC) turns the internal conflict into an international armed conflict (IAC) depends on the presence or lack of consent expressed by the government of the inviting State. In other words, the classification under IHL depends on criteria that do not strictly pertain to IHL. However, also due to the separation between *jus ad bellum* and *jus in bello*, the two branches have reached different conclusions and this leads to paradoxical consequences that will be addressed in the last part of this article.

Before delving into this analysis, it is worth clarifying a terminological issue. As is well-known, international law traditionally distinguishes two types of armed conflicts: international and non-international ones, *tertium non datur*. An IAC involves armed confrontations between two States. On the other hand, a NIAC occurs whenever there is protracted armed violence between

[2] C. Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights* (2021), 104.

governmental authorities and organized armed groups, or between such groups.[3] "[B]anditry, unorganized and short-lived insurrections, or terrorist activities"[4] do not amount to armed conflicts.[5]

While this distinction is still of crucial relevance, there are instances that challenge this dichotomy and prompt some question whether there is a need for a third category, namely that of *internationalized armed conflicts*. Notably, in the 1960s, during the Vietnam War, scholars started exploring the idea of the internationalization of NIACs. Dietrich Schindler presented the first systematic study on the issue, where he put forward the idea of "international civil wars", which he defined as NIACs in which a foreign country intervenes in favor of one of the parties to the conflict.[6] Drawing upon his study, other scholars started investigating internationalized armed conflicts, defining them as "a civil war characterized by the intervention of the armed forces of a foreign power".[7] The International Committee of the Red Cross (ICRC) also adopted the term and used it "for many years to refer to situations in which one or more third States intervened in a pre-existing armed conflict affecting all or part of the territory of a given State".[8]

Nevertheless, scholars have increasingly challenged the notion of *internationalized armed conflicts* for two crucial reasons, clearly highlighted by the ICRC. First, Ferraro convincingly explained that the ICRC has abandoned the term because it "quite wrongly suggests a blanket application of the law of IAC in such situations;" furthermore, "[i]t could … give the impression that these situations form a third category of armed conflicts".[9] As aforementioned,

3 *Prosecutor v. Tadić*, Judgment, IT–94–1, 2 October 1995, para. 70. See also A. Cullen, *The Concept of Non-International Armed Conflicts in international Humanitarian Law* (2010), 120.

4 *Prosecutor v. Tadić*, Judgment, IT–94–1, 7 May 1997, para. 562.

5 H. McCoubrey, 'The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?', 34 *Suffolk Transnational Law Review* (2011) 1, 145, 156-157; G. D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), 153.

6 D. Schindler, 'Die Anwendung der Genfer Rotkreuzabkommen seit 1949' 22 ASDI (1965) 75, 93, 98; D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols* (1979), 150, 151.

7 See, e.g., H.P. Gasser, 'International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon', 33 *American University Law Review* (1983) 1, 145, 157.

8 T. Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict', 97 *International Review of the Red Cross* (2015) 900, 1227, 1230.

9 *Ibid*.

international law recognizes only two types of armed conflicts; introducing a third category could therefore increase confusion with regard to the relevant legal framework.[10] Interestingly, a recent work by Mačak has brought back the term *internationalized armed conflicts*, defined as NIACs that have turned into IACs following a process of internationalization.[11]

It should be noted that part of the scholarship recurs to the term transnational armed conflicts (TAC). At times, this this is intended to refer to instances different from *internationalized armed conflicts*. For instance, Corn and Jensen define TACs as armed conflicts where at least one of the parties is a transnational non-State actor, namely a "foreign-based" armed group.[12] However, other authors use the term as synonymous with internationalized armed conflicts. One clear example is Carron, who distinguishes between two types of transnational armed conflicts, whereby the common denominator is the use of force by one State in another country:

> "On the one hand, there are conflicts between State A and Armed Group C, which start in State A and then spillover into the territory of State B (spillover transnational armed conflicts). This is the case of the operations led by Turkey against the pkk [sic], first in Turkey, then in Iraq. On the other hand, there are conflicts emerging with transnational actions between State A and Armed Group C in the territory of State B (extraterritorial transnational armed conflicts). … The use of force by the United States and by Russia against

10 D. Carron, 'Transnational armed conflicts: An argument for a single classification of non-international armed conflicts', 7 *Journal of International Humanitarian Legal Studies* (2016) 1, 5, 6; ‚Ferraro', *supra* note 8, 1227. It should be noted that similar remarks have been raised against the use of the term *transnational armed conflicts* (TAC), see, e.g., C. Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', 15 *Journal of Conflict and Security Law* (2010) 2, 245, 257; M. Milanovic, 'The Applicability of the Conventions to ''Transnational" and "Mixed" Conflicts' in A. Clapham, P. Gaeta & M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 27, 45. See *contra* G. Corn & E. T. Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations', 42 *Israel Law Review* (2009) 1, 46; Roy S. Schondorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime', 37 *New York University Journal of International Law and Politics* (2004) 1, 1.

11 K. Mačák, *Internationalized Armed Conflicts in International Law* (2018) 2, 27.

12 ‚Corn & Jensen', *supra* note 10, 49; D. Jinks, 'September 11 and the Laws of War', 28 *Yale Journal of International Law* (2003) 1, 1, 40-41.

> the Islamic State (an armed group) in Iraq and Syria are another example of extraterritorial transnational armed conflicts."[13]

This article agrees with the ICRC view: internationalized or transnational armed conflicts do not amount to a new legal category. Furthermore, as these terms increase confusion as to their meaning, classification, and consequences, it does not seem a useful category. Nevertheless, it will be exceptionally used only when reporting the position of authors that use the term themselves.

B. Intervention by Invitation in *jus ad bellum*

Let us imagine a hypothetical scenario in which State A intervenes in State B to fight the opposition group C. Whether State B consented to the intervention determines the legality of the intervention.[14] Copious *jus ad bellum* literature has addressed the question. Notably, two models have emerged: the effectiveness approach and the democratic entitlement one. They will be analyzed in turn, and then they will be tested against State practice. Ultimately, this will put forward a third approach which appears to be more consistent with State practice.

As we shall see, the criteria to identify the entity capable of representing the State are different in *jus ad bellum* and *jus in bello*. While this will be further explained below, it is worth delineating already the primary contrast. Under *jus ad bellum*, a democratically elected entity is recognized as the new government even when it does not exercise effective control over the territory and population of the State, and even when a competing entity with effective control claims to represent the State. On the other hand, in case of the absence of a democratic alternative, the effective entity will be recognized as the government of the State. On the contrary, the majoritarian view in IHL scholarship posits that the authority capable of speaking on behalf of the State is always the effective one, regardless of the presence of a democratic alternative. This leads to the paradoxical conclusion that, in case competing entities claim to represent the State, one democratically elected and the other exercising effective control, *jus ad bellum* will recognize the democratic government, while IHL will prefer the effective one. The reasons why this is particularly problematic will be addressed in the last part of this work.

13 Carron, *supra* note 10, 10-11.

14 This assuming that no other justifications are present, such as the authorization by the UN Security Council or the right to self-defence.

Before delving into this analysis, it is worth clarifying the role of the recognition of governments in international law. The primary subjects of international law are States. As explained by Roth:

> "International law acknowledges 'States' as bearers of a distinctive package of rights, obligations, powers, and immunities (i.e. 'sovereignty'), and attributes to each state a government' with the legal capacity (for the time being) to assert rights, incur obligations, exercise powers, and confer immunities on the state's behalf."[15]

International law is clear in determining that a State is an entity that "possess[es] the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States".[16] While a government is one of the essential elements of a state, "the latter can endure also in absence of an authority capable to speak on its behalf".[17] The practice related to failed States – whereby the lack of a functioning government does not determine the end of the State – supports this conclusion.[18] Furthermore, the recognition of governments is charged with political value. Against this backdrop, and as aforementioned, the Mexican Foreign Secretary Genaro Estrada posited in 1930 that States should recognize other States, not governments. This approach, which came to be known as the Estrada doctrine, is vastly accepted by the international community. For instance, at the outset of the Libyan armed conflict, the British Foreign Secretary endorsed this approach with regard to the Libyan National Transitional Council:

> "In line with our assessment of the NTC [National Transitional Council] as the legitimate interlocutor in Libya representing the aspirations of the Libyan people, the Government has invited the NTC to establish an office in the UK. This will enhance our existing relationship with the NTC, and better enable us to fulfil

15 B. R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (2011), 169.

16 Article 1, *Montevideo Convention on the Rights and Duties of States*.

17 *Redaelli*, *supra* note 2, 104.

18 See D. Thürer, 'Failing States,' *Max Planck Encyclopedia of Public International Law* (2009), para. 3: '[a] State is usually considered to have failed when the power structures providing political support for law and order have collapsed or are non-existent to the extent that the State ceases to be an effective member of the international community. This process is generally triggered and accompanied by anarchic forms of internal violence.'

> our commitment to protect civilians under threat of attack from the Qadhafi regime. ... This arrangement does not affect our position on the legal status of the NTC: the British Government will continue to recognise States, not Governments."[19]

While the Estrada doctrine has the merit to prevent States from expressing judgment towards the authority in power in a specific country, this approach fails to consider that there are circumstances when identifying the organ capable of speaking on behalf of the State is inevitable. One of these cases is when two competing authorities claim to be the government of a State.

Before addressing the question of consent, it is worth putting forward a caveat. Non-international armed conflicts are situations of transition, characterized by high volatility, where identifying the authority representing the State is extremely challenging. This circumstance inevitably calls for the necessity to accept that, in times of transition, there are moments when it will not be possible to identify who is the government with absolute certainty. Nevertheless, it is exactly in these grey areas that it is paramount to understand how to identify the organ capable of representing the State. To this end, analyzing state practice will prove decisive.

I. Traditional Approaches

1. Effectiveness Approach

Effective control over the territory and the population has been the traditional criterion to identify the government representing the State for decades. This approach can be found in early arbitral decisions. For instance, in the *Dreyfus* case, the Arbitral Tribunal maintained that:

> "According to a principle of international law … today universally admitted, the capacity of a government to represent the State in its international relations does not depend in any degree upon the legitimacy of its origin, so that … the usurper who in fact holds

[19] Foreign & Commonwealth Office, 'Announcement: Supporting the Libyan National Transitional Council' (2011) available at https://www.gov.uk/government/news/supporting-the-libyan-national-transitional-council (last visited 10 May 2022).

> power with the consent express or tacit of the nation acts … validly in the name of the State."[20]

In a similar vein, in the *Tinoco Concessions* case, the arbiter affirmed that a government exercising effective control should be considered the authority capable of representing the State, regardless of how it obtained power:

> "To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a de facto government, which conforms to the limitations of the old constitution, is to use a contradiction in terms."[21]

Kelsen was one of the most vocal supporters of this approach, as he believed that "a national legal order begins to be valid as soon as it has become – on the whole – efficacious; and it ceases to be valid as soon as it loses this efficacy".[22] Similarly, Wippman affirmed that "international law presumes that when a government exercises effective control over the territory and the people

20 *French Claims against Peru*, Award at the Arbitral Tribunal, 11 October 1921, 1 Reports of International Arbitral Awards (1921), 215-221.

21 *Tinoco Concessions Arbitration*, (Great Britain c. Costa Rica), 18 October 1923 (sole arbitrator William R Taft) RSA, vol. 1, p. 28. See H. Lauterpacht, *Recognition in International Law* (1947), 104.

22 H. Kelsen, *General Theory of Law and State* (1961), 220-221. See also B. R. Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', 11 *Melbourne Journal of International Law* (2010) 2, 393, 431; A. Tanca, *Foreign Armed Intervention in Internal Conflict* (1993), 48; D. Wippman, 'Military Intervention, Regional Organizations, and Host State Consent', 7 *Duke Journal of Comparative and International Law* (1996) 1, 209, 211-212; L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56 *British Yearbook of International Law* (1986) 1, 189, 196.

of the state, the government … possesses the exclusive authority to express the will of the State in its international affairs".[23]

The effectiveness approach has the merit of basing the decision on an objective criterion, namely the control over territory and population. Effectiveness seems therefore more objective and less prone to abuse. Nevertheless, it does raise several challenges. First, it is unclear what threshold is to be considered an effective government. Is it necessary to control the entirety of the territory? Is control over at least 50% of the territory enough? Should it be exercised on key areas, such as the capital and critical infrastructures? What if an entity exercises control over more than 50% of the country, but only on uninhabited areas and not on state infrastructures?[24] Lacking clear and generally accepted criteria on the required threshold, the effectiveness approach ultimately will rest on a discretional analysis of the situation, whereby States might decide whether the entity is sufficiently effective depending on their willingness to recognise it, or lack thereof.

Second, inasmuch as effectiveness is based on *de facto* consideration, it does not consider how the government gained power: "as far as the government can fulfil the functions of the state, it is considered capable of acting on its behalf".[25] In the words of Wright, "the *de facto* situation is presumed to overrule the *de jure* one".[26] Nevertheless, over the past decades this position has been vastly criticized in the literature. As human rights and the emerging right to democratic entitlement have gained momentum, relying on an approach that endorses the principle *ex factis jus oritur* has been increasingly perceived with unease. Notably, some authors have criticized it for being in contrast with the right to self-determination of people, and in particular their right to determine their own political future: "[i]nsofar as it is perceived as little more than an imprimatur for 'might makes right' at the local level, this 'effective control doctrine' is manifestly offensive to a rule-of-law sensitivity".[27] Against this backdrop, the democratic entitlement approach emerged.

23 D. Wippman, *supra* note 22, 211-212.

24 Redaelli, *supra* note 2, 107; E. Lieblich, *International Law and Civil Wars: Intervention and Consent* (2013), 154.

25 Redaelli, *supra* note 2, 107.

26 Q. Wright, 'United States Intervention in the Lebanon', 53 *The American Journal of International Law* (1959) 1, 112, 120.

27 Roth, *supra* note 15, 170. See also Wippman, *supra* note 22, 213; Doswald-Beck, *supra* note 22, 194; G. H. Fox, 'The Right to Political Participation in International Law' in G. H. Fox & B. R. Roth (eds.), *Democratic Governance and International Law* (1992), 539, 595.

2. Democratic Entitlement Approach

In recent years, the right to democracy has gained momentum, hence influencing debates on the recognition of governments. The favor granted to democratic governments over effective ones seems to find support among regional organizations. A clear example comes from the Organization for Security and Co-operation in Europe (OSCE), whose Moscow Document:

> "[C]ondemn[s] unreservedly forces which seek to take power from a representative government of a participating State against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order; will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values."[28]

The African Union (AU)[29] and the Organization of American States (OAS)[30] have been more vocal in taking a position against governments that took power through undemocratic means, such as a coup or elections fraud. Of particular interest is the African Charter on Democracy, Elections, and Governance (2007), which establishes a number of measures to be adopted against effective but undemocratic authorities:

> "4. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the

[28] Conference on Security and Cooperation in Europe (CSCE), *Document of the Moscow Meeting on the Human Dimension of the* CSCE, 30 I.L.M. (1991), 1670, 1677, para. 17. See Roth, *supra* note 1, 376; ‚Wippman', *supra* note 22, 219; M. Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy', 34 *Harvard International Law Journal* (1993) 1, 163, 175.

[29] M. Roscini, 'Neighbourhood Watch? The African Great Lakes Pact and *Jus ad Bellum*', 69 *Heidelberg Journal of International Law* (2009) 3, 931, 955–958.

[30] *Roth*, *supra* note 15, 209–211; B. S. Levitt, 'A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter', 48 *Latin American Politics and Society* (2006) 3, 93-123; D. S. Boniface 'Is There a Democratic Norm in the Americas? An Analysis of the Organization of American States', 8 *Global Governance* (2002) 3, 365.

> democratic order or hold any position of responsibility in political institutions of their State.
> 5. Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.
> 6. The Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Article 23 of the Constitutive Act.
> 7. The Assembly may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.
> 8. State Parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government."[31]

The OAS has similarly adopted a plethora of instruments which highlight the support for democratic governments overthrown through unconstitutional means, such as coups. Of particular interest is the Resolution *Representative Democracy* (1991),[32] which highlights that "one of the basic purposes of the OAS is to promote and consolidate representative democracy with due respect for the principle of non-intervention"[33] and establishes that:

> "In the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states, in order, within the framework of the Charter, to examine the situation, decide on and convene an ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly."

According to a number of authors, these regional documents all support the emerging right to democratic governance and a general preference for democratic but ineffective governments over undemocratic but effective ones. In other words, these instruments would represent "a net of participatory

31 *Ibid*.
32 *Representative Democracy*, 5 June 1991, AG/RES. 1080 (XXI-0/91).
33 Santiago Commitment, Preamble.

elements"[34] and an unprecedented "initiative to endorse and define a popular right of electoral democracy".[35]

II. Testing Traditional Approaches Against State Practice: The Emergence of a New Trend

Scholars have supported two approaches regarding the recognition of governments. On the one hand, a number of authors posit that effective entities should be preferred over democratic ones. On the other hand, some of the literature supports the idea that democratically elected governments have the authority to speak on behalf of the State, even when they are not effective. Interestingly, State practice seems to support both instances. As a matter of fact, recognition of governments, especially in cases of interventions in NIACs upon the invitation of the government, looks so chaotic that it seems to suggest that pure politics, rather than international law, regulates these instances. Nevertheless, upon closer examination, a pattern emerges and, while it might be early to conclude that it is part and parcel of customary law, practice and *opinio juris* have been consistent enough to suggest that this is the direction international law is taking.

The preference for democratic governments, even when ineffective, is supported by several cases. Among the most emblematic instances of military interventions upon invitation directed at restoring democratic governments ousted by a rebellion, it is worth mentioning Haiti (1990 and 1994),[36] Sierra

[34] T. M Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 1, 46, 69; L. E. Fielding, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy', 5 *Duke Journal of Comparative & International Law* (1995) 2, 329, 332-333.

[35] ‚Franck', *supra* note 34, 67.

[36] See Murphy, *supra* note 1, 574; ‚Wippman', *supra* note 22, 218–219; Roth, *supra* note 1, 366–387; W. M. Reisman, 'Why Regime Change is (Almost Always) a Bad Idea', 98 *American Journal of International Law* (2004) 3, 516, 251–252.

Leone (1996),[37] Côte d'Ivoire (2010),[38] Libya (2014),[39] and South Sudan (2014).[40] In all these cases, not only foreign interventions in internal conflicts took place upon the invitation of the ousted, democratically elected governments, but also the overwhelming majority of the international community recognized the ousted government as the organ representing the State. The events that unfolded in 2014 in Yemen seem to confirm this conclusion. In 2014, a non-international armed conflict broke out in Yemen between opposing Houthi forces and governmental troops. In September of that year, the rebel groups entered the capital. Fighting continued for months and, in February 2015, the opposition arrested President Abdrabbuh Mansur Hadi, who managed to flee to Saudi Arabia the following month.[41] As soon as he reached the country, he

37 See J. Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Siearra Leone', 12 *Temple International and Comparative Law Journal* (1998) 2, 333–377; K. Nowrot & E. W. Schebacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', 14 *American University International Law Review* (1998), 321; K. Samuels, '*Jus Ad Bellum* and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone', 8 *Journal of Conflict & Security Law* (2003) 2, 315; ‚Wippman', *supra* note 22, 303.

38 See IGC, 'Côte d'Ivoire: Is War the Only Option?' Africa Report No. 171, (3 March 2011); J. d'Aspremont, 'Duality of government in Côte d'Ivoire', *EJIL: Talk!* (2011), available at https://www.ejiltalk.org/duality-of-government-in-cote-divoire/; T. F. Bassett & S. Straus, 'Defending Democracy in Côte d'Ivoire: Africa Takes a Stand', 90 *Foreign Affairs* (2011), 130; A. J. Bellamy & P. D. Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect', 87 *International Affairs* (2011) 4, 825, 832.

39 Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2012/ 675, 30 August 2012, paras. 2-9; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc S/2015/624, 13 August 2015, paras. 29 ff.: S. Arraf, 'Libya: Conflict and Instability Continue' in A. Bellal (ed.), *The War Report: Armed Conflicts in 2017* (2018), 70–82; E. de Wet, *Military Assistance on Request and the Use of Force* (2019), 112.

40 See Report of the Secretary-General on South Sudan, UN Doc S/2011/678, 2 November 2011; 'Ugandan army confirms it will leave South Sudan,' BBC (12 October 2015), available at www.bbc.com/news/world-africa-34502524; 'Uganda admits combat role in South Sudan,' Al Jazeera (16 January 2014), available at www.aljazeera.com/news/africa/2014/01/ugandan-troops-battling-south-sudan-rebels-201411683225414894.html (last visited 31 August 2022).

41 See 'Yemen Crisis: Houthi Rebels Announce Takeover' BBC (6 February 2015), available at http://www.bbc.com/news/world-middle-east-31169773; 'Yemen's Hadi Seeks UN Military Support to Deter Houthis,' Al Jazeera (25 March 2015), http://www.aljazeera.com/news/middleeast/2015/03/yemen-hadi-seeks-military-support-deter-houthis-150324223355704.html (last visited 31 August 2022).

asked for a foreign intervention in order to fight against the rebels, a request that was accepted. In late March 2015, the United Arab Emirates, Bahrain, Qatar, and Kuwait engaged in airstrikes against the Houthi opposition forces.[42] While President Hadi did not exercise effective control over the country anymore, he was still deemed capable of issuing an invitation for a foreign intervention.

Another more recent example concerns the elections that took place in The Gambia in 2016-2017. On December 1, 2016, Adama Barrow won the presidential elections, defeating the long-term President Yahya Jammeh. However, on December 9, the incumbent announced that he did not recognize the results of the elections due to alleged fraud and he thus refused to step down and to hand power to Barrow. The international community nearly unanimously recognized the latter as the President of The Gambia. For instance, the UNSC affirmed that:

> "[A]ll Gambian parties and stakeholders to r*espect the will of the people* and the outcome of the election which recognized Adama Barrow as President-elect of The Gambia and *representative of the freely expressed voice of the Gambian people* as proclaimed by the Independent Electoral Commission."[43]

In a similar vein, the Economic Community of West African States (ECOWAS) adopted a communiqué in which it recognized the results of the elections and that it stands ready to "take all necessary measures to strictly enforce the results of the elections",[44] while the Peace and Security Council of

42 See *ibid*. See also 'Egypt defense minister in Riyadh to discuss operation in Yemen,' Al Araibiya (10 April 2015), available at http://english.alarabiya.net/en/News/middle-east/2015/04/10/Egypt-defense-minister-in-Riyadh-to-discuss-operation-in-Yemen.html; 'Communiqué: Morocco decides to provide all forms of support to the coalition for support of legitimacy in Yemen', Ministry of Foreign Affairs and International Cooperation of the Kingdom of Morocco (26 March 2015), available at https://www.diplomatie.ma/en/Politiqueétrangère/MondeArabe/tabid/2810/vw/1/ItemID/11926/language/en-US/Default.aspx; M. Ghaza, 'Jordan "Fully Committed to Defending Yemen's legitimacy, Fighting Foreign Interference",' Jordan Times (2015), available at http://www.jordanembassyus.org/news/jordan-fully-committed-defending-yemen-s-legitimacy-fighting-foreign-interference; 'Sudanese Planes Pound Houthi Targets in Yemen', Sudan Tribune (1 April 2015), available at http://www.sudantribune.com/spip.php?article5448 (all last visited 31 August 2022).

43 SC Res. 2337, UN Doc. S/RES/2337, 19 January 2017, paras. 1, emphasis added.

44 ECOWAS, Fiftieth Ordinary Session of the ECOWAS Authority of heads of State and Government, Final Communiqué, 17 December 2016. See also A. Hallo de Wolf, 'Rattling

the African Union condemned the coup and affirmed that Jammeh was not recognized as the authority representing the Gambian State any longer.[45]

The aforementioned cases demonstrate the emergence of a new trend, whereby the international community prefers democratically elected governments over effective ones, even when they are not effective. This is the case not only when the democratic governments have been in power before being ousted, but also when it had never exercised effective control over the country, such as in the case of The Gambia. This conclusion is not only supported by State practice, but it seems also to respect crucial norms, notably the right to self-determination of people. Accordingly, "this would prove that effective control principle is not the pivotal criterion to identify the government capable of consenting to foreign interventions".[46] However, we should not forget that several governments are undemocratic in nature, and yet they are recognized by the international community and sit at international and regional organizations. How can this circumstance be reconciled with the conclusions just reached about democratic governments?

Examples of undemocratic but effective entities that have been recognized as the organ capable of speaking on behalf of the State and so are also capable of issuing an invitation for foreign intervention are not scant. A clear example is provided by the Libyan government. In 1969, Muammar Gaddafi took power through a coup against the incumbent, monarchical government. At the time, he was recognized by the international community and his authority was questioned only when the population started demonstrating against him in 2011. This led to the outbreak of a NIAC and to the end of Gaddafi's regime.[47] Similarly, the way in which Bashar al-Assad reached power was not democratic. In 2000, he succeeded his father as President of Syria and his role was endorsed by a referendum, in which the Syrian population was called to decide whether they wanted to confirm the parliament's choice to designate Assad as the new president.[48] The results showed that Assad had the support of the 99.7% of the

Sabers to Save Democracy in the Gambia,' *EJIL: Talk!*, (2017), available at www.ejiltalk.org/rattling-sabers-to-save-democracy-in-the-gambia/ (last visited 31 August 2022).

45 *AU Peace and Security Council*, Communiqué, PSC/PR/COMM. (DCXLVII), 13 January 2017.

46 *Redaelli*, *supra* note 2, 131.

47 'Libya profile – Timeline,' BBC (19 April 2019), available at www.bbc.com/news/world-africa-13755445 (last visited 31 August 2022).

48 Immigration and Refugee Board of Canada, Syria: 'Syrian presidential election in 2000; confirmation of whether businessmen and/or other influential people in the community were pressured by security officers to collect other people's identity cards for the security

Syrian population. However, it is at least questionable whether the elections were free and fair.[49] Nevertheless, Assad was recognized as the authority representing Syria and, just like for Gaddafi, his authority would have been questioned only years later during the NIAC that started in 2012.

One last, more recent example relates to the events that unfolded in Chad. In 1990, a coup brought to power President Idriss Deby, whose authority was not questioned in spite of the undemocratic way in which he secured power. In 2019, as rebel forces were advancing towards the capital, the president invited France to intervene and help fight against the rebels. France accepted the invitation and launched Operation Barkhane. "While the democratic legitimacy of President Deby could be questioned, the intervention upon invitation was not criticised by the international community".[50]

The aforementioned cases are just a few of many examples of governments that achieved power in an undemocratic fashion and that were nonetheless recognized as representing the State. How can one reconcile these instances with the conclusions reached in the previous paragraph, which show a preference for democratic governments, even if not effective? The key criterion is the presence or absence of a democratic alternative. Indeed, in all cases when undemocratic governments were recognized as capable of representing the State, no democratic alternative was present. The choice was therefore between recognizing the undemocratic but effective government or not recognizing any entity. While the latter remains a possibility, for practical reasons it is often necessary to make such recognition in order to have a relationship with the government. On the other hand,

officer's use in the election (June–July 2001)' (24 March 2003), SYR41225.E, available at www.refworld.org/docid/3f7d4e22e.html. See also J. Kifner, 'Syrians Vote to Confirm Assad's Son as President', The New York Times (11 July 2000), available at www.nytimes.com/2000/07/11/world/syrians-vote-to-confirm-assad-s-son-as-president.html. A similar referendum took place in 2007, when Assad received 97.6% support. See I. Black, 'Democracy Damascus style: Assad the only choice in referendum', The Guardian (28 May 2007), available at www.theguardian.com/world/2007/may/28/syria.ianblack (all last visited 31 August 2022).

49 Immigration and Refugee Board of Canada, Syria: 'Syrian presidential election in 2000; confirmation of whether businessmen and/or other influential people in the community were pressured by security officers to collect other people's identity cards for the security officer's use in the election (June–July 2001)' (24 March 2003), SYR41225.E, available at www.refworld.org/docid/3f7d4e22e.html (last visited 31 August 2022).

50 *Redaelli*, *supra* note 2, 140; 'Rebel Incursion Exposes Chad's Weaknesses,' *International Crisis Group* (17 February 2019).

> "Democratic governments – i.e. endorsed by free and fair elections – are recognised even if they do not exercise effective control over the territory and population, and even when an effective but undemocratic alternative is available. This conclusion is valid in cases when the democratic government has exercised power for some time before being overthrown (e.g. Sierra Leone, 1997; Haiti, 1990-1994; Honduras, 2009) as well as when the government has never been in power (e.g. Côte d'Ivoire, 2010, and The Gambia, 2017). … Accordingly, democratic but ineffective governments are deemed to have the capacity to consent to foreign interventions in their favour."[51]

C. Foreign Interventions in *jus in bello*

Foreign interventions in internal conflicts are an increasingly common phenomenon. Yet, there is still uncertainty surrounding their legal qualification. As aforementioned, a number of scholars attempted to consider them as a new category of armed conflicts and defined them as internationalized or transnational conflicts. On the other hand, the majoritarian view, shared by the author of this article, is that international law recognizes only two types of armed conflicts: NIACs and IACs. While foreign interventions in internal conflicts do not create a third, new kind of conflict, such circumstances still raise crucial challenges, in particular for classification purposes.

Let us imagine another hypothetical scenario, in which State A intervenes in State B to fight against rebel group C. Let us also assume that there is a NIAC between State B and group C. Under IHL, there are several theories as to whether the foreign intervention changes the classification of the conflict and, in the case of a positive answer, how. Notably, three approaches have been put forward in the scholarship. Some authors are in favour of a single classification approach. In their view, the foreign intervention would turn the conflict into an IAC (single IAC approach), while others propound that the situation should be classified as a NIAC (single NIAC approach). At the other end of the spectrum, some scholars embrace the fragmented approach and classify the conflict depending on the presence of the consent by the territorial state. In the aforementioned case, if State B consents to State A's intervention to fight against rebel group C, there is a NIAC between State A and the opposition group. However, if there is a lack

[51] *Redaelli*, *supra* note 2, 250.

of consent by State A, there would also be an IAC between State A and State B. These positions will be analyzed in turn.

I. Single IAC Approach

In 1971, the ICRC submitted a draft to the first Conference of Government Experts for the Reaffirmation and Development of International Law, where it suggested that, in case of foreign intervention in a NIAC, the internal conflict should be regulated by IHL applicable to IACs. The rationale underpinning this position is that foreign interventions "widened the scope of the hostilities and increased the number of victims".[52] Accordingly, the law of armed conflict regulating IACs seem to better respond to such circumstances. However, the government experts rejected this proposal, as they feared that non-State actors would have asked for foreign help to enhance their legal status.[53] The following year, the ICRC submitted a similar, albeit more subtle, proposition to the Conference, which was again unsuccessful. Since then, the ICRC has abandoned the idea of treating these instances as IACs.[54]

Nevertheless, a minority of scholars still support this approach. In their opinion, foreign interventions in NIACs turn these situations into IACs, hence the corresponding legal framework would also regulate the armed confrontations between the intervening State and the armed group.[55] Several factors have led authors to reach this conclusion. For Aldrich, whenever there is an intervention in a NIAC, the nature of the conflict changes fundamentally. Drawing conclusions from his experience during the Vietnam War, he noted that "the armed conflict will certainly have become international" because "it will be practically impossible to apply both the rules on international armed conflict and those on non-international armed conflict to what, in fact, is a single armed conflict with two warring sides".[56] According to others, a foreign intervention would determine the qualification of the conflict as IAC due to the cross-border nature of the use of force. Since NIACs are internal in nature, a

52 ‚Gasser', *supra* note 7, 146.

53 *Ibid*.

54 D. Akande, 'International Law and the Classification of Conflicts', in E Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) 32, 73.

55 ‚Carron', *supra* note 10, 13.

56 G. Aldrich, 'The Laws of War on Land', 94 *American Journal of International Law* (2000) 1, 42, 62-63.

foreign intervention would introduce an international element and would thus change the classification.[57]

While it is tempting to conclude that a foreign intervention in a NIAC would turn the conflict into an international one, this approach raises important concerns. First, claiming that a NIAC becomes an IAC following a foreign intervention, even if one of the parties to the conflict is a non-State actor, would lead to the application of an inappropriate set of rules to the situation. Indeed, IHL regulating IACs has been designed specifically for States and there are challenges in extending its application to opposition groups.[58] Second, and on a related note, "the link between the applicable rules and the likelihood of their implementation" should not be underestimated.[59] Extending the application of the rules regulating IACs to rebel groups would mean imposing on them a set of rules that they might be unable to comply with. Lastly, there does not seem to be State practice or *opinio juris* supporting this approach.[60]

II. Single NIAC Approach

A number of authors support the view that foreign interventions in internal conflicts lead to a single classification of the conflict. Nevertheless, unlike the approach presented above, they posit that these instances should be considered as single NIAC.[61] Scholars supporting this view base their conclusions on the identity of the parties. While foreign interventions introduce an international element, armed confrontations still take place between a State and a non-State actor. Accordingly, it seems only natural that the conflict should be considered as a NIAC, notwithstanding the fact that fighting takes place between a foreign country and a rebel group based in another State, where fighting is taking place.[62] Furthermore, as long as the intervening country targets only the rebel group and not assets and organs of the territorial State, the question as to whether the government has consented to the foreign intervention would not be relevant.[63]

57 ‚Carron', *supra* note 10, 13.

58 *Ibid*., 15.

59 N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (2010), 104.

60 A. Paulus & M. Vashakmadze, 'Asymmetrical war and the notion of armed conflict – a tentative conceptualization', 91 *International Review of the Red Cross* (2009) 873, 95, 112.

61 ‚Carron', *supra* note 10, 13.

62 *Ibid*., 13-15; ‚Kreß', *supra* note 10, 255-256; ‚Paulus', *supra* note 60, 112.

63 T. D. Gill, 'Classifying the Conflict in Syria', 92 *International Law Studies* (2016) 353, 367.

This approach has the merit of classifying the conflict based on the identity of the parties, and it seems therefore preferable to the "single IAC" model. Nevertheless, concluding that there is a NIAC between the intervening State and the rebel forces does not address the question of the relationship between the foreign country and the territorial one. Kreß, who supports the single NIAC approach, has acknowledged this challenge:

> "[T]he 'pure non-international armed conflict model' will necessarily reach its limits in the following three situations which all go beyond our hypothetical (failed State) case scenario: in the case of an armed confrontation between the armed forces of the State acting in self-defence (here: Utopia) and the armed forces of the host State (here: Arcadia); in the case of capture and detention of armed forces of the State acting in self-defence by the host State; and in the case of an occupation of a part of the host State's territory by the State acting in self-defence. In all three cases the law of international armed conflict must apply and thereby 'the pure non-international armed conflict model' would be replaced by a model under which the laws of international and non-international armed conflict apply concurrently ('concurrency model')."[64]

In other words, should there be armed confrontations between the armed forces of the two States, there would also be a parallel IAC between them. As we shall see, this is in line with the fragmentation approach propounded by the ICRC and supported by the majority of scholars. Nevertheless, it does not consider one specific case: what if a foreign country intervenes against a rebel group without the consent of the host State? Does the lack of consent bear consequences for the classification of the conflict, regardless of whether armed confrontations take place between the two States? These questions will be addressed in the next section.

III. The Consent-Based Approach

In a seminal article published in 2015, Ferraro presented the fragmented approach, which has been adopted by the ICRC ever since. According to this model, the classification of an armed conflict and the determination of the applicable legal framework should be determined by looking at the bilateral

64 ‚Kreß', *supra* note 10, 256.

relationship between the parties.[65] This approach was endorsed by a number of international courts. Notably, the International Court of Justice (ICJ) adopted this model in the *Nicaragua* case, where it clarified that:

> "The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."[66]

Furthermore, the Pre-Trial Chamber of the ICC affirmed that:

> "[A]n internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside an internal armed conflict – if i) another State intervenes in that conflict through its troops (direct intervention) or if ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)."[67]

The overwhelming majority of the scholarship has endorsed this approach.[68]

Applying the fragmented approach to foreign interventions in pre-existing NIACs means that it is necessary to analyze the bilateral relationships between each party. In the aforementioned example, State A intervenes in State B to fight against rebel group C, while there is an ongoing NIAC between State B and State C. As explained above, the supporters of the single IAC approach would

65 ‚Ferraro', *supra* note 8, 1241.

66 ICJ, *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States of America), Judgment (Merits), 27 June 1986 (hereinafter *Nicaragua* case), paras. 219.

67 *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06, 29 January 2007, paras. 209. See also *Tadić*, *supra* note 3, paras. 77: 'the conflicts in the former Yugoslavia have both internal and international aspects.'

68 See, e.g., M. Sassòli, 'The Legal Qualification of the Conflict in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?', in S. Yee & T. Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001); Gasser, *supra* note 7; James G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', 85 *International Review of the Red Cross* (2003) 850.

conclude that there is an IAC between State A and rebel group C due to the transnational nature of the armed confrontations. On the other hand, those in favour of the single NIAC model conclude that the fighting between the foreign country and opposition forces amount to an internal conflict because the classification should be conducted based on the identity of the parties, regardless of whether the State party corresponds to the territorial State where the armed group is based. The latter approach should be preferred, as it is in line with the reality on the ground. Nevertheless, the single NIAC approach does not solve a crucial issue, namely the relationship between the intervening State and the territorial one.

To address this problem, some scholars have elaborated on the consent-based approach, whereby the presence or lack of consent to a foreign intervention plays a crucial role in the classification of the conflict. If we refer back to our illustrative example, this would mean that, if State B has consented to the intervention of State A against the rebels, there is going to be a NIAC between State B and rebel group C, parallel to the pre-existing NIAC between State A and the opposition group. However, if State B has not consented to the foreign intervention, there will be three armed conflicts: (i) a NIAC between State A and rebels C; (ii) a NIAC between State B and rebels C; (iii) and an IAC between State A and State B, regardless as to whether there are armed confrontations between the two countries. These two instances will be analyzed in turn.

1. Foreign Intervention With the Consent of the State

As is well-known, Syria has been engaged in parallel non-international armed conflicts against several rebel groups for years.[69] As the Islamic State of Iraq and Syria (ISIS) gained control over a growing segment of Syrian territory, the Syrian government affirmed in August 2014 that:

> "Syria is ready to cooperate and coordinate with regional and international efforts to combat terror … everyone is welcomed, including Britain and the United States, to take action against ISIS and Nusra with a prior full coordination with the Syrian government."[70]

[69] See the Rule of law in Armed Conflicts (RULAC), 'Non-international Armed Conflicts in Syria', available at https://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria (last visited 31 August 2022).

[70] G. Baghdadi, 'Syria welcomes U.S. strikes against ISIS there, with conditions', CBS News (25 August 2014), available at https://www.cbsnews.com/news/syria-welcomes-u-s-

Russia answered positively to this request and intervened in September 2015:

> "[I]n response to a request from the President of the Syrian Arab Republic, Bashar al-Asad [sic], to provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria, the Russian Federation began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015."[71]

In a letter to the UNSC, Syria confirmed its consent to the Russian intervention:

> "The Russian Federation has taken a number of measures in response to a request from the Government of the Syrian Arab Republic to the Government of the Russian Federation to cooperate in countering terrorism and to provide military support for the counter-terrorism efforts of the Syrian Government and the Syrian Arab Army."[72]

Pursuant to the fragmented approach, in order to determine the number and nature of armed conflicts taking place in Syria at the time, it is necessary to look at the bilateral relationships between the parties. As specified in the *Tadić* case, a NIAC occurs whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups.[73] Notably, the International Criminal Tribunal for the former Yugoslavia (ICTY) identified a test to determine whether there is a NIAC based on two cumulative criteria: "the intensity of the conflict and the organization of the parties to the

strikes-against-isis-there-with-conditions/ (last visited 31 August 2022).

71 Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/792, 2015.

72 Identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/789, 2015.

73 *Tadić*, *supra* note 3, paras. 70. See also ‚Cullen', *supra* note 3, 120.

conflict".[74] Accordingly, Syria was engaging in parallel NIACs against a number of armed non-State actors, ISIS included. This conclusion is based on the fact that (i) the threshold of violence between Syria and each armed group was met, and (ii) each group was sufficiently organized.[75] As Russia intervened upon the invitation of Syria, there was no IAC between the two countries. Following its intervention, Russia was party to a separate NIAC against ISIS because the intensity of violence between the two parties met the intensity requirement.[76] If the threshold of violence was not met, Russia would have been party to the pre-existing NIAC opposing Syria and ISIS, on the side of the government (support-based approach). As explained by Ferraro:

> "[A] third power supporting one of the belligerents can be regarded as a party to the pre-existing NIAC when the following conditions are met: (1) there is a pre-existing NIAC taking place on the territory where the third power intervenes; (2) actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict; (3) the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC; and (4) the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict."[77]

2. Foreign Intervention Without the Consent of the State

Over the past years, there have been several cases in which a foreign country used force in another State against a non-State actor without the consent of the territorial State. One notorious example is the US intervention in Syria against the Islamic State. As aforementioned, the Syrian government issued an invitation to fight against ISIS. Nevertheless, a number of countries did not want to cooperate with Assad and did not intend to accept his invitation due to the widespread and systematic violations of human rights and humanitarian law that the Syrian government was committing against the population. For instance, then-President Barack Obama affirmed that: "[i]n the fight against

74 *Prosecutor v. Rutaganda*, Judgment, ICTR–96–3, 6 December 1999, paras. 93. See also International Committee of the Red Cross (ICRC) Opinion Paper, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (2008), 3.

75 See RULAC, *supra* note 69.

76 *Ibid*.

77 ‚Ferraro', *supra* note 8, 1231.

ISIL, we cannot rely on an Assad regime that terrorizes its own people".[78] Albeit the lack of (acceptance of) consent, in September 2014, a US-led coalition launched airstrikes against ISIS on Syrian territory.[79] Did the intervention trigger an IAC between the States party to the coalition and Syria? Is the simple lack of consent – armed clashes between the States regardless – sufficient to conclude that there is an IAC between the intervening country and the territorial State?

According to the ICRC, this is indeed the case:

> "In some cases, the intervening State may claim that the violence is not directed against the government or the State's infrastructure but, for instance, only at another Party it is fighting within the framework of a transnational, cross-border or spillover non-international armed conflict. Even in such cases, however, that intervention constitutes an unconsented-to armed intrusion into the territorial State's sphere of sovereignty, amounting to an international armed conflict within the meaning of common Article 2(1)."[80]

This position finds support in in the *Congo* case, where the ICJ held that:

78 See B. Obama, 'Address to the Nation on United States Strategy to Combat the Islamic State of Iraq and the Levant Terrorist Organization (ISIL)', Daily Comp Press Docs, 2014 DCPD No 00654. It should be recalled that at the time the Syrian government was defined as 'not the legitimate representative of its own people', while this qualification was attributed to the opposition groups.

79 At first the intervention was conducted by the US, Bahrain, Jordan, Qatar, Saudi Arabia, and the United Arab Emirates. Albeit initially reluctant, Australia, Canada, France, and the UK, among others, eventually joined the US-led coalition intervening in Syria. As is well-known , the US justified the intervention on the base of the unwilling or unable doctrine. However, it is beyond the scope of this article to engage with this problematic issue. See O. Corten, 'Military Operations against 'Islamic State' (ISIL or Dae'sh) – 2014', in T. Ruys, O. Corten & A. Hofer (eds.), *The Use of Force in International Law: A Case-based Approach* (2018), 873, 875-876; O. Flasch, 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors', 3 *Journal on the Use of Force and International Law* (2016) 37, 38; V. Koutroulis, 'The Fight against the Islamic State and *Jus in Bello*', 29 *Leiden Journal of International Law* (2016) 3, 827.

80 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), paras. 261-263.

> "The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war."[81]

While the overwhelming majority of the scholarship supports the consent-based approach, the rationale underpinning this position might be unclear in certain circumstances. It is not uncommon that foreign interventions crucially affect the population and the territorial State. For instance, while Israel targeted mainly Hezbollah, the Lebanese civilian population and state infrastructures were also exposed to the attacks. However, there might be cases where the need to classify the relationship between the two countries as an IAC might be less apparent. One example is the Colombian intervention in Ecuador in order to target members of the FARC in 2008. Unlike the Israeli intervention in Lebanon, which significantly affected the territorial State, the incursion of Colombia did not seem to have any negative effects on Ecuador.[82] After all, the military operations took place in the remote jungle and did not have consequences on the civilian population. In such cases, affirming that there is an IAC between the intervening State and the territorial one might seem artificial.[83] What is the practical relevance of qualifying cases such as the Ecuador/Colombia/FARC one as an IAC?

The consent-based model has the merit of reflecting the reality on the ground, even if *prima facie* this might not seem the case. Even if the intervening State is only targeting a non-State actor, its intervention is unlawful inasmuch as it amounts to a use of force "against the territorial integrity or political independence" of the state where the rebels are based. The consent-based approach is grounded on the pivotal precondition for the existence of an IAC, namely the resort to force between two States. Nevertheless, IHL does not require that both States engage in armed confrontation against each other in order to have an IAC. Instead, it is sufficient that one country uses force against

81 ICJ, *Armed Activities in the Congo* (Democratic Republic of Congo v. Uganda), Judgment (Merits), 19 December 2005, paras. 163.

82 T. Waisberg, 'Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors', 12 *ASIL InSight* (2008) 17.

83 ‚Kreß', *supra* note 10, 253-254.; Lubell, *supra* note 59, 110-111.

the other. It might be objected that, in the aforementioned cases, the use of force was directed against the non-State actor, not against the State. Nevertheless, Article 2(4) of the UN Charter is violated whenever force is used on the territory of another State without its consent, regardless of whether the objective of the attack is an armed non-State actor.[84] To affirm otherwise would mean to accept the paradoxical conclusion that there might be cases in which a State uses force on the territory of another country without its consent and that the attack might even amount to an act of aggression, and yet the rules designed to address these instances – namely *IHL* applicable to IACs – would not be applicable.[85]

3. Whose Consent?

Based on these aspects, the consent-based model appears to be legally sound and to reflect the reality on the ground, and it should therefore be preferred. Nevertheless, a crucial question remains. If the classification of the conflict depends on the consent of the State, it is necessary to understand if it was indeed the government who issued such an invitation. One challenge lies in the fact that sometimes consent might not be public, such as in the case of the US intervention against the Taliban in Pakistan, which the Pakistani government did not endorse but did not criticize either.[86] Another, more challenging question regards the validity of the consent *per se*. NIACs are typically situations in which at least part of the population challenges the authority of the *de jure* government and when the opposition forces might control parts of state territory. Furthermore, it is not uncommon that more than one entity claims to be the government and to represent the State. How can the authority capable of speaking on behalf of the state be identified and therefore issue a valid invitation? As Brian Egan, US State Legal Advisor, correctly highlighted: "the concept of consent can pose challenges in a world in which governments are rapidly changing, *or have lost control of significant parts of their territory*, or have shown no desire to address the threat".[87] What does IHL have to say about the recognition of governments?

84 *Mačák*, *supra* note 11, 38-39; M. Milanovic & V. Hadzi-vidanovic, 'A Taxonomy of Armed Conflict', in N. White & C. Henderson (eds.), *Research Handbook on International Conflict and Security Law: "jus ad bellum, jus in bello," and "jus post bellum"* (2012), 256.

85 *Akande*, *supra* note 54, 74-75.

86 See, e.g., S. D. Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan', 85 *International Law Studies* (2015) 109.

87 M. Lederman, 'ASIL Speech by State Legal Adviser Egan on international law and the use of force against ISIL', Just Security, (4 April 2016), available at https://www.justsecurity.org/30377/asil-speech-state-legal-adviser-international-law-basis-for-limits-on-force-isil/.

Does it provide criteria as to how to identify the organ capable of consenting to a foreign intervention?

In order to answer this fascinating albeit challenging question, we should start our analysis with the Geneva Conventions. While the consent-based approach is not mentioned in IHL treaties, Article 4(A)(3) of the Geneva Convention III (GCIII)[88] is particularly relevant for our discussion when it affirms that:

> "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: … (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

The rationale underpinning this article draws back to the Second World War, when a number of States refused to grant Prisoner of War (PoW) status to members of the armed forces of another State due to the fact that they did not recognize the government. Originally, the provision was specifically intended to address the issue of Germany refusing PoW status to French troops operating under the command of General Charles de Gaulle and to southern Italian forces.[89] However, it does not answer the question of our investigation, namely the identification of the government capable of issuing an invitation. The ICRC Commentary to GCIII mentions a few instances when the Article would be applicable, namely:

> "Article 4A(3) covers armed forces that continue operations under the orders of a government in exile that is not recognized by the adversary but has been given hospitality by another State. … It can also apply where a State exists but where the government in power may not be recognized as the legitimate government of the territory by other States that are party to the conflict."[90]

Nevertheless, this does not clarify what happens when two entities claim to be the new government representing the State. The events that unfolded in

88 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

89 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War* (2020), paras. 1041.

90 *Ibid*., para. 1042.

Yemen clarify the importance of addressing this conundrum. How can the armed conflict(s) taking place in the country following the coalition's intervention be classified? If Hadi was still the President, we would have two parallel NIACs: one opposing the troops of Yemen and the rebels, and the other opposing the coalition forces and the rebels.[91] On the other hand, should we consider that the Houthi forces were the new government, then the consent expressed by Hadi to the intervention would not be valid, which in turn would imply that there would be one NIAC between Hadi rebel forces and Houthi state forces, and one IAC between the intervening foreign countries and Houthi troops.

The ICRC Commentary to the Geneva Conventions posit that the government capable of speaking on behalf of the State should be the effective one, namely the government capable "to exert State functions internally and externally, i.e. in relations with other States".[92]

> "Under international law, the key condition for the existence of a government is its effectiveness, that is, its ability to exercise effectively functions usually assigned to a government within the confines of a State's territory, including the maintenance of law and order."[93]

The Commentary specifically addresses the situation when two competing governments claim to represent the State, such as Côte d'Ivoire (2011) and Libya (2011 and 2014). These cases highlight the crucial need to determine who is the government, for classification purposes among others. In these circumstances, the ICRC concludes that:

> "In this regard, it does not matter that a government failed to gain recognition by the international community at large. The very fact that the said government is effective and in control of most of the territory of the State concerned means that it is the *de facto* government and its actions have to be treated as the actions

91 This is assuming that the intensity of violence between the intervening states and the rebels met the intensity requirement.

92 ICRC Commentary to GC I, *supra* note 80, paras. 234. See, e.g., J. Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post-Gaddafi Libya', 18 *Yearbook of International Humanitarian Law* (2016), 3, 15.

93 ICRC Commentary to GC I, *supra* note 80, paras. 234.

> of the State it represents with all the consequences this entails for determining the existence of an international armed conflict."[94]

The ICRC position is supported by several IHL scholars. For instance, for Serralvo, a government "must be independent and effective. Effectiveness includes not only the possibility to operate inside the territory, but also the capacity to represent the State outside its own borders *vis-à-vis* other States."[95] On the other hand, other authors require additional elements together with effectiveness and believe that the new government must have "established control over a significant part of the country, and is legitimized in an inclusive process that makes it broadly representative of the people (positive element)".[96] Interestingly, outside the IHL realm, a number of studies have shown that other criteria have emerged in State practice. It is therefore worth analysing the debates on recognition of governments in international law in general, and in *jus ad bellum* in particular.

D. Concluding Remarks

I. Challenging the Absolute Separation Between Jus ad Bellum and Jus in Bello?

The separation between the legality of war and the conduct of hostilities is one of the central pillars of IHL, which prides itself on applying equally to both parties, *jus ad bellum* considerations regardless.[97] As noted by Sassòli, "determining when IHL … applies requires an assessment of the factual situation on the ground. … Justifications underlying the resort to violence are wholly irrelevant".[98] To be sure, the specificities of IHL require that the criteria to determine its application be certain and easily verifiable. It would not be feasible to expect combatants on the ground to engage in *jus ad bellum* debates as to whether the use of force is lawful or not under *jus ad bellum*. This is particularly true considering that the legality of the international use of force is often controversial. It seems therefore crucial to keep the two branches of law separated. Furthermore, it is worth recalling that the separation between the

94 *Ibid*., para. 235
95 ‚Serralvo', *supra* note 92, 17.
96 ‚Milanovic', *supra* note 10, 34.
97 M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019), para. 3.10.
98 *Ibid*., para. 3.12.

two branches of international law provides protection to combatants and fighters taking part in hostilities, as well as to civilians.[99] While some scholars have suggested that *jus ad bellum* could override *jus in bello* in certain circumstances, this position has never been embraced by most authors.[100]

One of the key consequences of the absolute separation between *jus ad bellum* and *jus in bello* is that the first should not be used to interpret the latter. Nevertheless, the consent-based approach seems to suggest exactly that, as highlighted by its critics. For instance, according to Carron:

> "[W]e have to distinguish what is relevant to *ius ad bellum* and what pertains to *ius in bello*. The classification exercise, a *ius in bello* question, cannot depend on *ius ad bellum* elements such as the violation of sovereignty of the territorial State."[101]

Similarly, Gill has observed that:

> "[T]here is no reason to assume that the classification of an armed conflict is dependent upon— or even influenced by—the question of whether a violation of the *ius ad bellum* has occurred. … Moreover, if neither the intervening State nor the territorial State are engaged in hostilities or are supporting a party to an armed conflict, there is no presumption that they are belligerent parties vis-à-vis each other."[102]

It might be counterargued that the issue concerning the recognition of governments pertains to public international law, not to *jus ad bellum*. Accordingly, the consent approach would not be in contrast with the strict separation between *jus ad bellum* and *jus in bello*. However, the rationale underpinning the consent approach has a lot to do with the legality of the use of force. For instance, Mačak explains that:

99 See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Separate Opinion of Judge Fleischhauer, 1996, 35 ILM, p. 834, paras. 4. See also T. Christakis, '*De maximis non curat praetor? L'affaire de la licéité de la menace ou de l'emploi d'armes nucléaires*',49 *Revue Hellénique de Droit International* (1996), 355–399.

100 J. Moussa, 'Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law', 90 *International Review of the Red Cross* (2008), 963–990.

101 ‚Carron', *supra* note 10, 17.

102 ‚Gill', *supra* note 63, 369.

> "[When a] third state is operating militarily in another state's territory without that state's consent to do so, it should be seen as using force against that state. The resulting situation would once again qualify as an IAC. This is because the key condition for the existence of an IAC, ie, the resort to force between states, does not require that both states must actually use force; instead, it is sufficient that one state uses force against another state."[103]

Akande developed this point further:

> "Given that a use of force by one State on the territory of another, without the consent of the latter, is a use of force by the foreign State against the territorial State, a situation of armed conflict between the two automatically arises. An international armed conflict is no more than the use of armed force by one State against another. … To state otherwise is to assert that there can be an armed contention between States, possibly even an act of aggression by one State against another but that this is not covered by the rules which international law has designed to regulate such contentions between States."[104]

In sum, the consent-based approach has been developed stemming from the consideration that, whenever a state uses force against another, IHL should be applicable. To avoid IHL's inapplicability in situations when a state intervenes in another without its consent, inflating *jus ad bellum* considerations into *jus ad bellum* is inevitable.[105] Nevertheless, this would be contrary to the principle of absolute separation between the two branches of law. How can this conundrum be resolved? One possibility would be to refuse the consent-based approach and recur to the single conflict ones. Our analysis, however, demonstrates how these models raise more questions than they answer. Therefore, they would not ultimately make the classification exercise less problematic. Another option would simply be to accept that, despite the importance of separation between *jus ad bellum* and IHL, there are instances in which some degree of interference

103 *Mačák*, *supra* note 11, 38-39.

104 *Akande*, *supra* note 54, 74-75.

105 M. O'Connell, 'Saving Lives through a Definition of International Armed Conflict', 40 *Proceedings of the Bruges Colloquium, Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities* (2010), 68

between the two is inevitable. Military interventions in NIACs without the consent of the territorial state would be one such case. While this conclusion might seem unreasonable to those who abide by the absolute separation of the two branches of law, in the case under consideration it seems the most reasonable conclusion. It should also be recalled that, although the consent-based approach recurs to *jus ad bellum*, it does not require a complete legal analysis as to whether the intervention is lawful or not.[106] For example, we could imagine the intervention of a State in another country without the consent of the latter but with the authorization of the UN Security Council (UNSC). The UNSC resolution would make the intervention lawful under *jus ad bellum*, yet the absence of consent would still determine the international nature of the conflict.

II. Who is the Government? The Need for Common Criteria

Under *jus in bello*, the consent-based approach posits that the lack of consent to a foreign intervention would trigger an IAC between the two countries. As explained above, IHL scholarship claims that the government capable of speaking on behalf of the state should be the effective one. On the other hand, under *jus ad bellum*, State practice shows that democratic legitimacy is emerging as a crucial parameter for the recognition of governments. Before addressing this conundrum, a clarification is in order. Most State practice concerning the recognition of governments has emerged with regard to *jus ad bellum*. The reason is intuitive: when a state intervenes in a NIAC upon the invitation of the territorial country, it is necessary to understand whether the entity claiming to represent the State is indeed the government and can therefore speak on its behalf. Nevertheless, this does not imply that the recognition of government falls within *jus ad bellum*. Instead, it is part of general international law.

To be sure, this is not the first case in which IHL and general international law recur to two different criteria to analyze the same situation. Indeed, a similar challenge emerged with regard to the attribution of the actions of rebels to a State that is assisting them. In 1986, the US intervened in Nicaragua and provided assistance to the *contras*, who were engaging in a NIAC against the government. In order to determine whether the US was responsible for the violations of IHL committed by the *contras*, it was necessary to determine whether the provision of assistance was enough to conclude that the opposition group was acting as a

[106] *M. Milanovic & V. Hadzi-vidanovic*, *supra* note 84, 293.

de facto organ of the US.[107] As it is well-known, the ICJ put forward the effective control test and concluded that the US was not responsible for the actions of the rebel groups:

> "All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[108]

A few years later, the ICTY was called upon to answer the same question, albeit for different reasons. Notably, the Tribunal had to decide whether the Bosnian Serb military and paramilitary units were acting as *de facto* organs of Serbia. In case of a positive answer, the conflict would have been international in nature. Just like for the question of recognition of governments, IHL must recur to general international law criteria in order to classify the conflict.

The analysis conducted by the ICTY and its conclusions are particularly interesting for our discussion. Notably, the ICTY clarified that it believed that general international law and IHL should use the same criteria to determine the attribution of the actions of non-State actors to the State:

> "What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a *de facto* organ of a State. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as de facto State officials,

107 ICJ, *Nicaragua* case, *supra* note 66, paras. 113.
108 *Ibid*., para. 115.

> thereby rendering the conflict international and thus setting the necessary precondition for the 'grave breaches' regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international."[109]

In other words, the Tribunal acknowledged that the same question should have the same answer in international law, even if its effects bear consequences on different branches of the law. While the ICTY eventually chose a different test than the one suggested by the ICJ, it did so by explaining why it believed that the effective control test should be abandoned:

> "States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. … Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State."[110]

As is well-known, the ICJ had to address the question of attribution again in the *Genocide* case. Here, the Court concluded that, while the overall control test might well be used for classification purposes, it is not convincing when called to solve issues related to the responsibility of States, as it would excessively broaden such responsibility:[111]

> "Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does

109 *Prosecutor v. Tadić*, Judgment, IT–94–1, 15 July 1999, paras. 104.

110 *Ibid*., paras. 117-120.

111 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), 26 February 2007, paras. 406. (see above)

> not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining – as the Court is required to do in the present case – when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive."[112]

It is beyond the scope of this article to engage in the substance of this debate. What is of particular interest is that the ICTY has made clear that, whenever the classification exercise has to rely on issues pertaining to general international law, IHL should not have different, *ad hoc* criteria. This is particularly true in the case under examination in this article. Indeed, here the consequences of using two different criteria to identify the government might be far more problematic than in the case of attribution of acts of rebels to an intervening State.

Referring to the intervention in Yemen on behalf of President Hadi could clarify this point. As previously mentioned, when he asked foreign countries to intervene in Yemen to fight against the rebels, he was in exile in Saudi Arabia, while the opposition groups were in control of most of Yemen and of the capital. Accordingly, under IHL, the rebels should have been considered the new government insofar as they had effective control over most of Yemen. On the other hand, under general international law, President Hadi was still the authority capable of speaking on behalf of the state. This circumstance creates major problems for the application of IHL.

Jus in bello has its own specificities due to the peculiarity of the situations it must regulate. This branch of international law developed as an attempt to make war more humane, while also acknowledging that armed conflicts ultimately and inevitably cause death and destruction. Accordingly, one of the main objectives of IHL is to provide for clear rules that can be easily applied by combatants amid the fog of war. Determining that the authority capable of speaking on behalf of the State is the one that exercises effective control over most of the territory and the bulk of the population is in line with the objective of IHL: insofar as effectiveness is based on objective criteria, the classification of the conflict and the rules applicable could be assessed with a certain ease and would not depend on more sophisticated criteria, such as the democratic nature

[112] *Ibid*., para. 404.

of the government or recognition by the international community. Nevertheless, while the effective control test seems easier to ascertain and apply, the fact that general international law developed different criteria creates more confusion.

If we refer to the intervention in Yemen, applying two different criteria for *jus ad bellum* – is the foreign intervention upon invitation lawful? – and *jus in bell*o – is the conflict between the rebel forces and the intervening countries international or internal in nature? – would be especially problematic. Indeed, the Saudi-led coalition intervened on the invitation of President Hadi and the intervention was lawful under international law for the reasons explained above. However, in determining the law applicable, they would have had to conclude that, for IHL purposes, the rebels were the new government and, therefore, that the conflict was international. Nevertheless, if the foreign countries intervene in favour of the government, it would then be unreasonable to expect that they would proceed to a different assessment only for classification purposes. After all, as explained above, the rationale underpinning the consent-based approach is to avoid a situation in which an unlawful use of force between two States would not be covered by IHL.

In sum, it is submitted that, when a foreign country intervenes in a NIAC in order to fight against the rebels but without the consent of the government, the relationship between the territorial and the intervening States should be classified as an IAC. As for the criteria to identify the organ capable of consenting to the intervention, the author believes that IHL should use the criteria developed under general international law. This is not only legally sound and supported by State practice, but it also has the advantage of rendering the classification exercise more straightforward and less artificial.

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Interpretation and Application of the ECHR: Between Universalism and Regionalism

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The protection of human rights guaranteed by the Council of Europe, in particular through the *Convention for the Protection of Human Rights and Fundamental Freedoms* and the supervision exercised by the European Court of Human Rights, has a dual dimension: its universal vocation goes hand in hand with the regional nature of its implementation. Tensions between universalism and regionalism play out in a fruitful and productive way.

In 1950, the States that concluded and ratified the Convention entitled it "Convention for the Protection of Human Rights and Fundamental Freedoms," deliberately choosing not to territorialize its name. On the other hand, Article 19 of the Convention introduces the "European Court of Human Rights." Rights whose scope is not defined according to the territorial jurisdiction of the States Parties and a regionalized jurisdictional mechanism thus coexist.

This dual dimension is reflected in the Preamble to the Convention. Its economy perfectly reflects the two aspects of the undertaking: the recognition of universal rights whose effective respect is ensured by a regional mechanism of protection. By basing its first recital on the 1948 *Universal Declaration of Human Rights*, the Preamble sets the Convention's horizon in universalism. However, from the third recital onwards, the statement of the Council of Europe's aim – "the achievement of greater unity between its members" – asserts the regional dimension of the project. It is a political project supported by several European States, in the historical context of the post-World War II period and the beginning of the division of the continent into two blocs, which is based on a legal instrument. The third recital of the Preamble states that "one

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of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms". As if under the influence of a pendulum, the following considerations are again projected onto the world stage with the affirmation of the attachment of the Council of Europe's State Parties to the freedoms "which are the foundation of justice and peace in the world" before returning to the regional dimension of the project that brings them together "as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law". This last phrase suggests the idea of a shared ideal, which could constitute a form of European identity. In the text of the Preamble itself, the European dimension of the project, which is both political and functional, is combined with the universal character of the rights and freedoms protected.

The *travaux préparatoires*, and in particular those relating to Article 1 of the Convention, also reflect the hybrid nature of this project. The drafting of the Convention gave rise to major debates between the United Kingdom on the one hand and France on the other, which had quite radically different conceptions of the plan to implement. The French favored the idea of a charter that merely enumerated rights; the British, quite the opposite, supported the project of a charter that defined the content of rights and freedoms as precisely as possible. Incidentally, this was a reversal in roles taken in the usual oppositions between continental law and common law. There was also a lively debate about whether or not the Court should precede the Convention or, in any case, be created at the same time, which indirectly referred to the praetorian part that the founding States intended to save for the effective protection of human rights. Beyond these oppositions, the discussions revealed a number of key elements. There are three such key elements.

The first element refers to the fact that the undertaking was part of the European context of the immediate post-war period and the political goal it pursued. In the words of Pierre-Henri Teitgen, the aim was to establish democracy in Europe on a lasting basis, to prevent the return of "the terrible fate" that had shattered not only the European continent but also the world, and to promote democracy and the rule of law after the victory over Nazism and at a time when an alternative model was developing in Eastern Europe. The second key element is based on the idea that such a political project had to be supported by law, through the recognition and collective guarantee of human rights. The drafting of the Convention gave rise to an important debate on whether to commit to recognising rights, guaranteeing them, or protecting them. At the end of the discussions and transactions, the authors of the Convention settled on the idea of recognising rights and a common mechanism for effective

guarantee. The third key element is essential. It lies in the refusal, shared by all Member States, to enshrine a European definition of human rights. This strong and unanimous conviction explains why the 1950 Convention abuts the 1948 Universal Declaration. The *travaux préparatoires* are peppered with numerous references to the general principles of rights recognized by civilized nations, which reveal the deliberate inclusion of the project in public international law. The intertwining of these elements expresses the specificity of the Convention mechanism: its universal dimension is accompanied by the establishment of a regional human rights guarantee instrument – the European Court of Human Rights.

In the preparatory report on the drafting of the Convention by the Secretary General of the Council of Europe, there is a formula that exactly captures this balance: "in the absence of a European definition, there will be a European guarantee". In the same spirit, Pierre-Henri Teitgen, in the *travaux préparatoires* for Article 1, explains that, by referring to the Universal Declaration, the aim is to "demonstrate first of all its respect for the technical value and the moral authority of this document of world-wide importance, and also to avoid making a distinction between European and world order". Throughout the *travaux préparatoires*, there is a desire to stay away from creating a specifically European body of law that would be different from the 1948 Universal Declaration and the universal concept of fundamental rights on which it is based. Nevertheless, the regional dimension of the treaty mechanism is not forgotten. The representative of Greece spoke of "the conclusion of a pact for the protection of those values which had their birth in Europe, were developed in Europe, and created there that common cultural heritage which is threatened with greater danger there than elsewhere". In a way, the regional coloring of the project stems from the idea that the European civilization has been the bearer, for thousands of years, of a certain European conception of human rights, which moreover inspired the Universal Declaration. But it is also linked to the fact that this "common heritage," referred to in the Preamble, was particularly challenged by the totalitarianisms and then by the Second World War which originated in Europe. By drafting the Convention and devising a regional mechanism for the protection of human rights, the founding fathers sought to include the democratic and liberal rebound of post-1945 Europe in a movement carried world-wide, while relying on the specific characteristics of this region. The European dimension of the project and the universal dimension that supports it, transcends it and transports it, interact together. For all that, it is first and foremost a common undertaking that is sealed in this form of shared guardianship that the States decide to exercise together, aware of the community

of fate that unites them. This state of mind is particularly well expressed by the words of Lord Layton, the British representative: "the maintenance of certain basic democratic rights in any one of our countries is not the concern of that country alone, but it is the concern of the whole group". It directly inspires the duty of the Court, to whose control the States agree to submit, as is clear from the words of P. H. Teitgen:

> "We are less concerned to set up a European juridical authority capable of righting isolated wrongs, isolated illegal acts committed in our countries, than to prevent, from the outset, the setting up in one or other of these countries of a regime of the Fascist or Nazi type. That is the essential element of our purpose."

The interplay between universalism and regionalism did not only preside over the work that led to the establishment of the conventional system. They also characterize the way it functions today.

The regional dimension of the human rights protection mechanism thrives on several elements. The first element is the origin and nature of the cases brought before the Court and which feed into its jurisprudence. These are located in Europe, since the Court has jurisdiction over the 47 Member States of the Council of Europe, which themselves have jurisdiction over more than 800 million people. The Court's largely territorial conception of the jurisdiction of the State Parties explains why almost all disputes it rules on originate in Europe. The 40,000 to 45,000 or so cases that the Court assigns to a judicial formation each year are therefore European in nature. Moreover, these cases not only originate in Europe but also concern European issues. They involve the political and legal systems of the Council of Europe Member States, even if a number of them, and good ones at that, have an extra-regional dimension (e.g. cases concerning the risk of violation of Article 3 in the event of the return of certain persons to certain non-European States) or even a global dimension (e.g. cases concerning environmental protection and climate change). For all that, the horizon of litigation is above all European. The development of inter-State cases, which has been particularly significant in recent years, is a regrettable illustration of this. These cases, which pit one European State against another, truly place the Court's jurisdictional activity on a regional scale. On a completely different level, the growing interactions with European Union (EU) law and the case law of the Court of Justice of the European Union reinforce the European dimension of the Strasbourg Court's activity. Without waiting for the accession of the EU to the Convention, the convergence of protected rights and

the particular dialogue that the two European courts are constantly developing, in particular around the figure of the presumption of equivalent protection, which was established by the *Bosphorus* case law (see for a recent application *Bivolaru and Moldovan v. France*), are part of the regional integration of the Convention system.

In addition to this first set of elements concerning the nature of the cases and the questions they raise, there is a second set of elements relating to the answers given by the Court. The Court settles the disputes brought before it by providing solutions that are rooted in the regional scale. This is undoubtedly the result of the architecture of the system and its functionality, which is organized around the fundamental notion of shared responsibility. The principle of subsidiarity, enshrined in the Preamble following Protocol 15 which enters into force on 1 August 2021, is the key to this shared responsibility. Thus anchored in the political, legal and jurisdictional reality of European States, the Court is able to interpret and apply the Convention in a way that updates it in a regional context. The realization of human rights is always situated, in time and space. To ensure effective protection of human rights, the Convention must remain a "living instrument". The national courts, as the primary guarantors of compliance with the Convention, and the Court, after all domestic remedies have been exhausted, each take their turn in doing so. The Court's case law draws its constructive dynamism from this melting pot, described in a visionary way by P.H. Teitgen: "the common ground of our [national] legislation, the general principles that emerge from all of this legislation, will certainly make it possible to define the practical content of each of these freedoms". In another way, a form of tension between universalism and regionalism is apparent in the Court's case law: while the definition of the protected rights, in substance, is based on a universal conception of human rights (reflected in particular in the rejection of the "double standard"), their implementation is necessarily integrated at the regional level, in the European area. It is in this respect that there can be a European conception, not of the law, but of the conditions for its realization. This form of European conception of the ways in which the right can be exercised can be found in the case law of the Court, in particular concerning Article 8 (the right to privacy) or Article 10 (freedom of expression).

The main instrument for this shared responsibility is the dialogue between judges, the formalization and institutionalization of which has accelerated in recent years. In 2015, the Superior Courts Network was created, which brings together today 93 courts from 40 different countries. This forum enables exchanges of case law and research to be carried out in a mutualized manner and is becoming increasingly important as a tool for cross-fertilization between

the different European systems and the Court's case law. Moreover, Protocol 16 has given national courts the possibility of submitting to the Court a request for an optional opinion on a question of principle relating to the interpretation and application of the Convention, thereby radically renewing the arrangements for dialogue between the Court and the domestic courts. Five requests have already been submitted, the first of which came from the French Cour de cassation.

The terms and conditions of the Court's supervision also reflect the European dimension of its case law. This is particularly evident in the use of the concept of consensus in Europe. As the Court regularly points out,

> "Where there is no consensus within the Contracting Parties to the Convention, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider."

The cursor of the control exercised by the Court can thus, in particular when "qualified rights" are at stake, i.e. the rights protected by Articles 8 to 11 of the Convention, be defined according to the existence or absence of such a consensus. If a consensus is found, it reveals the existence of a shared standard, a form of conception common to the European States or at least to a large majority of them, which the Court can use to legitimize the exercise of a more thorough control. Where there is no consensus, however, the Court leaves more room for the national margin of appreciation of each State, while checking that the substance of the rights is not affected.

The case of *Vavřička and Others v. Czech Republic*, of 8 April 2021, is emblematic of the Court's mobilisation of the figure of European consensus. It deserves particular attention insofar as it concerns compulsory vaccination and resonates in a particular way in the health context of the moment.

> "On the existence of a consensus, the Court discerns two aspects. Firstly, there is a general consensus among the Contracting Parties, strongly supported by the specialised international bodies, that vaccination is one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population (…). Accordingly, there is no doubt about the relative importance of the interest at stake. Secondly, when it comes to the best means of protecting the interest at stake, the Court notes that there is no consensus over a

> single model. Rather, there exists, among the Contracting Parties to the Convention, a spectrum of policies on the vaccination of children, ranging from one based wholly on recommendation, through those that make one or more vaccinations compulsory, to those that make it a matter of legal duty to ensure the complete vaccination of children." §§ 277-278

In this case, the Court found that there was a consensus on the interest at stake, but no consensus on the technical means to achieve it. In order to do this, the Court carried out a very thorough comparative law study within European States, not only thanks to the observations of the parties but also thanks to third-party interventions. In this case, a number of States intervened, thus adding to the collection of elements specific to the situation in Europe.

Nonetheless, the Court does not refrain from referring to other international instruments or to the case law of other courts that are not European. This is the case in *Vavřička* when the Court, referring to the best interests of children, adds that "[t]his reflects the broad consensus on this matter, expressed notably in Article 3 of the UN Convention on the Rights of the Child". The Court's reliance on rights that are universal in scope is, here as in other cases, not only assumed but claimed. There is no risk of a European retreat in the Court's case law, which is open to the world and is justified by the universal nature of the rights it guarantees.

To conclude on the relationship between the universalism that characterizes the definition of human rights and the regionalism that characterizes their realisation, three observations and a final proposal can be made. First observation: the treaty system was born in the European context – at the time of the post-war period and the beginning of the division of Europe into two blocs – and was conceived as the legal instrument of a political project carried out by the Council of Europe. It is therefore specific to Europe; it is part of and assumes its regional dimension. Secondly: from the outset, this project has been marked by its adherence to a universal conception of human rights, its integration into international public law and its refusal to enshrine a European definition of human rights that would be contrary to, or even simply alongside, the one adopted by the 1948 Universal Declaration. Third observation: the regional dimension is, on the other hand, fully asserted from a functional point of view. It is reflected in the establishment of a collective guarantee, provided by a European Court, whose decisions are binding and whose rulings are enforceable. The functionality of the system is nourished, on a daily basis, by a European

dimension which stems both from the origin and nature of the disputes and from the architecture of the protection mechanism, which is based on shared responsibility and the principle of subsidiarity. These three observations lead to a final observation: far from opposing universalism and regionalism, they should be thought of together, in a complementary manner. The conventional system is a European project, both historically and currently, and is part of a coherent whole conceived at an international level. It seeks to give substance on a European scale to legal humanism and to the ambitious project of maintaining and further realising human rights which, insofar as they are designed for the human person, can only be defined and recognized as universal by their very nature.

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Is the International Law Commission Taking Regionalism Seriously (Enough)?

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* Associate Legal Officer at the International Court of Justice. The views expressed in this article are personal to the author and do not necessarily reflect those of the International Court of Justice. The author would like to thank Alfredo Crosato Neumann, the organisers and all the participants of the Conference "Regionalism in International Law" held on 10 and 11 February 2020 at the Paris 1 Pantheon Sorbonne University, and the two anonymous reviewers from GoJIL.

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Abstract

Regionalism poses a challenge to the work of the International Law Commission (ILC). The Commission, entrusted by the United Nations General Assembly (UNGA) with the "progressive development of international law and its codification", is tasked with identifying and elaborating universally accepted and acceptable rules of international law. The challenge posed by regionalism lies in its ambivalent role precisely in relation to the mandate of the ILC: on the one hand, a significant share of practice in international law is generated at the regional level. Since regional practice thus constitutes a substantial part of State practice, the ILC cannot avoid taking regional practice into account if it is to identify and develop common rules. On the other hand, regionalism often involves claims for special legal treatment based on the affiliation with a *region*; thus, deviations from precisely those general legal rules which the ILC seeks to codify and develop. The present contribution analyses how the Commission has approached regionalism in its previous work and identifies four approaches. It shows that each of these approaches suffers from shortcomings. At the same time, the current projects on *General principles of law* (GPL) and *Sea-level rise in relation to international law* possibly indicate the emergence of a more fruitful fifth approach. Based on this analysis, the present contribution shows that the practice of the ILC evinces two methodological challenges arising from regional plurality –, *the challenge of equal regional representation* and *the challenge of regional exceptionalism*, – and makes suggestions as to how to address these in the future.

A. Introduction

James Crawford observed in 1997 that the International Law Commission's (ILC) "record reveals not merely an absence of reference to the issues of regionalism but even a deliberate attempt to eschew any such ideas"[1] and that the ILC's contribution in this regard was "one-sided, or even wholly lacking".[2] Two very different projects recently put on the agenda of the ILC, *General principles of law* and *Sea-level rise in relation to international law*, have one aspect in common: both of them illustrate the tension between regionalism and universalism in the work of the Commission. They suggest reviewing the approach taken by the ILC towards regionalism more than twenty years after Crawford's acute remarks.

Regionalism, understood as including claims for special treatment based on the affiliation with a *region*,[3] represents a challenge to the role entrusted to the ILC. Being tasked with the "progressive development of international law and its codification" by the United Nations General Assembly (UNGA),[4] the Commission's function consists in the identification and elaboration of universally accepted and acceptable rules of international law. The challenge posed by regionalism lies in its ambivalent role precisely with respect to that mandate of the ILC: on the one hand, a significant share of practice in international law is generated at the regional level. Long before any universal international organization was established in the late 19th century, States had already set up regional institutions tasked, for example, with regulating navigation on watercourses[5] and concluded a multitude of regional agreements

1 J. Crawford, 'Universalism and Regionalism from the Perspective of the Work of the International Law Commission', in *United Nations* (ed.), *International Law on the Eve of the Twenty-first Century, Views From the International Law Commission* (1997), 99, 113.

2 *Ibid*.

3 See, similarly, *Ibid.*, 102, fn. 18: "In this essay I use the term 'regionalism' in a broad and no doubt inexact sense, to include claims special treatment by reference to (or regulatory systems based on) historical, economic or geographical sub-classifications of States." As indicated by Crawford, *region* is generally understood as designating a group of States which is objectively identifiable by a minimum of geographic cohesion and/or a shared ideology or history.

4 *Charter of the United Nations*, 26 June 1945, Art. 13 (1), 1 UNTS; *Statute of the International Law Commission*, GA Res 174 (II), 21 November 1947, annex, Art. 1(1).

5 The 1815 Central Commission for Navigation on the Rhine has been considered to represent the first regional organization between States in Europe, L. Boisson de Chazournes, *Interactions Between Regional and Universal Organizations – A Legal Perspective* (2017), 29-30.

on a wide range of subject-matters.[6] Since regional practice thus constitutes a substantial part of state practice, the ILC cannot avoid taking regional practice into account if it is to identify and develop common rules. On the other hand, regionalism often entails deviations from those general legal rules which the ILC seeks to codify and to develop. This ambivalence of regionalism poses a challenge for the task entrusted to the ILC.

This challenge needs to be taken seriously if the ILC's output should continue to reflect universally accepted and acceptable rules of international law. The adequate treatment of regional practice by the ILC represents a recurrent issue raised by delegations in the Sixth Committee during their annual discussion of the ILC reports.[7] For example, the cautious stance of Asian delegations with respect to the elaboration of a convention on crimes against humanity, as proposed by the ILC in 2019, has been explained by the region's different approach to international criminal law.[8] In light of these developments, the ILC is – perhaps more than ever – asked to demonstrate that the methodology underlying its output neither neglects or overstates the role of regional practice in general, nor that of certain regions in particular.[9]

6 See, for instance, the dense web of inter-State agreements between American States in the 19th century (on this aspect: A. Álvarez, 'Latin America and International Law', 3 *American Journal of International Law* (1909) 269-352).

7 Delegations in the Sixth Committee have frequently asked the Commission to put greater emphasis on including State practice "from diverse regions" (*e.g.*, on the topic of *Immunity of State Officials, Topical Summary of the Discussion Held in the Sixth Committee*, UN Doc A/CN.4/734, 12 February 2020, para. 16), from "across all regions" (on Sea-level rise, para. 57) and criticized "a bias towards case law from particular regions" (*Topical Summary of the Discussion Held in the Sixth Committee*, UN Docs A/CN.4/713, 26 February 2018, para. 37. (Immunity of State officials). They have also pointed to the insufficient consideration of regional agreements, mechanisms and IOs (*Topical Summary of the Discussion Held in the Sixth Committee* (2015), UN Doc A/CN.4/678, paras 9, 17 and 97). At the same time, delegations have expressed concerns "about relying too heavily on regional practices relating to human rights treaties, as the solutions applicable to those treaties were not necessarily transposable to other treaties" (*Topical Summary of the Discussion Held in the Sixth Committee*, UN Doc A/CN.4/638, 19 January 2011, para. 17 (reservations)) and about "identify[ing] general rules of international law on the expulsion of aliens, since there already existed detailed regional rules on the subject" (*Topical Summary of the Discussion Held in the Sixth Committee*, UN Doc A/CN.4/657, 18 January 2013, para. 4)).

8 M. Takeuchi, 'Asian Perspectives on the International Law Commission's Work on Crimes Against Humanity', 6 *African Journal of International Criminal Justice* (2020) 2, 151-161, in particular at 155, 157 and 159.

9 See for examples of regional *minilateralism*: EU General Data Protection Regulation, OJ 2018 L 127/6. And a critical discussion of its extraterritorial effect and relationship to

To demonstrate these claims, this contribution shows in a first part that in accordance with its mandate the ILC serves as a custodian of universality (B.). Different from the provisions regulating its composition, the Commission's working methods, however, do not explicitly envisage a regionally balanced approach. Therefore, this contribution analyses in a second part the practice of the Commission vis-à-vis regionalism in its work (C.). It identifies five approaches taken by the ILC: the institutional dialogue with its regional counterparts, the exclusion of regional law and institutions from the scope of the respective projects, the tacit and often imbalanced reliance on regional practice, and the treatment of regional law as *lex specialis*. This contribution shows that each of these approaches suffers from shortcomings. It then turns to the current work of the ILC, the project on "General principles of law" and "Sea-level rise in relation to international law" as possibly indicating an emerging fifth approach. Based on the first two parts, the third part shows that the practice of the ILC evinces two methodological challenges arising from regional plurality, the "challenge of equal regional representation" and the "challenge of regional exceptionalism" and makes suggestions as to how to address these in the future (D.) before it concludes (E.).

other rules under international law: Symposium 'The GDPR and International Law', 114 *AJIL Unbound* (2020); the adoption of the conclusion of the Regional Comprehensive Economic Partnership (RCEP) under the auspices of ASEAN in 2020 (criticising its approach to dispute settlement and human rights as "head[ing] for the opposite direction" compared to "the rest of the world": D. Desierto, 'The Regional Comprehensive Economic Partnership (RCEP)'s Chapter 19 Dispute Settlement Procedures', *EJILTalk!*, 16 November 2021, available at https://www.ejiltalk.org/the-regional-comprehensive-economic-partnership-rceps-chapter-19-dispute-settlement/ (last visited 1 December 2021)); see for examples of regional contestation: the controversy about the scope of immunity *ratione personae* between the International Criminal Court and the African Union illustrated by the adoption of Article 46A *Bis* of the Malabo Protocol by AU member States in 2014 (on this: D. Tladi, 'Article 46A *Bis*: Beyond the Rhetoric', in CJ Jalloh *et al.* (eds), *The African Court of Justice and Human and Peoples' Rights in Context. Development and Challenges* (2019), 850–865; G. Werle & M. Vormbaum, 'African States, the African Union, and the International Criminal Court: A Continuing Story', 60 *German Yearbook of International Law* (2017) 17–42). See on the role of regional approaches and their relationship to claims of universality: A. Koagne Zouapet, 'Regional Approaches to International Law (RAIL): Rise or Decline of International Law?', KFG Working Paper Series 2021/05, No. 46, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3804733 (last visited 1 December 2021).

B. The ILC as a Custodian of Universality?

The ILC finds itself in a unique position to serve as a custodian of universality in international law. Its mandate for the codification and progressive development of international law has met with support across all regions (I.) to which the entrenchment of regional plurality in the composition of the Commission contributed significantly (II.). Yet, the way pursuant to which the working methods of the ILC should address issues of regionalism is less clear (III.).

I. The Mandate of the ILC

Established in 1947 as a subsidiary organ to the UNGA,[10] the ILC has not been set up to make binding recommendations or determinations on the content of universally applicable rules of international law. However, it is the only international expert body that has been entrusted with the task of identifying and proposing common rules of international law by all UN-member States. While it is true that the UN possessed only a third of the number of its current members in 1947 when the ILC was mandated with the "progressive development of international law and its codification", the ILC's mandate met with enthusiastic support by the newly independent States which were successively admitted to the UN in the following years.[11] Over the last seventy decades, this mandate of the ILC to identify and propose common rules of international law across all fields and regions has been repeatedly affirmed by States from all regions and never been seriously called into question.

II. Regional Representation in the Composition of the Commission

This universal acceptance of the ILC's mandate to codify and progressively develop international law across all regions is rooted, in part, in the regionally representative composition of its members.[12] According to Article 8 of its Statute,

10 Crawford, *supra* note 1, 102, fn. 18.

11 See *e.g.* A. Krueger, *Die Bindung der Dritten Welt an das Postkoloniale Völkerrecht* (2018), 135-144 for further references.

12 See Secretariat of the International Law Commission, 'Introduction' in United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future (2021)*, 34: "In other words, the membership of the Commission, representative of the five regional groups of States and their widely diverse cultures and traditions, including legal traditions, is essential to the authority and respect that the Commission needs to carry out its mandate."

"in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured".[13] In order to reflect the expanding membership of the UN, the number of members have been increased several times, from the original 15 members to 34 members today.[14] Furthermore, the *gentlemen's agreements* which had previously determined the allocation of seats among regional groups were replaced by a fixed distribution of seats to ensure equitable regional representation in 1981.[15] Anthea Roberts argued in 2017 that the nationality alone does not necessarily indicate that the respective persons have been trained and socialized in the respective national – regional – environment.[16] Yet, it must not be forgotten that the candidates are nominated within their respective regional groups and that it can thus be presumed that they are considered to represent the legal approach of that region. Nevertheless, the findings by Roberts still illustrate that the equitable regional composition of the ILC may not be sufficient to ensure the representation of regional plurality in the work of the Commission.

III. Regional Representation in the Working Methods of the Commission

Article 8 is limited to the composition of the ILC. It does not extend to its working methods. Instead, as Crawford observed in 1997, "[i]n conformity with its Statute and mandate, the Commission has worked entirely on the assumption of universalism"[17]. This observation appears to be in a certain tension with the claim made by the ILC Secretariat in 2018 on the occasion of the seventieth anniversary commemoration of the Commission. According to the Secretariat "[r]egional representation infuses every aspect of the working methods of the Commission"[18]. At closer inspection, however, the Secretariat mainly referred to the regional rotation of offices within the Commission, notably the positions in

13 GA Res 174 (II), UN Doc A/RES/174(II), 21 November 1947.

14 GA Res 1103 (XI), UN Doc A/RES/1103(XI), 18 December 1956 (increase to 21); GA Res 1647 (XVI), UN Doc A/RES/1647(XVI), 6 November 1961 (increase to 25); UNGA Res 36/ 39, UN Doc A/RES/36/39, 18 November 1981 (increase to 34).

15 *Ibid*. See also: Secretariat of the International Law Commission, *supra* note 12, 229.

16 Instead, she observes that "students are more likely to move from peripheral and semiperipheral states toward core states, and from non-Western states to Western ones, than the other way around": A. Roberts, *Is international law International?* (2017), 53-54.

17 Crawford, *supra* note 1, 113.

18 Secretariat of the International Law Commission, *supra* note 12, 37.

the Bureau and the appointment of Special Rapporteurs.[19] While these practices are an important way to enhance the consideration of different approaches, it still does not guarantee the reflection of regional plurality in the substance of the Commission's output.

But is it necessary to explicitly address issues of regionalism in order to reflect regional plurality in the Commission's work? In other words, does the lack of references to regionalism automatically mean that the ILC does not take regional plurality seriously?

Writing almost 20 years after Crawford's observation, Mathias Forteau made a strong case against this latter assumption. Forteau understands the working methods of the ILC as a rather positive blueprint for the use of "comparative international law" in practice which successfully reconciles political and cultural – regional – plurality with the need for general rules.[20] He specifically describes two different ways in which the Commission deals with normative divergence: for one, Forteau mentions three "accommodating tools" which the Commission has employed to overcome divergences, *i.e.* "recourse to linguistic tools", "drafting of general rules" and "providing for normative flexibility".[21] Yet, in cases of a *pronounced* divergence or inconsistency in State practice, Forteau observes, secondly, that the ILC either refrains from codification or progressive development, or codifies by relying on what it perceives to reflect the majority of State practice, or progressively developes international law "by expressing a normative preference for one state practice or *opinio juris* over another".[22] Does regionalism, in light of this analysis, require a special treatment in the working methods of the ILC? Forteau himself does not seem to be of this view arguing that the

> "analysis of the Commission's practice and experience since 1945 reveals that real different approaches to existing rules of international law are quite exceptional. State practice can vary or be inconsistent; this is the normal life of international law. On the

19 *Ibid*., see further M. Kamto, 'The Working Methods of the International Law Commission' in United Nations (ed.), Seventy Years of the International Law Commission: *Drawing a Balance for the Future (2021)*, 198-214 at 207 on the importance of appointing Special Rapporteurs from different regions.

20 M. Forteau, 'Comparative International Law Within, Not Against, International Law: Lessons From the International Law Commission', 109 *American Journal of International Law* (2015), 498-513, 500-501 ['Within, not Against International Law'].

21 *Ibid*., 508-513.

22 *Ibid*., 507-508.

> other hand, the Commission does not frequently face, in its day-to-day work, cultural, 'civilizational', or political opposition on what international law is or should be."[23]

Does the approach sketched by Forteau indeed fully capture the methodological challenge posed by regionalism or, alternatively, is what he describes as the ILC's approach merely symptomatic of the "deliberate attempt to eschew any such idea [of regionalism]"?

C. The ILC and Regionalism: Five Approaches

To answer this question, we need to *zoom in* on the way in which the ILC has dealt with normative plurality arising specifically from regionalism.[24]

So far, the ILC has adopted five distinct approaches towards regionalism in its work since 1947. Each of them is marked by the attempt to reconcile the role of the ILC as a custodian of universality, on the one hand, with the consideration of regional plurality on the other.

I. Dialogue: Regional Institutions as Interlocutors

The ILC seeks to integrate the views of regional bodies through its institutional cooperation with regional institutions.

1. Exchange With Regional Law Commissions

As envisaged in Article 26 (4) of its Statute, the ILC cooperates and holds regular consultations with regional law commissions, such as the Asian

[23] *Ibid*., 507.

[24] The following analysis includes all the different forms of output by the ILC without distinguishing in greater detail between draft articles, conclusions, principles, guidelines, and the reports of study groups. See on the distinction between these various types of output and the differences in working methods: Kamto, *supra* note 19, 199, who observes that the Commission itself did not "devote much discussion on the issue [the author: the differences in working methods], even after the introduction of new products in its practice, like guidelines, principles, conclusions and reports of study groups"; see further S. Murase, Concluding Remarks on the Working Methods, in United Nations (ed.), Seventy Years of the International Law Commission: *Drawing a Balance for the Future* (2021), 221 for a criticism of the establishment of study groups.

African Legal Consultative Organization (AALCO),[25] the AU Commission of International Law (AUCIL),[26] the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI)[27] and the Inter-American Juridical Committee (IAJC).[28] In this regard, the ILC explicitly encourages States to participate in such regional efforts of codification and progressive development.[29] One example of a particularly productive cooperation has been the exchanges between the ILC and an AALCO Informal Expert Group on the topic of customary international law, notably from 2014 to 2016.[30]

2. Comments by Regional Organizations on the Work of the ILC

Furthermore, the Commission frequently calls upon IOs to submit comments on certain topics.[31] In particular, the project on "Responsibility of

25 'Statutes of the Asian-African Legal Consultative Organization' (2004), available at https://www.aalco.int/STATUTES.pdf (last visited: 12 December 2021), preceded by 'Statutes of the Asian-African Legal Consultative Committee', 1 *Asian Yearbook of International Law* (1991), text as in force with effect from 12 January 1987.

26 *Statute of the African Union Commission on International Law*, EX.CL/478 (XIV), 4 February 2009.

27 Established under Article 17 of the Statute of the Council of Europe by a decision of the Committee of Ministers in 1991, preceded by the Committee of Experts on Public International Law (CJ-DI) (from 1982 to 1990), see M. Requena & M. Wood, 'Committee of Legal Advisers on Public International Law (CAHDI)', MPEPIL 2017, para. 3. The rules of procedure of the Committee are governed by Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working method (adopted by the Committee of Ministers of the Council of Europe on 9 November 2011).

28 *Statutes of the Inter-American Juridical Committee*, OEA/Ser. Q/I rev.2, 5 June 2007; *Charter of Organization of American States*, 13 December 1951, Article 53 lit d, 1609 UNTS 119, 3.

29 Memorandum by the Secretariat, *Identification of Customary International Law Ways and Means for Making the Evidence of Customary International Law More Readily Available*, UN Doc A/CN.4/710/Rev.1, 14 February 2019, para. 120.

30 See for an overview of these exchanges: S. Yee, 'AALCO Informal Expert Group's Comments on the ILC Project on "Identification of Customary International Law": A Brief Follow-up', 17 *Chinese Journal of International Law* (2018), 187–194 and M. Wood, 'The Present Position Within the ILC on the Topic "Identification of Customary International Law": in Partial Response to Sienho Yee, Report on the ILC Project on "Identification of Customary International Law"', 15 *Chinese Journal of International Law* (2016), 3–15.

31 IOs have submitted comments regarding, inter alia, the regime of the high seas (ILC, 'Comments by Inter-Governmental Organizations' (1956), UN Doc A/CN.4/100), the representation of States in their relations with international organizations (ILC,

international organizations for internationally wrongful acts", concluded in 2011, attracted comments by regional IOs, including the Council of Europe, the European Union (EU), North Atlantic Treaty Organization (NATO), the Organisation for Economic Co-operation and Development (OECD) and the Organization for Security and Co-operation in Europe (OSCE).[32] In addition, regional IOs have commented on ILC projects in the 6th Committee of the UNGA.[33]

'Observations of […] the Secretariat of the United Nations, the Specialized Agencies and the IAEA on the Draft Articles on Representatives of States to International Organizations' (1971) UN Doc A/CN.4/239 and Add.1–3 and UN Doc A/CN.4/240 and Add.1–7), the most-favoured-nation clause (ILC, 'Observations of […] the Secretariats of the United Nations, the Specialized Agencies and the International Atomic Energy Agency on the Draft Articles on Representatives of States to International Organizations' (1978), UN Doc A/CN/4/308, Add.1, Add.1/Corr.1 and Add.2), treaties concluded between States and international organizations or between two or more international organizations (ILC, 'Comments and Observations of Governments and Principal International Organizations' (1981), UN Doc A/CN.4/339 and Add.1–8 and (1982), UN Doc A/CN.4/350, Add.1–6, Add.6 /Corr.1 and Add.7–11), the international liability for injurious consequences arising out of acts not prohibited by international law (ILC, 'Replies Received (from International Organizations)' (1984), UN Doc A/CN.4/378), crimes against the peace and security of mankind (ILC, 'Observations of Member States and Intergovernmental Organizations' (1985), UN Doc A/CN.4/392 and Add.1–2), the law of transboundary aquifers or 'shared natural resources' (ILC, 'Comments and Observations Received from Governments and Relevant Intergovernmental Organizations' (1005), UN Doc A/CN.4/555 and Add.1), the effect of armed conflicts on treaties (ILC, 'Comments and Observations Received from International Organizations' (2008), UN Doc A/CN.4/592 and Add.1), the responsibility of international organizations (with comments consistently submitted between 2004 and 2011: ILC, 'Comments and Observations Received from International Organizations', UN Doc A/CN.4/545, A/CN.4/556, A/CN.4/568 and Add.1, A/CN.4/582, A/CN.4/593 and Add.1, A/CN.4/609, A/CN.4/637 and Add.1), the protection of persons in the event of disasters (ILC (2016), UN Doc A/CN.4/696 + Add.1), subsequent agreements and subsequent practice in relation to the interpretation of treaties (in in 2015 and 2016: available at https://legal.un.org/ilc/guide/1_11.shtml (last visited 5 April 2022), crimes against humanity (ILC, (2019), UN Doc A/CN.4/726 + Add.1 + Add.2), provisional application of treaties (ILC (2020), UN Doc A/CN.4/737) and Sea-level rise (2021 and 2022), available at https://legal.un.org/ilc/guide/8_9.shtml (last visited 5 April 2022).

32 See, *Comments and Observations Received from International Organizations*, UN Doc A/CN.4/637 and Add. 1, 14 and 17 February 2011.

33 See also the statements made by Bahamas on behalf of CARICOM, by El Salvador on behalf of CELAC, by the Council of Europe and by the EU in the Sixth Committee in 2018, available at https://www.un.org/en/ga/sixth/73/ilc.shtml (last visited 5 April 2022).

3. Assessment

The exchanges between the ILC and regional institutions are the classic example mentioned in scholarship for the way in which the ILC seeks to reconcile its universal mandate with the consideration of regional plurality.[34] These exchanges undoubtedly improve the Commission's capacity to consider regional practice in its various projects. The intense exchanges between the Commission and AALCO on the topic of CIL are a particularly positive example. However, it is also interesting to note that in his reply to Sienho Yee, Rapporteur of the AALCO on that topic, Special Rapporteur Sir Michael Wood felt the need to caution with respect to the regional aspect that

> "The AALCO Comments, and similar input from regional bodies such as the AU Commission on International Law (AUCIL), are welcome because they reflect serious input from a number of States or regional experts. As I see it they are welcome more because they may be seen as reflecting, to some degree at least, the views of a considerable number of States, rather than because they necessarily reflect a particular regional view on the matter. Regional views may be important, but on a topic like the identification of customary international law they must surely be seen as a contribution to a universal view of the matter".[35]

Beyond the example of the AALCO-ILC exchanges on CIL, the actual impact of the institutional cooperation remains unclear. Moreover, as the consultations between the AUCIL and the ILC of 2012 demonstrate, the relationship between regional law commissions, regional IOs and the ILC is not free from controversy due to partly overlapping mandates.[36] This is also due to the fact that the ILC-Statute is silent on the role played by the views of regional law commissions in the ILC's own work. Instead, it is left to the discretion of the Commission to what extent it considers them. Finally, there has been an imbalance between Western and non-Western regional IOs in commenting on the ILC's projects until very recently. This bears the risk that existing distortions

34 See extensively on this: B. G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977), 178-184.

35 Wood, 'The Present Position Within the ILC', *supra* note 30, 5.

36 See *Summary Records of the Visit by Representatives of the African Union Commission on International Law at the ILC*, UN Doc A/CN.4/SR.3146, 17 July 2012; see also Forteau, 'Within, not Against, International Law', *supra* note 20, 503.

of the international legal order to the detriment of non-Western States are only exacerbated.[37]

II. Exclusion: Regional Practice as a *Misfit*?

Turning from the institutional approach to the ways in which the ILC dealt with regional plurality in the substance of its projects, we can observe that, particularly in its early projects, the ILC either excluded regional IOs and regional international law from the scope of its work or avoided engaging with more idiosyncratic regional rules.

1. Explicit Exclusion of Regional Elements From the Scope of the Project

Regional IOs were excluded from the scope of what would become the 1975 *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* after "considerable controversy among the members of the Commission".[38] Notably, the opposing camps pointed to the great practical relevance of the practice of regional IOs, but drew opposing conclusions from it. Some members feared that the exclusion would lead to a "serious gap in the draft articles".[39] Others, including the Special Rapporteur, acknowledged that "the experience of [regional IOs] could be taken into account in the study",[40] yet expressed the concern that their practice was "so

37 See also Hassouna, 'Presentation', in United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future (2021)*, 102: "Moreover, the commenting States do not reflect the diverse views held by Member States, and the African and Asian perspectives are particularly underrepresented. Despite continuous calls by Commission members for States to submit comments on a given topic, comments from under-represented States remain disproportionately low. This has resulted in the absence of their perspectives in the process of formulating universal rules of international law."; the AALCO initiative and the role played by non-Western regional institutions in the project on Sea-level rise may signal a change, see below.

38 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, *Yearbook of the International Law Commission* (1967), Vol II, 138 para. 31, not yet in force.

39 *Yearbook of the International Law Commission* (1968), Vol II, 195 para. 26 [*YBILC 1968*].

40 *Ibid*. See also second report by Special Rapporteur, *Ibid*., 148, para. 94(a): "[r]egional organizations would not be excluded from the actual study; their valuable experience would have to be drawn upon".

diverse that uniform rules applicable to all of them could hardly be formulated" and "that they should therefore be free to develop their own rules".[41]

A further example concerns the draft of what would eventually become Article 53 of the 1969 *Vienna Convention on the Law of Treaties* VCLT. The Chairman of the Drafting Committee clarified that

> "The Drafting Committee had also meant to make it clear that the article was concerned with universal international law; that was why the title referred to general international law, to the exclusion of regional international law […]".[42]

2. Avoidance of Specific Regional Rules

In later projects, the ILC avoided pronouncing upon specific regional rules within the scope of the topic. For instance, in its 2006 commentaries on *Diplomatic protection*, it clarified that draft Article 14 "does not take cognizance of the 'Calvo clause' […] [whose] validity […] has been vigorously disputed", but which was still "viewed as a regional custom in Latin America".[43]

3. Assessment

These examples illustrate that the methodological challenge posed by regionalism has occasionally divided the ILC to such an extent that it even refrained from taking a stance on it. While such an approach may sometimes be the only way to achieve overall consensus on a topic, it can hardly be claimed that it has been satisfactory. The ILC itself acknowledged the great practical relevance of these – unaddressed – regional aspects. Furthermore, the controversial nature of regional law still influenced the drafting of several provisions of the VCLT, notably of what became Article 48 VCLT.[44] Finally, the Commission's approach to Article 53 VCLT postponed a debate which only would re-emerge fifty years

41 *YBILC 1968*, *supra* note 39, 195 para. 26.

42 *Yearbook of the International Law Commission* (1963), Vol I, 214 para. 72 [*YBILC 1963*].

43 *Draft Articles on Diplomatic Protection with commentaries, Yearbook of the International Law Commission* (2006), Vol. II Part 2, Article 14, 45 para. 8, leaving open the question of its reconcilability with general international law.

44 See *e.g.*, the debate in the ILC in 1963 on whether the false assumption that a norm under regional law also binds a third party (*YBILC 1963*, *supra* note 42, 44-45 with Yasseen and Rosenne arguing that regional law resembled domestic law and should thus be treated as an error of fact, while Waldock argued that an error about regional law should be treated as an error of law).

later. In the debate on the project "Peremptory norms of general international law (*jus cogens*)" held in 2019, the ILC was divided on whether *regional jus cogens* existed or not.[45] Yet, as a result of these divisions – which equally showed in the 6th Committee – the ILC once more decided that "norms of a […] regional character are also excluded from the scope of the topic".[46]

III. Reliance: Regional Practice as a *Hidden Champion*?

As the post WWII era saw a continuous institutionalization of inter-State relations at the regional level, the Commission increasingly relied on regional practice in several of its projects without, however, specifically designating the respective practice as *regional* or indeed explaining the legal value it attributed to such – geographically or otherwise – limited practice.

1. Implicit Recognition of Regional Practice as a Structural Element in International Law

Regional IOs or agreements have, firstly, played a prominent role in the 1994 draft articles on the *Non-navigational uses of international watercourses*,[47]

45 In his fourth report, the Special Rapporteur on jus cogens rejects the idea of 'regional jus cogens': Special Rapporteur on Jus Cogens, UN Doc A/CN.4/727, 31 January 2019, 11–20; see also the debate within the ILC during its seventy-first session in 2019: Summary record, UN Doc A/CN.4/SR.3459, 8 May 2019; UN Doc A/CN.4/SR.3460, 9 May 2019; UN Doc A/CN.4/SR.3461, 10 May 2019; UN Doc A/CN.4/SR.3462, 11 May 2019; UN Doc A/CN.4/SR.3463, 15 May 2019.

46 ILC, 'Report on the Work of the Seventy-First Session, Chapter V Peremptory Norms of General International Law (Jus Cogens)' (2019), UN Doc A/74/10, p. 148.

47 See also L. Boisson de Chazournes, 'Freshwater and International Law: The Interplay Between Universal, Regional and Basin Perspectives', *The United Nations World Water Assessment Programme—Insight* (2009), 4-5: "Reading the reports of the ILC's special rapporteurs on the Law of International Watercourses for Uses other than Navigation, the large quantity of regional and local practice cited for supporting universal principles is impressive. Indeed, the ILC's work illustrates that principles of international law adopted at the universal level are based on either state practice and agreements concerning individual river basins, or on agreements of regional scope" [Footnotes omitted by the author].

the 2008 draft articles on *Transboundary aquifers*[48] and the 2014 draft articles on *Expulsion of aliens*.[49]

A strong, but largely uncommented, reliance on regional practice underlies, secondly, topics specifically addressing the law of IOs, such as the draft preparing the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986 VCLT)[50] and the 2011 *Articles on the responsibility of international organizations* (ARIO).[51] In 2018, the ILC adopted the controversial Conclusion 4 (2) in its work on *Identification of customary international law* according to which "in certain cases" the practice of IOs as such contributes to the formation of a customary rule. The corresponding commentary drew principally on practice of regional IOs to give examples for such "certain cases".[52]

Finally, regional practice also played an important role in projects without a specific *regional* or at least *institutional* nexus, such as the 2006 *Draft articles on diplomatic protection*[53] and the 2011 *Guide to practice on reservations to treaties*.[54]

48 See the commentary on draft article 7 (General obligation to cooperate), *ILC Report 2008*, UN Doc A/63/10, 5 May – 6 June and 7 July – 8 August 2008, chap. IV, p. 31: "Europe has a long tradition of international river Commissions […] In other parts of the world, it is also expected that comparable regional organizations will play a role in promoting the establishment of similar joint mechanisms [Footnotes omitted by the author]".

49 See the various references in *ILC Report 2014*, UN Doc A/69/10, 5 May – 6 June and 7 July – 8 August 2014, chap. IV, paras 35–45.

50 Commentary on draft article 18, *ILC Report 1982*, UN Doc A/37/10, 3 May – 23 July 1982, p. 33, para. 5 citing prominently an example involving the European Economic Community.

51 Commentary on draft article 7 (attribution based on effective control), *ILC Report 2011*, UN Doc A/66/10, 26 April – 3 June and 4 July – 2 August 2011, chap. V, citing the ECHR jurisprudence, pp. 90-92. See also the commentaries on draft article 45 (admissibility of claims), pp. 140-141; draft article 48 (Responsibility of an international organization and one or more States or international organizations), p. 144; and draft article 52 (countermeasures), pp. 152-153; citing prominently examples from the EU.

52 *ILC Report 2018*, UN Doc A/73/10, 30 April – 1 June and 2 July – 10 August 2018, chap. V, paras 53–66 and 131 fn 695.

53 See commentaries on draft article 8, *ILC Report 2006*, UN Docs A/61/10, 1 May – 9 June and 3 July - 11 August 2006, chap. IV, pp. 36-38, on the definition of *refugee* referring to regional practice from Europe, Africa and Latin-America.

54 *ILC Guide to Practice on Reservations to Treaties, Report of the International Law Commission*, (2011) UN Doc A/66/10/Add. 1, Guideline 2.6.4 Objections formulated jointly, pp. 252-253 („In the context of regional organizations, and in particular the Council of Europe, member States endeavour to coordinate and harmonize, to the extent possible, their reactions and objections to reservations.") and Guideline 4.5.3 Status of

2. Assessment

In contrast to the technique of exclusion,[55] this approach takes the practical relevance of regional practice into account. It met with general support with regard to those projects in which regional institutions play a prominent role (*e.g.* with respect to shared natural resources). However, considering regional practice without providing further explanations for doing so carries the risk that certain outcomes of the ILC's work are perceived as being regionally imbalanced. The project on *Expulsion of aliens* notably attracted criticism by States from both within and outside Europe.[56] In reaction to this criticism, Special Rapporteur Maurice Kamto in his final report of 2014 point[ed] out the following: "regional law is part of international law and cannot be set aside, especially since the International Law Commission has always referred to it in its work"[57].

IV. Fragmentation: Regional Law as *Lex Specialis*

Given the increasingly prominent role of regional practice in its work, the ILC was eventually confronted with the question of how to classify regional law.

1. The 2006 Fragmentation Report

An ILC Study Group chaired by Martti Koskenniemi addressed this question in its 2006 *Fragmentation report* and distinguished between three meanings of regionalism: regionalism as "a set of approaches and methods for examining international law", as "a technique for international law-making"

the author of an invalid reservation in relation to the treaty, pp. 524-542 (relying heavily on the case law of the European Court of Human Rights and the Inter-American Court of Human Rights).

55 See C.II.

56 On the one hand: Denmark (on behalf of the Nordic countries), UN Doc A/C.6/67/SR.18, 4 December 2012, para. 45: "remained unconvinced of the usefulness of the Commission's efforts to identify general rules of international law on the expulsion of aliens, since it was an area of law covered by detailed regional rules"; on the other: UN Doc A/C.6/65/SR.25, 1 December 2010, para. 7 (United States of America): "the ILC should not seek to codify new rights or to import concepts from such regional bodies as the European Commission".

57 *9th Report of the Special Rapporteur on Expulsion of Aliens*, UN Doc A/CN.4/670, 25 March 2014, 7. The final commentaries cite practice from the various regions pointing out where differences persist, *e.g.* on the issue of a prohibition of discrimination based on sexual orientation (*YBILC 1963*, *supra* note 42, commentary on draft article 14, p. 38: "differences remain and in certain regions the practice varies").

and as "the pursuit of geographical exceptions to universal international law rules".[58] The report focused on the third meaning and expressed an inclination that regionalism was "no different from […] *lex specialis*".[59] Even though these findings met with support among ILC members, it was also noted that "some [members] still felt that this was not all that could be said about it".[60] Yet, the approach of treating regional law as *lex specialis* was followed in two recent projects.

2. The 2011 Articles on the Responsibility of International Organizations

The first concerns Article 64 of the 2011 ARIO providing for a *lex specialis* provision according to which the articles contained in ARIO

> "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility […] are governed by special rules of international law".[61]

As the commentary illustrates, this article was primarily inserted to accommodate the EU's repeatedly expressed doubts on whether the ILC's approach to responsibility of IOs would do justice to the EU's *sui generis* nature.[62]

3. The 2018 Conclusions on the Identification of Customary International Law

The Commission also followed the "lex specialis approach" when adopting Conclusion 16 on *Particular customary international law* in its 2018 *Conclusions on the identification of customary international law*. According to Conclusion

58 *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006, 102-112 paras 195-217.

59 *Ibid*, 112 para. 216.

60 *ILC Report 2005, Yearbook of the International Law Commission* (2005), Vol. II, Part 2, 85 para. 461.

61 *ILC Report 2011*, *supra* note 51, 102.

62 *Ibid*., 102-104 illustrates that the commentary on Article 64 is tailored to the special case of the EU. See further the comments by the European Commission in 2011 (A/CN.4/637), 167-168.

16, *particular customary international law* encompasses "regional, local or other" rules which, according to the commentary, apply "only among a limited number of States".[63] Yet, in the overwhelming majority of cases cited in the commentary, "particular customary international law" was identified on the basis of its regional or local character. Particular custom without an element of territorial cohesion was referred to as a theoretical possibility.[64]

4. Assessment

Classifying regional law as just a variant of *lex specialis* has met with a considerable amount of support,[65] but also with a non-negligible amount of criticism by scholars and practitioners.[66] Sean Murphy, for instance, criticized in 2013 that "the Report arguably fails to pay sufficient heed to fragmentation in the form of regionalism, viewing it as simply an example of a possible *lex specialis*, and thereby denying regionalism's rich cultural content".[67] Similarly, Christopher Borgen lamented that "The ILC Study Group downplayed the role of geographic regionalism".[68] Only recently, in 2020, James Thuo Gathii attacked the Fragmentation report from yet another angle pointing to its overwhelming reliance on regional practice from Europe while largely ignoring practice from Africa and Asia.[69] The risk of being accused of regional imbalances is similarly present in those cases in which a *lex specialis* provision is inserted and tailored to accommodate one very particular regional IO. Still, the "*lex specialis*

63 *ILC Report 2018*, *supra* note 52, conclusion 16, 154 para. 1.

64 *Ibid*.

65 See, *e.g.*, M. Wood, 'A European Vision of International Law: For What Purpose?' 1 *Select Proceedings of the European Society of International Law* (2006), 152ff; M Forteau, 'Regional International Law', MPEPIL 2006, para. 22.

66 See also C. Landauer, 'Regionalism, Geography, and the International Legal Imagination', 11 *Chicago Journal of International Law* (2011), 560-561 "regionalism…is defined as only another flavour of fragmentation" and 570-571 at 571: "The Koskenniemi study is another case of regionalism being emptied of real, local regional content."; see also into this direction J. Finke, 'Regime-collisions: Tensions between treaties (and how to solve them)', in C. J. Tams, A. Tzanakopoulos & A. Zimmermann (eds), *Research Handbook on the Law of Treaties* (2014), 427ff.

67 S. D. Murphy, 'Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project' 27 *Temple International and Comparative Law Journal* (2013), 293, 302-303.

68 C. J. Borgen, 'Treaty Conflicts and Systemic Fragmentation', in D.B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd ed. (2020), 436.

69 J. T. Gathii, 'The Promise of International Law: A Third World View' (25 June 2020), available at https://digitalcommons.wcl.american.edu/auilr/vol36/iss3/1/ (last visited 12 December 2021), 385.

approach" to regionalism persists in the work of the Commission. Conclusion 16 of the ILC's Conclusions on CIL is a recent example in this regard. Although the commentary on CIL acknowledges that non-regional particular custom has remained a "theoretical possibility",[70] Conclusion 16 equated regional law with this "theoretical" non-regional custom. This approach was criticized by some States in the 6th Committee in 2018.[71] Given that States invoke forms of "regional" custom in practice, in particular, before international courts and tribunals, the ILC might have missed an opportunity to provide guidance in this regard.[72] For these reasons, the approach of understanding regional law as *lex specialis* does not entirely resolve the challenge arising from regional plurality.

V. A Fifth Approach in the Making?

In recent years, the Commission seems to have started accentuating the normative role of regional practice in at least some of its projects instead of *eschewing* it. In its 2001 *Articles on State responsibility* (ARSIWA), the Commission stated that the existence of "collective obligations" in Art. 48 ARSIWA was indicated, *inter alia*, if the obligations in question concerned the environment, human rights or environment *of a region*.[73] The respective commentaries on the 2018 conclusions on the *Identification of customary international law* and *Subsequent agreements and subsequent practice in relation to interpretation of treaties* point specifically to the case law of regional courts as a subsidiary means for the identification of customary international law and as a supplementary

70 Wood, 'The Present Position Within the ILC', *supra* note 30, 5.

71 *Topical Summary of the Debate in the 6th Committee, Prepared by the Secretariat*, UN Doc A/CN.4/724, 12 February 2019, para. 136.

72 See *e.g.* in recent case law: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, 21 April 2022*, paras 53, 202, 213-214 and 220; *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022*, para. 169; IACtHR, *Advisory Opinion OC-25/18 of 30 May 2018*, paras 157-163. See further: G.R. Bandeira Galindo, 'Particular customary international law and the International Law Commission: Mapping presences and absences' *QIL, Zoom-in 86* (2021) 3-21, 20: "the role of regionalism in particular customary international law was not fully developed in the ILC's Conclusions on Identification of Customary International Law".

73 See, *e.g.*, commentaries on Article 48 2001 ARSIWA, *ILC Report 2001*, UN Doc A/56/10, 23 April – 1 June and 2 July – 10 August 2001, Chapter IV, 126: "They might concern, for example, the environment or security of a region (*e.g.* a regional nuclear-free-zone treaty or a regional system for the protection of human rights)" [Italics by the author].

means of treaty interpretation under Article 32 VCLT.[74] However, in none of these projects did the ILC explain this prominent role of regional practice.

Two projects put on the current agenda of the ILC in 2018 promise to trigger a more substantial debate in the future: *General principles of law* and *Sea-level rise in relation to international law*. Both illustrate that the issue of regionalism emerges at two different normative levels: on the one hand, regional practice plays a prominent role in the identification of universally shared rules. On the other hand, both projects face the question on whether regional exceptions from common rules exist.

1. General Principles of Law

The two reports by Special Rapporteur Marcelo Vázquez-Bermúdez on *General principles of law* refer to regional elements for the purpose of identifying (universally shared) general principles of law (a.) as well as to the controversial existence of general principles of law with a regional scope of application (b.).

a. The Role of Regional Practice for the Identification of General Principles of Law

The second report on *General principles of law* of 2020 attributes an important role to regional practice when identifying a general principle of law. Two examples from the 2020 report shall be briefly addressed to illustrate this claim.

For one, regional practice plays a crucial role in assessing whether a principle is common to the *principal legal systems of the world*. The Special Rapporteur proposes in Draft Conclusion 5 (2) that: "The comparative analysis must be wide and representative, including different legal families and regions of the world."[75] The report elaborates on this proposal by emphasizing that "the criterion that different regions of the world should also be reflected in the comparative analysis must, in the view of the Special Rapporteur, in any

[74] *ILC Report 2018*, *supra* note 52, conclusion 13, 150, para. 4, on decisions of regional courts as subsidiary means for the determination of rules of customary international law, *ILC Report 2018*, *supra* note 52, conclusion 12, 97 para. 14, regional agreements as supplementary means of interpretation within Article 32 VCLT.

[75] Special Rapporteur on General Priciples of Law, *Second Report on General Principles of Law*, UN Doc A/CN.4/741, 9 April 2020, 35, para. 112, see also 16 para. 53: "Furthermore, the criterion that different regions of the world should also be reflected in the comparative analysis must, in the view of the Special Rapporteur, in any event be taken into account".

event be taken into account".[76] In order to substantiate this proposition, three arguments play a particularly prominent role in the report's line of argument: firstly, the report points to the practice of international and domestic courts and tribunals.[77] Secondly, the Special Rapporteur quotes and builds upon the 2018 report by an ILA study group on *The use of domestic law principles in the development of international law*, according to which

> "[I]t is also not enough to "identify" a general principle among the main legal systems if there is not enough geographical representation, e.g., a general principle shared by Civil Law countries in Europe should also be identified in other Civil Law countries located in different geographical areas and belonging to different civilizations".[78]

And finally, the report specifically borrows the terminology of "principal legal systems of the world" contained in the provisions on composition in the ILC-Statute (Article 8) as well as in the ICJ-Statute (Article 9) "to convey the idea that the comparative analysis must be wide and representative, covering different legal families and regions of the world".[79]

Furthermore, though much more implicit, the report indicates that, in certain cases, the practice of regional integration organizations can be considered "as such" when conducting the comparative analysis.[80] The report mentions practice concerning the European Union as the sole example of an IO which has been included in the comparative analysis of various domestic legal systems in the case law of courts and tribunals.[81]

76 *Ibid*., para. 53.

77 *Ibid*., see, in particular, examples mentioned in paras 28-34.

78 International Law Association, 'Report of the Study Group on the use of Domestic Law Principles in the Development of International Law' in M. Brus & A. Kunzelmann (eds), *Report of the Seventy-Eighth Conference, Sydney* (2018), 1170–1242, at para. 214 quoted at 60 para. 51 of the report.

79 Special Rapporteur on General Principles of Law, *supra* note 75, para. 54.

80 *Ibid*., 22, para. 72: "when an international organization (such as the European Union) is conferred the power to issue rules that are binding on their Member States and directly applicable in the legal systems of the latter, those rules may be taken into account when carrying out the comparative analysis".

81 See, *e.g. Ibid*., 11 fn. 67 where the report cites the Memorial of Timor-Leste of 28 April 2014, *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia), Order of 11 June 2015, ICJ Rep 2015, p. 572, where the EU was included.

During the debate within the Commission in 2021, ILC members welcomed the Special Rapporteur's emphasis on the role of regional practice.[82] Eventually, the reference to "legal families" was even deleted by the ILC Drafting Committee whereas the reference to "regions" was retained. In her statement, the Chair of the Drafting Committee explained that:

> "The Committee concluded that it was important to expressly refer to different regions of the world in the draft conclusion itself to ensure that they were covered in the analysis. The reference to 'legal families', originally proposed, was not retained because the expression 'wide and representative, including the different regions of the world' was considered to be sufficient".[83]

Draft Conclusion 5 (2), as provisionally adopted by the Drafting Committee, now reads: "The comparative analysis must be wide and representative, including the different regions of the world."[84]

b. General Principles of Law With a Regional Scope of Application?

A much more controversial aspect concerns a question which has been briefly raised in the *First Report on General Principle of Law* of 2019: the existence of general principles of law with a regional scope of application. As already mentioned above, a structurally similar question had already been debated with regard to *regional* custom in the context of the 2018 *Conclusions on Customary international law* as well as *regional jus cogens* in the debate on *Peremptory Norms*

[82] See, *e.g.*, ILC, 'Summary Records [of the Discussion of the Second Report in Plenary]' (12 to 21 July 2021): Forteau (UN Doc A/CN.4/SR.3538, p. 10, highlighting the role of regional IOs); Jalloh (UN doc A/CN.4/SR.3539, pp. 4-5); Nguyen (ibid pp. 7-8); Saboia (UN Doc A/CN.4/SR.3541, p. 3); Lehto (*ibid* p. 4); Cissé (*ibid* pp. 10-11); Oral (UN Doc A/CN.4/SR.3542, p. 10); Grossman Guiloff (*ibid* p. 15); Ruda Santolaria (UN Doc A/CN.4/SR.3543, p. 3); Escobar Hernández (*ibid* p. 8).

[83] See ILC, 'Report of the Drafting Committee' (2021) UN Doc. A/CN.4/L.955/Add.1. See also statement of the Chair of the drafting committee: (ILC, 'Statement of the Chair of the Drafting Committee' (3 August 2021), available at: https://legal.un.org/ilc/documentation/english/statements/2021_dc_chair_statement_gpl.pdf, pp. 10-11).

[84] *ILC, 'Report on the work of the seventy-second session (2021)'*, UN Doc A/76/10, para. 172: "At its 3557th meeting, on 3 August 2021, the Commission considered the report of the Drafting Committee (A/CN.4/L.955 and Add.1) on draft conclusions 1 (in French and Spanish), 2, 4 and 5, provisionally adopted by the Committee at the present session. At the same meeting, the Commission provisionally adopted draft conclusions 1, 2 and 4 (see sect. C.1 below), and took note of draft conclusion 5.".

of General International Law in 2019 – leading to very different approaches respectively (the absorption of *regional* custom in the conclusion on *particular customary international law* on the one hand, and the decision not to address regional *jus cogens* at all, on the other).

While the 2018 ILA Report on *The Use of Domestic Legal Principles for the Development of International Law* rather light-heartedly claims that "[s]imilar to the existence of regional customary law, the possibility exists of the existence of regional general principles derived from the domestic laws of a specific region",[85] the overall picture emerging from the ILC plenary debate and the exchanges in the 6th Committee suggests a more cautious approach.[86] Based on the debates, we can identify two opposing positions concerning the question whether Article 38 (1) lit. c ICJ-Statute encompasses general principles of law with a regional scope of application. A number of skeptical ILC members and delegations relied essentially on three arguments which, in their view, suggested not including regional GPL in the scope of Articel 38(1) lit. c.[87] Firstly, they pointed to the word *general* and argued that this was to be understood as *universal*.[88] Secondly, some found the expression *recognized by civilized nations* to require recognition by *all States*.[89] Thirdly, the lack of examples also argued against a recognition of GPL under Article 38 (1) lit. c.[90]

Other members and delegations, however, indicated a certain openness towards such a broader understanding of Article 38 (1) lit. c.[91] Mirroring

85 *Report of the International Law Association Study Group*, *supra* note 78, para. 216.

86 See also on the debate: MC De Andrade, 'Regional Principles of Law in the Works of the International Law Commission', *QIL, Zoom-in 86* (2021) 23-46.

87 ILC, 'Summary Records' (2019), UN Doc A/CN.4/SR.3489, p. 13 (Hmoud); p. 15 (Murphy); UN Doc A/CN.4/SR.3491, p. 9 (Aurescu); UN Doc A/CN.4/SR.3492, p. 8 (Oral, wo, however, stated that "she was prepared to be persuaded otherwise by the Special Rapporteur's future work".). See the statements of the following delegations made at the 6th Committee in 2019: UNGA, 'Summary Records' (6 November 2019), UN Doc A/C.6/74/SR.32, para. 5 (The Philippines), para. 16 (UK), para. 43 (Chile), para. 106 (Czech Republic); UNGA, 'Summary Records' (6 November 2019), UN Doc A/C.6/74/SR.33, para. 26 (US).

88 Hmoud, Aurescu and Oral; with Hmoud and Oral referring to the North Sea Continental Shelf quote (*ibid*). Czech Republic; Philippines; UK; US (*ibid*.).

89 Hmoud, *supra* note 87.

90 Hmoud, *ibid*.

91 ILC, 'Summary Records', UN Doc A/CN.4/SR.3491, pp. 12-13 (Nguyen); p. 17 (Reinisch); UN Doc A/CN.4/SR.3492, p. 4 (Argüello Gómez); p. 12 (Ruda Santolaria). See the statements made at the 6th Committee in 2019: UNGA, 'Summary Records' (6 November 2019), UN Doc A/C.6/74/SR.32, para. 55 (Micronesia). France (Déclaration de la République Française (5 November 2019), 6th Committee of the UNGA, available

the three arguments, they argued, firstly, that the term *general* must not be understood to exclude regional GPL,[92] and, secondly, to the structural similarity to Article 38 (1) lit. b and the recognition of regional custom.[93] Finally, they cited examples for regional GPL, notably the concept of *uti possidetis*.[94] An interesting understanding of GPL was expressed by August Reinisch who remarked that "for a true regional general principle of law to exist" it would need to be applicable between States of a particular region outside the context of regional organizations".[95]

So far, the Commission has either excluded regional variants of sources from the scope of the project (regional *jus cogens*) or treated them as a mere sub-form of *lex specialis* (regional custom). It remains to be seen how the Commission will deal with the controversial existence of general principles of law with a regional scope of application – whether it will follow one of the approaches described above or adopt a third one and recognize such a regional variant under Article 38 (1) lit. c ICJ-Statute.[96]

2. Sea-level Rise in Relation to International Law

As regards the project on *Sea-level rise in relation to international law*, the role of regional practice plays a prominent role in the work of the ILC Study Group as illustrated by the *First issues paper on sea-level rise in relation to international law* prepared by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group (hereinafter: "first issues paper" or "paper").[97]

at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/france_3.pdf (last visited 5 April 2022), pp. 2-3). Mexico and Spain expressed an ambiguous attitude (Intervención de México (6 November 2019), 6th Committee of the UNGA, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/mexico_3.pdf, p. 6; Intervención de España (6 November 2019), 6th Committee of the UNGA, available at: https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/spain_3.pdf (last visited 5 April 2022), p. 1).

92 Nguyen, *ibid*.; Ruda Santolaria, *ibid*.

93 Argüello Gómez, *supra* note 91; Reinisch, *supra* note 91; Micronesia, *supra* note 91.

94 Uti possidetis: Nguyen, *supra* note 91; Ruda Santolaria, *supra* note 91; See, however, sceptical Reinisch, *supra* note 91, pp. 17 and 19.

95 Reinisch, *supra* note 91, p. 17.

96 *ILC Report 2021*, *supra* note 84, para. 220 (summarizing the debate on the future programme of work): "The view was also expressed that the issue of general principles of law of a regional character, and whether the concept of universality of general principles would be inconsistent with such principles, should also be addressed.".

97 While the *first issues paper* covers the implications of sea-level rise for the rules relating to the law of the Sea (ILC, 'First Issues Paper by Bogdan Aurescu and Nilüfer Oral (72nd Session of the ILC (2020)'), UN Doc A/CN.4/740, 28 February 2020) ['First Issues Paper

a. The Impact of Regional Practice on the Universal Regime on the Law of the Sea

The question at the core of the *first issues paper* is to what extent the practice of only a limited group of States and IOs (mainly from regions particularly affected by a climate change induced rise of the sea level) can affect the rules contained in the 1982 Convention on the Law of the Sea (UNCLOS).

This concerns, in particular, the rules relating to the baselines and outer limits of the maritime spaces that are measured from the baselines. According to Article 5 UNCLOS, "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast[…]". Traditionally, the term low-water line has been interpreted by the majority of States and commentators as being *ambulatory* or *floating*, *i.e.* as moving if the land recedes.[98] Has this understanding of baselines as being *ambulatory* changed, or is it at least possible to discern a *trend* moving into this direction?

The *first issues paper* cautiously argues in favour of a trend towards a solution based on fixed baselines and/or the preservation of maritime zones by relying extensively *and* explicitly on "regional State practice" and "the practice of regional organizations" stemming mostly from the Asia-Pacific region.[99] This

on Sea-level rise in Relation to International Law'], the *Second issues paper* on sea-level rise in relation to international law, which was discussed in 2022, focusses on the subtopics of statehood and the protection of persons affected by sea-level rise (ILC, 'Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria (73rd session of the ILC (2022))', UN Doc A/CN.4/752, 19 April 2022). The 2022 Report by the Study Group summarizing the debate on the *Second issues paper* among ILC members indicates that the special role of regional practice from small island States in the Pacific was acknowledged. However, it was also emphasized that the Commission should not overlook the comments, needs and practice of States and international organizations, especially in Africa, Asia and Latin America and the Caribbean (ILC, 'Report of the Study Group on Sea-Level Rise in Relation to International Law'), UN Doc A/CN.4/L.972, 15 July 2022, pp. 6-7, paras 23 and para. 33 ['Report of the Study Group on Sea-Level Rise'].

98 ILC, 'First Issues Paper on Sea-level rise in Relation to International Law', *supra* note 97, p. 28 para. 78.

99 *Ibid.*, paras 102 ("The practice of regional organizations is also relevant to State practice; it indicates the same trend evidenced above.") and 104 lit. g ("As evidenced by the submissions by Member States to the Commission in response to the request included in chapter III of its 2019 annual report, the statements of the delegations of Member States before the Sixth Committee, and the official declarations of regional bodies, there is a body of State practice under development regarding the preservation of baselines and of outer limits of maritime zones measured from the baselines.") and para. 104 lit. h.

raises two methodological questions which are implicitly addressed in the paper: first, how can the practice of only some States change the interpretation of a universal multilateral treaty? The paper emphasizes that Sea-level rise does not affect States uniformly.[100] While making it clear that the paper neither intends to deviate from the "two-element-approach" for the identification of custom nor claims that these conditions are met, the paper seems to express a certain inclination to attribute a significant weight to that regional practice as that of "specially affected States" when it considers it

> "worth mentioning that, after analysing some of the declarations of regional bodies mentioned above, the Committee on International Law and Sea Level Rise, in its final report to the 2018 Sydney Conference of the International Law Association, concluded that: 'there is at least prima facie evidence of the development of a regional State practice in the Pacific islands … The Pacific Island States would of course be among those "States whose interests are specially affected', a significant attribute regarding the establishment of a general practice in the formation of a new rule of customary international law[…]"[101]

However, even if "Sea-level rise is not uniform, as it varies regionally",[102] a second problem stems from the fact that the practice originates mainly from the Asia-Pacific region. The paper addresses this issue in its observations by explaining that

> "Information on such State practice was available to the Co-Chairs of the Study Group for the Pacific, Asian (mainly South-East Asian) and (to some extent) North American regions, alongside some indicating a similar trend for the Caribbean. Unfortunately, there were no submissions received by the Commission from Africa or Latin America, although the effects of sea-level rise also affect these regions. A very limited number of submissions from European

100 *Ibid*., para. 31.

101 *Ibid*., para. 103 quoting 'Final Report of the Committee on Baselines Under the International Law of the Sea', in International Law Association, Report of the Seventy-fifth Conference, Held in Sofia, August 2012, vol. 75 (2012), p. 887.

102 ILC, 'First Issues Paper on Sea-level rise in Relation to International Law', *supra* note 97, 'First Issues Paper by Aurescu and Oral', *supra* note 97, para. 31.

> States indicate that their national legislation provides for the obligation or possibility to apply an ambulatory baselines system; at the same time, the absence, for the time being, of submissions from these regions does not necessarily imply the lack of similar State practice".[103]

In light of the lack of submissions from Africa, one of the Co-Chairs, Yacouba Cissé, analysed

> "the legislative, constitutional and conventional practice of 38 African coastal States, as well as relevant judicial decisions rendered by international courts, in order to assess whether coastal States were supportive of ambulatory or fixed maritime limits".[104]

In his presentation before the Commission, he concluded that there

> "was no generalized African practice since the geography of the coasts varied, such that the justification for the use of baselines, tide (high or low), ambulatory or permanent lines was dependent on the general configuration of the coasts".[105]

In his view, however, "the application of principles of public international law in the African context could favour fixed baselines or permanent maritime boundaries".[106]

In the course of the debate that took place within the Commission in 2021, the Study Group also stated that its future work would, *inter alia*, include an examination of customary international law "of a regional scope" as well as of regional agreements. The Study Group further intends "to extend its study of State practice and *opinio juris* to regions for which scarce, if any, information had been made available, including Asia, Europe and Latin America".[107] It remains to be seen to what extent the Commission will consider such information and

103 *Ibid.*, para. 104 lit. h.
104 *ILC Report* (2021), *supra* note 84, p. 167 para. 259.
105 *Ibid.*, p. 167 para. 260.
106 *Ibid.*, p. 167 para. 261.
107 *Ibid.*, p. 176 para. 294.

how much weight it will attribute to the respective regional practice when consolidating the *first issue paper* in 2023.[108]

b. Exceptions From UNCLOS Based on Regional Custom?

Given the absence of a general practice regarding the preservation of baselines and of outer limits of maritime zones measured from the baselines, the *first issues paper* further addresses the possibility that regional practice may evolve into a "particular or regional customary rule" in its "observations of preliminary nature". Before examining whether the requirements set out in Conclusion 16 of the ILC Conclusions on CIL are met,[109] the *first issues paper* explains the difference between a regional and a particular rule of customary international law in this respect thereby recognizing the distinct role of regional law.[110] Applying the requirements contained in Conclusions 4 – 8 and 16, the *first issues paper* then expresses the view that the objective element of custom is sufficiently present when arguing that

> "for the material element of the custom, it can be concluded that – at least for the Pacific and South-East Asia regions – there is State practice (supported by practice of international organizations) … [which] is widespread and representative among the States of these regions, as well as consistent. It is more and more frequent".[111]

As for the subjective element, however, the paper finds that

> "the existence of the *opinio juris* is not yet that evident, although the general reliance of the conduct of the respective States in their

108 ILC, 'Report of the Study Group on Sea-Level Rise', *supra* note 97, p. 18, para. 83.

109 ILC, 'First Issues Paper on Sea-Level Rise in Relation to International Law', *supra* note 97, para. 104 lit. i. and reiterated at 55 para. 141 for the preservation of effected maritime delimitations and of maritime boundaries.

110 *Ibid*., fn. 229 on the distinction between a regional and a particular customary rule in this regard by stating that: "The character of the potential customary rule depends on the availability of the evidence of State practice: it can stay regional if confined (only) to the Pacific and South-East Asia, or, if confirmed for other regions as well and depending on the number of States involved, it can be general or particular (including 'thematic' – meaning that it is linked to the specific issue of sea-level rise and it applies among a limited number of States)."

111 *Ibid*. Footnotes have been omitted from the text.

> practice (as mentioned) on the grounds of legal stability and security is an indication in that sense. In order for a definitive conclusion to be possible, more submissions by Member States to the Commission in response to the request included in chapter III of its 2019 annual report are needed".[112]

Eventually, the *first issues paper* makes clear that "it is early to draw, at this stage, a definitive conclusion on the emergence of a particular or regional customary rule (or even of a general customary rule)".[113]

3. Assessment

Both projects demonstrate an unprecedented engagement with the role of regional practice in the work of the ILC: in contrast to previous projects, they do not merely *secretly* rely on regional practice or treat it as just another form of *lex specialis*. Instead, they give a normative explanation for the weight which they accord to the regional practice. Furthermore, they recognize the difference between regional practice and other forms of particularism – while the work on general principles of law emphasizes the distinct and indispensable role of *regional representation* when assessing the generality of a principle,[114] the project on Sea-level rise explicitly explained the difference between a regional and a particular

112 *Ibid*. Footnotes have been omitted from the text.

113 *Ibid*.

114 It should be noted that the role of regional representation in the assessment of the universally shared character of a norm has also been taken up during the second reading of the draft conclusions on *Peremptory norms of general international law* (*jus cogens*) in 2022. The Commission decided, upon proposal by the Special Rapporteur, to modify the formulation contained in draft conclusion 7 (2) by adding "and representative" ("Acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law…") (ILC, 'Peremptory Norms of General International Law (Jus Cogens): Texts of the Draft Conclusions and Annex Adopted by the Drafting Committee on Second Reading', UN Doc A/CN.4/L.967, p. 2; ILC, 'Fifth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur', UN Doc A/CN.4/747, p. 34 para. 96). This change responds to comments by States and ILC members who criticized that the original formulation would not ensure equal representation "across regions, legal systems and cultures" (see Fifth report on jus cogens, *ibid*., pp. 29-34 (notably Singapore), paras 85-96; see, *e.g.* ILC, 'Summary Records', UN Doc A/CN.4/SR.3567, 22 April 2022, p. 4 (Nguyen); p. 6 (Reinisch); p. 9 (Oral); ILC Summary Records, UN Doc A/CN.4/SR.3568, 22 April 2022, p. 9 (Vázquéz-Bermúdez); p. 10 (Ruda Santolaria)).

customary rule for the purpose of that project. At the same time, these two projects illustrate once again that the Commission's equitable consideration of regional plurality also depends on the cooperation and contribution by regional organization and States.

D. Regionalism and the ILC: A Continuing Methodological Challenge

Each of the five approaches described suffers from certain shortcomings. These shortcomings are rooted in two methodological challenges which arise from regionalism, and which may require a further refinement of any *comparative international law approach*.

I. The Challenge of Equal Regional Representation

On the one hand, regional plurality puts pressure on any proposal for codification or progressive development to specifically justify that the alleged *universal* rules indeed include regional practice equally and without any imbalance to the detriment of one or more other regions ("challenge of equal regional representation"). This challenge notably arises in those two situations mentioned by Forteau in which the ILC codifies or makes a proposal for the progressive development of international law despite a pronounced divergence or inconsistency in State practice. The projects on *Fragmentation*, *Expulsion of aliens* and *Immunity of State officials*, for instance, have been criticized for their over-reliance on regional practice from the European context.

II. The Challenge of Regional Exceptionalism

On the other hand, we also encounter the countervailing tendency emanating from regionalism, the "challenge of regional exceptionalism". Divergences in State practice are often not only rooted in different domestic legal systems or policy approaches. In some cases, these divergences are deliberately entrenched in regional rules and institutions. These rules and institutions often prescribe a different legal relationship between States within the respective region and between those States and States outside that region. Consequently, States sometimes rely on regional rules and institutions to exempt themselves from a universal legal obligation.

While in some cases *regional exceptionalism* merely pertains to the substance of rules,[115] it sometimes transcends to the level of *meta-rules*, claiming, for instance, a higher normative status of a specific regional rule or the existence of different methods of treaty interpretation at the regional level. Accordingly, these regional rules test the limits of accommodation through the *drafting of general rules* and through *providing for normative flexibility* which feature prominently in the *comparative international law* approach sketched by Forteau. Thus, the challenge of *regional exceptionalism* tends to undermine the identification and development of universally shared rules: any proposal by the Commission in this regard risks being perceived as either too rigid, directly challenging the respective regional rule or institution, or as too lenient, yielding to and even legitimizing regional fragmentation.

III. Responses to the Methodological Challenge of Regionalism: Possible Ways Forward

Two steps promise to better respond to the methodological challenge posed by regionalism. They involve, on the one hand, the ILC, but also, on the other, its regional counterparts, regional IOs and States.

Firstly, the Commission should continue the approach which it seems to have adopted in its recent projects on *General principles of law* and *Sea-level rise* and explain the role it attributes to regional law and practice based on secondary rules of international law, *i.e.*, the rules on sources and interpretation. As Danae Azaria has pointed out on the occasion of the seventieth anniversary of the ILC:

> "Consistent 'adherence' to such secondary rules is an important basis on which the Commission's work is and will be relied upon. This is because adherence to such methodology operates as a restraint on the Commission's discretion: it anchors its output in State practice, opinio juris and international jurisprudence, rather than on mere policy preferences of the Commission's members.[116]"

[115] As illustrated by the regional claim on adopting fixed baselines ('First Issues Paper on Sea-Level Rise in Relation to International Law', *supra* note 97) as well as by the "Calvo Clause" in the project on diplomatic protection (Draft Articles on Diplomatic Protection, *supra* note 43).

[116] D. Azaria, 'The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making', in United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future (2021)*, *supra* note 12, 175.

Secondary rules on sources and interpretation are – according to a traditional understanding – reflected in Article 38 (1) of the ICJ-Statute and the VCLT. They provide a common point of reference for determining the conditions under which a certain regional exception is permissible. Furthermore, they help to justify the prominent reliance on the practice of a specific region in some projects. For example, the First Issues Paper on Sea-level rise has explained the reliance on the regional practice in the Asian-Pacific region by drawing on the ILC's previous work on regional customary international law. In other projects, secondary rules underline the relevance of drawing on a wide range of regions. Notably, the project on *General principles of law* highlights the crucial role of drawing on a diversity of regional practice when assessing whether a principle is common to the *principal legal systems of the world*.

Yet, as has also been illustrated by the debates on the two projects on *General principles of law* and *Sea-level rise*, many aspects relating to the way in which secondary rules may integrate regional law and practice remain open and controversial. These include the impact of subsequent regional agreements and subsequent regional practice on universal treaties, such as UNCLOS or even the UNCH. It is also not clear to what extent a regional group of States may shape customary international law as *specially affected States* or when acting through a regional integration organization. Having excluded *regional jus cogens* from the scope of the topic on peremptory norms, the question of how to deal with regional law that claims a higher normative status vis-à-vis other rules of international law in the future remains unsettled. Similarly, it is still open how the Commission will treat allegedly distinct regional sources of law (*general principles of EU law*) and different approaches to treaty interpretation adopted by regional judicial bodies. These questions play an important role for determining the limits of regional exceptionalism and deserve further scrutiny.

Secondly, it must be noted that overcoming the *challenge of equal regional representation* does not merely depend on the ILC, but also – crucially – on the availability of practice and cooperation from all regions. Certain imbalances to the detriment of some regions that have occurred in the past have also been rooted in a less active participation of some regional IOs and States as compared to others.[117] For instance, Alhagi B.M. Marong has noted a significant lack of

[117] See also Hassouna, *supra* note 37; E. Petrič, 'Presentation', Secretariat of the International Law Commission, *supra* note 12, 68: "Not to mention that often there are no reactions at all, or just a few from some regional groups or specific continents, and that many reactions are poorly elaborated, inconcrete and superficial".

engagement by African delegations with the project on a draft convention on crimes against humanity during the debates in the Sixth Committee.[118] However, the challenge of equal regional representation can only be overcome by a joint effort undertaken by the Commission, its regional counterparts, regional IOs, and States in the 6th Committee.

E. Conclusion

The analysis of ILC practice suggests that Crawford's observation of a "deliberate attempt to eschew"[119] the idea of regionalism made in 1997 does not fully capture the picture anymore. Over the past two decades, five distinct ways of dealing with the methodological challenge of regionalism crystallized, most likely reinforced by the ever-increasing regional juridification after the end of the Cold War. Each of these approaches tries to reconcile the practical relevance of regional practice with the need for a commonly shared legal approach at the universal level.

Nevertheless, given the respective shortcomings of these approaches, it seems precipitous to stop here. Two interrelated issues prove to be a continuing methodological challenge for the ILC and may inspire a refinement of any *comparative international law* approach. On a substantive level, the ILC is not only expected to propose common rules. States expect the ILC to demonstrate that these rules neither unduly stress nor suppress a specific regional approach ("challenge of equal regional representation"). At the same time, the work of the ILC is frequently confronted with the insistence on regional exceptions from universal rules based on claims of a distinct regional identity and regulatory autonomy ("challenge of regional exceptionalism"). This contribution has suggested two steps which might help to address these challenges: firstly, the adherence to, explanation based on, and further exploration of secondary rules when dealing with regional law and practice by the ILC, and, secondly, the increased engagement and input by regional IOs and States in the Sixth Committee.

The work of the ILC over the past two decades has taken regionalism increasingly more seriously. Whether the Commission is taking regionalism seriously enough remains to be seen.

118 A. B. M. Marong, 'The ILC Draft Articles on Crimes Against Humanity. An African Perspective', 6 *African Journal of International Criminal Justice* (2020) 2, 93-124, at 98-99.

119 Crawford, *supra* note 1, 113.

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Dynamic Belt and Road Initiative and the Global South's Approach to Sustainability

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Abstract

When discussing China's Belt and Road Initiative (BRI), mainstream scholarship adopts the narrative of grand strategy, which assumes the existence of a predetermined and top-down plan as well as China's determination to implement it according to its interests and vision. This article, with its focus on sustainability, challenges this narrative and draws attention to the indeterminate features of the BRI. It proposes an alternative interpretation that considers the BRI as a dynamic field that facilitates the emergence of the Global South's approach to international law. It argues that the countries of the Global South can be regrouped as a symbolic region by their proximity in the global distribution of economic and environmental goods, with its identity defined by common history with international law, and necessary solidarity in the pursuit of the cause of liberation. This article then compares the BRI with the previous projects of the Global South and identifies a vagueness of commitment, lack of coordination mechanism, and flexibility as their key features. Further substantialized by two case studies, it contends that the formulation of rules is determined by strategic interactions between States and different non-State actors in a given location according to local realities.

Keywords: Third World Approaches to International Law; the Global South; the Belt and Road Initiative

A. Introduction

On his tour of Kazakhstan and Indonesia in 2013, the Chinese President, Xi Jinping, announced an ambitious development project consisting of "[the] Silk Road Economic Belt" to link China with South East Asia, South Asia, Central Asia, Russia, and Europe by land, and "[the] 21st century Maritime Silk Road", a sea route connecting China's coastal regions with South East and South Asia, the South Pacific, the Middle East, and Eastern Africa, all the way to Europe.[1] Originally known as *One Belt, One Road* because of its composition, this project is now more commonly called the Belt and Road Initiative (BRI). With around 140 countries joining the BRI,[2] it has become the priority of Chinese diplomacy and one of the most debated topics in international studies.[3]

The mainstream mediatic, political, and even scholarly discourses either present it as the greatest and most efficient development project ever that will lead us to a brave new world without American hegemony,[4] or as a Trojan horse that invites Chinese colonial power under the guise of prosperity.[5] Both narratives assume that the BRI is a well-designed economic and diplomatic project and that the Chinese government has both the determination and capacity to impose its vision on the other partner States.[6] These assumptions are in line with the modern view of law that presupposes the distinction between the center, where consensus is reached and decisions are made, and the peripheries where

1 European Bank for Reconstruction and Development, 'Belt and Road Initiative', available at https://www.ebrd.com/what-we-do/belt-and-road/overview.html (last visited 05 September 2022).

2 Green Belt and Road Initiative Center, 'Countries of the Belt and Road Initiative', available at https://green-bri.org/countries-of-the-belt-and-road-initiative-bri/ (last visited 05 September 2022).

3 A. Bhattacharya, 'Conceptualizing the Silk Road Initiative in China's Periphery Policy', 33 *East Asia* (2016) 4, 309, 310; W. Fasslabend, 'The Silk Road: a Political Marking Concept for World Dominance', 14 *European View* (2015) 2, 293, 294; F. Leverett & B. Wu, 'The New Silk Road and China's Evolving Grand Strategy', 77 *The China Journal* (2016) 110, 111.

4 L. Benabdallah, 'Contesting the International Order by Integrating it: The Case of China's Belt and Road Initiative', 40 *Third World Quarterly* (2019) 1, 92, 96-97; Bhattacharya, *supra* note 3, 325.

5 Fasslabend, *supra* note 3, 296; T. Miller, *China's Asian Dream: Empire Building Along the New Silk Road*, 2nd ed. (2019), 15.

6 J. Wang, 'China's Governance Approach to the Belt and Road Initiative: Partnership, Relations, and Law', NUS Law Working Paper 2019/005, 3; M. Clarke, 'The Belt and Road Initiative: China's New Grand Strategy?' *Asia Policy* (2017) 24, 71, 72.

orders are received and obeyed.[7] However, they tend to cloud the plasticity of any institutional framework and undermine the endless strategic interactions between agents at all levels.

The objective of this article is to propose a new research agenda. With specific attention to sustainability, our key argument is that the BRI can be made sustainable through ongoing dispersed legal and judicial practices that involve the Chinese government, investors, central and local governments of host countries, and local communities in the Global South. Instead of qualifying the BRI as sustainable or unsustainable, we propose to regard it as a dynamic framework, a temporary configuration of the deeds of stakeholders, a structure that is stable in each given moment within which actors engage while also susceptible to being shaped and reshaped by constant engagements. The BRI so understood serves as a platform that allows the Global South to frame and experiment with its own approach to sustainable development.

This article is structured as follows: Section B briefly summarizes the state of scholarship on the BRI and argues that the available literature presupposes the BRI as a grand strategy while overlooking local dynamics. In Section C, we then reframe the BRI under the lens of a regional approach, as an alternative to global sustainability based on the realities of the Global South. By documenting a series of disputes between Chinese and foreign stakeholders on environmental issues, Section D discusses both the existence of a well-designed plan and China's ability to implement it unilaterally, and it envisages a new understanding of the BRI as a dynamic framework.

B. The Grand Strategy Narrative

I. (Un)sustainability of the BRI?

China has advocated the BRI as an alternative to the neoliberal, hegemonic, and unsustainable world order built on the premises of markets and democracy.[8] In this narrative, the BRI promotes cross-national cooperation via policy communication, transportation connectivity, trade facilitation, monetary

7 This view is predominant in contemporary legal positivism, exemplified by the separation between primary and secondary rules, ordinary citizens, and law's officers. See H. Hart, *The Concept of Law* (1994).

8 Y. He, 'Belt & Road vs. Liberal Order', China-US Focus (22 May 2017), available at https://www.chinausfocus.com/foreign-policy/-belt--road-vs-liberal-order (last visited 05 September 2022).

circulation, and people-to-people interactions.[9] By inheriting the spirit of peace and cooperation, openness and inclusiveness, mutual learning and reciprocity,[10] the BRI will provide means in terms of economics, commerce, technology, and finance to form "win-win" partnerships and a "community of shared destiny" with its neighbors.[11] Moreover, a commitment to sustainability has been specially stated in that "China's [BRI] must be green and sustainable"[12], with the goal of "realiz[ing] diversified, independent, balanced and sustainable development in [BRI] countries".[13]

However, skepticism about China's commitment to sustainability is widespread.[14] Negative environmental impacts are documented when coal-fired power plants, heavily polluting factories, oil and gas pipes, and infrastructure are built in the name of the BRI.[15] Take its impact on climate change mitigation as an example: according to the International Institute of Green Finance's report

9 Ministry of Foreign Affairs of the PRC, 'President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt With Central Asian Countries' (7 September 2013), available at https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpfwzysiesgjtfhshzzfh_665686/t1076334.shtml (last visited 05 September 2022).

10 'Full Text of President Xi's Speech at Opening of Belt and Road Forum', Xinhua News (14 May 2017), available at http://www.xinhuanet.com//english/2017-05/14/c_136282982.htm (last visited 05 September 2022).

11 ASEAN-China Centre, 'Speech by Chinese President Xi Jinping to Indonesian Parliament' (3 October 2013), available at http://www.asean-china-center.org/english/2013-10/03/c_133062675.htm (last visited 11 June 2021); Ministry of Foreign Affairs of the PRC, 'Xi Jinping: Let the Sense of Community of Common Destiny Take Deep Root in Neighboring Countries' (25 October 2013), available at https://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/activities_663312/t1093870.shtml (last visited 05 September 2022).

12 B. Goh & C. Cadell, 'China's Xi Says Belt and Road Must Be Green, Sustainable', Reuters (25 April 2019), available at https://www.reuters.com/article/us-china-silkroad-idUSKCN1S104I (last visited 05 September 2022).

13 Belt and Road Portal, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road' (2015), available at https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm (last visited 05 September 2022).

14 A. Kalinin *et al.*, *Chinese Grand Strategy in the Eurasian Heartland. Belt and Road Initiative in Russia, Belarus, Central Asia and the Caucasus* (2019), 63-66; T. P. Cavanna, 'Unlocking the Gates of Eurasia: China's Belt and Road Initiative and its Implications for U.S. Grand Strategy', 2 *Texas National Security Review* (2019) 3, 10, 18; J. Hurley, S. Morris & G. Portelance, 'Examining the Debt Implications of the Belt and Road Initiative From a Policy Perspective', *CGD Policy Pape*r (2018) 121; S. Shieh *et al.*, 'Understanding and Mitigating Social Risks to Sustainable Development in China's BRI', *ODI report* (2021), 13-51.

15 Kalinin *et al., supra* note 14, 65; Shieh *et al.*, *supra* note 14, 5.

on China's investment in the BRI in 2020, though investments in fossil fuels have slowly dropped from their peak in 2015, they still constitute the majority of the BRI's energy investments.[16] Critics also questioned the BRI's long-term sustainability because of the debt burden, economic concerns, and social risks the BRI has introduced.[17] Economically, the massive loans extended to host States might result in a "debt trap"[18], which will cause an unfavorable degree of dependency on the creditor.[19] Increasing debt and incapacity to assume such debt jeopardize some BRI projects, such as the renegotiation of East Coast Rail Link project between Malaysia and China[20] or the cancellation of Sierra Leone's Mamamah airport.[21] Many observers are further concerned about other social issues, including corruption,[22] labor conditions,[23] and cultural and linguistic disparities.[24]

II. The BRI as a Grand Strategy

The unsustainable dimensions of the current BRI projects cast a shadow over its future. However, debate over the sustainable or unsustainable nature of the BRI presupposes that it has an essence, a predetermined agenda. Indeed, current scholarship may propose opposite accounts of the BRI, but opposing camps share the assumption of a grand strategy. Analysts who hold optimistic outlooks about the BRI constantly refer to it as "an economic grand strategy"[25], or a grand strategy "in pursuit of [China's] decades-long goal of returning to

16 C. Nedopil Wang, *China's Investments in the Belt and Road Initiative (BRI) in 2020* (2021), 9-10.

17 Kalinin *et al., supra* note 14, 63-66.

18 Cavanna, *supra* note 14, 18.

19 Hurley, Morris & Portelance, *supra* note 14, 2.

20 T. Mitchell & A. Woodhouse, 'Malaysia Renegotiated China-backed Rail Project to Avoid $ 5bn Fee', Financial Times (15 April 2019), available at https://www.ft.com/content/660ce336-5f38-11e9-b285-3acd5d43599e (last visited 05 September 2022).

21 'Mamamah Airport: Sierra Leone Cancels China-Funded Project', BBC (10 October 2018), available at https://www.bbc.com/news/world-africa-45809810 (last visited 05 September 2022).

22 Cavanna, *supra* note 14, 18.

23 M. Azeem, 'Theoretical Challenges to TWAIL With the Rise of China: Labor Conditions Under Chinese Investment in Pakistan', 20 *Oregon Review of International Law* (2019) 2, 395, 405-407.

24 Shieh *et al.*, *supra* note 14, 27.

25 A. Kratz, 'One Belt, One Road: What's in it for China's Economic Players?', in European Council on Foreign Relations (eds), "*One Belt, One Road": China's Great Leap Outward* (2015), 8, 8.

great-power status",[26] which is "non-threatening and non-revisionist".[27] At the other end of the spectrum, authors raise concerns about economic expansionism or China's ambition to substitute the liberal democratic world order with its undemocratic hegemony under the cover of the BRI.[28]

The dictionary definition of *grand strategy* provided by Edward Luttwak and Paul van Hooft refers to "the highest level of national statecraft that establishes how States, or other political units, prioritize and mobilize […] military, diplomatic, political, economic, and other sources of power to ensure what they perceive as their interests",[29] and it is often used in the context of the BRI.[30] Meanwhile, Michael Clarke added that the BRI "constitutes an 'intellectual architecture that gives form and structure to foreign policy' and is 'a purposeful and coherent set of ideas about what a nation seeks to accomplish in the world'".[31] Therefore, the grand strategy narrative presumes that all the projects related to the BRI are orchestrated around a coherent, top-down plan and that China is capable of executing it.

The assumption of a coherent and top-down plan is illustrated by the efforts to interpret the BRI as a logical step in the continuous historical development of China's policy. Looking backward, some experts regard the BRI as old wine in new bottles "… because many of the methods and projects that it encompasses existed before its launch"[32]. Authors have also noticed the continuity between the BRI and the precedent development strategies, namely the exploration of the Western China policy in the late 1990s, the *Going Out* investment plan for strategic assets in the 2000s, the growth-seeking infrastructure campaigns in

26 Clarke, *supra* note 6, 72.

27 A. Bondaz, 'Rebalancing China's geopolitics', in European Council on Foreign Relations (eds), "*One Belt, One Road": China's Great Leap Outward* (2015), 6, 6.

28 N. Rolland, 'China's Belt and Road Initiative: Underwhelming or Game-Changer?', 40 *The Washington Quarterly* (2017) 1, 127, 136-137; Bhattacharya, *supra* note 3, 325; S. Yu, *Belt and Road Initiative: Defining China's Grand Strategy and the Future World Order* (2018), 51-53.

29 E. N. Luttwak, *The Grand Strategy of the Byzantine Empire* (2009), 409; P. van Hooft, 'Grand Strategy' (03 June 2019), available at https://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0218.xml (last visited 05 September 2022).

30 Kalinin *et al.*, *supra* note 14, 14-15; F. J. Leandro & P. A. Duarte, *The Belt and Road Initiative: An Old Archetype of a New Development Model* (2020), 7; Leverett & Wu, *supra* note 3, 112.

31 Clarke, *supra* note 6, 75.

32 Cavanna, *supra* note 14, 14.

1997 and 2008, and 'peaceful rise' rhetoric promoted in the mid-2000s.[33] Clarke argued that "[the] BRI did not spring fully formed from the mind of Xi but builds on the corpus of foreign and security policy concepts bequeathed by his successors"[34]. Bhattacharya also claimed that it "… is embedded in the periphery diplomacy that has influenced not only China's foreign policy formulations but also the formation of Chinese state and polity".[35] With the backing of experience from generations of political leaders, promoting the BRI was not a hasty decision, but rather one that "was arrived […] after a thorough reassessment".[36]

Looking forward, some authors underlined the instrumentality of the BRI in promoting China's vision of global governance.[37] This vision, often symbolized by a "community of shared [destiny]" and the "China dream"[38], is represented as rooted in the Confucian legal and political tradition.[39] Therefore, the unity of Chinese tradition further guarantees the coherence of the BRI. In this respect, the BRI is the country's grand strategy because "it does indeed outline the broad lines or logics for [China's engagement with the world.]"[40]

Regarding China's ability to enforce unilateral implementation, academics either claimed that a set of measures has been taken to guarantee the BRI operates in accordance with its original plan or they examined China's potential to promote the BRI's development.[41] The formation of a Silk Road Fund (SRF) and the Asian Infrastructure Investment Bank (AIIB) is often cited as evidence of China's concrete moves toward attaining BRI goals.[42] A comparison has become popular between the BRI and the United States' grand strategy post-World War II, since the SRF, AIIB, and investment corridors are allegedly similar to the International Monetary Fund, the World Bank, and comparable policies in the

33 Cavanna, *supra* note 14, 14-15; A. Ekman *et al.*, *Three Years of China's New Silk Roads From Words to (Re)action?* (2017), 17-21.

34 Clarke, *supra* note 6, 72.

35 Bhattacharya, *supra* note 3, 322.

36 *Ibid*.

37 W. A. Callahan, 'China's "Asia Dream": The Belt Road Initiative and the New Regional Order', 1 *Asian Journal of Comparative Politics* (2016) 3, 226, 239.

38 T. Fallon, 'The New Silk Road: Xi Jingping's Grand Strategy for Eurasia', 37 *American Foreign Policy Interests* (2015) 3, 140, 141; Z. Zhang, 'The Belt and Road Initiative: China's New Geopolitical Strategy?', 4 *China Quarterly of International Strategic Studies* (2018) 3, 327, 334.

39 Zhang, *supra* note 38, 334; Yu, *supra* note 28, 7.

40 Leandro & Duarte, *supra* note 30, 7.

41 *Ibid.*, 5.

42 Clarke, *supra* note 6, 75; Callahan, *supra* note 37, 236.

Marshall Plan.[43] Scholars consider these regional projects as a signal that the BRI is not hollow: "Real work[s under the BRI can be seen]"[44].

Meanwhile, other scholars, being aware of the prematurity of assessing the accomplishment of the BRI's goals in its early stages, focus their attention on the Chinese government's potential and argue that China has the capacity to concretize the BRI as it has been designed for three reasons. First, key Chinese government agencies, such as the National Development and Reform Commission, who have developed detailed plans for specific aspects of the BRI,[45] remain central in coordinating the BRI's implementation.[46] Second, China's domestic infrastructure has helped develop the practical experience to realize the BRI.[47] Third, an authoritarian atmosphere promotes stability and continuity, making it easier for China to move through with its initiatives.[48]

The grand strategy narrative portrays China as the designer and driver of the BRI and places it at center of stage, at the price of putting all other actors in the periphery. The existing research agenda risks undermining the actions, reactions, and interactions of recipient countries, business entities, and other provincial or local players.[49] The disagreements and discontents manifested by local protests and struggles are noticed but merely regarded as proof of the hegemonic and unsustainable nature of the BRI or as the 'risks' that can be avoided or addressed by China.[50] Therefore, the sustainability of the BRI is borne on the shoulders of China alone.

The grand strategy narrative either romanticizes or diabolizes China's position in the global pursuit of sustainability. At the same time, it ignores the agency of other actors and their capacity in agenda setting, misunderstanding the realities of making the international order via the BRI. Before concretizing

43 Yu, *supra* note 28, 7.

44 Callahan, *supra* note 37, 236.

45 M. Beeson, 'Geoeconomics with Chinese Characteristics: the BRI and China's Evolving Grand Strategy', 6 *Economic and Political Studies* (2018) 3, 240, 249.

46 *Ibid.*, 249; S. Heilmann & O. Melton, 'The Reinvention of Development Planning in China, 1993-2012', 39 *Modern China* (2013) 6, 580, 581-583.

47 Beeson, *supra* note 45, 249.

48 S. Kalathil, 'China's Eurasian Century? Political and Strategic Implications of the Belt and Road Initiative by Nadège Rolland (Review)', 28 *Journal of Democracy* (2017) 4, 170, 174.

49 Cavanna, *supra* note 14, 16.

50 李玉璧，王兰：《"一带一路"建设中的法律风险识别及应对策略》，《国家行政学院学报》2017年第2期，第77-81页。(Y. Li & L. Wang, 'The Identification and Coping Strategies of Legal Risks in the Construction of "One Belt and One Road"', 107 *Journal of CAG* (2017) 77, 77-81).

the opposition to the grand strategy narrative, we propose another reading of the BRI as a project of the Global South.

C. BRI as a Regional Approach to the International Law of the Global South

I. The Global South as a Region

Though President Xi announced that "the BRI is a public road open to all" at the opening ceremony of the *Boao Forum for Asia Annual Conference 2021*,[51] the great majority of BRI members are developing or underdeveloped countries. According to official statistics, 26 low-income countries and 39 lower middle-income countries have joined the initiative.[52] Most concrete projects related to the BRI are also envisaged in these countries. In contrast, developed countries tended to endorse the BRI as a concept, but not to identify specific projects.[53] For example, in the 2019 Memorandum of Understanding (MoU) between Italy and China, both States promised to "work together within the BRI to translate mutual complementary strengths into advantages for practical cooperation and sustainable growth"[54], while materialization is still absent.[55] Therefore, the BRI is first and foremost a project of the Global South.

When discussing a *regional approach to international law*, scholars are aware that the scope of a *region* is not self-evident and they define the term in different ways. The definition that we find apposite was proposed by Samantha Besson in her intervention in the *colloque de rentrée* 2020 at the Collège de

51 'Xi Says BRI a Public Road Open to all, not Private Path', Xinhua News (20 April 2021), available at http://www.xinhuanet.com/english/2021-04/20/c_139892744.htm (last visited 05 September 2022).

52 Green Belt and Road Initiative Center, *supra* note 2.

53 D. Sacks, 'Countries in China's Belt and Road Initiative: Who's in And Who's Out', Council on Foreign Relations (24 March 2021), available at https://www.cfr.org/blog/countries-chinas-belt-and-road-initiative-whos-and-whos-out (last visited 05 September 2022).

54 *MoU Between the Government of the Italian Republic and The Government of the People's Republic of China on Cooperation Within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative*, March 2019, available at: https://www.governo.it/sites/governo.it/files/Memorandum_Italia-Cina_EN.pdf (last visited 05 September 2022).

55 F. Ghiretti, 'The Belt and Road in Italy: 2 Years Later', The Diplomat (23 March 2021), available at https://thediplomat.com/2021/03/the-belt-and-road-in-italy-2-years-later/ (last visited 05 September 2022).

France: this considers a region as jurisdictions connected by their proximity, identity, and solidarity.[56]

Proximity may primarily refer to the spatial relationship between locations, but it can also be used to measure the relative positions of States in the symbolic global order. Despite several infrastructure projects that concern European countries, the vast majority of the BRI-related investments or plans target Latin America, Central and South-Eastern Asia, and Africa.[57] Home to most of the economically less developed countries, these regions are commonly known as *the South*,[58] a term that, at the same time, indicates their latitude and symbolic position in the global economic order.[59] They are underdeveloped because "[their economic growth trajectories] are determined by foreign capital"[60]. They are only "producers of raw materials or to serve as repositories of cheap labor, and are thus denied the opportunity to market their resources in any way that competed with [developed States]"[61].

The disadvantages of the Global South in the distribution of wealth among nations are easily translated into their suffering in terms of sustainability. If many States of the Global South attempted to nationalize their respective natural resource sectors and place the environment "… under the control of those who depend upon it instead of mortgaging it to distant owners and abusers"[62], joining the international trade regime would mean that this control is gradually contracted to multinational enterprises whose headquarters are located in the

56 'Le Droit International Des Civilisations Ou Comment Instituer Leur Concertation' (2020), available at https://www.youtube.com/watch?v=VZo03OwHaRE&t=1262s (last visited 05 September 2022).

57 China Global Investment Tracer, 'Chinese Investments & Contracts in Belt and Road Initiatives (2005-2020)', available at https://www.aei.org/china-global-investment-tracker/ (last visited 05 September 2022).

58 D. Nour & C. Raewyn. 'The Global South', 11 *Contexts* (2012) 12, 12; N. Lees, 'The Brandt Line After Forty Years: The More North-South Relations Change, the More They Stay the Same', 47 *Review of International Studies* (2021) 85, 85; J. Rigg, 'The Global South', in Global South Studies Center (eds), *Concepts of the Global South* (2012) 7.

59 L. A. Duck, 'The Global South Via the US South', in Global South Studies Center (eds), *Concepts of the Global South* (2012), 5.

60 L.S. Stavrianos, *Global Rift: The Third World Comes of Age* (1981), 39.

61 A. Sajed, 'From the Third World to the Global South' (2020), available at https://www.e-ir.info/2020/07/27/from-the-third-world-to-the-global-south/ (last visited 05 September 2022).

62 K. Mickelson & U. Natarajan, 'Reflections on Rhetoric and Rage: Bandung and Environmental Injustice', in L. Eslava, M. Fakhri & V. Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017), 471.

Global North.[63] Even worse, Southern States will *race to the bottom*, adopting loose environmental and labor standards to lure foreign investors who are interested in moving their manufacturing from jurisdictions where regulations are strict.[64] For instance, the miraculous economic growth in China did not only turn this country into the world's factory but also the world's dumping ground.[65] In fear of an environmental catastrophe, environmentalists from the North accuse the emerging economies, such as India and China, of exploiting resources, destroying natural reserves, emitting conventional pollutants and greenhouse gases (GHGs), and call for the abandonment of the Common But Differentiated Principle.[66] "But emissions are emissions. You've just got to do the math."[67], said Todd Stern, the United States envoy for climate negotiation. The math also reveals that, according to the calculation of *Our World in Data*, the per capita CO2 emission of Americans in 2017 was more than 2.3 times that of Chinese – at 16.16 tons compared with 6.86 tons.[68] People of the Global South are both the authors and victims of pollution, ecological degradation, or adverse climate events. However, inequality can be so structural and fundamental that the cost of ecological transitions also disproportionately lands on the shoulders of vulnerable countries.[69] In sum, the Global South countries are situated lower in

63 J. F. Rweyemamu, 'International Trade and the Developing Countries', 7 *The Journal of Modern African Studies* (1969) 203, 213.

64 A. Chan & R. Ross, 'Racing to the Bottom: International Trade Without a Social Clause', 24 *Third World Quarterly* (2003), 1011; A. Prakash & M. Potoski, 'Racing to the Bottom? Trade, Environmental Governance, and ISO 14001', 50 *American Journal of Political Science* (2005) 350.

65 K. de Freytas-Tamura, 'Plastics Pile Up as China Refuses to Take the West's Recycling', The New York Times (11 January 2018), available at https://www.nytimes.com/2018/01/11/world/china-recyclables-ban.html (last visited 05 September 2022).

66 R. Watson *et al.* (eds), T*he Truth Behind the Climate Pledges* (2019), 2-3.

67 D. Samuelsohn, 'No 'Pass' for Developing Countries in Next Climate Treaty, Says U.S. Envoy', The New York Times (9 December 2009), available at https://archive.nytimes.com/www.nytimes.com/gwire/2009/12/09/09greenwire-no-pass-for-developing-countries-in-next-clima-98557.html?pagewanted=print (last visited 05 September 2022).

68 H. Ritchie & M. Roser, 'China: Co2 Country Profile', available at https://ourworldindata.org/co2/country/china (last visited 6 July 2021); H. Ritchie & M. Roser, 'United States: Co2 Country Profile', available at https://ourworldindata.org/co2/country/united-states (last visited 05 September 2022).

69 R. Eckersley, 'Responsibility for Climate Change as a Structural Injustice', in *The Oxford Handbook of Environmental Political Theory* (2016), 346-361; B. K. Sovacool, 'Countering a Corrupt Oil Boom: Energy Justice, Natural Resource Funds, and São Tomé e Príncipe's Oil Revenue Management Law', 55 *Environmental Science & Policy* (2016) 196, 197-199; L. Chancel & T. Piketty, 'Carbon and Inequality: From Kyoto to Paris' (2015), available

the hierarchy of the production and distribution of economic and environmental goods, and they are struggling to maintain economic growth while complying with the standards of sustainability that are also agreed upon in the North.[70] They are the humiliated and insulted.

The experience of humiliation and insult within international law is not new for the South. On the contrary, it has persisted ever since the Western perception of governmentality via international law and comparative law, was globalized[71] and it constitutes the essence of the identity of the South in regard to international law. From the Spanish and Portuguese conquerors in the Americas, all the way through the colonial agents in countless terrible events throughout Africa and North America during the 19th century, to the actions of Japanese troops at the Port Arthur massacre, "international law was in itself an instrument of the denial of recognition and of domination because it was based entirely on the fundamental discrimination between civilized and non-civilized States"[72]. Within the civilization narratives that defined, ordered, and distributed political power differently, the clash between the European and non-European worlds was seen "in terms of a conflict of cultures and cultural systems" during which "European military superiority left non-European societies no choice but to come to grips with the European standard of 'civilization'"[73]. Their troops defeated in wars, sovereignty denied in the name of civilization, cultural and political identity stigmatized as backwardness, countries of the South that are largely also colonized were once subjugated to the *civilizing mission* of the North.[74]

After World War II, though, "many colonies overthrew the yoke of direct colonial rule [and] they quickly realized that political independence was

at https://voxeu.org/article/carbon-and-inequality-kyoto-paris (last visited 05 September 2022).

70 M. A. Mustunsir, 'Sustainability vs Economic Growth: a Third World Perspective', 11 *World Journal of Entrepreneurship. Management and Sustainable Development* (2015) 312, 321.

71 E. Jouannet, 'Colonialisme Européen et Néo-Colonialisme Contemporain', 6 *Baltic Yearbook of International Law Online* (2006) 49, 49-50; E. Jouannet, 'Le Droit International de La Reconnaissance', 13 *Revue générale du droit international public* (2012), 769, 770-772 [Reconnaissance]; D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in A. Santos & D. Trubek (eds), *The New Law and Economic Development* (2006), 28-32.

72 Jouannet, Reconnaissance, *supra* note 71, 770.

73 G. W. Gong, *The Standard of Civilization in International Society* (1984), 98.

74 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2004), 121–122.

largely illusory"[75]. "Third World States were still bonded politically, legally and economically to the West."[76] Colonial history has had a significant impact on States' formations, international trade patterns, and the structure of international organizations like the United Nations (UN). Within the process, international law operates as a tool that "… brings the uncivilized/aberrant/violent/backward/oppressed into the realm of civilization, the universal order"[77]. Today, as a century ago, the international legal order still subordinates the people and societies of the South to the conquest and domination of the North.[78] As colonialism has been, and still is, central to the formation and evolution of international law,[79] being victims of hegemony or imperialism is an essential element of the regional identity of the States of the South.

Hegemony and dominance are never free from resistance, and it is the awareness of past struggles that defines the South's solidarity. These countries "… have suffered from imperialist or neo-colonial domination and are equal partners in the struggle to end international economic iniquities"[80]. Intellectuals, social activists, and politicians of the South have been aware that the common objective of liberation will not be achieved without solidarity.[81] Solidarity requires these countries to "… reach and maintain a common policy position on a given issue"[82]. Several initiatives were experimented with to give place to solidarity, such as hosting the *Bandung Conference*, developing the Non-aligned Movement (NAM), and attending as the Group of 77 (G77) before the UN that "… showed a fairly united front in proposing the New International Economic Order […] and Global Negotiations […]"[83]. Indeed, the identity and solidarity of Southern countries does not mean that it is easy to unite around a single project.[84] On the

75 M. Mutua & A. Anghie, 'What is TWAIL?', 94 *American Society of International Law* (2000), 31, 34.

76 *Ibid*.

77 A. Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', 27 *Third World Quarterly* (2006) 739, 742 [Colonial and Postcolonial Realities].

78 A. Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law', 5 *Social and Legal Studies* (1996) 321, 333.

79 Anghie, Colonial and Postcolonial Realities, *supra* note 77, 742; *Ibid*.

80 Z. A. Bhutto, 'The Third World: The Imperative of Unity', 29 *Third Quarter* (1976), 3, 4.

81 *Ibid*.; L. Eslava, M. Fakhri & V. Nesiah, 'The Spirit of Bandung', in L. Eslava, M. Fakhri & V. Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017), 6-7, 12-14.

82 K. Lida, 'Third World Solidarity: The Group of 77 in the UN General Assembly', 42 *International Organization* (1988) 375, 376.

83 *Ibid*.

84 Eslava, Fakhri, Nesiah, *supra* note 81.

contrary, internal division is common.[85] Still, it is widely believed that the Third World can be an important voice in international relations only if it operates in unity.[86]

II. Features of the Global South's Approach

Regrouped by their proximity, identity, and solidarity as a region, the States of the Global South would have the opportunity to envisage an alternative normative framework that would be free from universalist claims but more adaptive to their needs and realities. The theory and practice of the Third World approach to international law, from Bandung to Havana, has embodied the hopes and aspirations of many peoples. Numerous attempts have been made to translate this hope and aspiration into concrete outcomes, and we contend that these attempts can be better understood under the lens of a regional approach to international law.

Usually used interchangeably with the term "regional arrangement"[87], "regional approach" refers to the formal consensus of a group of States in coordinating activities in the pursuit of a common goal.[88] Odermatt noticed that the emergence of a regional approach is, in itself, a reaction against the Eurocentric perception disguised under universalism: "[d]ifferent regions and countries, especially outside the West, have developed practices and views towards international law that show that international law is perceived and practiced differently in different parts of the world"[89]. As one symbolic region defined by proximity, identity, and solidarity, the Global South has a shared determination to resist the universal abstraction of international law in the post-colonial era and offer a more equitable and sustainable framework that is

85 J. A. Graham, 'The Non-Aligned Movement After the Havana Summit', 34 *International Relations of Developing Countries* (1980) 153, 153, 160.

86 H. Strydom, 'The Non-Aligned Movement and the Reform of International Relations', 11 *Max Planck Yearbook of United Nations Law* (2007), 1, 2; B. R. Tomlinson, 'What Was the Third World?', 38 *Journal of Contemporary History* (2003) 307, 309-313.

87 See R. Moynihan & B. Magsig, 'The Rising Role of Regional Approaches in International Water Law: Lessons from the UNECE Water Regime and Himalayan Asia for Strengthening Transboundary Water Cooperation', 23 *The Review of European Comparative & International Environmental Law* (2014) 43, 44.

88 *Ibid*.; R. Burchill, 'Regional Approaches to International Humanitarian Law', 41 *Victoria University of Wellington Law Review* (2010) 205, 209.

89 J. Odermatt, 'Regional Approaches to International Law', 1 *Amicus Curiae* (2019) 108.

sensitive not only to the needs of the center States on the international stage but also to the peripheries, including those of various social groups.[90]

The *origin myth* of the Global South's approach can be traced to a landmark event, the *Bandung Conference*. In 1955, delegates from 29 States in Asia and Africa attended a conference held in the Indonesian city of Bandung.[91] In the context of the Cold War, for the first time the newly independent countries "… entered world politics as a collective of States"[92] and "… devoted attention to common problems of colonialism, economic development, and maintenance of peace"[93]. Makau Mutua regarded Bandung as "… the symbolic birthplace of Third World approach to international law"[94] as "Bandung marked the moment when the global decolonization and the advent of newly independent countries changed international law"[95].

To better understand the legacy of Bandung, it is important to consider three outcomes. First, Bandung's final communique urged that all historically colonial States be admitted to the UN, forming a UN bloc.[96] The development of a UN bloc would bring together representatives from Third World countries and, to some extent, prevent the superpowers from subjugating them.[97] Second, ten principles adopted by the conference demonstrate the Third World's determination to promote peace and cooperation.[98] It expressly committed itself to a world order based on international law,[99] which played an historical role in the development of international law[100] by fully supporting people's self-

90 See B. Chimni, 'Third World Approaches to International Law: A Manifesto', 8 *International Community Law Review* (2006) 3.

91 Eslava, Fakhri, Nesiah, *supra* note 81.

92 B. Rajagopal, 'International Law and Its Discontents: Rethinking the Global South', 106 *American Society of International Law* (2012) 176, 179.

93 N. Park, 'The Third World as an International Legal System', 7 *Boston College Third World Law Journal* (1987) 37, 45-46.

94 Mutua & Anghie, *supra* note 75, 31.

95 M. Fakhri & K. Reynolds, 'The Bandung Conference' (2017), available at https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0150.xml?rskey=bGd3mg&result=1&q=bandung+#firstMatch (last visited 05 September 2022).

96 L. Segal, 'Vijay Prashad on the Idea of the Third World', 5 *A Journal on Social History and Literature in Latin America* (2008) 308, 312.

97 Sajed, *supra* note 61, 2.

98 S. Sucharitkul, 'Multi-Dimensional Concept of Human Rights in International Law', 62 *Notre Dame Law Review* (1987) 305, 309-310.

99 Rajagopal, *supra* note 92, 179.

100 Fakhri & Reynolds, *supra* note 95.

determination, fundamental human rights, and State sovereignty.[101] Third, from an economic perspective, Bandung raised an awareness of the need for economic cooperation among Third World nations, leading to the establishment of the *UN Conference on Trade and Development*.[102] It is an economic alternative for the developing States that differs from the dominant capital model.[103]

While the *Bandung Conferenc*e did not establish any permanent organization, the spirit of it lives on in its successors, such as the NAM and the G77. In general, these two Third World associations are complementary.[104] The NAM initially concentrated on political issues, then shifted its interests more towards the economy, whereas the G77 focused on economic matters.[105] With the common goal of anti-colonialism and promoting development, both programs heightened the voice of the Third World on the international stage, which made significant contributions to international law. For instance, under the impetus of the NAM and the G77, the *Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States* were adopted by the UN General Assembly.[106] It is true that the NAM and the G77 may be trapped by serious strategic disagreement among member States[107] or the rise of local elites only pursuing their own interests.[108] Nonetheless, we cannot ignore the significance of the NAM and the G77 representing the Third World in international fora.

The aforementioned projects share some common characteristics that reveal certain realities of the alternative approach adopted by the Global South. First, as projects of the South, by the South, and for the South, their ideological programs are identical: decolonization, independence, and development.[109] Second, actors

101 *Final Communiqué of the Asian-African conference of Bandung* (1955), available at https://www.cvce.eu/en/obj/final_communique_of_the_asian_african_conference_of_bandung_24_april_1955-en-676237bd-72f7-471f-949a-88b6ae513585.html (last visited 05 September 2022).

102 Park, *supra* note 93, 46.

103 Sajed, *supra* note 61, 2.

104 Park, *supra* note 93, 43.

105 L. M. Luthi, 'The Non-Aligned Movement and the Cold War, 1961-1973', 18 *Journal of Cold War Studies* (2016) 98, 100.

106 Tomlinson, *supra* note 86, 312-313; Park, *supra* note 93, 54; A. Chen, 'A Reflection on the South-South Coalition in the Last Half Century from the Perspective of International Economic Law-making', 7 *Journal of World Investment & Trade* (2006) 201, 204.

107 Graham, *supra* note 85, 153; Segal, *supra* note 96, 313; Chen, *supra* note 106, 205.

108 Chimni, *supra* note 90, 6-7.

109 R. Stojanovic, 'The Emergence of the Non-Aligned Movement: A View from Belgrade', 13 *Case Western Reserve Journal of International Law* (1981) 443, 444-445; K. P. Sauvant,

with different or even conflicting interests from the South must coordinate their activities in an environment characterized by a lack of a centralized decision-making mechanism, fine-grained binding rules, and effective implementation measures.[110] Though the idea of institutionalization is appealing, demonstrated by the creation of the Non-Aligned Coordinating Bureau in the NAM and the South Coordination Commission in the G77, their internal structures are still loose.[111] Strong anti-bloc sentiment and concerns for superpower domination prevent the NAM and the G77 from having permanent headquarters[112] or other means of organized activities that are necessary for effective coordination.[113] The consensus on abstract ideological terms and the absence of a rigid coordination mechanism lead to a high degree of indeterminacy as the third characteristic of this regional approach. Constantly oscillating between the necessities of speaking with one voice and adapting to local economic and environmental realities, States may find large gaps in the forging of concrete solutions to coordination problems in South-South cooperation.[114]

The characteristics of these past or existing projects are also the realities of the BRI, *bon gré mal gré*. As mentioned above, the BRI primarily targets the South and the official discourse of China portrays it as a project that serves the needs and interests of the South by providing a framework for promoting the flow of capital, technology, and equipment into this region, therefore assisting their industrialization and urbanization.[115] However, the vocabulary used in the governmental documents and manifestos is vague and abstract, offering almost

'The Early Days of the Group of 77', available at https://www.un.org/en/chronicle/article/early-days-group-77 (last visited 05 September 2022).

110 Park, *supra* note 93, 48; J.J.G. Syatauw, 'The Non-Aligned Movement at the Cross-Roads-the Jakarta Summit Adapting to the Post-Cold War Era', in Ko Swan Sik *et al.* (eds), *Asian Yearbook of International Law* (1994) 130.

111 M. Banerji, 'Institutionalization of the Non-Aligned Movement', 20 *International Studies* (1981) 549, 562; Park, *supra* note 93, 50-51; Chen, *supra* note 106, 206.

112 S. I. Keethaponcalan, 'Reshaping the Non-Aligned Movement: Challenges and Vision', 3 *Bandung Journal of the Global South* (2016) 1, 3; R. Kochan, 'Changing Emphasis in the Non-Aligned Movement', 28 *The World Today* (1972) 501, 505.

113 Park, *supra* note 93, 43.

114 *Ibid.*, 51-52.

115 'Success of China's Belt and Road Initiative Depends on Deep Policy Reforms, Study Finds', The World Bank (2019), available at https://www.worldbank.org/en/news/press-release/2019/06/18/success-of-chinas-belt-road-initiative-depends-on-deep-policy-reforms-study-finds (last visited 05 September 2022); 'Developing Countries Become BRI's Biggest Beneficiaries', PR Newswire (25 April 2019), available at https://www.prnewswire.com/news-releases/developing-countries-become-bris-biggest-beneficiaries-300838067.html (last visited 05 September 2022).

no binding commitment or clearly defined goals.[116] States agree on values such as mutual respect, reciprocity, sustainability, autonomy, sovereignty, and the right to development,[117] while leaving the concrete measures of translating them into reality to be determined in future discussions.

Two contrasting perspectives of the BRI are evident. The mainstream narrative analogizes the BRI to the Marshall Plan: a well-thought, concrete plan to be implemented according to the vision and interests of China.[118] The alternative considers the BRI as the heir to the Bandung spirit and observes that the initiative "… was put forward as a broad, vague idea without a specific blueprint as its inception"[119], and "… dependent upon an enthusiastic acceptance by China's neighbors"[120].

Though the Marshall Plan analogy is well-received among many international relation experts and the general public, its credibility is undermined by a key misconception. According to the Foreign Assistance Act of 1948, the main components of the Marshall Plan are defined and clear, including standards for organizations set up to administer funds, advisory boards to monitor those organizations, as well as salaries and responsibilities for officials in charge of such organizations.[121] For the BRI, its core document, *Vision and Actions on Jointly Building the Silk Road Economic Belt and 21st Century Maritime Silk Road*, is full of vague rhetoric,[122] which "contains a number of generic proposals without delineating any concrete steps forward and is intermixed with various platitudes about cooperation and understanding"[123]. Observers of the BRI are struck by its

116 Kalinin *et al.*, *supra* note 14, 16; Kalathil, *supra* note 48, 170.

117 'What Kind of Principles Should We Follow Under Belt and Road Initiative?', Xinhua News (June 16 2020), available at https://en.imsilkroad.com/p/310483.html (last visited 05 September 2022).

118 D. Chen, 'China's "Marshall Plan" is Much More', The Diplomat (10 November 2014), available at https://thediplomat.com/2014/11/chinas-marshall-plan-is-much-more/ (last visited 28 June 2021); E. Curran, 'China's Marshall Plan', Bloomberg (8 August 2016), available at https://www.bloomberg.com/news/articles/2016-08-07/china-s-marshall-plan (last visited 05 September 2022).

119 J. Zeng, 'Narrating China's Belt and Road Initiative', 10 *Global Policy* (2019) 207, 208.

120 Callahan, *supra* note 37, 3.

121 'One Belt, One Road, No Dice', Geopolitical Futures (12 January 2017) available at https://geopoliticalfutures.com/one-belt-one-road-no-dice/ (last visited 28 June 2021); *Foreign Assistance Act of 1948*, available at https://www.marshallfoundation.org/library/wp-content/uploads/sites/16/2014/06/Foreign_Assistance_Act_of_1948.pdf (last visited 05 September 2022).

122 Zhang, *supra* note 38, 329.

123 One Belt, One Road, No Dice, *supra* note 121; *Action Plan on the Belt and Road Initiative*, available at http://english.www.gov.cn/archive/publications/2015/03/30/

preference for project papers and soft law;[124] practically all guiding documents refer to the BRI as informal and legally non-binding.[125] With the emergence of such documents as joint communiques, joint declarations, MoUs, and letters of intent,[126] the success of the BRI heavily depends upon active cooperation from all involved parties, not only China.[127] Scholars who endorse comparison tend to rely on institutions such as the AIIB to demonstrate the BRI's effective structure.[128] However, no centralized coordination body has been established. Various government departments' failure to come up with coherent planning,[129] increasing local rivalry,[130] and the unstable political climates among China's partners[131] all contribute to the BRI's fragmentation. Indeed, the employment of abstract ideological terms and the absence of a rigid coordination mechanism make the BRI more comparable to the Bandung spirit than the Marshall Plan.

D. The BRI as a Dynamic Framework

I. Making Local Actions Visible

Almost inevitably, the BRI, as with other projects of South-South cooperation, allows significant flexibility among actors, not only for China but also other State and non-State actors. If projects related to the BRI opened up

content_281475080249035.htm (last visited 05 September 2022).

124 H. Wang, 'Divergence, Convergence or Crossvergence of Chinese and US Approaches to Regional Integration: Evolving Trajectories and Their Impactions', 10 *Tsinghua China Law Review* (2018) 150, 150; L. Zeng, 'Conceptual Analysis of China's Belt and Road Initiative: A Road Towards a Regional Community of Common Destiny', 15 *Chinese Journal of International Law* (2016) 3, para 64.

125 H. Wang, 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability', 22 *Journal of International Economic Law* (2019) 1, 12 [China's Approach to the BRI].

126 *Ibid*.

127 P. Ferdinand, 'Westward ho — the China Dream and 'One belt, One road': Chinese Foreign Policy Under Xi Jinping', 92 *International Affairs* (2016) 4, 941, 956.

128 Clarke, *supra* note 6, 75; Callahan, *supra* note 37, 11.

129 Y. Hong, 'Motivation Behind China's 'One Belt, One Road' Initiatives and Establishment of the Asian Infrastructure Investment Bank', 26 *Journal of Contemporary China* (2017) 105, 353, 363.

130 *Ibid*; L. Jones & J. Zeng, 'Understanding China's "Belt and Road Initiative": Beyond "Grand Strategy" to a State Transformation Analysis', 40 *Third World Quarterly* (2019) 3, 1, 12.

131 Hong, *supra* note 129, 367; G. Ran, 'Is China's Belt and Road Initiative Moving Towards a Silk Road Union?: A Legal and Policy Consideration', 6 *China & WTO Review* (2020) 1, 49, 63.

the space for the emergence of a new set of norms of international law, their creation relies on bilateral and loose cooperation arrangements, e.g., MoUs and statements of cooperation, which vary greatly depending on the partners and issues involved.[132] This fragmented, decentralized mechanism of rulemaking is further complicated by the variety of actors that range from States, provincial bureaucracies, territorial units, local communities, State-owned enterprises, and private businesses.[133]

Compared to the well-defined, rule-based approach to international order, the flexible and principle-based approach that emerges in the implementation of the BRI has both opportunities and challenges. Since China must discuss the terms of a bilateral agreement with each individual partner, the parties have more room for negotiation and, at least in theory, can reach arrangements that better reflect the economic, environmental, social, and political realities of the host countries, which is also one of the key benefits of the regional approach. Furthermore, loose arrangements allow the parties to adjust the terms of cooperation according to the evolution of situations. Meanwhile, it is also admitted that, without clear rights, duties, and responsibilities defined by binding legal provisions, State and non-State actors must navigate through considerable uncertainty. If national governments can handle this inconvenience by renegotiation, then subnational governments, business entities, and local communities may find that they must accept the results of negotiations in which they have no right to participate.

Having said that, non-State actors still have the means to protect their interests by translating the political commitments of States into concrete actions. Frictions over sustainability provide some examples. Until 2016, China was involved in 240 coal power projects related to the BRI.[134] Not only did these projects increase GHG emissions, they also raised local opposition due to the transformation of land use, air and water pollution, and poor labor conditions.[135]

132 H. Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale and Challenges', 20 *World Trade Review* (2020) 1, 2-5; Wang, China's Approach to the BRI, *supra* note 125, 16-17.

133 Cavanna, *supra* note 14, 14; Jones & Zeng, *supra* note 130; Zeng, *supra* note 119.

134 H. Feng, 'China's Belt and Road Initiative Still Pushing Coal', China Dialogue (12 May 2017), available at https://chinadialogue.net/en/business/9785-china-s-belt-and-road-initiative-still-pushing-coal/ (last visited 05 September 2022).

135 C. Blackwell, 'How Protest is Posing a Growing Threat to the BRI', in Oxford University Silk Road Society & the Green BRI Center (eds), *The Central Asia Way* (2021), 22-24, available at https://green-bri.org/how-protest-is-posing-a-growing-threat-to-the-bri/ (last visited 05 September 2022).

In light of this growing criticism of the adverse environmental impacts of BRI-related projects, the Chinese Ministry of Ecology and Environment issued the *Guidance on Promoting a Green Belt and Road* in 2017.[136] Though this policy document does not prescribe any sanctions, local activists from different jurisdictions occasionally managed to tackle unsustainable projects through the instrumentality of the courts. For instance, residents in the historical town of Lamu convinced the Kenyan National Environmental Tribunal to halt the construction of a coal-fired power plant on the grounds of an insufficient environmental impact evaluation.[137] In Pakistan, coal field development and the construction of multiple coal-fired plants have been challenged before the Supreme Court in the name of future generations.[138] If these rare but high-profile lawsuits have caught scholarly attention,[139] opposition to BRI projects exist more widely in the form of protests, gatherings, and confrontations with local public authorities. Opposition could only be a sign of failure if the BRI were a well-defined strategy, as this would destabilize its predetermined and fixed route. Once the BRI's flexibility is acknowledged, those who oppose it will breathe new life into the BRI's long-term viability.

As a dynamic field, the BRI makes possible both the strategic interactions between actors and the temporary configuration of these interactions into law.[140] As with previous projects of international law for the Global South, ideological foundations and political commitments are expressed in a vague language where consensus is developed at conferences and summits. However, at the level of 'low politics', where economic and environmental costs and benefits are unevenly distributed, discontent, disagreements, resistance, confrontations, and collaborations take place on concrete and specific issues. Through these continuous and dispersed strategic interactions that nonetheless lack a centralized plan, various State and non-State actors defend, reject, interpret, and

136 *Guidance on Promoting Green Belt and Road* (2017), available at http://english.mee.gov.cn/Resources/Policies/policies/Frameworkp1/201706/t20170628_416864.shtml (last visited 05 September 2022).

137 *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd*, (2019) National Environmental Tribunal, NET 196 of 2016.

138 *Ali v. Federation of Pakistan*, (2016) The Supreme Court of Pakistan, Constitutional Petition No /I of 2016.

139 S. Bogojević & M. Zou, 'Making Infrastructure "Visible" in Environmental Law: The Belt and Road Initiative and Climate Change Friction', 10 *Transnational Environmental Law* (2020) 1, 1, 15-19.

140 P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field (With the Translator's Introduction)', 38 *Hastings Law Journal* (1987) 5, 805.

misinterpret the guiding principles proposed by leaders and the existing rules of international law, such as the *Paris Agreement*, for their own interests. They are the true (co)authors of the international law of the BRI, but none have the monopoly. To deny their roles is to deny their deeds and agency.

II. Defeats of Coal-Fired Power Plant Projects in Bangladesh

The fate of coal-fired plants in which Chinese companies invested in Bangladesh can shed light on the sensitivity of BRI-related projects to the economic circumstances of the host countries. After 2014, coal was Bangladesh's main source of fuel to ensure their energy security[141] and the Bangladeshi government has shown a positive attitude toward coal-fired power plants in the long term.[142] Bangladesh's decision to build more coal-fired plants coincided with the announcement of the BRI and China's domestic industry restructuring drove Chinese companies in coal-related sectors to seek new markets abroad.[143] Around 2015, coal investment in the BRI reached its peak.[144] At almost the same time, Bangladesh was trapped in a domestic power crisis.[145] With the belief that coal could address its electricity shortage at an affordable price,[146] Bangladesh accepted the olive branch from Chinese investors; this has facilitated a large number of new power plants projects in Bangladesh.[147] It is not surprising,

141 A. R. Rasel, '7 New Coal-fired Power Plants Planed', Bangladesh's First Internet Newspaper (14 December 2011), available at https://bdnews24.com/bangladesh/2011/12/14/7-new-coal-fired-power-plants-planned (last visited 05 September 2022).

142 *Ibid*.

143 E. Downs, *The China-Pakistan Economic Corridor Power Projects: Insights into Environmental and Debt Sustainability* (2019), 17-30; Bogojević & Zou, *supra* note 139, 16; Kratz, *supra* note 25, 9.

144 Nedopil Wang, *supra* note 16, 9.

145 M. A. Haque & J. Rahma, 'Power Crisis and Solution in Bangladesh', 45 *Bangladesh Journal of Scientific and Industrial Research* (2010) 2, 155,155; 'Wartsila Provides More Power Plants to Ease Electricity Shortage in Bangladesh', Power Engineering (20 September 2017), available at https://www.power-eng.com/on-site-power/wartsila-provides-more-power-plants-to-ease-electricity-shortage-in-bangladesh/#gref (last visited 05 September 2022).

146 N. Karim, 'Bangladesh Looks to Cut Future Coal Use as Costs Rise', Reuters (7 August 2020), available at https://www.reuters.com/article/us-bangladesh-energy-climatechange-trfn-idUSKCN25320C (last visited 05 September 2022).

147 D. Li & Y. Wang, 'Bangladesh May Suspend New Power Plant Approvals', China Dialogue (11 September 2019), available at https://chinadialogue.net/en/energy/11512-bangladesh-may-suspend-new-power-plant-approvals/ (last visited 05 September 2022).

therefore, that Chinese companies became dominant in both the construction and investment of newly planned projects.[148]

At the outset, both governments seem to be fully committed to collaboration. In the 2016 MoU between China and Bangladesh, both parties outlined their cooperation on the construction of the Gazaria power station, worth $433 million US.[149] Despite the introduction of a draft bill prohibiting the use of crop land for industrial purposes, the Gazaria project was given the green light by the Executive Committee of the National Economic Council of Bangladesh.[150] Some extreme violence followed, as was the case with the Banshkhali power station contracted between S. Alam Group and two Chinese companies. Confrontations between villagers who were concerned with the environmental impact and those who were attracted by employment opportunities resulted in police shootings, causing four deaths.[151] This violence did not, however, prevent the government from approving the project.[152]

Both the Gazaria and Banshkhali projects, alongside other coal-fired plants, now face cancellation.[153] In August 2020, Bangladesh's Minister of Power, Energy, and Mineral Resources announced that the country is planning to review the number of coal-based power plants, around 90% of which might be abandoned.[154] The Banshkhali project is on the cancellation list sent to the

148 T. Baxter, 'Bangladesh May Ditch 90% of its Planned Coal Power', China Dialogue (27 August 2020), available at https://chinadialogue.net/en/energy/bangladesh-may-ditch-planned-coal-power/ (last visited 05 September 2022).

149 R. U. Mirdha, 'Beximco, Meghna Tie up With Chinese Investors for Power', The Daily Star (18 October 2016), available at https://www.thedailystar.net/business/beximco-meghna-tie-chinese-investors-power-1300171 (last visited 05 September 2022).

150 Global Energy Monitor, 'Gazaria Power Station', available at https://www.gem.wiki/Gazaria_power_station_(RPCL) (last visited 05 September 2022).

151 P. Roy, 'Four Killed as Bangladesh Villagers Oppose Coal-Fired Power Plant', China Dialogue (18 April 2016), available at https://chinadialogue.net/en/pollution/8838-four-killed-as-bangladesh-villagers-oppose-coal-fired-power-plant/ (last visited 05 September 2022).

152 A. Muhammad, 'Scrap Projects of Destruction', The Daily Star (11 April 2016), available at https://www.thedailystar.net/op-ed/politics/scrap-projects-destruction-1207177 (last visited 05 September 2022).

153 Baxter, *supra* note 148.

154 Karim, *supra* note 146; *Ibid*.

Prime Minister's office.[155] Bangladesh also requested the removal of the Gazaria plant from the agreed lists of investment projects.[156]

For the host country, its energy problem is shifting from power shortages to risking a surplus.[157] Bangladesh's dependence on imports of both equipment and coal makes it sensitive to the growing price of coal on the global market.[158] At the same time, power demand has dropped as Gross Domestic Product (GDP) growth could dive from a pre-COVID forecast of 7.4% to just 2.0%.[159] According to the Institute for Energy Economics and Financial Analysis (IEEFA), power system overcapacity problems and the rising cost of coal have put a significant financial strain on the Bangladesh Power Development Board,[160] prompting Bangladesh to reconsider those coal plants.[161] Turning from coal to other fossil fuels or renewables seems to be an economically rational choice.

On the other hand, the Chinese government also has incentives to withdraw from coal-related sectors. In the search for global leadership of climate governance in the post-Paris era,[162] China must not only reduce its domestic

155 P. Roy, 'Future not Coal Power', The Daily Star (19 November 2020), https://www.thedailystar.net/frontpage/news/future-not-coal-power-1997305 (last visited 05 September 2022).

156 J. Chakma, '$ 3.6b Chinese Loan Uncertain After Dhaka Drops Projects from Agreed List', The Daily Star (04 March 2021), available at https://www.thedailystar.net/business/news/36b-chinese-loan-uncertain-after-dhaka-drops-projects-agreed-list-2054613 (last visited 05 September 2022).

157 Li & Wang, *supra* note 147; M. A. Rahman, 'Pause in Approval to New Power Plants Likely', The Financial Express (5 May 2019), available at https://thefinancialexpress.com.bd/trade/pause-in-approval-to-new-power-plants-likely-1557891145 (last visited 3 July 2021).

158 Baxter, *supra* note 148.

159 *Ibid*.

160 IEEFA, 'Bangladesh's Power System Overcapacity Problem is Getting Worse' (20 January 2021), available at https://ieefa.org/ieefa-bangladeshs-power-system-overcapacity-problem-is-getting-worse/ (last visited 05 September 2022); IEEFA, 'Bangladesh Power Review: Overcapacity, Capacity Payments, Subsidies and Tariffs Are Set to Rise Even Faster' (May 2020), available at https://ieefa.org/wp-content/uploads/2020/05/Bangladesh-Power-Review_May-2020.pdf (last visited 05 September 2022).

161 A. Siddique, 'Finances Force Bangladesh to Reconsider Coal Plants', The Third Pole (19 October 2020), available at https://www.thethirdpole.net/en/energy/lack-of-finance-forces-bangladesh-to-consider-shelving-coal/ (last visited 05 September 2022).

162 'Xi Focus: China Injects Impetus into Global Climate Governance', XinHua News (30 October 2021), available at: http://www.news.cn/english/2021-10/30/c_1310279723.htm (last visited 10 February 2022); G. Chen, 'China' Quest for Global Climate Leadership', East Asian Forum (24 June 2021), available at: https://www.eastasiaforum.

GHG emissions but also limit outsourcing emissions with surplus productivity.[163] In 2021, Chinese President Xi announced before the UN General Assembly that China "… will not build new coal-fired power plants abroad"[164]. Retreating from Bangladesh's coal-power investments reflects the enthusiasm to shift focus from fossil fuels to renewable projects.[165]

Though the rationales behind the cancellation of BRI-related coal-fired plants in terms of realpolitik seem obvious, the role of social activism must not be ignored. There were constant protests against the Banshkhali project that allegedly affects 7,000 households, 70 mosques, 20 shelter houses, several schools, and numerous other public facilities.[166] Local discontent was provoked by land grabbing, a lack of transparency, environmental concerns, and delays in wage payments, and the clashes between the protestors and police forces have caused a dozen deaths.[167] 129 individuals and 74 organizations from 21 countries, including Bangladesh, wrote a letter to Chinese Minister of Commerce calling for the withdrawal of financial and technical support to the project.[168] In the case of the Gazaria plant, due to massive protests in the local communities, Rural Power Company Limited (RPCL), a Bangladeshi state-owned enterprise that was supposed to implement the project, decided to pull out.[169] The RPCL has written several letters to the Power Division proposing the removal of the

org/2021/06/24/chinas-quest-for-global-climate-leadership/ (last visited 05 September 2022).

163 Benabdallah, *supra* note 4, 95.

164 Y. Shi, 'China to Stop Building New Coal Power Projects Overseas', China Dialogue (22 September 2021), available at: https://chinadialogue.net/en/energy/china-to-stop-building-new-coal-power-projects-overseas/ (last visited 05 September 2022).

165 J. Han & C. N. Wang, 'China's Coal Investments Phase-out in BRI Countries-Bangladesh Case', Green Belt and Road Initiative Center (27 April 2021), available at https://green-bri.org/chinas-coal-investments-phase-out-in-bri-countries-bangladesh-case/ (last visited 05 September 2022); 'Bangladesh Looks to Beijing to Speed its Solar Ambition', PV-Magazine (9 June 2020), available at https://www.pv-magazine.com/2020/06/09/bangladesh-looks-to-beijing-to-speed-its-solar-ambition/ (last visited 05 September 2022).

166 Roy, 'Future not Coal Power', *supra* note 155.

167 *Ibid*.

168 '129 Individuals, 74 Orgs Demand Stop to Banshkhali Coal Power Plant Project', The Daily Star (22 June 2021), available at https://www.thedailystar.net/environment/news/129-individuals-74-orgs-demand-stop-banshkhali-coal-power-plant-project-2116033 (last visited 05 September 2022).

169 M. M. Rahaman. 'Chinese Loans: Govt to Drop Coal Plant Project', The Financial Express (22 March 2020), available at https://thefinancialexpress.com.bd/trade/chinese-loans-govt-to-drop-coal-plant-project-1584684501 (last visited 05 September 2022).

Gazaria project from the Chinese MoU.[170] In addition, some non-government organizations have also made suggestions to aid in the government's decision. Groups such as Transparency International Bangladesh and Waterkeepers Bangladesh are pushing for an alternative power sector development path that would radically expand renewables.[171] Such situations, in which the interests of host and invest countries, multinational business ambitions, and local aspirations are intertwined, are not unique in the BRI. As such, the BRI can no longer be considered a top-down monolithic strategy, but rather one that is co-shaped by actors in different positions.

III. Civil Society Against Deforestation

Grassroots protests can play a vital role in forcing foreign investors to act in accordance with international law and to be held responsible for the damage caused by illegal projects. One of the recent eye-catching examples concerns the Atewa Forest case in Ghana. In early 2017, Ghana signed a MoU with China, under which China would finance $2 billion US to help Ghana establish new infrastructure such as roads and hospitals.[172] In exchange, Ghana would repay the loans with bauxite, a sedimentary rock that contains aluminum and gallium.[173] The Ghanaian government claimed that local society would benefit from this deal. However, the execution of this deal had significant environmental and social impacts in some locations, including Atewa, which is not only earmarked as one of the main sources of bauxite but also contains three-quarters of all remaining upland rainforest in Ghana and serves as a vital water source for millions of Ghanaians.[174] Mining in Atewa would destroy habitat for numerous species of endangered mammals, as well as threaten the livelihoods of local communities that rely on cultivating cocoa, cassava, and plantain.[175]

The mining project has raised discontent among local residents. They have argued that deforestation will set off a chain reaction of negative consequences,

170 *Ibid.*

171 Baxter, *supra* note 148.

172 N. Gbadamosi, 'Ghana High Court Considers NGO Case Against Bauxite Mine', China Dialogue (21 October 2020), available at https://chinadialogue.net/en/nature/ghana-high-court-considers-ngo-case-against-bauxite-mine/ (last visited 05 September 2022).

173 *Ibid.*

174 Rainforest Trust, 'New Protection for West Africa's Imperiled Wildlife', available at https://www.rainforesttrust.org/urgent-projects/new-protection-for-west-africas-imperiled-wildlife/ (last visited 05 September 2022).

175 Gbadamosi, *supra* note 172.

such as a loss of biodiversity, loss of access to clean water, and the loss of climate amelioration services for the area, and their cause has attracted national and international attention.[176] Over the course of three years, local residents, along with civil society organizations typified by A Rocha Ghana, have taken a series of measures to persuade governments against the scheme. This has included marches, billboards, and an online petition with over 30,000 signatures.[177] A Rocha Ghana even filed a motion with the International Union for Conservation of Nature (IUCN) World Congress to stop all mining exploration inside the forest range,[178] which gained support from the IUCN in its resolution.[179]

The filing of a lawsuit brought their movement to a climax. In 2020, A Rocha Ghana, together with six other civil society organizations and four private citizens, filed a suit against the Attorney General at the Ghana High Court, claiming that bauxite mining in the Atewa Forest violates the right to life and dignity enshrined in Ghana's Constitution, as well as the right to a clean and healthy environment.[180]

As the case is pending, the people of Atewa have reason to believe that they can turn the achieve remedies through the lawsuit. Alongside the abovementioned Lamu case, the plaintiffs can also be inspired by the victory from the Rio Blanco case in Ecuador. On August 3, 2018, the Ecuadorian court ordered the suspension of all mining activities by a Chinese corporation in the highlands of Rio Blanco;[181] this ended a decade-long struggle between Ecuador's indigenous communities and foreign investors. It was the first time in Ecuadorean

176 M. Sullemana, 'Ghana: Dismiss Atewa Forest Case Against Govt … A-G to High Court', AllAfrica (22 September 2020), available at https://allafrica.com/stories/202009230228.html (last visited 05 September 2022).

177 K. G. Asiedu, 'Ghanaian Activists Sue Government to Save Forest from Mine', Reuters (9 July 2020), available at https://www.reuters.com/article/us-ghana-mining-environment-trfn-idUSKBN24930W (last visited 05 September 2022).

178 'IUCN Members Pass Resolution Calling for Global Action to Save Atewa Forest in Ghana' (2020), available at https://www.iucn.nl/en/news/iucn-members-pass-resolution-calling-for-global-action-to-save-atewa-forest-in-ghana/ (last visited 05 September 2022).

179 IUCN, Urgent Measures to Safeguard the Globally Important Atewa Forest, WCC-2020-Res-087-EN, 2020.

180 A Rocha Ghana, 'Gov't of Ghana Taken to Court Over Atewa' (3 July 2020), available at https://ghana.arocha.org/news/govt-of-ghana-taken-to-court-over-atewa/ (last visited 05 September 2022).

181 M. Picq, 'When the Impossible Happens: Historic Sentence Upholds Prior Consultation in Ecuador's Rio Blanco Case' (2018), available at https://intercontinentalcry.org/historic-sentence-upholds-prior-consultation-in-ecuadors-rio-blanco-case/ (last visited 05 September 2022) [When the Impossible Happens].

history that the court upheld the indigenous right to prior consultation since Ecuador ratified the *International Labor Organization (ILO) convention 169* in 1989 and the *UN Declaration on the Rights of Indigenous Peoples* in 2007.[182] With death threats to nature defenders, $18 million US in bribes to community leaders, and pressure from the central government,[183] the triumph in stopping this operational gold mine (which was expected to generate $336 million US in tax revenues[184] for the government) did not come lightly. The battle with both government and transnational corporation was backed by a collective effort, as indigenous communities and related organizations across Ecuador supported the struggle.[185] Six *Amicus Curiae* from universities, scholars, and activists offered legal aid before the court.[186] Local media, such as el Mercurio, Ondas Azuayas, and Vz del Tomebamba, broadcast information about legal rights and potential environmental impacts relevant to the case for months, and they also made great contributions to amplify indigenous voices.[187] Resistance from multiple actors is not an obstacle to the BRI but a hope to make it more sustainable. The BRI, as a dynamic framework, embraces and even welcomes such opposition.

E. Conclusion

To describe the BRI as a project of the Global South is not to say that it is intended to or will necessarily bring prosperity to the underdeveloped countries. On the contrary, there is a risk of duplicating the current hegemonic, neoliberal, and unsustainable world order. The indeterminate nature of the BRI as a dynamic field that allows for the experimentation and emergence of an approach of the Global South to international law must be recognized. As with previous projects of the Global South, the BRI commits only to abstract ideological principles, lacks a centralized coordination mechanism, and is flexible. Unlike previous projects, the BRI is materialized through numerous projects that actually

182 M. Picq, 'Can the Law Prevail Over Chinese Investments in Ecuador?' (2018), available at https://intercontinentalcry.org/can-the-law-prevail-over-chinese-investments-in-ecuador/ (last visited 05 September 2022).

183 *Ibid.*

184 Picq, 'When the Impossible Happens', *supra* note 181.

185 N. Hui, 'How Local Communities Halted a Chinese-owned Gold Mine in Ecuador', China Dialogue (5 July 2019), available at https://chinadialogue.net/en/business/11358-how-locals-halted-a-chinese-owned-gold-mine-in-ecuador/ (last visited 05 September 2022).

186 Picq, 'When the Impossible Happens', *supra* note 181.

187 *Ibid.*

affect the living conditions of citizens of the host States, employees of Chinese enterprises, and the natural environment. While it is almost impossible to reject the principles or spirit of the decolonization cause of past agendas, contesting the potential outcomes of the concrete projects related to the BRI is relatively straightforward.

Struggles in the name of social and environmental sustainability in Kenya, Pakistan, Ecuador, and Ghana are not isolated. Investments and projects related to the BRI are also contested elsewhere, including notably in Kazakhstan, where this notion was first made known. Since the development projects usually comprise large scale infrastructure, energy facilities, and factory construction, as well as mining, they involve the almost necessary transformation of landscape and human mobility. It is difficult to think of any such project that does not provoke opposition. Each individual project of the BRI is a field of contests, where the words "community of shared destiny" and the ambition for economic growth of the national government confronts the determination of local communities to preserve their livelihood and environment. On each occasion, actors determine and adjust their actions and strategies according to their needs and interests, temporary domestic and international circumstances, and their economic and political powers. On each occasion, abstract political commitments are translated through these interactions into legal rights and duties and, eventually, into concrete and material objects—dams, power plants, factories, forests vanished or preserved, and landscape transformed or protected. On each occasion, battles are lost and won. The arrangements may serve the interests of the local communities or those of the foreign investors, and the resolution of such contests may be sustainable or not. However, the outcome is never predetermined, and nothing is more misleading than thinking of the BRI as a grand design that can be imposed by China alone, regardless of local realities.

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An Unlikely Duo? Regionalism and *Jus Cogens* in International Law*

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A. Introduction

Recent years have witnessed a renewed interest in peremptory norms of international law (*jus cogens*) in the international legal discourse. The ongoing works of the International Law Commission (ILC or Commission) on the topic[1], also prompted by the increasing relevance such norms have gained in the case law of national and international courts, is refreshing the long-standing debate about the scope, nature and content of peremptory norms[2]. Against this background, less attention is being paid to the possible relations between *jus cogens* and regionalism, as well as to the legal and political implications such relations may have in the international realm.

There is no doubt that, at least at first sight, the juxtaposition of the two idea(l)s of regionalism and peremptoriness appear as counter-intuitive in international law. If one moves from the definition of peremptory norms included in Article 53 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT), referring to a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted", there seems to be little room for any regional perspective in this context. The universalistic stance underlying the idea of *jus cogens* has long influenced judicial and scholarly elaborations. It is not entirely clear, however, whether and why speaking of "regional *jus cogens*" today is controversial in States and ILC's perspectives, as well as whether "regional approaches to *jus cogens*" play some role in defining the relations between peremptoriness and regionalism in international law. These concepts – regional *jus cogens* and regional approaches to *jus cogens* – express two different ways of assessing the relations between regionalism and peremptoriness. Regional *jus cogens* refers to the possibility of peremptory norms having a regional character, thus lacking the universal scope that commonly attaches to the notion of *jus cogens*. Regional approaches to *jus cogens*, on the

1 International Law Commission Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) (With Commentaries), *Report of the International Law Commission*, Seventy-First Session, General Assembly Official Records, Supp No 10 (A/74/10), Chapter iv, para. 57. See D. Tladi, 'The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*): Making Wine From Water or More Water Than Wine', 89 *Nordic Journal of International Law* (2020) 2, 244.

2 See among others K. Gastorn, 'Defining the Imprecise Contours of *Jus Cogens* in International Law', 16 *Chinese Journal of International Law* (2017) 4, 643-62; U. Linderfalk, '*Understanding Jus Cogens in International Law and International Legal Discourse*' (2020); E. de Wet, '*Entrenching International Values Through Positive Law: The (Limited) Effect of Peremptory Norms'*, KFG Working Paper No. 25, (2019).

other hand, refer to the attitude taken by regional actors, and particularly by regional international courts such as the European Court of Human Rights (ECtHR) or the Inter-American Court of Human Rights (IACtHR), as to the identification of *jus cogens* norms as traditionally conceived.

This paper looks at these two regional perspectives of *jus cogens* with a view to discuss how the relations between peremptoriness and regionalism are perceived in the current debate pertaining to *jus cogens*. While these two perspectives express different ways of considering the relations between regionalism and peremptoriness, this paper shows that they are somehow interconnected: regional *jus cogens* may indeed represent a useful tool to capture and give meaning to certain regional (and controversial) approaches to *jus cogens*.

This paper is organized into two parts. In the first part, the paper takes stock of the recent position adopted by States and the ILC on regional *jus cogens*. As with many other issues about the legal nature of *jus cogens* and its core elements, there is no generally accepted view on the admissibility of regional *jus cogens*. A rather firm stance has however been recently taken by the Special Rapporteur of the ILC on the subject of *jus cogens*. Besides concluding that the notion of regional *jus cogens* does not find support in the practice of States, the Special Rapporteur has identified several conceptual and practical difficulties with the concept. This stance followed the even more radical positions taken by States on the matter. This paper appraises in particular the alleged reasons why regional *jus cogens* is met with skepticism. It does not aim to demonstrate that, contrary to the ILC's position, there is room, in theory and practice, for regional *jus cogens*. The question remains open to debate and its understanding is subject to the "pervasive influence" of legal positivism and legal idealism approaches to the issue[3]. Rather, this paper claims that the debate on regional *jus cogens* displays approaches that say something as to the ways regionalism is currently perceived in international law.

In the second part, this paper explores the second regional perspective of *jus cogens* – that of regional approaches to *jus cogens* – taking as a case study the judicial practice of the IACtHR. Over the years, the Court has shown particular activism in dealing with the question of *jus cogens*. The way the IACtHR approaches the topic is illustrative especially because it depicts a tension between the universalism that traditionally lies behind the idea of *jus cogens* and a latent regionalism that also emerges from that body of judicial practice. The main

[3] U. Linderfalk, 'Understanding the *Jus Cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism', in M. den Heijer & H. van der Wilt (eds), 46 *Netherlands Yearbook of International Law* (2015), 51.

argument here is not to demonstrate that that Court is, as a matter of fact, identifying and applying regional *jus cogens*. On the contrary, the aim is to demonstrate that the Court is developing a practice that is difficult to square with the idea of universalism underlying the traditional conception of *jus cogens*. Resorting to the notion of regional *jus cogens*, it is submitted, may ultimately help in understanding and conceptualizing this controversial practice.

B. Regional *Jus Cogens* and Its Discontents

I. The ILC...

The first regional perspective pertains to the idea of regional *jus cogens*. It is worth recalling that such an idea has been advanced and discussed by many scholars over the years. It is sufficient to recall here that, according to Gaja,

> "[n]o convincing reason has ever been given for ruling out the possibility of the existence of non-universal, or 'regional' peremptory norms. Values prevailing in regional groups do not necessarily conflict with values operating in a larger framework. There may be norms which acquire a peremptory character only in a regional context. [...] the Vienna Convention appears to use an unjustifiably restricted concept of peremptory norm".[4]

While admitting the theoretical possibility of regional *jus cogens*, several scholars have also attempted to substantiate the concept. Reference has been made, for instance, to a "European system of peremptory human rights"[5] a

4 G. Gaja, 'Jus Cogens Beyond the Vienna Convention', 172 *Collected Courses of the Hague Academy of International Law* (1981), 284. See also R. Hasmath, *The Utility of Regional Peremptory Norms in International Affairs*, paper presented at the American Political Science Association Annual Meeting (New Orleans, United States), 30 August-2 September 2012 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366803 (last visited 21 September 2022); and more recently P. Fois, 'Sui Caratteri Dello Jus Cogens Regionale nel Diritto Dell'Unione Europea', *Rivista di diritto internazionale* 103 (2020) 3, 635; Further references are included in the *Fourth Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur*, UN Doc. A/CN.4/727, paras 21 [*Fourth Report*].

5 A. Pellet, 'Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion Against the Excesses of Fragmentation' in (XVII) *Finnish Yearbook of International Law* (2006), 89.

"European public order"[6], and, in a historical perspective, to "*jus cogens* norms among socialist countries"[7]. Probably the most famous and much-quoted reference to regional *jus cogens* comes from the Inter-American Commission of Human Rights, which in 1987 held that "in the member States of the [Organization of American States] there is recognized a norm of *jus cogens* which prohibits the State execution of children"[8]. Most of these examples of regional *jus cogens* have been dismissed by other authors, and by the same Special Rapporteur at the ILC, as presenting several conceptual difficulties and, most importantly, as not really supported by State practice[9].

As stated above, it is not our intention to engage in the debate whether regional *jus cogens* is theoretically and practically conceivable, least of all whether this or that regional norm has acquired the status of *jus cogens*. The debate is open, and even admitting the logical possibility of regional *jus cogens*, one has to acknowledge that the concept remains "largely untested in practice and not in line with the universal aspirations of peremptory norms"[10]. Rather, aside from the absence of practice, our focus is placed on the reasons why there is a general distrust towards the possibility of regional *jus cogens* in the Commission and States' views.

6 R. Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (2015), 97. Reference to the concept of "European public order" can be found in the case law of the European Court of Human Rights; See e.g. *Loizidou v. Turkey (preliminary objections)*, ECtHR Application No. 15318/89, Judgement of 23 March 1995, paras 37, 75, 93.

7 G.I. Tonkin, *Theory of International Law* (1974),158, 444-445; see also Hasmath, *supra* note 4 for other examples.

8 R*oach and Pinkerton v. United States*, IACHR Petition 12-439, No. 3/87.

9 Fourth Report, *supra* note 4, referring to the difficulties of the establishment (or formation) of a regional *jus cogens* (with the problem of the applicability of the persistent objector rule), the question of definition of "region", the question of the link between regional *jus cogens* to an existing regional treaty regime, the exceptional character of *jus cogens,* and the difficulties relating to the consequences of regional *jus cogens*; See more recently R. Santolaria, 'The Treatment of Peremptory Norms of General International Law (*Jus Cogens*) in the Inter-American Human Rights System', in D. Tladi (ed.) *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021), 320, 323, criticizing the idea of an "American *jus cogens*" or "African *jus cogens*".

10 D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (2017), 20. See more recently, on this debate, P. Šturma, 'Is There any Regional Jus Cogens in Europe? The Case of the European Convention of Human Rights', in D. Tladi (ed.) *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021), 302, 318, who concludes that the ECHR as a whole "is not an example of regional *jus cogens*".

It is submitted that such skepticism reflects a combination of two factors: on the one hand, the universal assumptions that generally inspire the Commission's works, which are fostered in our case by the traditional universalistic narrative of peremptory norms; on the other hand, the attitude of States in rejecting this concept. This attitude may be traced back to the uncertainties pertaining to the formation and impact of peremptory norms in general, and regional peremptory norms in particular. Since States are largely the makers of international law, some may actually have genuine legal concerns about an additional legal category that could curtail their normative leeway.

Starting from the attitude that generally emerges from the work of the Commission, it is worth recalling what Crawford summarized when describing the "resolute universalism" of the ILC:

> "the Commission's record reveals not merely an absence of reference to the issues of regionalism but even a deliberate attempt to eschew any such ideas [...] [I]f one could write a history of normative developments at the international level in terms of the tension or dialectic between universalism and regionalism, the point is that a history of the contribution of the Commission to those developments would be one-sided, or even wholly lacking. In conformity with its Statute and mandate, the Commission has worked entirely on the assumption of universalism"[11].

This attitude has been sustained over the years by the Commission and it is evident that it can be found even more so in works relating to a category of norms which, since their first acknowledgments in official codification works, have always been considered as inherently universal by States and by the ILC itself.

Indeed, the idea of universal aspirations and the applicability of peremptory norms is clearly reflected in the works of the ILC on peremptory norms. Draft conclusion 3, adopted on first reading, provides that "Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are *universally applicable*"[12]. In the commentary to

[11] J. Crawford, 'Universalism and Regionalism From the Perspective of the Work of the International Law Commission' in United Nations, *International Law on the Eve of the Twenty-first Century. Views From the International Law Commission* (1997), 113.

[12] Emphasis added.

this conclusion, it is noted that the characteristic of universal applicability of peremptory norms of general international law implies that such norms do not apply on a regional or bilateral basis[13]. Thus, the ILC seems to have closed the doors for the possibility of regional *jus cogens* moving from the idea that *jus cogens* norms are universally applicable by their very nature. This idea denotes a strong attachment to the spirit of Article 53 VCLT and enjoys wide support in practice, even if it is mainly referred to practice pertaining to norms of universal character (such as the prohibition of genocide, or aggression). In other words, the ILC has drawn from such practice an inherent feature of *jus cogens*, which is its universal applicability. In his first report the Special Rapporteur even stated that regional *jus cogens* would be an exception to the "general principle of universal application of *jus cogens* norms"[14].

At the same time, however, there is some ambiguity in the ILC approach to the question of the possibility of regional *jus cogens*. While the passages just mentioned show a somewhat radical position as to the possibility of regional *jus cogens* in international law, other passages suggest a more permissive approach which seems at least to acknowledge the logical possibility of such norms. In the commentary to draft Conclusion 1, dealing with the scope of the work, it is stated that

> "[t]he phrase 'peremptory norms of general international law (*jus cogens*)' also serves to indicate that the topic is concerned only with norms of general international law. *Jus cogens* norms in domestic legal systems, for example, do not form part of the topic. Similarly, norms of a purely bilateral or regional character are *also excluded from the scope of the topic*".[15]

In this case the exclusion from the topic does not seem to completely rule out at least the logical possibility of regional *jus cogens*[16].

13 *Report of the International Law Commission Seventy-First Session*, UN Doc A/74/10, 9 August 2019, 156, para. 15.

14 *First Report on Jus Cogens by Dire Tladi, Special Rapporteur* (2016), UN Doc A/CN.4/693, para. 68.

15 *Report of the International Law Commission Seventy-First Session, supra*, note 13, 148, para. 7 (emphasis added).

16 At the end of the fourth report dealing with the issue, the Special Rapporteur observed that "it can be concluded that the notion of regional jus cogens does not find support in the practice of States. While a draft conclusion explicitly stating that international law does not recognize the notion of regional jus cogens is possible, the Special Rapporteur

It should be noted, in passing, that a similar and more permissive approach – which does not seem to exclude the possibility of regional *jus cogens*, but simply leaves such category out of the scope of the work – can also be found in an earlier work of the ILC. The reference goes to the 2011 *ILC Guide to Practice on Reservation to Treaties*[17], whose Special Rapporteur, Alain Pellet, has supported the idea of regional *jus cogens* in scholarly writings[18]. In the commentary to Article 4.4.3 on the absence of effect of a reservation to a treaty provision which reflects a peremptory norm of general international law[19] the reference to peremptory norms, which, in the ILC's words, "*ex hypothesi* [are] applicable to all States and international organizations", is accompanied by the caveat "subject to the possible existence of regional peremptory norms, which the Commission did not address"[20].

Ultimately it seems that the Commission's "resolute universalism" has been confirmed in recent work on peremptory norms, particularly in light of the influence played by the universalistic stance coming from the VCLT and practice relating to *jus cogens* norms of universal character. Yet, apart from the absence of significant practice, the logical possibility of regional *jus cogens* does not seem to have been completely ruled out by the ILC. It is simply something that goes beyond the assumptions of the ILC.

II. ...and States.

In addition to the Commission's approach, which confirms the universalism underlying its work, it is to be noted that, in its recent work on peremptory norms, the Commission has been faced with the even more resolute position taken by States with respect to the concept of regional *jus cogens*.

is of the view that such a conclusion is not necessary, and an appropriate explanation could be included in the commentary. For this reason, no draft conclusion is proposed in relation to *regional* jus cogens". See *Fourth Report*, supra note 4, para. 47.

17 The provision reads as follows: "1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations. 2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law".

18 Pellet, *supra* note 5, 89.

19 *Yearbook of the International Law Commission* (2011), Vol. II, Part 3, UN Doc A/CN.4/SER.A/2011/Add.1 (Part 3), 294.

20 *Ibid,* p. 294, fn. 2324.

In fact, States' statements reflect a rather radical position as to the impossibility of regional *jus cogens*. For example, according to Greece the idea of regional *jus cogens* "runs contrary to the very notion of *jus cogens*, which was by definition universal". To the United Kingdom the concept of regional *jus cogens* "would undermine the integrity of universally applicable *jus cogens* norms". For South Africa entertaining a concept such as regional *jus cogens* would have "a watering-down effect on the supreme and universal nature of *jus cogens*".[21] In essence, States – virtually all States according to the ILC[22] – have shown skepticism, if not hostility to the concept of regional *jus cogens*. The recognition of such a concept, in States' perception, would be at the detriment to the the integrity of the universal concept of *jus cogens*.

It would be interesting to investigate the reasons behind such hostility by States towards this concept. It is not easy to find the legal and policy reasons underlying such a resolute stance. What States here strongly oppose is the very idea of regional *jus cogens*. From a value-based perspective this may sound strange as there seems to be nothing fundamentally wrong with the possibility that peremptory norms emerge only in regional contexts as aiming at protecting fundamental values in those particular contexts. After all, to recall again Gaja's words "[v]alues prevailing in regional groups do not necessarily conflict with values operating in a larger framework"[23]. More generally, similar to the narrative often employed for regionalism in general, it has been submitted that, even if, contrary to universal *jus cogens*, regional *jus cogens* does not seem to respond to the idea of formal equality among sovereign States, it may nevertheless foster "substantive equality" among States by encouraging what has been defined as a "pluralistic approach marked by diversity and respect for differences"[24].

Why then do States do not appreciate the idea of a regional *jus cogens*? A closer look suggests that in the States' perspectives there may be plausible

21 Fourth Report, *supra* note 16, para. 22.

22 *Report of the International Law Commission Seventy-First Session, supra* note 13, 156, para. 15, fn. 736.

23 Gaja, *supra* note 4, 284.

24 Hasmath, *supra* note 4, 14. As the author notes, "the existence of regional *jus cogens* through the promotion of regional divisions and variations in international law is an affront to our general sensibilities and intuition. Even so, in a contemporary international community whereby nation-States are characterized by unprecedented heterogeneity, norms of regional *jus cogens* are demanded in limited situations; in the hopes of promoting substantive equality and differential treatment, in spite of perpetuating greater sovereign inequality. Denying a regional group of nation-States their collective legal thought – embodied as a regional *jus cogens* only invites the maintenance of privileged perspectives. This should likewise be an affront to our sensibilities and intuition".

reasons to react against the idea of regional *jus cogens*, or at least to leave this idea to scholarly speculations and not to the work of a body such as the ILC. States' disaffection toward the concept of regional *jus cogens* may indeed be explained by the uncertainties relating to the role of consent, and by the process of identifying *jus cogens* norms in general. These kinds of norms are perceived as exceptional and the process for their identification is particularly stringent. That is so because *jus cogens* has the capacity to bind without consent. The persistent objector rule does not apply to peremptory norms of general international law[25]. As has also been acknowledged by the ILC, the rationale for this power of *jus cogens* to bind without consent can be found in the fact that these norms are fundamental to the international community and so are universal in nature[26]. This may seem to be a *petitio principii* but, from the States' perspective, this universal character represents a sort of safety valve – only when universal fundamental values are at stake is there the possibility of *jus cogens*. Otherwise, States seek to retain their freedom to possibly object to custom, whether it is universal or regional. It is therefore understandable that States perceive the idea of regional *jus cogens* as something which could unexpectedly and excessively constrain their sovereign space. If not an expression of universal values, *jus cogens* would escape what States perceive as a guarantee against such a deep constraint on sovereignty. More generally, aside from the capacity of *jus cogens* to bind without consent, the process for its formation remains somewhat mysterious and less subject to States' "control" if compared with the formation of custom[27]. In addition, it is well known that the effects of *jus cogens* may go well beyond the law of treaties, entailing consequences also in terms of State responsibility[28].

A further factor that might have driven States to radically exclude the possibility of regional *jus cogens* relates to the uncertainties as to the "external" normative impact of regional *jus cogens*. It has been stated that "the passage at the regional level can be the entrance door for wider recognition"[29]. Indeed, if one considers the very limited and controversial practice available in the field of regional *jus cogens*, one may notice a tendency towards the universalisation of such norms. This is the case of the already mentioned rule prohibiting juvenile executions which has been declared "universalized" by the same regional system

25 *Report of the International Law Commission Seventy-First Session, supra* note 13, 182.
26 Fourth Report, *supra* note 4, para. 28.
27 B. Simma & P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' in *Australian Year Book of International Law* (1992), 103-106.
28 See generally Costelloe *supra* note 10.
29 Pellet, *supra* note 5, 89.

after some years following the declaration of its status as a regional peremptory norm[30]. The factors behind this alleged expanding force are not clear and it cannot be excluded that States "outside the region" might fear this force that can make them subject to peremptory norms whose origins were extraneous to them.

C. Regional Approaches to *Jus Cogens*

I. The Use of Peremptoriness by the Inter-American Court of Human Rights

The current general distrust towards the possibility of regional *jus cogens* in the ILC and States' views finds resonance in the IACtHR, one of the most active organs in resorting to this category of norms. As the Special Rapporteur recognized

> "[w]hile the Inter-American Court and Commission have been more open to recognizing norms of *jus cogens*, those norms of *jus cogens* have not been characterized as regional *jus cogens*. Thus, the inter-American human rights system does not provide support for the notion of regional *jus cogens*".[31]

However, one might wonder whether the reasons leading the ILC to embrace the "resolute universalism"[32] are the same guiding the American organs or whether the IACtHR has preferred to adhere to the universalistic aspect of peremptoriness due to other reasons of judicial policy.

At the outset, two queries can be raised in relation to the remark of the Special Rapporteur as to the IACtHR. First, while it is true that the system has been open to recognize certain rules as peremptory, one can at least cast doubt whether the *jus cogens* rules identified by the Court are really universally accepted. The Court may well recognize as *jus cogens* a rule – as may be, for instance,

30 See Fourth Report, *supra* note 4, para. 39, quoting *Michael Domingues v. United States*, Petition 12-185, Report No. 62/02, para. 85 ("the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its *Roach and Pinkerton* decision").

31 Fourth Report, *supra* note 4, para. 40.

32 See Crawford, *supra* note 11.

the principle of "indirect non-refoulement"[33] – that is not yet consensus in the international community. It may also be that the Court identifies, interprets and applies a well-established universal *jus cogens* rule, while promoting a different interpretation of that rule. A possible reading of these approaches could be that the Court is in fact dealing with different rules, perhaps regional ones. No guidance on these highly theoretical questions can be found in the ILC's work. The Special Rapporteur seems to avoid these questions either by not examining the practice of the IACtHR or by insisting on the absence of references to regional *jus cogens* by the Court.

Second, is it possible to exclusively rely on the open admission of the (non)existence of regional *jus cogens* rules by a certain group of States or a given judicial organ to determine the existence of these rules? If the final criterion for determining the existence of regional *jus cogens* is the open admission by the Court that the rule it applies has the nature of regional *jus cogens*, the legal category is destined to non-existence. In this fashion, the Special Rapporteur's search for examples of regional practice is destined to come up empty-handed.

The relationship between regionalism[34] and peremptoriness is particularly controversial if seen through the lens of the IACtHR's judicial practice. As we shall see, the Court embraces a resolute universalism, and, for different reasons, it nominates some rules that need to gain particular importance within the system as *jus cogens*. On the other hand, the Special Rapporteur and the ILC are satisfied with the fact that the inter-American system does not create difficulties for the universalistic project on *jus cogens* and holds on to the silence of the Court on regional peremptory rules. However, the ultimate difficulty of reconciling what lies in the middle is something that the ILC project seems only to postpone and we seek to highlight it here: the fragile harmony between peremptoriness, regionalism, and universalism is under tension. The consistency

[33] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion of 19 August 19, IACtHR Series A, No. 21, 88, para. 225; and *The Institution of Asylum, and its Recognition as a Human Right Under the Inter-American System of Protection*, Advisory Opinion of 30 May 2018, IACtHR Series A, No. 25, 58, para. 181.

[34] The question of regionalism in the American continent has regained attention in recent times. See, in this regard, G.R.B. Galindo, 'Direito Internacional Costumeiro Regional (Em Especial no Contexto Americano)' in *Comité Jurídico Interamericano y Departamento de Derecho Internacional de la Secretaría de Asuntos Jurídicos de la Organización de los Estados Americanos*' (2020) 13-27; L.C. Lima, 'Regionalism in the Codification of International Law: the Experience of the Inter-American Juridical Committee' in A. Annoni, S. Forlati & F. Salerno (eds), '*La Codificazione Nell'Ordinamento Internazionale e Dell'Unione Europea*' (2019) 393, 407.

of the universalistic project of the ILC on *jus cogens* rests on the fact that States are not prone to recognize regional *jus cogens*, nor do regional international courts want to make use of it. However, the tension between these three legal concepts has the potential to taint any coherent legal project. Some wrinkles can already be perceived at the IACtHR.

On the one hand, the universalistic approach taken by the ILC associates *jus cogens* norms with rules that necessarily convey the values of the international community as a whole. Any threat to the universality of these values undermines their peremptoriness. Thus, the obvious solution is to rule out any kind of exceptionality (expressed here by regionalism) and emphasize the requirement of the universality of peremptory rules. At the other end of the spectrum, however, there are regional bodies which, for historical arguments, special needs or other reasons, aspire to give certain rules a superior character. Such rules have not yet reached universal recognition, yet the need to give them peremptoriness remains. To summarize, there is demand from regional bodies to use peremptoriness in their practice. Consequently, peremptoriness does not become just a requirement of the universalistic project but a tool for regional aspirations.

Throughout its jurisprudence, the IACtHR has already recognized at least eight different rules as *jus cogens*.[35] However, on rare occasions these recognitions have been accompanied by specific effects. In the case *Aloeboetoe et al. v. Suriname*, the Court considered that a treaty "would today be null and void because it contradicts the norms of jus cogens *superveniens*".[36] This was the only occasion on which the Court drew specific effects in accordance with Article 64 of the VCLT. In most cases, the declaration of the peremptory character of a rule has a purely rhetorical effect, with a view to reinforce the importance of the rule in the specific context in which it is applied. It is used especially to reinforce the duty to respect international obligations when they might conflict with domestic obligations. Put differently, the recourse to the peremptory character of a rule by the IACtHR serves to assert the hierarchically superior character of the rule in relation to the domestic legal orders. For instance, in *Yatama v. Nicaragua*, the IACtHR has observed that

35 See *The Obligations in Matters of Human Rights of a State That Has Denounced The American Convention on Human Rights And The Charter of The Organization of American States*, IACtHR Advisory Opinion of 9 November 2020, Series A, No. 26, 37, para. 106.

36 *Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993, IACtHR Series C, No. 15, 14, para. 57.

> "at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens* […] Consequently, States are obliged not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual."[37]

It is difficult to understand why these obligations are derived from the peremptoriness of the rule rather than from the need to respect international obligations. Examples also abound in the case law of the Court.[38] Thus, the recourse to peremptory rules appears to reiterate the primacy of the inter-American order over national legal orders, offering an additional tool to the first with a view to fostering compliance by the second.

A second particularity of the *jus cogens* rules in the IACtHR's case law pertains to its method of ascertainment. The Court has frequently taken a comprehensive approach with several norms, deducing the peremptory character merely from the same character of other norms, an approach that could be described as a "cascade effect". This exercise has resulted in extending the number of rules having such an effect. This occurred with the declaration of *non-refoulement* and the prohibition of enforced disappearances as rules of *jus cogens*. In essence, the logic of the Court would be that

> "since [non-refoulement] is an obligation derived from the prohibition of torture, the principle of non-refoulement in this

[37] *Yatama v. Nicaragua*, Judgment of June 23, 2005, IACtHR Series C, No. 127, 82, paras 184 and 185. See, in this regard, M. Duarte & F.S. Lima, 'O Princípio da Igualdade e não Discriminação Como Norma Jus Cogens na Corte Interamericana de Direitos Humanos', 8 *Caderno de Relações Internacionais* (2017) 15, 151-180.

[38] See, for instance, R. Abello Galvis, 'La Jurisprudence de la Cour Interaméricaine des Droits de l'Homme et le Jus Cogens (2013-Fevrier 2016)', in J. Crawford *et al.* (eds), *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (2017) 533–543; R. Abello Galvis, 'La Jerarquía Normativa en la Corte Interamericana de Derechos Humanos: Evolución Jurisprudencial del Jus Cogens (1993-2012)', 12 *Revista do Instituto Brasileiro de Direitos Humanos* (2012) 12, 357-375; see also Gastorn, *supra* note 2, 643, 643–662.

area is absolute and also becomes a peremptory norm of customary international law; in other words, of *ius cogens*".[39]

II. The Proneness to Universality of the Inter-American Court of Human Rights

The Inter-American Court uses *jus cogens* rules for specific purposes and is particularly prone to elevating certain rules (or connected rules) to peremptoriness. The Court's particularism seems to depart from what would be a "traditional" approach to *jus cogens*, or at least the general approach adopted by the Special Rapporteur of the ILC which puts emphasis on its universal dimension. This seems to go against the idea that the practice of the IACtHR completely rules out the idea of regional *jus cogens*.

There are at least two reasons of judicial policy that one can sketch to explain why the Inter-American Court is so prone to identify *jus cogens* rules. The first has to do with its mission and the perception of its role as guardian and promoter of human rights in the Americas.[40] Thus, the recognition of a hierarchically superior rule, in the Court's logic, serves to guarantee greater protection for the victims of serious violations of human rights. The second reason why the Inter-American Court makes recourse to the argument of peremptoriness relates to the general resistance to international law and to the Court itself in the Americas. National judges and public agents are not particularly open to outside legal orders and recent literature has pointed to cases of resistance to the Court.[41] Accordingly, the Court reacts by refining the legal discourse and resorting to the peremptoriness of the rule in question. This

39 *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra* note 33, 88, para. 225. As to the enforced disappearances, the reference is *Osorio Rivera and Family Members v. Peru*, Judgment of 26 November 2013, IACtHR, Series C, No. 274, 41, para. 112.

40 There is a rich literature in this regard, but, generally, see L. Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism', *Hors-série Revue Québécoise de Droit International* (2011) 1, 57; L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', 21 *European Journal of International Law* (2010) 3, 585; L. Burgorgue-Larsen, '"Decompartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties', 16 *International Journal of Constitutional Law* (2018) 1, 187.

41 J. Contesse, 'Resisting the Inter-American Human Rights System', 44 *Yale Journal of International Law* (2019) 2, 180; A.V. Huneeus, 'Courts Resisting Courts: Lessons From the Inter-American Court's Struggle to Enforce Human Rights', 44 *Cornell International Law Journal* (2011) 3, 494.

can be verified, by way of illustration, when the Court decided to declare not only that the prohibition of crimes against humanity was a rule of *jus cogens* but also the "associated obligations to prosecute, investigate and punish such crimes".[42] In these cases, and given the earlier resistance of national law due to amnesty laws, the tool that the Court uses to increase enforcement of its decision is to extend the scope of the *jus cogens* rule. In other words, the Court resorts to peremptoriness for the sake of a regional need, which can be described as a factual or legal situation particular to the members of the American Convention that prompts the Court to adopt a specific legal strategy. As shown above, the Court felt the need to "promote" certain categories of rules not universally recognized as *jus cogens* in order to increment their force *vis-à-vis* domestic legal orders. Either to reinforce its role as a protector of human rights, or to increase the respect and effectiveness of its decisions in domestic legal orders, the discursive use of *jus cogens* rules is a reality in the jurisprudence of the Inter-American Court and it is based on a regional dynamic – not a universal one – aimed at increasing the effectiveness of the American Convention.

In a recent pronouncement, the Court found an opportunity to elaborate and clarify some questions about its approach to these rules. In the Advisory Opinion 26 of 2020, requested by Colombia, the Court was called upon to express its view on the obligations of States that withdrew from the American Convention and the OAS Charter. Among the remaining obligations, the Court was stark in pinpointing that "some obligations stipulated by the American Convention coincide with those pertaining to customary norms of international law. The same applies to the general principles of law and to *jus cogens* norms".[43] In an ode to universalism, the Inter-American Court makes a declaration particularly aligned with the views of the Special Rapporteur and the ILC when it declared that

> "*jus cogens* is presented as the legal expression of the international community as a whole, based on universal and superior values, which embodies basic standards that guarantee essential or fundamental human values related to life, human dignity, peace and security".[44]

42 See, for instance Case of *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006, IACtHR Series C, No. 154, 8, para. 40b and *Herzog et al. v. Brazil*, Judgment of 15 March 2018, IACtHR Series C, No. 353.

43 The Obligations in Matters of Human Rights of a State That Has Denounced The American Convention on Human Rights And The Charter of The Organization of American States, *supra* note 35, para. 100.

44 *Ibid.*, *supra* note 35, para. 105.

These two passages seem to reveal a certain ambiguous attitude of the IACtHR. While reaffirming that *jus cogens* rules express values of the general community as a whole, at the end of the day the Court places itself as the guardian of a regional treaty whose obligations "coincide" with the *jus cogens* norms. The Court does not expressly recognize it, but it seems to justify its expansive approach in relation to *jus cogens* precisely because it is the interpreter of the Convention. What is interesting to note, though, is that the Court has the last word in determining which situations might require declaring a certain rule possesses a peremptory character. The Court defines (1) when a rule has reached such character; (2) the specific methods to identify *jus cogens* rules in the Americas (including the abovementioned approach based on "cascade effects") and; (3) defines which situations are particularly important to resort to these norms. Thus, within the system, it is the Court that has the last word on peremptory rules, but it seems convenient for the Court to adhere to a universalistic discourse because it serves to legitimize its exclusive role as identifier and interpreter of *jus cogens* rules.

Another possible explanation for this resolute adherence to universalism by the IACtHR is that, by resorting to universalism, the Court reinforces its own case law on the identification and interpretation of *jus cogens*. By embracing the idea of *jus cogens* as general rules representing universal values, and at the same time being one of the most active identifiers of these rules, the inevitable consequence of the Court's reasoning is to bolster its own previous findings on *jus cogens* – something that it does in the following paragraph of the Opinion.[45] In other words, the Court embraces the idea that certain rules have "universal and superior values" but establishes itself as one of the authentic interpreters of these values. This comes not without difficulties.

III. Difficulties Arising From the Use of *Jus Cogens* by the Inter-American Court of Human Rights.

It is not easy to reconcile the Court's universalist rhetoric on *jus cogens* and its effective practice that emphasizes regional elements or its regional authority. An attempted reconciliation might create at least two problems worth exploring. The first is the potential non-correspondence between the universalist project of *jus cogens* and the IACtHR rulings on *jus cogens*. The second regards the relationship between regional and universal rules of *jus cogens*.

[45] *Ibid*. paras 106-107.

The first problem is particularly well-illustrated in a recent advisory opinion (OC-26/20) of the Inter-American Court. In that instance, the Court offers a list of eight jus cogens rules recognized in its case law.[46] If one compares the list with the non-exhaustive list of peremptory norms of general international law prepared by the Special Rapporteur of the ILC, some issues become evident. The first is that the IACtHR list is significantly more inclusive than the ILC list. This is not surprising, given the aforementioned reasons. Additionally, even when they have similar rules listed, the content of the rules in the IACtHR's list tends to be more expansive, such as the "prohibition of slavery and *any other* similar practice" or the "prohibition of crimes against humanity *and* the associated obligation to prosecute, investigate and punish those crimes". Interestingly, the Special Rapporteur treats as "*jus cogens* candidates"[47] at least two rules that the IACtHR recognizes as *jus cogens* rules: the non-refoulement rule and the prohibition of enforced disappearances. One understands that the ILC's list is exemplificative and that the

> "report (and any possible conclusions and commentaries adopted by the Commission) may serve as impetus for the generation of further evidence of acceptance and recognition by the international community of States as a whole of the peremptory character of additional norms".

However, this statement and the ILC project in general does not address the challenge presented when one of the "candidate rules" has been treated by a regional court within a specific treaty regime as having a peremptory character. State parties to that treaty might have begun treating it accordingly.

46 The Obligations in Matters of Human Rights of a State That Has Denounced The American Convention on Human Rights And The Charter of The Organization of American States, *supra* note 35, para. 106; The Court recognizes the following rules, making references to the judgments and advisory opinions where the recognition occurred; Principle of equality and prohibition of discrimination; Absolute prohibition of all forms of torture, both physical and psychological; Prohibition of cruel, inhuman or degrading treatment or punishment; Prohibition of enforced disappearance of persons; Prohibition of slavery and other similar practices; Principle of non-return (non-refoulement), including non-rejection at borders and indirect refoulement; Prohibition to commit or tolerate serious, massive or systematic human rights violations, including extrajudicial executions, forced disappearances and torture; and Prohibition of crimes against humanity and the associated obligation to prosecute, investigate and punish those crimes.

47 Fourth Report, *supra* note 4, para. 123.

The point here is not to say that these "candidate rules" are necessarily regional *jus cogens* rules or that our effort aims at understanding their real legal status. One could even perceive the difference of opinion between the IACtHR and the ILC as a divergence of opinion between progressives and conservatives as to the universal level, rather than a difference between the universal and the regional level. Notwithstanding, we are merely arguing that the legal category of regional *jus cogens* rules was ruled out of the ILC project too early and could have received more attention from the Commission. Moreover, as a legal category, regional *jus cogens* could at least serve as an accommodating middle-ground which could shelter rules that exhibit some features of *jus cogens* rules but did not yet consolidate as such.

At the end of the day, one is left with the impression that both the ILC and IACtHR are pushing in different directions while both advocating a resolute universalism. The anxieties of States and the ILC about potential fractures in the project by admitting regional *jus cogens* are rather theoretical than practical. However, although one cannot exclude that the recognition of regional *jus cogens* might prove coherent with a universalist project of *jus cogens*, the Inter-American Court does not take this hypothesis into consideration. One possible reason for this fact adheres to the same logic by which the IACtHR resorts to peremptoriness: the rhetoric of universal *jus cogens* resonates better with the domestic audiences with which it needs to develop credibility. Indeed, perhaps the Court would do well to pursue the path of universalism because this could lend greater weight to its decisions in terms of the formation of the universal *jus cogens*. However, this lack of resort to regional *jus cogens* could be perceived as a missed opportunity for the Court, which could have its rules allocated to a more appropriate category than "candidates" to *jus cogens*.

The second issue on which the practice of the IACtHR can offer insights relates to the potential relationship between regional and universal rules of *jus cogens*. One of the resistances in accepting regional peremptory rules is the potential conflict with universal peremptory rules. The question is which should prevail in case of a conflict.[48] For the sake of our purposes in this section, we shall hypothetically assume that the identification of *jus cogens* rules in the OC 26/20 of the IACtHR corresponds to regional *jus cogens*: they correspond to values shared by all State parties to the *American Convention on Human Rights*, they were properly identified by the monitoring judicial organ, and they have particularities that do not correspond to the general recognition required by the ILC Special Rapporteur in the Fourth Report in relation to certain rules. Even

[48] This case is not unknown in the scholarship. See in this regard Gaja, *supra* note 4, 284.

with this assumption, the case law related to these eight rules is revealing. No conflicts appear and the regional particularities seem to detail the rules already existent at the universal level. Put differently, it does not undermine universal peremptory rules; on the contrary, it seems to enrich them. The absence of apparent conflict reveals a crucial logic behind regionalism: the freedom of certain States from different regions to protect specific values and use peremptoriness as an instrument to protect such values. Moreover, the lack of conflict indicates another potential dimension of the legal category of regional *jus cogens*: the fact that it might constitute an intermediate stage for the formation of universal *jus cogens*.[49]

D. Conclusion

The debate on regional peremptory rules shows that the idea of universality is deeply rooted in the very notion of peremptory norms as understood by States and the ILC. In the recent works of the ILC, following the radical position of States in this respect, this idea has been even more accentuated. These works have added to the common view that universality is an inherent feature of *jus cogens*. This suggests that, even assuming its logical possibility, regional *jus cogens* would fall under a normative category that differs from that of peremptory norms of international law and which, in the ILC and States' perspective, should not be taken into account when it comes to assessing the concept of peremptoriness in international law. Therefore, the story so far confirms the impression that, at least in the perception of States and the ILC, regionalism and peremptoriness in international law remain apparently not mutually compatible when it comes to the first regional perspective we have analyzed, which is that of regional *jus cogens*.

On the other hand, the analysis of the second regional perspective of *jus cogens* – that of regional *approaches* to *jus cogens* – calls into question this "principled" incompatibility between peremptoriness and regionalism. It is also true that the inter-American system upholds a universalistic notion of peremptoriness that apparently leaves little room for regional rules. However, the Court's approach to *jus cogens* is essentially prompted by local needs.

The paradox is precisely this: even if regional *jus cogens* may be logically conceivable and potentially useful, the Court seems to have no interest in developing it. As shown, the Court declares the *jus cogens* character of a number of rules but it does so in a specific context and for a specific purpose.

[49] Pellet, *supra* note 5, 89.

Perhaps these two elements (context and purpose) could be better weighed when identifying whether the "universal and superior values" are that of the international community as a whole or of the community of American States.

These two regional perspectives on *jus cogens* ultimately show that, notwithstanding the general distrust of States and the ILC towards the idea of regional *jus cogens*, regional approaches to *jus cogens* may call into question a uniform understanding of these norms and may also pave the way to properly understanding the significance of the idea of regional *jus cogens* in international law.