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Articles

Current Developments in International Law

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The length of contributions is not restricted. However, we recommend a maximum of 15,000 words. Contributors are requested to insert a short abstract to their submission. Contributions should be saved in MS Word (any version through 7.0) format. Authors should be prepared to supply any cited sources upon request. The full Author Style Sheet is available online at http://gojil.uni-goettingen.de/authorguidelines.pdf.

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Editorial

At the end of this decade the General Court of the European Union delivered its judgment Kadi II in which it applied the principles established by the European Court of Justice in its Kadi-judgment. The bottom line: the sanction system still lacks effective judicial protection, the improvements such as establishing a focal point or an ombudsman cannot be regarded providing sufficient legal protection. The General Court is therefore entitled as well as obliged to full judicial review "so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection"[1].

At the end of its judgment the General Court raised an important question: "It might even be asked whether – given that now nearly 10 years have passed since the applicant's funds were originally frozen – it is not now time to call into question the finding of this Court […] according to which the freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof."[2] Nearly 10 years have now passed since the funds of Mr Kadi and others were frozen – one could raise the question whether the Court's statement can be interpreted as a call for a return to normality, to a reassessment of the taken measures. At least, the sanctions as implemented in States have been subjected to judicial review and partly have been challenged successfully. Currently we are witnessing many legal proceedings focusing on legal questions about the terror-lists and its implementation: the Kadi-Litigation before the Courts of the European Union, the pending proceedings in Nada v Switzerland as well as Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada and A, K, M, Q & G v HM Treasury before the

1 *Yassin Abdullah Kadi v. European Commission*, Judgment of 30 September 2010, General Court, Case T‑85/09, para. 127.

2 *Id.*, para. 150.

United Kingdom Supreme Court, just to name a few. The latter one also discussed by Alexander Orakhelashvili in this issue. He analyzes in his article the UK state practice in interpretation of Security Council Resolutions of the last ten years and attempts to determine when and whether unilateral interpretation of Security Council Resolutions takes place. After an introduction on the interpretation of Security Council Resolutions, the author examines a broad range of cases, from the Iraq-intervention over the Presence in Iraq to the recent terror-list proceedings in the UK as well as Resolution 1244 in the Kosovo Advisory Proceedings.

Even 10 years after 9/11 the Law of Self-Defence and in particular its scope remains a disputed question. Taking a look at the definition of the crime of aggression in the Kampala resolution, States decided to define the crime of aggression as a so-called leadership-crime which has to be attributable to a State[3], non-State-actors are not capable of committing a crime of aggression *per definitionem*. Extending the scope of the definition to non-State-actors could have lead to far-reaching consequences for the interpretation of Article 51 of the Charter of the United Nations and for the international community. As Tom Ruys puts it in the most recent book dedicated to this topic "'Armed Attack' and Article 51 of the UN-Charter" "it is difficult to avoid the impression that both State practice and *opinio iuris* have undergone important shifts since 1986, and especially since 2001. At the same time, it appears premature to conclude that this shift in customary practice has crystallized in the unequivocal emergence of a new *ratione personae* threshold, replacing the traditional one. […] State practice since 2001 has been far from coherent."[4] One problem with customary international law is that a new practice is first a violation of the established norm until the practice is no longer be seen as a violation but as the expression of a new legal norm. This transition from illegality to legality is a grey area which stresses the importance of the second element, the *opinio iuris* and implicitly also the significance of the international lawyers interpreting the status of law. This is the starting point of Ulf Linderfalk. He invites us in his essay "The Post-9/11 Discourse Revisited – The Self-Image of the International Legal Scientific Discipline" to a critical examination of the role of the legal scientific discourse with regard to the law of self-defence after 9/11. According to the author the scholarly debate about the scope of Article 51 failed to live up to

[3] Cf. Article 8*bis* para. 1 of the Kampala-Declaration, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited 29 December 2010).

[4] T. Ruys, *'Armed Attack' and Article 51 of the UN-Charter* (2010), 486.

the standards normally applied in serious legal analysis. Mr Linderfalk uses the debate to elaborate on and to deduce from it a description of the international legal scientist as archetype.

This issue covers furthermore a broad range of other topics.

The article of Markus Kaltenborn deals with the legal framework of the European Union's global development partnerships. It discusses legal problems arising in the context of the European Union's development policy and sheds light on its contribution to the international law of development.

Jessica Liang examines the defence of superior orders as one of the most controversial defences to be pleaded under international criminal law and points out how in recent years the resort to superior orders has re-emerged as a complete defence. Criticizing the motives of this development the author claims the manifest illegality doctrine as a "middle-way" to be most workable.

Marie-José Domestici-Met delivers in her second part a description of the origins of the Responsibility to Protect and discusses whether the World Summit Outcome 2005 provides a legal tool to protect a state's population from violations of humanitarian law. She concludes that although the R2P might not have a striking impact on an ongoing conflict it might help to establish a new principle leading to national and international measures before and after a crisis.

With her contribution "The Rise of Self-Determination Versus the Rise of Democracy" Cécile Vandewoude won the annual Student Essay Competition. Ms Vandewoude examines the gap between the idea that the right of self-determination should be lead to the establishment of democratic governments and the state practice. She argues that the right of self-determination should not only be limited by the principle of territorial integrity and by human rights but also by the goal of democratic governance.

It is great to see that the winning contributions of our student essay competitions have been cited so far[5] which encourages us to continue the concept of hosting an annual competition and of accompanying students on the path of

[5] Cf. M. Roscini, 'World Wide Warfare- Jus ad bellum and the Use of Cyber Force', 14 *Max Planck United Nations Yearbook of International Law* (2010), 106; Law Council of Australia, 'A Charter: Protectiong the rights of all Australians- Law Council of Australia's Submission to the National Consultation on Human Rights', available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_ uuid=8A2A9585-1E4F-17FA-D2E6-585D7F729F44&siteName=lca (last visited 22 December 2010).

a (first) scientific publication. More information on the 2011 essay competition will be available at our website www.gojil.eu soon.

This issue's Current Developments in International Law section contains three contributions related to the situation in Kosovo and two more dealing with recent developments in the areas of legal assistance and the United Nation's Millenium Development Goals.

Christopher Borgen evaluates the implications of Kosovo's declaration of independence on the European Union. In "From Kosovo to Catalunya: Separatism and Integration in Europe" Mr Borgen compares the separatism in Kosovo to similar situations in regions of the EU and the increasing role of regions in the EU in general.

Michael Riegner argues that independence and constitution-making under external influence in Kosovo represent two faces of the same internationalized constituent power aspiring for self-determination. According to the author, the International Court of Justice recognized the constitutional law concept of *pouvoir constituant* and discusses its role as well as normative standards applying to it.

Volker Röben critically evaluates the underlying Lotus-recourse of the International Court of Justice: according to the author the rule-centred approach to international law is not without alternatives. More coherence of the law, more predictive power and ultimately greater legal certainty can be expected from a principle-based approach on which he further elaborates.

In "The Millennium Development Goals and Human Rights at 2010 – An Account of the Millennium Summit Outcome" Marie von Engelhardt focuses on the outcome of the United Nations' Millennium Summit of September 2010. She analyses the previous progress made towards the Millennium Development Goals with regard to human rights.

In view of recent events involving Julian Assange the interest in the system of legal assistance in criminal matters increased noticeably. What are the legal bases for legal assistance among European States and between them and third countries? Bilateral agreements between European States, between European States and third countries, between third countries and the European Union as well as obligations deriving from the European Treaties and corresponding secondary acts lead to a complex legal situation. In addition, definitions of crimes differ from country to country.

Peter Rackow and Cornelius Birr illuminate the fundamental principles of legal assistance and underline the importance and problems of the principle of mutual recognition in criminal matters paying also attention to the European Union's role as an entity to commit its individual members to the fulfillment of obligations towards other non-Member States.

We are delighted to present herewith this issue of the GoJIL to our cherished readership and are hoping that it will be a worthwhile read.
Since the release of the last issue in August the Editorial Board expanded its field of activity by organizing and hosting the GoJIL's first international conference on "Resources of Conflicts – Conflicts over Resources" from October 7-9 in Göttingen. It was a remarkable event which was attended by international lawyers from all over the world. It is a pleasure to rebuke to the publication of the papers presented during this distinguished event in the next issue of the GoJIL.

The Editors

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Unilateral Interpretation of Security Council Resolutions: UK Practice

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Abstract

Unilateral interpretation of UN Security Council resolutions takes place where, due to political considerations of the day, one or more States attempt construing the resolution in question as falling short of, or exceeding, the agreement between the Council's Member States that the resolution on its face suggests. Whether unilateral interpretation indeed takes place depends on what the content of the resolution actually is, which question in its turn depends on the use of transparent methods of interpretation applicable to resolutions. After examining the applicability of the 1969 Vienna Convention in this process, the article turns to four instances of unilateral interpretation from the UK practice, and to reactions to the attempts of unilateral interpretation. These four instances demonstrate that the consistent use of interpretation methods, coupled with the reaction by other States to that effect, can help maintaining the adherence to the resolution's meaning. Where the national or international courts are available as forums to challenge unilateral interpretation, they can further enhance the maintenance of proper meaning of these instruments.

A. The Regime of Interpretation of Security Council Resolutions and the Essence of Unilateral Interpretation

In order for the United Nations Security Council to properly implement its primary responsibility to maintain and restore international peace and security, it has to be able to properly communicate to its membership what steps and measures should be taken in the relevant situation to maintain or restore peace and security under Chapters VI and VII of the United Nations Charter. The Council communicates, through its resolutions, its collective intention as to those steps and measures. Clarifying the content and scope of those resolutions through the use of a single and hierarchically arranged set of interpretation rules is necessary if it is going to be ensured that the steps and actions taken on the ground correspond to those articulated in the Council’s collective decision. The hierarchical arrangement of interpretation rules is meant to precisely identify the parameters of the Council’s collective intention, should States have a disagreement as to what precisely the Council has demanded, mandated, authorized or proscribed.

The only written and authoritative set of interpretation rules in the international legal system is provided for under Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. No alternative set of the rules of interpretation formulated by academics, legal advisers or diplomats can have the same authority of law as this codified set of rules. Security Council Resolutions are agreements between Member States of the Council; even though they are adopted as institutional decisions, they are beforehand negotiated and agreed by Member States. Even if they can bind States that have voted against them or are not even members of the Council, they still remain agreements as between States that constitute the majority in the Council specified in Article 27 of the UN Charter. Resolutions should therefore be interpreted as agreements pursuant to Articles 31 and 32 of the Vienna Convention. Although Articles 31 and 32 are not formally designated to apply to Security Council resolutions, their paramount rationale still is to help identifying the meaning of the agreed written word so that then States can place reliance upon them, which need is no less pressing in the case of resolutions that it is in the case of treaties.

Questions regarding the above conclusion will necessarily arise as the International Court of Justice has suggested in the Kosovo Advisory Opinion, in somewhat obscure terms, that

> "While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty."[1]

The Court did not specify what those "other factors" are, and how the drafting process of resolutions is "very different" from that of treaties. In reality, however, both these drafting processes relate to arriving at the agreement between States (whether within an institutional framework or outside it), enshrining that agreement in the written text and enabling the

[1] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, [Kosovo-Opinion] available at http://www.icj-cij.org/docket/files/141/15987.pdf (last visited 5. August 2010) *[Kosovo-Opinion]*, 34, para. 94.

relevant States to place reliance on it whenever their rights and obligations are at stake. It can also be said that the drafting process of a BIT is different, or "very different", from that of the ICCPR; but they are both agreements regardless, and subjected to the same regime of interpretation. In general, it is not uncommon in the Court's jurisprudence to pay a lip-service to the "special" nature of certain "non-treaty" acts, but ultimately interpret them in compliance with the Vienna Convention regime.[2]

The interpretation of resolutions pursuant to Articles 31 and 32 shall thus demonstrate the objectively intelligible content of the resolution in question and of the agreement between States it embodies. Only the factors expressive of that agreement have to be considered, above all the text of the resolution in the light of its object and purpose as could be inferred from the resolution's overall aims and structure. Adopting Articles 31 and 32 of the Vienna Convention as guidance, even if not as a direct authority, requires that the primary importance shall be attached to the ordinary meaning of the text of the relevant resolution in the light of its object and purpose. In the *Kosovo* Advisory Opinion, the International Court applied this method of interpretation to Security Council resolution 1244 (1999)[3]. Through the use of the object and purpose method, the Court concluded that the regime of interim administration of Kosovo was fundamentally interim, but retained its continuous validity until it would be abolished the way it was originally established.

In the final analysis, interpretation of resolutions is always about identifying and evidencing the Council's collective will to the exclusion of unilateral projection – whether by a single State or a group of States – of the parameters and scope of the Council's agreed position. Such use of interpretation methods confirms the limited role of interpretation – it is meant to identify what Member States of the Security Council have agreed upon, as opposed to projecting what would have been reasonable or suitable for them to agree.

2 In *Fisheries Jurisdiction* (Spain/Canada) the International Court has stated that the Optional Clause declarations of the acceptance of the Court's jurisdiction are *sui generis* instruments. However, the actual process of interpretation in this case was conducted in the same way as the faithful application of the 1969 Vienna Convention would require, by reliance on the textual meaning of the Canadian declaration as the crucial factor of the ascertainment of its meaning, *Fisheries Jurisdiction (Spain v. Canada*), Jurisdiction of the Court, Judgment, I. C.J. Reports 1998, 432, especially 457-465, paras 61 to 80.

3 SC Res. 1244, 10 June 1999

The issue of unilateral interpretation relates not to methods of interpretation, that is *how* interpretation should be performed, but *who* should interpret the relevant resolution. Individual States, whether or not they have been part of the drafting process, are obviously not prevented from expressing their views as to the content of the relevant resolution. The standing accorded to individual States reflects the principle that United Nations organs are not the ultimate auto-interpreters of their decisions; individual States must have the faculty to react when a UN organ adopting a decision thereby exceeds its delegated powers; or if a State or an organ implementing that decision construes it to the same effect, or the way that differs from the decision that has been actually adopted, for instance by disrupting the required sequence of interpretation methods that are aimed at clarifying what the Council precisely intended and agreed upon. On the other hand, unilateral interpretation by States becomes a problem when attempting to construe the relevant resolution as approving the outcomes different from those emerging when normal methods of interpretation are used, and the State which advances an interpretation other than those defensible under the normal methods of interpretation can be said to be engaging in unilateral interpretation. Factors that motivate unilateral interpretation prominently include attempts to stay, nominally at least, within the range of the United Nations law. The outcome sought through unilateral interpretation is to project the legal position that either exceeds, or is narrower than, that envisaged under the Council's collective decision.

B. Iraq: Invasion in 2003

The UK argument in favor of the use of force against Iraq in March 2003 centered around the following points: Security Council Resolution 687 (1991)[4] suspended but did not terminate the authority to use force under Security Council Resolution 678 (1990)[5] to liberate Kuwait from Iraq; a material breach of the resolution 687 would revive that authority under resolution 678; resolution 1441 (2002)[6] determined that Iraq was in material breach of resolution 687; the authority to use force thus revived.[7] The

4 SC Res. 687, 3 April 1991.
5 SC Res. 678, 29 November 1990.
6 SC Res. 1441, 8 November 2002.
7 *The Use of Force against Iraq*, The Attorney-General's Opinion, 52 *International & Comparative Law Quarterly* (2003) 3, 811 at 811-812;Attorney General's Advice on

unilateral interpretation thus concerned, as we shall see, all those three resolutions.

Under paragraph 2 in resolution 678, and in response to Iraq's invasion of Kuwait in August 1990, the Security Council authorized member States cooperating with Kuwait "to use all necessary means to uphold and implement resolution 660 (1990)[8] and all subsequent relevant resolutions and to restore international peace and security in the area." It is arguable that the open-ended language in resolution 678, namely the words "to restore international peace and security in the area" could, on their face at least, be interpreted as authorizing the use of force up to the point of removing the Iraqi regime and occupying Iraq for some time, if that would be necessary to restore the peace in the area. However, the problem in this case can be disposed by the contextual reading of resolution 678 which saw the "breach of the peace" in Iraq's invasion of Kuwait – no other event – and thus authorized the Chapter VII force to deal with, and "restore peace and security in the area" after that "breach of the peace". Once this "breach of the peace" would be reversed, peace and security in the area would be restored. There was thus no authority granted beyond the liberation of Kuwait, because no objective of "restoring peace and security in the area" additional to the liberation of Kuwait has ever been formulated by the Council. Projecting the authority to use force against Iraq beyond the limits of the liberation of Kuwait will pose an insoluble question as to precisely how far such broader authorization would go, what instances it would or would not encompass. Reading in such broader authorization would thus fall short of providing any workable guidance on this matter.

The second step of interpretative exercise related to inferring the authority to use force against Iraq from resolution 687 (1991), which argument was based on a false premise that the authorization of the use of force under resolution 678 went beyond the liberation of Kuwait. The FCO Paper on *Legal Basis for the Use of Force* suggested that

> "SCR 687 did not repeal the authorization to use force in paragraph 2 of SCR 678 … The authorization was suspended for so long as Iraq complied with the conditions of the ceasefire. But the authorization

the Iraq War Iraq Resolution 1441, 54 *International & Comparative Law Quarterly* (2005) 3, 767, 769

8 SC Res. 660, 2 August 1990.

> could be revived if the Council determined that Iraq was acting in material breach of the requirements of SCR 687."[9]

That argument then led to a consequent assertion that the determination, under resolution 1441, of Iraq's "material breach" has revived – the non-existent as we saw – authority to use force under resolution 678.

It has to be specified that resolution 687 is clear in acknowledging that the authorization of the use of force under resolution 678 had lapsed as soon as Kuwait got liberated. Despite the semantics, what happened in 1991 as between the Coalition States and Iraq was not really a cease-fire but termination of hostilities, and the end to war. Resolution 686 (1991)[10] spoke in its preamble and paragraph 8 of "the rapid establishment of a definitive end to the hostilities" as an aim. Even if resolution 687 spoke of a cease-fire, this has to be seen as a stage towards "a definitive end to the hostilities" as envisaged earlier, not as a temporary break in hostilities, if the Council's entire position is to be construed consistently. Both preamble and paragraph 6 of resolution 687 manifest the Council's intention to bring "military presence in Iraq to an end as soon as possible consistent with paragraph 8 of resolution 686."

Moreover, quite apart from resolutions 678 and 687, resolution 1441 showed no trace of automatic authorization of force, as has been confirmed in British and American statements.[11] Under paragraphs 1 and 4 the Council stated the essence of the problem, namely that Iraq's failure to cooperate with UN inspectors and the IAEA amounted to a material breach of resolution 687(1991); under paragraphs 11 and 12 the Council expressed its intention to obtain the information regarding Iraq's further non-compliance and non-cooperation, and "consider" the need to ensure Iraq's compliance.

9 *Iraq: Legal Basis for the Use of Force*, 52 *International & Comparative Law Quarterly* (2003) 3, 813; Attorney-General's advice, 54 *International & Comparative Law Quarterly* (2005) 3, 767, 769, para. 7

10 SC Res. 686, 2 March 1991.

11 The British and American statements did not at that stage claim that this resolution contained an express or implied authorization to that effect. In fact, the US Representative in the Council conceded that resolution 1441 contained no hidden triggers and no automaticity regarding the use of force. Security Council 4644th Meeting, SC Press Release SC/7564; Security Council, 4644th meeting, 8 November 2002, S/PV.4644, 3; Letter dated 20 March 2003 from Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2003/351, 21 March 2003.

The legal effect of these paragraphs is straightforward in pointing to the standing of the Council as the sole entity that has to ascertain the facts of Iraq's non-compliance and to consider and decide the steps that should address this problem. As such, paragraphs 1, 4, 11 and 12 entail no other effect, and there has thus been no authorization to use force under that resolution.

C. Iraq: The Post-Invasion Governance Regime and Security Measures

From May 2003 until the end of June 2004, the British and American forces had been the forces of occupation in Iraq. On 28 June 2004 the occupation ended and the interim constitution of Iraq came into effect. Sovereignty was thus transferred to the Iraqi Interim Government. This required establishing the new legal basis for the presence of British and American forces. Thus, the UN Security Council resolution 1546 (2004)[12] proclaimed the end of the occupation regime, established the US-led Multinational force (MNF), and transferred the governmental authority to the Iraqi Government. The resolution also authorized the MNF to use force and intern individuals for maintaining security and stability in Iraq. The powers claimed by British forces in Iraq under that resolution ultimately have risen to the litigation in the *Al-Jedda* case before English courts – Divisional Court, Court of Appeal and House of Lords.

Mr Al-Jedda was detained on 10 October 2004 in Baghdad on the ground that his internment was necessary for imperative security reasons, on the allegation of recruiting terrorists outside Iraq. He was flown from Baghdad to a British detention facility in Basra. No charges have been brought against him and no trial has been held. His detention has been periodically reviewed and prolonged by senior officers in the British army. In June 2005, he began proceedings before English courts to obtain the pronouncement on the legality of his detention. Al-Jedda challenged his detention alleging the violation of the freedom from arbitrary detention under Article 5 of the European Convention on Human Rights, which applies in English legal system through the 1998 Human Rights Act, and of Article 78 of the 1949 IV Geneva Convention, which deals with the right of the occupying power to detain individuals, and the conditions on which such right can be exercised. Following the decisions of the lower courts, the

[12] SC Res. 1546, 8 June 2004.

House of Lords dismissed the appeal of Al-Jedda on the basis of the authorization to intern individuals in Iraq as stipulated in the UN Security Council resolution 1546(2004).[13]

The Divisional Court held that this power of detention and internment was conferred pursuant to Article 78 of the IV Geneva Convention, and the Resolution "provides a clear indication of the intention that the powers previously derived from Article 78 of Geneva IV were to be continued."[14] The court's judgment did not address the question whether the detentions and internments in Iraq were accompanied by the procedure of appeal, as is required under Article 78 of the IV Geneva Convention.[15] The Court stated that "the procedures applied to the claimant's detention do not strictly meet the requirements of Article 78, since the decision-maker was a single individual rather than an administrative board. On the other hand, the non-compliance is in our view more technical than substantial." This "technical" non-compliance with the procedural requirements of Article 78 did not allegedly have the automatic effect of rendering the detention unlawful.[16]

The Court of Appeal's approach is somewhat less straightforward, but it subscribes to the same outcome in relation to the interpretation of Security Council resolutions and their impact on the relevant international law. The Court of Appeal proceeded from the assumption that

> "at the level of international law Article 103 of the UN Charter had the effect that a State's obligations under a Security Council Chapter

[13] *R (on the application of Al-Jedda) (FC) (Appellant)* v *Secretary of State for Defence (Respondent)*, Judgment of 12 December 2007, Appellate Committee, House of Lords [2007] UKHL 58, [Al-Jedda (House of Lords)], para. 44.

[14] *Regina (Al-Jedda) v the Secretary of State for Defence*, Judgment of 12 August 2005, Queens Bench Divisional Court, Case No: CO/3673/2005, paras 87, 92.

[15] Article 78 of the IV Geneva Convention requires, in its relevant parts, that "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power." Geneva Convention relative to the Protection of Civilian Persons in Time of War, 21 October 1950, 75 U.N.T.S., 287, Article 78.

[16] *R (Al-Jedda) v the Secretary of State for Defence*, Judgment of 12 August 2005, Divisional Court, [2005] EWHC 1809 [*Al-Jedda* (Divisional Court)], paras 126, 144.

> VII resolution prevailed over any obligation it might have under any other international agreement, such as the ICCPR or the ECHR, in so far as those obligations were in conflict. If and in so far as UNSCR 1546(2004) obliged member states participating in the MNF to intern people in Iraq for imperative reasons of security in order to fulfil the mandate of the MNF, this obligation prevailed over the "no loss of liberty without due court process" obligations of a human rights convention or covenant."[17]

The Court of Appeal used the Security Council's qualification of Article 78 of the IV Geneva Convention for further inferring from the Council's action the qualification imposed on the freedom from arbitrary detention under Article 9 of the International Covenant on Civil and Political Rights and under Article 5 of the European Convention on Human Rights.[18]

Similar to the outcome in *Al-Jedda I*, in *Al-Jedda II* Arden LJ considered it to be clear from *Al-Jedda I* that the UK had obligations pursuant to Security Council resolutions which overrode UK's other obligations, including those under the IV Geneva Convention.[19] Detention for security reasons was the task MNF was *required* under resolution 1546, which obligation allegedly derived from Article 103 UN Charter.[20] This differs from the House of Lords understanding of resolution 1546 as merely authorizing security detention, for which reason the House of Lords vigorously asserted in *Al-Jedda I* that authorizations under a Security Council resolution produce, via Article 103, effects similar to obligations.

17 *R (Al-Jedda) v the Secretary of State of Defence*, Judgment of 29 March 2006, Court of Appeal, [2006] EWCA Civ 327, para. 63.

18 *Id.*, para. 80.

19 *Hilal Abdul Razzaq Ali Al Jedda v the Secretary of State for Defence*, Judgment of 8 July 2010, Court of Appeal (Civil Division), [2010] EWCA Civ 758, para. 84 [*Al-Jedda II*]; this case concerned Al-Jedda's claims for damages for unlawful imprisonment in Iraq, raised by amendment of his original claims in *Al-Jedda I* regarding the *habeas corpus*.

20 *Al-Jedda II*, *supra* note 12, paras 105 & 108 (further using the wording "entitled and bound"); Arden LJ pointed later on, however, that the actions by British forces had a legal basis in overarching provisions of Article 103 and the IV Geneva Convention, at para. 105. On a general plane, however, Article 103 produces no obligations on its own; it merely requires according the primacy to obligations that the Council has validly created through its resolutions.

It is noteworthy that the Divisional Court and Court of Appeal in *Al-Jedda I* did not address the issue of proper interpretation of resolutions; nor did, on the whole, the House of Lords which essentially upheld the decisions of the two lower courts in this case. Only Baroness Hale of Richmond has emphasized that the House of Lords devoted little attention to the precise scope of the authorization under Resolution 1546, as "there must still be room for argument about what precisely is covered by the resolution and whether it applies on the facts of this case."[21]

In terms of specific action and measures under resolution 1546, the Security Council had

> "*Decide[d]* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities."

Broad as it is, the scope of this provision does not specifically refer to, nor inherently imply, the power of the Multinational Force to intern or detain individuals in violation of the applicable human rights and humanitarian law.

The letter of the US Secretary of State, by reference to which the Resolution 1546 is adopted and the part of which it forms, emphasizes the need for the Multinational Force to be able to intern individuals:

> "Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where

[21] *Al-Jedda* (House of Lords), supra note 6, para. 129.

> this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security."[22]
>
> However, the letter of the Secretary of State proceeds to state that
>
> "the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions."[23]

The exchange of letters thus confirms that the Multinational Force has the power to intern, but at the same time they will be acting in conformity with the Geneva Conventions. Therefore, on its face the Resolution 1546 does not divulge the intention to depart from the applicable international humanitarian law, whose relevance it expressly affirms, nor from human rights law because it does not contain any indication to that effect.[24] Consequently, each and every act of internment must be in accordance with Article 78 of the IV Geneva Convention, and the procedures of review and appeal must be provided for. It has also to be emphasized that the reference to the text of resolution 1546 renders moot any exercise in a "human-rights-friendly" or "harmonious" interpretation of this resolution, because there is simply no need to go that far. The Divisional Court, for instance, has rejected the argument of "harmonious" interpretation,[25] but it also disregarded the textual requirements of the resolution, the same problem to be replicated later in the two judgments of the higher courts. In practice it matters not whether a resolution should be construed in a "harmonious" way with human rights norms; it matters instead whether the text of a resolution shows any authorization to depart from human rights norms – which resolution 1546 does not – there thus being no need for its "harmonious" construction; or if, hypothetically, a resolution were to divulge such authorization to depart from human rights, then the problems would arise with the validity of that provision in the light of the Council's paramount

22 Al-Jedda (House of Lords), supra note 6, para.14.

23 *Id*.

24 The UK is bound by international human rights law, particularly the ECHR, while conducting its operations in Iraq, as was affirmed in another House of Lords judgment, *Al-Skeini and Others v Secretary of State for Defence*, Judgment of 13 June 2007, House of Lords, [2007] UKHL 26, para. 132 (*per* Lord Brown). para. 90 (*per* Baroness Hale), para. 97 (*per* Lord Carswell).

25 *Al-Jedda* (Divisional Court), supra note 9, paras 90-108.

duty to keep within human rights restrictions both as a matter of the principles of the UN Charter and of general international law.

The House of Lords' approach effectively approved a unilateral interpretation of resolution 1546 contrary to that resolution's terms. The outcome thus contemplated is problematic as it projects the Security Council's decision to authorize a practically indefinite detention of individuals contrary both to human rights law and humanitarian law. Placing *Al-Jedda*-type detentions within the Security Council's powers is essentially confirming a rather scary outcome that the Security Council is also authorized to approve indefinite detentions of the kind practiced by the US Government in the Guantanamo Bay.

D. Targeted Sanctions against Terrorism Suspects

Targeted sanctions imposed by the Security Council against the individuals suspected of their involvement with terrorism are aimed not against States as such, but against individuals. Resolution 1267 (1999)[26] initiated this policy of targeted sanctions, manifested in the travel ban and the freezing of funds. Resolution 1373(2001) has introduced a number of general measures to deal with these problems. In the preamble of resolution 1822(2008) the Council articulates the necessity of targeted sanctions against terrorist suspects the way that terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States "to impede, impair, isolate, and incapacitate the terrorist threat." By resolution 1735 (2006)[27], adopted "with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them", the Council decided that all States freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, and ensure that such funds, financial assets or economic resources are not made available to them (paragraph 1(a)).

The interpretation placed on these resolutions by the UK came before English courts. The High Court in England addressed the implementation in the English legal system of paragraph 1(c) of Security Council resolution 1373 (2001)[28] which obliges States to "freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to

[26] SC Res. 1267, 15 October 1999.
[27] SC Res. 1735, 22 December 2006.
[28] SC Res. 1773, 24 August 2007.

commit, terrorist acts or participate in or facilitate the commission of terrorist acts." In view of that, the 2006 Terrorism Order conferred to the Treasury the power to act upon the resolution requirements where they have "reasonable grounds for suspecting that the person *is or may be*" committing the relevant crimes. The High Court rightly pointed out that the threshold set in the Order was very low and could not constitute a necessary means of implementing the resolution. The resolution did not extend to those who were suspected of possible involvement in terrorism, even if the resolution was not actually limited to those who were actually proved to be performing those acts.[29] The High Court also specified that the objective of asset-freezing under resolution 1373 was to ensure that funds were not made available for terrorist purposes; "thus any criminal liability which could fall on those who make any assets available to a designated person should depend on whether it was or ought to have been known to the supplier that the asset in question could result in funds being available for terrorist purposes." That at the very least was an appropriate limitation on criminal liability. The Order did not reflect the resolution's requirements and was thus not a necessary measure to implement the resolution or obligations imposed by the Sanctions Committee.[30]

The Court of Appeal in the same case acknowledged that the reasonable suspicion standard is not warranted under the text of resolution 1373, and insists that the resolution is silent on the standard of proof to be satisfied on the question whether a particular person commits the relevant terrorist act. The State could thus properly conclude that it was expedient to provide for the reasonable suspicion test. However, the use of words "may be" had to be disapproved because the language of resolution 1373 did not authorize inserting these words in the 2006 Order.[31] The reasoning, as well as evidence – or the lack of it – to substantiate this last point in the appeal judgment is essentially the same as the one relating to the use of the reasonable suspicion standard. If the use of words "may be" was not

29 *A, K, M, Q & G* v *HM Treasury*, Judgment of 24 April 2008, High Court of Justice, Queen's Bench Division, Administrative Court, [2008] EWCH 869 (Admin), paras 39-40. The reasonable suspicion approach is also disapproved under Security Council Resolution 1822 (2008) which focuses on "acts of activities indicating" that an individual or entity is associated with Al-Qaida, Usama Bin Laden or the Taliban (paragraph 2).

30 *Id*., para. 46.

31 *A, K, M, Q & G* v *HM Treasury*, Judgment of 30 October 2008, Court of Appeal (Civil Division), [2008] EWCA Civ 1187, paras 39, 42.

warranted by the resolution, nor was that of the reasonable suspicion standard.

The difference in approaches of the two courts may not be that great if the Court of Appeal's rejection of the words "may be" is considered. Any sensible meaning the reasonable suspicion approach could properly have refers, in essence, to whatever the State suspects "may be" the case. Suspicion is a mental process focused on likelihood, potential or possibility, and is thus definitionally different from certainty that falls within the realm of demonstration, knowledge and proof. One could never suspect that something *is* the case but only that something *may be* the case, and one's assertion to be suspecting that something is the case in effect only means that one suspects that something may be the case. From the perspective of an external observer, the expression of a suspicion not substantiated by evidence points, in any case whatsoever, to the likelihood that suspected facts could be true, whether or not the person expressing suspicion insists to be suspecting that this actually is the case. The use, in the 2006 Order, of the words "suspecting that the person is" thus amounts to an oxymoron. The Court of Appeal's rejection of the words "may be" effectively amounts to its rejection of the reasonable suspicion test as a whole, because in practice it will be very difficult to approve this test without also approving its likelihood element.[32] This litigation demonstrates that the choice of words in the 2006 Order has been unfortunate.[33]

The courts' approach to interpreting resolution 1373 is a separate question. While the High Court rightly opposes the adoption of standard of reasonable suspicion, it also acknowledges that the obvious proof standard is not required in Security Council resolutions either. Thus, if the High Court's approach opposing the reasonable suspicion standard is right, it is left profoundly unambiguous what is the standard that actually applies the assets freezing requirement under paragraph 1(c) of resolution 1373 which again, on the High Court's interpretation, supports neither of the two evidentiary standards. Therefore, under the High Court's approach, the British Government effectively auto-interpreted paragraph 1(c) by

[32] Unless, of course, courts were to defer to the self-judging assertion by the Executive that the latter's mere belief and suspicion point to certainty as opposed to likelihood and possibility, without being in any position to verify it.

[33] Even more so in the 2006 Al Qaida Order, Article 4(1) of which enables the taking of the relevant measures if the HM Treasury has "reasonable grounds for suspecting" that the relevant person "is or may be" Usama Bin Laden or a person designated by the Sanctions Committee.

arrogating to itself a greater power over individuals than that paragraph allocated to it.

On its face, paragraph 1(c) is sufficiently clear by referring to individuals who "commit", "attempt to commit" or "facilitate the commission" of terrorist acts, as opposed to those who are suspected or presumed to be doing any of that. The text of the resolution does not mandate any presumptive approach in this regard. It is moreover doubtful whether the Council could validly subscribe to the reasonable suspicion standard. Even as targeted sanctions fall within its powers under Article 41, it is still incompetent to stipulate the reasonable suspicion standard in relation to what effectively amounts to criminal liability and consequently offend against fundamental human rights that possess peremptory status. The Court of Appeal's decision avoids construing paragraph 1(c), implemented through the 2006 Order, as actually entailing that result, in particular through by disapproving the words "may be" which in practice will preclude the application of paragraph 1(c) as if it approved the use of reasonable suspicion standard. But as a matter of principle, the Court of Appeal does not reject the reasonable suspicion standard as such and this approach, it can be concluded, materialized only due to the lack in the appeal judgment of any consistent attempt to properly interpret paragraph 1(c) in accordance with methods that govern interpretation of Security Council resolutions.

The Supreme Court Judgment in this case demonstrates the ways of interpreting Security Council resolutions to prevent a unilateral modification of their meaning by States. Lord Hope held that the words of the Order must be tested against the words used in the resolution. While the Order was meant to enforce the resolution, "but it does not permit interference with the basic rights of the individual any more that is necessary and unavoidable to give effect to the SCR and is consistent with the principle of legality." There was "nothing to indicate that the Security Council has decided that freezing orders should be imposed on a basis of mere suspicion." Resolution 1373 is not phrased in terms of reasonable suspicion. It instead lays "specific factual tests" for association with Al-Qaida and Taliban. By introducing that test to give effect to resolution 1373, the Treasury had acted *ultra vires* of that resolution as given effect in England through the 1946 UN Act.[34]

[34] *HM Treasury* v *Mohammed Jabar Ahmed and others*, Judgment of 27 January 2010, United Kingdom Supreme Court, [2010] UKSC 2, paras 47, 58-61, 139, 142 (*per* Lord Hope), also referring to Guidelines of the 1267 Committee, section 6(d), which specified the required type of evidence that justified listing and was qualitatively

This expansive interpretation also has an impact on the proportionality of actions claimed to be taken pursuant to resolutions 1373. As Lord Hope specified,

> "The Resolution nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures. Even if the test were that of reasonable suspicion, the result would almost inevitably be that some who were subjected to freezing orders were not guilty of the offences of which they were reasonably suspected. The consequences of a freezing order, not merely on the enjoyment of property, but upon the enjoyment of private and family life are dire. If imposed on reasonable suspicion they can last indefinitely, without the question of whether or not the suspicion is well-founded ever being subject to judicial determination."[35]

Similarly, Lord Mance observed in this context that "A measure [under the 2006 Order] cannot be regarded as effectively applying that core prohibition [under resolution 1373], if it substitutes another, essentially different prohibition freezing the assets of a different and much wider group of persons on an indefinite basis."[36]

All this demonstrates that the principles of interpretation of Security Council resolutions have been applied by the Supreme Court, above all the principle of ordinary meaning. This has enabled the Court to identify the meaning and reach of measures prescribed in resolution 1373, distinguish them from those projected under the unilateral interpretation made by the Executive, establish that this unilateral interpretation entails consequences disproportionate in relation to the objectives set by the Security Council, and enforce the legal consequences of all that within the English legal system.

different from mere suspicion, *id*., para. 140; *id*., paras 199-200 (*per* Lord Brown), paras 225-226 (*per* Lord Mance).

35 *Id*., para. 137.

36 *Id*., para. 230.

E. Resolution 1244 (1999) and the Provisional Governance of Kosovo

As is well-known, the Security Council intervened with the situation in Kosovo after the NATO-led war against FRY in 1999, and established its transitional administration regime in Kosovo through resolution 1244(1999). This resolution established the UN Mission in Kosovo (UNMIK) to administer the territory on an interim basis, and as a background it also recognized that FRY's territorial integrity was not going to be disrupted. Independence for Kosovo was not envisaged.

On 17 February 2008, the Kosovo assembly issued a Unilateral Declaration of Independence (UDI), after which Kosovo received recognition from several dozens of States. Whether this process is compatible with resolution 1244 depends on the proper interpretation of this instrument. Both before and after the UDI, including the pleadings before the International Court regarding this issue, interpretation States placed on resolution 1244 were not uniform. States supporting the Kosovo independence argued that resolution 1244 did not preclude the UDI, while States opposed to independence argue that it did prohibit any unilateral and non-consensual solution of the Kosovo issue, such as UDI.

When the matter came before the International Court, these competing claims had to be assessed in terms of the regime governing the interpretation of Security Council resolutions. Principal questions were, quite simply, whether resolution 1244 is time-limited, whether it allows a unilateral exit from its interim arrangements capped by UNMIK, and whether the Kosovo UDI is thus compatible with this resolution. A number of States, including the UK, argued that resolution 1244 did allow for an ultimate UDI even in the absence of a consensual solution.

The background of this problem illuminates that right up to the events in the eve of the Kosovo UDI, there was a virtual agreement in the international society that unilateral exit from 1244 arrangements would be impermissible. States that subsequently recognized Kosovo have confirmed the impermissibility of a UDI both by voting for resolution 1244 and by supporting the Contact Group statements on Kosovo.[37] Even in the Ahtisaari

[37] See statements reproduced in the Declaration by Vice-President Tomka in the *Kosovo* case, *Kosovo-Opinion*, *supra* note 1, Declaration of Judge Tomka, 7, para. 27, available at http://www.icj-cij.org/docket/files/141/15989.pdf (last visited 20 December 2010).

plan, the "supervised independence" for Kosovo was proposed to be effected through the revision of 1244 arrangements. There was thus a clear agreement on this point.[38]

A subsequent revision of position by pro-UDI States took place around the period when the UDI was proclaimed, from 2007 onwards, and this got reflected in the pleadings submitted to the International Court when it was discussing the legality of that UDI. The UK position before the Court was, by reference to the UN Secretary-General's view, that "The situation established under Resolution 1244(1999) was, however, unsustainable in the long term," among others because UNMIK was expensive to maintain.[39] Furthermore, "[t]he purpose of setting up local provisional institutions was to transfer authority from the international civil presence over time, until all authority was vested in local institutions, whose character at that point would – unless otherwise agreed – no longer be provisional."[40] But this left the question open as to whether resolution 1244 justifies such transfer of authorities without the Council's collective decision, and thus a unilateral exit from 1244 arrangements. And here it has to be faced that, as a matter of interpretation of resolution 1244, even if UNMIK and KFOR are regarded as *interim* arrangements – which has to be the case unless the Council were to decide to permanently detach Kosovo from Serbia – their mandate is not *time-limited*. The interim nature of 1244 arrangements means that they will be terminated at some point in the future when the Council comes to an agreement on this point, to the exclusion of any option of unilateral exit. This position – the absence of a fixed time-limit on the validity of 1244 arrangements – was regarded as vital back in 1999 when resolution 1244 was adopted, in order not to enable non-NATO States to block the extension of the KFOR and UNMIK mandates. It is rather inconsistent to argue that the option of unilateral exit is available now, much as there has been no agreement to amend resolution 1244.

38 *Letter Dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council*, S/2007/168, 26 March 2007.

39 UK Written Submission, 17 April 2009, 111, para. 6.28, available at http://www.icj-cij.org/docket/files/141/15638.pdf (last visited 20 December 2010.

40 *Id*., 111, para. 6.29, also referring to the periodic review requirements, para. 6.30, which however do nothing to reverse the requirement that the actual continuation of 1244 arrangements depends on the collective decision of the Security Council. Even if UNMIK faced difficulties in administering the entire territory of Kosovo (see para. 6.47), it still does not follow that its mandate or any other aspect of 1244 arrangements could be modified unilaterally, that is without the Council's collective decision.

The International Court's own position has been that 1244 arrangements, including the UNMIK supervision of the Kosovo authorities, continues on the terms it has been originally arranged back in 1999.[41] The Court regarded neither material difficulties nor position of pro-UDI States as factors that could adversely impact that position. Much as the Court chose to address the problem on narrow grounds, it nevertheless precluded the validity of such unilateral interpretation of resolution 1244, thus reaffirming that the interim 1244 arrangements continue in force regardless of interpretations unilaterally placed upon that resolution.

F. Conclusion

Resorting to unilateral interpretation is principally motivated by political considerations of the day. It is noteworthy that while, in relation to the invasion of Iraq, resolution 678 was considered to produce the authorizing effect far beyond its proper temporal scope of authorization, in relation to Kosovo the provisional regime of governance under resolution 1244 was argued to have before the decision of the Council to abolish it. In this latter case too, the unilateral interpretation had challenged not just a specific aspect of resolution 1244, but the entire rationale and essence of interim 1244 arrangements.

In procedural terms, options of responding to unilateral interpretation may be limited, and various systemic models can emerge depending on the availability of the fora where unilateral interpretations could be challenged. The Iraq invasion in 2003 was performed pursuant to the unilateral interpretation of resolutions 678, 687 and 1441. There was no court to exercise jurisdiction and verify the interpretation placed upon these resolutions. In relation to the detention of Al-Jedda, the House of Lords did not address the interpretation of Security Council resolutions, but have plainly confirmed the outcome that the Executive inferred on that basis of their unilateral interpretation of resolution 1546. In relation to targeted sanctions against suspected terrorists the UK judiciary was, to the contrary, quite strict in censuring the Executive's exercise in unilateral interpretation of resolution 1373. Finally, the unilateral interpretation of resolution 1244 on Kosovo was disapproved by the International Court in its Advisory Opinion in relation to the Kosovo UDI.

41 Kosovo-Opinion, *supra* note 1, 33-34, paras 91-93.

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The Legal Significance of Global Development Partnerships: European Development Cooperation and its Contribution to the International Law of Development

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Abstract

The global development partnerships of the European Union are embedded in a legal context which provides several constraints for stakeholders in Brussels. This legal framework consists both of the rules and principles of public international law and of the 'supranational' law of the European Union. After a short survey of the activities of the European Union referring to North-South relations, some of the prevailing legal problems of the Union's development policy as well as its contribution to the international law of development are discussed in this Article.

A. Introduction

In September 2000, the United Nations held its Millennium Summit in New York to adopt the United Nations Millennium Declaration.[1] Seven so-called 'Millennium Development Goals' (MDGs) were set out as a series of time-bound targets to be implemented by the global community by the year 2015. One year later – initiated by the developing countries – a further Goal, MDG 8, was added.[2] It aims at setting-up a global partnership for development and is mainly addressed to industrial countries. In particular, its objective is to improve development finance, world trade, debt reduction and transfer of technologies.

The European Union understands its relationship to emerging markets and developing countries as such a 'global partnership'. In a document published by the European Commission in 2002, the European Union, as the world's largest donor in development cooperation and one of the most important trading partners of developing countries, is described as being 'well placed to assume a leading role in the pursuit of global sustainable development'.[3] The document is entitled 'Towards a Global Partnership for

1 GA. Res. 55/2, 18 September 2000.

2 United Nations, Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc A/56/326, 6 September 2001, Annex, 58; see also United Nations, *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals*, MDG Gap Task Force Report 2008 (2008) available at http://www.un.org/millenniumgoals/pdf/MDG%20Gap%20Task%20Force%20Report%202008.pdf (last visited 18 December 2010).

3 Commission Communication of 21 February 2002, COM (2002) 82 final, 6.

Sustainable Development'. In a recent document, giving an account of the actual state of implementation of the MDG, the European Union again characterizes itself as a 'global partner for development.'[4] The term 'partnership' is also frequently used to describe the relations between individual southern countries or regions and the European Union.[5]

This Article introduces the most important elements of this development partnership; it offers insight into some of the legal problems of the partnership[6] and shows its significance to the emerging framework of international development law. Two levels have to be differentiated: at first, European development policy – as with development policy of other

4 Commission Communication of 9 April 2008, COM (2008) 177 final: "The EU – a global partner for development – Speeding up progress towards the Millennium Development Goals".

5 See *e.g.* Commission Communication on a new partnership with South-East Asia, COM (2003) 399 final; Commission Communication of 16 June 2004, An EU-India Strategic Partnership, COM (2004) 430 final; Commission Communication of 8 December 2005, A stronger partnership between the European Union and Latin America, COM (2005) 636 final; Commission Communication of 27 June 2007, From Cairo to Lisbon – The EU-Africa Strategic Partnership, COM (2007) 357 final; see moreover the documents regarding the Euro-Mediterranean Partnership, e.g. Commission Communication of 20 May 2008 on the "Barcelona Process: Union for the Mediterranean", COM (2008) 319 final.

6 For a general analysis of European development policy see E. R. Grilli, *The European Community and the Developing Countries* (1993); O. Babarinde, *The Lomé Convention and Development* (1994); A. Cox, *How European Aid Works. A Comparison of Management Systems and Effectiveness* (1997); C. Cosgrove-Sacks (ed.) *The European Union and Developing Countries: The Challenges of Globalization* (1999); A. Cox *et al.*, *European Development Co-operation and the Poor* (1999); M. Lister (ed.), *New perspectives on European Union development cooperation* (1999); M. Holland, *The European Union and the Third World* (2002); K. Arts & A. K. Dickinson (eds), *EU Development Cooperation: From model to symbol* (2004); F. Granell, *La coopération au développement de la communauté européenne*, 2nd ed. (2005); J. Mayall, 'The Shadow of Empire: The EU and the Former Colonial World', in C. Hill & M. Smith (eds), *International Relations and the European Union* (2005), 292-316; M. Carbone, *The European Union and International Development: the Politics of Foreign Aid* (2007); Y. Bourdet *et al.* (eds), *The European Union and Developing Countries* (2007); A. Mold (ed.), *EU Development Policy in a Changing World* (2007); W. Hout (ed.), *EU Development Policy and Poverty Reduction* (2008); M. van Reisen, *Window of Opportunity. Development Co-operation Policy after the End of the Cold War* (2009); T. Hauschild & K. Schilder, *Wohin Europäische Entwicklungspolitik?* (2009); O. Stokke & P. Hoebink (eds), *Perspectives on European Development Cooperation* (2009).

industrial countries as well – is embedded in a public international law context that includes not only basic rules of international trade law but also international human rights standards and aspects of international environmental law. Apart from that, development policy of the European Union is also confronted with judicial problems where European Union law is concerned, in particular the relevant provisions of the Treaty on the European Union (TEU),[7] the Treaty on the Functioning of the European Union (TFEU)[8] and of secondary legislation. Both public international law and the 'supranational' law of the European Union create the legal framework for global partnerships between Europe and the developing countries. Part II of this Article offers a short survey of the activities of the European Union referring to North-South relations. Part III discusses some of the prevailing legal problems of the Union's development policy as well as its contribution to international development law.

7 Consolidated Version of the Treaty on European Union, OJ 2008 C 115/13 [TEU].

8 After the Treaty of Lisbon (Draft Treaty of Lisbon, OJ 2007 C 306/01), entered into force on 1 December 2009, the former Treaty establishing the European Community (TEC) was renamed to Treaty on the Functioning of the European Union (hereinafter TFEU; for the consolidated version of the TFEU see OJ 2008 C 115/47). For a general survey of the main innovations in the field of the European Union's external relations *see* J. Wouters *et al.*, 'The European Union's External Relations after the Lisbon Treaty', in St. Griller & J. Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (2008), 143-203; C. Vedder, 'Außenbeziehungen und Außenvertretung', in W. Hummer & W. Obwexer (eds), *Der Vertrag von Lissabon* (2009), 267-300; C. Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon* (2009); especially with regard to development policy see E. Koeb, 'A more political EU external action. Implications of the Treaty of Lisbon for the EU's relations with developing countries', 21 *ECDPM-InBrief* (2008), available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/610BD646FDC57122C125748100533C75/$FILE/InBrief%2021_e_Lisbon%20final.pdf (last visited 18 December 2010); B. Martenczuk, 'Die Kooperation der Europäischen Union mit Entwicklungsländern und Drittstaaten und der Vertrag von Lissabon', 43 *Europarecht (*2008) 2, 36; S. Grimm, 'The Reorganisation of EU Foreign Relations: What Role for Development Policies within the European Institutional Setup?', *German Development Institute (DIE)-Briefing Paper No* 11 (2009) available at http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/%28ynDK_contentByKey%29/ANES-7YUHGV/$FILE/BP%2011.2009.pdf (last visited 18 December 2010).

B. Development Policy of the European Union

I. The Partnership between Europe and the ACP-Countries

The notion of partnership is vividly expressed mainly in the relations of the European Union and the so-called ACP-countries. 'ACP' refers to a group of developing countries in the African, Caribbean and Pacific region (with main emphasis on Sub-Saharan African partners[9]). Contractual relations between these countries and the European Union are not based on individual bilateral agreements, but on one multilateral agreement. The partnership has been effective since the 1960s. Over time, the name of the agreement has been changed several times and the number of participating countries has steadily grown. Today, 79 countries are parties to the 'Cotonou-Agreement'[10] which is meant to be in force as a contractual basis

9 South Africa is also member of the ACP group. Nevertheless the economic and financial covenants of the Cotonou-Agreement do not address South Africa. In fact the European Union agreed on a separate economic and cooperation agreement with South Africa in 1999 which entered into force in 2004 (Trade, Development and Cooperation Agreement of 11 October 1999, OJ 1999 L 311/3 [TDCA] and the Additional Protocol of 25 June 2005, OJ 2005 L 68/33); see furthermore Commission Communication of 28 June 2006, COM (2006) 347 final. For details of the relationship between the European Union and South Africa see J. Weusmann, *Die Europäische Union und Südafrika* (2005); G. Olivier, *South Africa and the European Union: Self-interest, Ideology and Altruism* (2006); L. Petersson, 'The EU and South Africa: Trade and Diversification', in Bourdet, *supra* note 6, 97-119; M. Frennhoff Larsén, 'Trade negotiations between the EU and South Africa: a three-level game', 45 *Journal of Common Market Studies* (2007) 4, 857-881.

10 Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317/3 and Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, of 22 December 2005, OJ 2000 L 209/27. See generally O. Babarind & G. Faber (eds), *The European Union and the Developing Countries: the Cotonou Agreement* (2005); D. Dialer, *Die EU-Entwicklungspolitik im Brennpunkt: Eine Analyse der politischen Dimension des Cotonou-Abkommens* (2007); G. Laporte, *The Cotonou Partnership Agreement: What Role in a Changing World?* (2007); A. Flint, *Trade, Poverty and the Environment: the EU, Cotonou and the African-Caribbean-Pacific Bloc* (2008); see also F. Müller, 'Storming, Norming, Performing – Implications of the Financial Crisis in Southern Africa', 2 *Goettingen Journal of International Law* (2010) 1, 167.

for the partnership from 2000 until 2020. The agreement comprises numerous issues of development cooperation: the one hundred articles of the treaty contain, *inter alia*, regulations regarding economic cooperation and cooperation in trade policy (Arts 34 *et seq*.), competition policy (Art. 45), investment promotion (Arts 74 *et seq*.), service transactions (Arts 41 *et seq*.), regional economic integration (Arts 28 *et seq*.) and protection of intellectual property (Art. 46). Provisions concern the protection of human rights, good governance and participation of civil society are included in the Cotonou-Agreement (Arts 2 [2], 9); regulations on a political dialogue between the partners, in particular with regard to conflict prevention and fighting organized crime, can be found in the treaty (Art. 8). However, the central objective of the agreement is to reduce poverty in the ACP countries. Art. 1 (2) of the Cotonou-Agreement claims: 'The partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of ACP countries into the world economy'. At the institutional level, the ACP-EU Council of Ministers, the committee of ambassadors and the so called balanced assembly, consisting of members of parliament both from the EU and the ACP partners, keeps watch over the enforcement of the Cotonou-Agreement (Arts 14 *et seq*.).

II. Relations between the European Union and Latin American, Asian and Mediterranean countries

Primarily for historic reasons, Sub-Saharan Africa forms the focus of European development cooperation, but the European Union also maintains cooperation relationships with other states and groups of states of the so-called 'Third World'. Trade agreements usually are the basis for such cooperation. They often also provide elements of development policy and therefore are called 'cooperation agreements'. Some Latin American states are bound to the European Union by bilateral agreements[11] but there are also

[11] See Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, of 8 December 1997, OJ 2000 L 276/45; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, of 18 November 2002, OJ 2002 L 352/3. Beyond these two association agreements with Chile and Mexico there exists a so-called "strategic partnership" with Brazil; see

contractual relations with regional organizations such as the Andean Community[12] and the Central American Integration System.[13] The European Union moreover has entered into negotiations with the most important regional organization in Latin America, the Mercosur, on setting up a cooperation partnership.[14] In addition to contractual relations there is an intense political dialogue between both continents. As a result of the sixth 'European Union – Latin America and Caribbean Summit' which took place in Madrid in May 2010, the partnership between the continents will focus in the future on strengthening the science, technology and innovation dialogue for achieving sustainable development and social inclusion.[15]

Commission Communication of 30 May 2007, COM (2007) 281 final; see furthermore A. Poletti, 'The EU for Brazil: A Partner Towards a 'Fairer' Globalization?', 12 *European Foreign Affairs Review* (2007) 3, 271-285; R. Leal-Arcas, 'The European Union and the New Leading Powers: Towards Partnership in Strategic Trade Policy Areas', 32 *Fordham International Law Journal* (2009) 2, 353; 382.

12 Framework Agreement on Cooperation between the European Economic Community and the Cartagena Agreement and its member countries, of 28 April 1993, OJ 1998 L 127/11; see furthermore M. Bustamante & R. Giacalone, 'An Assessment of European Union Cooperation towards the Andean Community (1992–2007)', in P De Lombaerde (ed.), *The EU and World Regionalism. The Makability of Regions in the 21st Century* (2009), 149-170.

13 Framework Cooperation Agreement between the European Economic Community and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of 22 February 1993, OJ 1999 L 63/39. In May 2010 the EU and the Central American Integration System signed an association agreement covering trade, political dialogue and cooperation; see http://www.eu2010.es/en/cumbre_ue-alc/noticias/may19centroamerica.html (last visited 18 December 2010).

14 Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part – Joint Declaration on political dialogue between the European Union and Mercosur, of 15 December 1995, OJ 1996 L 69/4; see also European Commission of 2 August 2007 (E/2007/1640). See generally A. G. A. Valladão *et al.* (eds), *EU-Mercosur Relations and the WTO Doha Round Common Sectorial Interests and Conflicts* (2006).

15 Madrid Declaration 'Towards a new stage in the bi-regional partnership: innovation and technology for sustainable development and social inclusion', of 18 May 2010, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/114535.pdf (last visited 18 December 2010); see also Commission Communication of 30 September 2009 COM (2009) 495/3; furthermore Commission Communication of 8 December 2005, *supra* note 5. See generally W. Grabendorff & R. Seidelmann (eds), *Relations between the European Union and Latin America: Biregionalism in a Changing Global System* (2005); C. Freres, 'Challenges of Forging a Partnership Between the European Union and Latin America', in Mold, *supra* note 6, 169-199.

Asian developing countries and emerging markets are also connected to the European Union through several cooperation agreements (*e.g.*, China[16], India[17] and the ASEAN group[18]) and via a regular political dialogue.[19] European heads of state and government, the President of the

16 Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China, of 21 May 1985, OJ 1985 L 250/2; see also Commission Communication of 24 October 2006, COM (2006) 631 final; see furthermore M. Mattlin, 'Thinking Clearly on Political Strategy: The Formulation of a Common EU Policy Toward China', in B. Gaens *et al.* (eds), *The Role of the European Union in Asia: China and India as Strategic Partners*, (2009), 95-120; F. Snyder, *The European Union and China, 1949 – 2008: Basic Documents and Commentary* (2009); Leal-Arcas, *supra* note 11, 396.

17 Cooperation Agreement between the European Community and the Republic of India on partnership and development of 20 December 1993, OJ 1994 L 223/24; see also The EU-India Joint Action Plan (JAP) – Global partners for global challenges, of 29 September 2008, available at http://ec.europa.eu/external_relations/india/sum09_08/joint_ action_plan_2008_en.pdf (last visited 18 December 2010); furthermore S. Chauvin *et al.*, 'EU-India trade and investment relations', in R. K. Jain & H. Elsenhans (eds), *India, the European Union, and the WTO* (2006), 129-165, in R. K. Jain (ed.), *India and the European Union* (2007); S. Baroowa, 'The Emerging Strategic Partnership between India and the EU: A Critical Appraisal', 13 *European Law Journal* (2007) 6, 732-749; S. A. Wülbers (ed.), *EU India Relations: a Critique* (2008); R. K. Jain, 'Engaging the European Superpower: India and the European Union', in Gaens *et al.*, *supra* note 16, 173- 188; S. T. Madsen, 'EU – India Relations: An Expanded Interpretive Framework', *id.*, 77-94; Leal-Arcas, *supra* note 11, 386.

18 Cooperation Agreement between the European Economic Community and the member countries of the Association of South-East Asian Nations, of 7 March 1980, OJ 1980 L 144/2; see furthermore Plan of Action to Implement the Nuremberg Declaration on an EU ASEAN Enhanced Partnership, of 22 November 2007, available at http://ec.europa.eu/external_relations/asean/docs/action_plan07.pdf (last visited 18 December 2010); for details of the projected Free Trade Agreement see B. Andreosso-O'Callaghan & F. Nicolas, 'What Scope for an EU-ASEAN Free Trade Agreement?', 42 *Journal of World Trade* (2008) 1, 105-128; D. Camroux, 'The Political and Economic Dimensions of EU-ASEAN Relations: An Overview', in J. L. de Sales Marques *et al.* (eds), *Asia and Europe: dynamics of inter- and intra-regional dialogues* (2009), 183-208.

19 See Commission working document, COM (2000) 241 final. For a general discussion of the relationship between Asian states and the EU see H. Loewen, 'Democracy and Human Rights in the European-Asian Dialogue: A Clash of Cooperation Cultures?', *GIGA Working Paper No 92* (2008), available at http://www.giga-hamburg.de/dl/download.php?d=/content/publikationen/pdf/wp92_loewen.pdf (last visited 18 December 2010); R. Seidelmann *et al.* (eds), *European Union and Asia: a*

Commission and the heads of ten Asian countries meet every two years, European Union-China summits even take place every year.[20] However, dissonances, especially regarding human rights policy, repeatedly put a strain on the 'strategic partnership'[21] the European Union maintains with the People's Republic of China.

A third important region for the European Union in economic and development policy, and with regard to migration policy[22], is the Mediterranean. A steadily increasing number of ships with refugees landing on the Spanish and Italian coasts visualize dramatically the North-South divide to Europeans. The EU tries to combat this migration problem by supporting their neighbors located on the other side of the Mediterranean, both on a bilateral and multilateral level. The Europeans ratified association agreements with seven of the Mediterranean countries, which form the basis for political and economic cooperation.[23] In addition, the so called 'Euro-

Dialogue on Regionalism and Interregional Cooperation (2008); J. Rüland *et al.* (eds), *Asian-European Relations. Buildings Blocks for Global Governance?* (2008).

20 See http://ec.europa.eu/external_relations/china/summits_en.htm (last visited 18 December 2010).

21 C. Hackenesch & J. Ling, 'White Bull, Red Dragon – EU-China Strategic Partnership in the Making', *German Development Institute (DIE) – The Current Column*, 2 June 2009, available at http://www.die-gdi.de (last visited 18 December 2010); see also A. Sautenet, 'The Current Status and Prospects of the 'Strategic Partnership' between the EU and China', 13 *European Law Journal* (2007) 6, 699-731; J. Men, 'Building a long-term EU-China partnership', in F. Laursen (ed.), *The EU in the Global Political Economy* (2009), 219-238; X. Dai, 'Understanding EU-China Relations', in G. Hauser *et al.* (eds), *China: The Rising Power* (2009), 63-86; D. Bingran, 'Towards an EU-China Partnership', in de Sales Marques *et al.*, *supra* note 18, 239-252.

22 See 'Agreed Ministerial Conclusions of the First Euro-Mediterranean Ministerial Meeting on Migration' (19 November 2007) available at http://www.eu2007.pt/NR/rdonlyres/8D86D66E-B37A-457E-9E4A-2D7AFF2643D9/0/20071119AGREEDCONCLUSIONSEuromed.pdf (last visited 10 December 2010); see generally B. Gebrewold (ed.), *Africa and Fortress Europe* (2007); R. Kunz & S. Lavenex, 'The Migration-Development Nexus in EU External Relations', 30 *Journal of European Integration* (2008) 3, 439-457; St. Sterkx, 'The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe?', in J. Orbie (ed.), *Europe's Global Role. External Policies of the European Union* (2008), 117-138); P. J. Cardwell, *EU External Relations and Systems of Governance. The CFSP, Euro-Mediterranean Partnership and Migration* (2009), 140.

23 See the documents listed at http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r14104_en.htm (last visited 18 December 2010); see also F. Zaim, 'The Third Generation of Euro-Mediterranean Association Agreements: A View from the South', 4 *Mediterranean*

Mediterranean Partnership' (EUROMED) – sometimes also called 'Barcelona Process' for the place of the foundation conference – was founded in 1995.[24] At the initiative of France's President Sarkozy the EU recently called for an extension of its relations to the Mediterranean countries, resulting in a 'Union for the Mediterranean' in 2008.[25] In that context, several specific projects will be implemented, especially with regard to environmental protection of the sea, transportation and exploitation of solar energy. Currently there are several problems within that partnership, in large part due to the difference in attitudes between Europeans and some Arab states relating to Middle East policy.[26]

III. Global Development Policy of the European Union

European development policy is not limited to bilateral relations with single states or groups of states, but also takes place in various global arrangements. One outstanding example is the Generalized System of

Politics (1999) 2, 36-52; G. Joffé (ed.), *Perspectives in Development: The Euro-Mediterranean Partnership* (1999).

24 Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference of 27 and 28 November 1995 and its work programme, available at http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf (last visited 18 December 2010); see H. A. Fernández & R. Youngs (eds), *The Euro-Mediterranean Partnership: Assessing the First Decade* (2005); B. Gavin, 'The Euro-Mediterranean Partnership', 40 *Intereconomics* (2005) 6, 353-361; J. Brach, 'The Euro-Mediterranean Partnership: The Role and Impact of the Economic and Financial Dimension', 12 *European Foreign Affairs Review* (2007) 4, 555-579; E. Lannon, 'The EU's strategic partnership with Mediterranean and the Middle East', in A. Dashwood & M. Maresceau (eds) , *Law and practice of EU external relations. Salient patterns of a changing landscape* (2008), 360-375.

25 Joint Declaration of the Paris Summit for the Mediterranean, of 13 July 2008, available at http://www.eu2008.fr/webdav/site/PFUE/shared/import/07/0713_declaration_de_paris/Joint_declaration_of_the_Paris_summit_for_the_Mediterranean-EN.pdf (last visited 18 December 2010); Commission Communication from the Commission to the European Parliament and the Council of 20 May 2008 on the "Barcelona Process: Union for the Mediterranean", COM (2008) 319 final; see also R. Gillespie, 'A 'Union for the Mediterranean' … or for the EU?', 13 *Mediterranean Politics* (2008) 2, 277-286; R. Balfour, 'The Transformation of the Union for the Mediterranean', 14 *Mediterranean Politics* (2009) 1, 99-105.

26 See generally K. Krausch & R. Youngs, 'The end of the 'Euro-Mediterranean vision'', 85 *International Affairs* (2009) 5, 963-975.

Preferences that provides tariff advantages for all developing countries.[27] Beyond that, the least developed countries (LDC's) benefit from the Union's 'Everything but Arms' (EBA) initiative, which grants such states duty-free and quota-free market access for all products with the exception of armaments.[28] Furthermore the European Union participates in international agreements and programs on environmental[29] and health protection,[30] rural development,[31] energy security[32] and humanitarian aid[33]. Last but not least, it is noteworthy that the European Union – as well as its member states – is

27 Art. 6 Council Regulation 732/2008, applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011, OJ L 2008 211/1. The European GSP has been redesigned in a response to a decision of the WTO Appellate Body in 2004, see Appellate Body Report, EC – Granting of Tariff Preferences, WT/DS246/AB/R, adopted 7 April 2004; see also L. Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program', 6 *Journal of International Economic Law* (2003) 2, 507-532; R. Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences', 4 *Chicago Journal of International Law* (2003) 2, 385-406; H. Jessen, '"GSP Plus" – Zur WTO-Konformität des zukünftigen Zollpräferenzsystems der EG', 9 *Policy Papers on Transnational Economic Law* (2004) available at http://www2.jura.uni-halle.de/telc/PolicyPaper9.pdf (last visited 18 December 2010); J. Harrison, 'Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform', 42 *Common Market Law Review* (2005) 6, 1663-1689; G. M. Grossman & A. O. Sykes, 'A Preference for Development: The Law and Economics of GSP', in G. A. Bermann & P. C. Mavroidis (eds), *WTO Law and Developing Countries* (2007), 255-282; C. Stevens, 'Creating a Development-Friendly EU Trade Policy', in Mold, *supra* note 6, 221-236.

28 Art. 11 Council Regulation 732/2008, *supra* note 27; see also G. Faber & J. Orbie (eds), *European Union Trade Politics and Development. 'Everything but Arms' unravelled* (2007).

29 See e.g. Commission Staff Working Paper of 10 April 2001, SEC (2001) 609; Commission Staff Working Paper SEC (2009) 555 final; see also Y. G. Franco & J. M. Martínez Sierra, 'EU Environmental Cooperation with Developing Countries', in Laursen (ed.), *supra* note 21, 253-268.

30 Commission Communication of 22 March 2002, COM (2002) 129 final.

31 Commission Communication of 25 July 2002, COM (2002) 429 final.

32 Worth mentioning in this context are especially the activities of the European Union Energy Initiative (EUEI), see http://www.euei.net (last visited 18 December 2010).

33 Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, The European Union Consensus on Humanitarian Aid, of 18 December 2007, OJ C 25/1 (2008); see also H. Versluys, 'European Union Humanitarian Aid: Lifesaver or Political Tool?', in Orbie (ed.), *supra* note 22, 91-118.

a member of the World Trade Organization (WTO)[34] and, therefore, one of the main stakeholders in the negotiations on new international trade regulations on the basis of the Doha Development Agenda.[35]

C. The Legal Framework of European Development Partnerships

I. The Basic Principles of Development Policy under European Union Law

1. The Competences of the European Institutions in Development Politics

From a legal point of view it is not self-evident that the European Union would have its own development policy. As a part of foreign affairs, activities in development policy fall within the member states´ sovereignty. The Union (respectively – in the pre-Lisbon system – the Community) was able to gain its own competences in that political area because of a correlating waiver of the member states. As early as the founding of the Community, this took place with regard to the former colonies, especially

[34] Art. XI:1 Agreement Establishing the WTO; see also M. E. Footer, 'The EU and the WTO global trading system', in P.-H. Laurent & M. Maresceau (eds), *Deepening and Widening* (1998), 317-338; P. Hilpold, *Die EU im GATT-WTO-System* (1999); G. de Búrca & J. Scott (eds), *The EU and the WTO. Legal and Constitutional Issues* (2001); C. Herrmann *et al.*, *Welthandelsrecht* (2007), 66.

[35] See WTO, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, 41 International Legal Materials (2002), 746-754; for an analysis of the North-South divergences referring to the Doha Development Agenda see M. Khor, *The WTO's Doha Negotiations and Impasse: A Development Perspective* (2006); Th. W. Hertel & L. A. Winters (eds), *Poverty and the WTO: Impacts of the Doha Development Agenda* (2006); P. van Dijck & G. Faber (eds), *Developing Countries and the Doha Development Agenda of the WTO* (2006); H. Jessen, *WTO-Recht und "Entwicklungsländer"* (2006), 399; F. Ismail, *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (2007); Y.-S. Lee, *Economic Development throuh World Trade: a Developing World Perspective*, 2008; L. Crump & S. J. Maswood (eds), *Developing Countries and Global Trade Negotiations* (2009); C. Thomas & J. P. Trachtman (eds), *Developing Countries in the WTO Legal System* (2009); see also Leal-Arcas, *supra* note 11, 360-366.

those of France and Belgium in Sub-Saharan Africa. Via the legal instrument of association, these new founded states were bound close to the Community. After Great Britain entered the Community in 1973, the former British colonies also joined. Today, Art. 217 TFEU (ex Art. 310 TEC) is still widely considered to form the legal basis with regard to the Cotonou-partnership and other association agreements such as with the Mediterranean countries.[36] Art. 217 TFEU (ex Art. 310 TEC) covers all subject matters that the TFEU allocates to the Union, such as commercial policy, freedom of movement for workers, freedom of establishment, the service sector, competition law or aspects of consumer protection and pollution control. However, as a general rule, the Union is not the only contracting party in association agreements – the single member states have to accede to the agreement, too. These treaties are therefore called 'mixed agreements'.[37] This is due to the fact that some subject matters included in association agreements are not in the exclusive or concurrent jurisdiction of the Union but are part of a parallel jurisdiction of the Union and the member states. This mainly affects regulations regarding the health system, education, scientific research and cultural matters.

Even though the European Union from the very start had been involved in development activities apart from association policy, development cooperation has not been implemented into the EC Treaty as a domain of independent competence until its reform by the Maastricht Treaty in 1992. Today, the main legal basis for global partnerships between the European Union and both newly industrializing countries and developing countries is laid down in Arts 208-211 TFEU (ex Arts 177-181 TEC)[38] – as long as there are no special regulations in effect, such as specific provisions with regard to issues of association.

36 H.-H. Herrnfeld, 'EGV Artikel 310', in J. Schwarze (ed.), *EU-Kommentar*, 2nd ed. (2009), marginal note 4.

37 See generally D. O'Keeffe & H. G. Schermers (eds), *Mixed Agreements* (1983); A. Rosas, 'The European Union and Mixed Agreements', in A. Dashwood & C. Hillion (eds), *The General Law of E.C. External Relations* (2000), 200-220; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2001); P. Koutrakos, *EU International Relations Law* (2006), 137-182; G. De Baere, *Constitutional Principles of EU External Relations* (2008), 232; R. Holdgaard, *External Relations Law of the European Community* (2008), 147-166.

38 See K. Lenaerts & P. Van Nuffel, *Constitutional Law of the European Union*, 2nd ed. (2005), 852.

According to Art. 208 TFEU (ex Art. 177 TEC), the Union's policy in the field of development cooperation has to be conducted within the framework of the principles and objectives of the Union's external action, which in turn are laid down in the new Art. 21 TEU. This provision specifies the principles which shall guide the Union's action on the international scene: 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'[39] Moreover the most important objectives of the Union's external action are specifically articulated in this Article. Among others, its foreign policy is aimed at consolidating and supporting 'democracy, the rule of law, human rights and the principles of international law,' fostering the 'sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' and encouraging the 'integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.'[40] Art. 208 (1) TFEU reinforces one of these objectives – the aim of reducing (and, in the long term, eradicating) poverty as the primary objective of the Union's development cooperation policy. Art. 208 (2) TFEU (ex Art. 177 [3] TEC) obliges both the Union and each member state to comply with their commitments concerning development cooperation which they have approved in the context of the United Nations or other international organizations. Therefore, political declarations executed in these forums – *e.g.*, concerning the increase of development aid as one of the outcomes of the Monterrey Conference in 2002 or regarding the achievement of the MDG – gain legal effect through Art. 208 (2) TFEU (ex Art. 177 [3] TEC).[41]

Apart from that, the TFEU neither indicates how to accomplish the goals circumscribed in Art. 208 TFEU nor provides any specific legal instruments for the Union to use in order to achieve them. Art. 209 (1) TFEU (ex Art. 179 TEC) contains a kind of *carte blanche*, stating that the

39 Art. 21 (1) TEU.

40 Art. 21 (2 lit. b, d and e) TEU.

41 K. Schmalenbach, 'EGV Art. 177', in C. Calliess & M. Ruffert (eds), *Das Verfassungsrecht der Europäischen Union*, 3rd ed. (2007), marginal note 24; but see also W. Benedek, 'EGV Art. 177', in E. Grabitz & M. Hilf (eds), *Das Recht der Europäischen Union*, (2003), 49.

European Parliament and the Council are meant to enact measures 'necessary' to accomplish the objectives laid down in Art. 208 TFEU. Measures in this context can be instruments of secondary law like directives and regulations or just political measures without legal force. Art. 209 (1) TFEU provides for the so-called 'ordinary legislative procedure'.[42] This means that in development policy the European Parliament has a broad right to have a say.[43] In practice European development policy shows that Parliament makes extensive use of that right, *e.g.*, lately in the discussion concerning the establishment of a new secondary law framework for development aid.[44] After an intense debate between the European Commission and the concerned committee of the European Parliament several regulations became effective in 2007. They now form the legal fundament for development activities of the European Union beneath the level of primary law.[45]

[42] For a survey of the institutions involved in the decision making process in European Development Politics see P. Hoebink, 'From 'particularity' to 'globality': European development cooperation in a hanging world', in P. Hoebink (ed.), *The Treaty of Maastricht and Europe's Development Co-operation* (2005), 47; see also S. Vanhoonacker, 'The Institutional Framework', in Hill & Smith (eds), *supra* note 6, 75.

[43] As far as international treaties are concerned, which base in the field of development policy on Art. 209 (2) TFEU (ex Art. 181 TEC), Parliament has similar rights; see Art. 218 (6) TFEU (ex Art. 300 [3] TEC); see D. Thym, 'Parliamentary Involvement in European International Relations', in M. Cremona & B. de Witte (eds), *EU Foreign Relations Law. Constitutional Fundamentals* (2008), 207. For a short survey of the Parliament's rights regarding the conclusion of international agreements see also Lenaerts & Van Nuffel, *supra* note 38, 393; P. Craig & G. de Búrca, *EU Law. Text, Cases and Materials*, 4th ed. (2008), 199.

[44] See R. Passos & D. Gauci, 'European Parliament and Development Cooperation: Shaping Legislation and the new Democratic Scrutiny Dialogue', 43 *Europarecht* (2008) Beiheft 2, 138-158.

[45] Council Regulation 1085/2006 OJ 2006 L 210/82; EP/Council Regulation 1638/2006 OJ 2006 L 310/1; EP/Council Regulation 1905/2006 OJ L 378/41 (2006); EP/Council Regulation 1717/2006, OJ 2006 L 327/1; Council Regulation (Euratom) 300/2007, OJ 2006 L 81/1; EP/Council Regulation 1889/2006, OJ 2006 L 386/1; Council Regulation 1934/2006, OJ 2006 L 405/41. In this context the already existing humanitarian aid instrument has to be added, Council Regulation 1257/96, OJ 1996 L 163/1. Another important political – not strictly legal – document is the so-called "European Consensus on Development", a Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union, of 20 December 2005, OJ 2006 C 46.

2. The 'Triple C'

a) The Demands of Complementarity and Coordination

From the legal point of view, several problems of European development politics are connected with the so-called 'Triple C' – the demands of complementarity, coordination and coherence.[46] According to Art. 208 (1) TFEU (ex Art. 177 TEC), the Union's development cooperation policy and that of the Member States are meant to complement and reinforce each other.[47] Thus, European Union law assumes parallel competences of the Union and the member states. In this context the demand of coordination – laid down in Art. 210 TFEU (ex Art. 180 TEC) – also becomes important. Thereafter, both the Union and the member states have to coordinate their activities in development cooperation and harmonize their foreign aid programs.[48] In fact the member states´ share of development aid makes about 80% of the European total.[49] Therefore the European Union is only one out of several stakeholders within the European partnership with the South. In various respects the different political programs of the member states compete with each other, as they usually do not base upon altruistic motives, but follow external – mostly economic – objectives. Of course, this competitive character is desirable to a certain

46 See generally P. Hoebink, 'Evaluating Maastricht's Triple C: An Introduction to the Development Paragraphs of the Treaty on the European Union and Suggestions for its Evaluation', in Hoebink, *supra* note 42, 1-24; N. Schrijver, ''Triple C' from the Perspective of International Law and Organisation: Comparing the League of Nations, United Nations System and the European Union Experiences', *id.*, 63-96; see also C. Loquai, *The Europeanisation of Development Cooperation: Coordination, Complementarity, Coherence* (1996); J. de Deus Pinheiro, 'Consistency, Coordination and Complementarity', *The Courier* NO 155 (1996), 20-21.

47 See M. Jorna, 'Complementarity between EU and Member State Development Policies: Empty Rhetoric or Substantive New Approach?', *The Courier* No 154 (1995), 78-80; J. Bossuyt *et al.*, *Improving Complementarity of European Union Development Cooperation: From the Bottom Up* (1999); L. Dacosta *et al.*, 'Complementarity of European Union Policies on Development Co-operation', in Hoebink, *supra* note 42, 97-134.

48 See G. Gill & S. Maxwell, 'The co-ordination of development co-operation in the European Union', in Hoebink, *supra* note 42, 135-182.

49 See OECD, Statistical Annex of the 2010 Development Co-operation Report, table 1 (2009), available at http://www.oecd.org/document/9/0,3343,en_2649_34447_1893129_1_1_1_1,00.html (last visited 18 December 2010).

extent, motivating the member states to a consistent improvement and widening of their North-South activities. But this competition also results in a large number of stakeholders with different priorities. Necessarily there will be losses of efficiency, if these activities remain uncoordinated. Consequently, deciding for complementarity on the one hand, this on the other hand requires a high degree of coordination and (if possible) cooperation.[50]

This fundamental problem of development partnerships, which is not unique to European donors, is discussed in the international arena primarily in the context of the 'Paris Declaration on Aid Effectiveness' of 2005[51] and the 'Accra Agenda for Action' being adopted at a follow-up conference in Ghana in 2008.[52] One of the basic principles of these documents relating to donors focuses on better adjustment and complementarity of aid programmes. The European Union has met these international obligations and self-imposed demands fixed in Art. 210 TFEU (ex Art. 180 TEC) by taking a number of actions – for example in 2007, when a code of conduct was passed which contained guidelines for a better division of work between the donors.[53]

b) Coherence

The two demands of the TFEU, complementarity and coordination in development aid, are important due to the fact that the donors to the global development partnership are an alliance of several states. Coherence is a further important criterion for each development partnership – irrespective of whether the donor consists of one or more partners. The criterion of

50 Political practice does not always reflect these legal requirements; see J. Orbie & H. Versluys, 'The European Union's International Development Policy: Leading and Benevolent?', in Orbie (ed.), *supra* note 22, 72: "Although the principles of complementarity and coordination are enshrined in the Treaty, they have been honoured more in their breach than in their observance."

51 This document, which has been adopted by the OECD´s Development Assistance Committee (DAC) and numerous developing countries in March 2005, is available at http://www.oecd.org/dataoecd/11/41/34428351.pdf (last visited 18 December 2010).

52 *Id*.; see furthermore the Commission Staff Working Paper of 8 April 2009, COM (2009) 160 final.

53 Commission Communication of 28 February 2007, COM (2007) 72 final.

coherence[54] can be found in the second sub-paragraph of Art. 208 (1) TFEU (ex Art. 178 TEC); furthermore Art. 21 (3) TEU (ex Art. 3 [2] TEU) stipulates the institute of coherence explicitly for all sub-sections of European foreign policy.[55] Art. 208 (1) TFEU requires that ' (t)he Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.' The wording of Art. 208 (1) TFEU shows the weak normative force of the rule. Development goals shall merely be taken into 'account' which does not guarantee their priority over other political objectives. In this regard, the TFEU gives Union institutions wide political scope for making their decisions – which most scholars on European Union law consider to be beyond judicial control.[56] The corresponding principle of coherence stated in Art. 21 (3) TEU is not much more precise. Furthermore, both regulations apply only to the Union and do not impose corresponding obligations on the member states.[57]

Art. 11 TFEU (ex Art. 6 TEC) demonstrates that coherence clauses or cross-section clauses can be drafted in a way that allows more normative

54 P. Hoebink, 'Policy Coherence in Development Co-operation: the Case of the European Union', in J. Forster & O. Stocke (eds), *Policy Coherence in Development Co-operation* (1999), 323-345; P. Hoebink, 'Evaluating Maastricht's Triple C: The ‚C' of Coherence', in Hoebink, *supra* note 42, 183-218; G. Ashoff, 'Enhancing Policy Coherence for Development: Justification, Recognition and Approaches to Achievement', 11 *German Development Institute (DIE) - Studies* (2005); M. Carbone, 'Mission Impossible: the European Union and Policy Coherence for Development', 30 *Journal of European Integration* (2008) 3, 323-342; J. Mackie *et al*., 'Coherence and effectiveness: Challenges for ACP-EU relations in 2008', *InBrief* No 20 (2008), 1-12. For a general discussion of the requirements of coherence (consistency) in European Foreign Policy see U. Schmalz, 'The Amsterdam Provisions on External Coherence: Bridging the Union's Foreign Policy Dualism?', 3 *European Foreign Affairs Review* (1998) 3, 421-442; P. Gauttier, 'Horizontal Coherence and the External Competences of the European Union', 10 *European Law Journal* (2004) 1, 23-41; S. Nuttal, 'Coherence and Consistency', in Hill & Smith (eds), *supra* note 6, 91-112; Lenaerts & Van Nuffel, *supra* note 38, 899.

55 See F. Hoffmeister, 'Das Verhältnis zwischen Entwicklungszusammenarbeit und Gemeinsamer Außen- und Sicherheitspolitik am Beispiel des EG-Stabilitätsinstruments', 43 *Europarecht* Beiheft (2008) 2, 59.

56 K. Schmalenbach, 'EGV Art. 178', in Calliess & Ruffert (eds), *supra* note 41, 1; see also R. Lane, 'New Community Competences under the Maastricht Treaty', 30 *Common Market Law Review* (1993) 5, 978; M. Obrovsky, 'PCD – Policy Coherence for Development', *OEFSE-Briefing Paper* No 1 (2008), 5.

57 Carbone, *supra* note 54, 330.

power.[58] According to Art. 11 TFEU environmental protection requirements 'must be integrated into the […] implementation of the Union policies and activities'. This clause certainly does not provide a priority of environmental policy over other political areas but it at least allows limited actionability. Though it might not be possible to enforce certain environmental tasks, single legal acts can be challenged for alleged violations of provisions covered by Art. 11 TFEU before the European Court of Justice.[59] Due to the vague wording of Art. 208 (1) TFEU, such a form of judicial control presumably would not be very successful regarding the development coherence clause.

A legally strict definition of the demand of coherence is important in light of the fact that European development policy has more than once found itself the focus of various criticisms. In particular, agricultural policy causes a massive conflict regarding the goals of European development policy, given the vast subsidies for European farmers.[60] Similar coherence problems emerge in other policy areas. In foreign trade policy, development aid is usually linked to the delivery of goods and services from the donor country.[61] Regarding fishing policy, in the past efficient inshore fishing has been foiled by fishing quotas the European Union has agreed upon with

58 See also Schrijver, *supra* note 46, 84: "(C)omparing […] Art. 178 with Art. 6 on integration of environmental protection […] must lead to the conclusion that coherence of development policies is not of equal weight as integration of environmental protection for two reasons."

59 A. Käller, 'EGV Artikel 7', in J. Schwarze (ed.), *supra* note 36, 12; 18; see also N. Dhondt, *Integration of Environmental Protection into other EC Policies* (2003), 30; M. Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (2005), 44; P. Wenneras, *The Enforcement of EC Environmental Law* (2007), 201; J. H. Jans & H. H. B. Vedder, *European Environmental Law*, 3rd ed. (2008), 16.

60 K. Bertow & A. Schultheis, *Impact of EU's Agricultural Trade Policy on Smallholders in Africa* (2007); A. Matthews, 'The European Union's Common Agricultural Policy and Developing Countries: the Struggle for Coherence', 30 *Journal of European Integration* (2008) 3, 381-399.

61 G. Ashoff, 'Improving Coherence between Development Policy and Other Policies. The Case of Germany', *German Development Institute (DIE)-Briefing Paper* No 1 (2002), 2.

developing countries.[62] Finally, arms export policy often is contradictory to the conflict preventing programmes in development cooperation.[63]

Obviously, there is a gap between the legal claim for coherence, as set out in Art. 208 (1) TFEU on the one hand, and political reality on the other. But even though legal proceedings in order to control these shortfalls are not very promising given the current legal situation, Art. 208 (1) TFEU – (respectively the former Art. 178 TEC) – has not remained completely ineffective. The Union's institutions have taken up several initiatives in order to improve the coherence of their activities. In a memorandum of the European Commission published in 2005[64] twelve policy sectors are identified – trade, environment, security, agriculture, fishing, the social dimensions of globalization, migration, research and innovation, information technologies, transport and energy – in which so called 'coherence responsibilities for development' shall be effective. A first interim report issued in 2007 concerning the 'Policy Coherence for Development (PCD)' came to the conclusion that within the institutions of the European Union there was an increasing awareness for the effect of different policy areas on developing countries and that on the European Union level a greater progress in promoting policy coherence could be gained than in the member states.[65] However the European Union still finds itself, as the Commission itself acknowledged, 'at an early stage of PCD development'.[66] Political conflicts of priority and interest between the European Union member states and developing countries are considered to be the main barriers for policy coherence. In a communication published in September 2009, the Commission emphasized the need for a stronger concentration on select PCD priority areas, just as climate change, food security, migration, intellectual property rights and security questions.[67]

62 C. Bretherton & J. Vogler, 'The European Union as a Sustainable Development Actor: the Case of External Fisheries Policy', 30 *Journal of European Integration* (2008) 3, 401-417.

63 G. Ashoff, 'Improving Coherence between Development Policy and Other Policies. The Case of Germany', *German Development Institute (DIE)-Briefing Paper* No 1 (2002), 2.

64 Commission Communication of 12 April 2005, COM (2005) 134 final.

65 Commission Working Paper of 20 September 2007, COM (2007) 545 final, 3.

66 *Id.*, 4; see also Obrovsky, *supra* note 56; Carbone, *supra* note 54, *334*.

67 Commission Communication of 15 September 2009, COM (2009) 458 final; for a critical analysis of this report see Concord (ed.), *The EC Commission Communication on Policy Coherence for Development and whole of the Union approach. What does it*

II. Development Policy of the European Union and the Requirements of Public International Law

1. Association Partnerships in Conflict with World Trade Law

The Union's development cooperation is governed not only by the supranational European Union law but also by the principles and rules of public international law which provide several constraints for stakeholders in Brussels when cooperating with Asian, African and Latin-American partners. The partnership with ACP-Countries recently made that plain. In the Lomé-Convention and the Cotonou-Agreement, the European Union granted ACP-countries unilateral trade preferences which essentially are incompatible with basic rules of the World Trade Organization (WTO). These preferences do not achieve the reciprocity demands of a free trade agreement and therefore discriminate against other developing countries. In the past, such a privilege has only been allowed in the case of special approval by the WTO partners – a so-called *waiver* under Art. IX:3 Agreement Establishing the WTO.[68] Once this approval terminated at the end of 2007, the European Union and ACP-countries, when negotiating the terms of the Cotonou-Agreement, settled on several 'Economic Partnership Agreements' (EPAs) which would replace the former trade regulations. These new agreements will be free trade agreements, connecting the European Union with single ACP-sub-regions.[69] According to Art. XXIV:8

mean for EU Development Policy? (2009), available at http://www.concordeurope.org/Public/Page.php?ID=69 (last visited 18 December 2010).

68 See with regard to the Cotonou Agreement WTO, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, European Communities-The ACP-EC Partnership Agreement; WTO Doc. WT/MIN (01)/15, Decision 14 November 2001.

69 See generally A. Borrmann *et al.*, 'EU/ACP Economic Partnership Agreements: Impact, Options and Prerequisites', 40 *Intereconomics* (2005) 3, 169-177; C. Stevens, 'The EU, Africa and Economic Partnership Agreements: Unintended Consequences of Policy Leverage', 44 *Journal of Modern African Studies* (2006) 3, 441-458; S. Bilal, 'Concluding EPA Negotiations. Legal and institutional issues', *ECDPM Policy Management Report* No 12 (2007), available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/C04BB76BD86391E9C12573090047AF15/$FILE/PMR12-e.pdf (last visited 18 December 2010); A. Borrmann & M. Busse, 'The institutional challenge of the ACP/EU Economic Partnership Agreements', 25 *Development Policy Review* (2007) 4, 403-416; O. Morrissey, 'A Critical Assessment of Proposed EU-ACP Economic Partnership Agreements', in Mold (ed.), *supra* note 6, 199-220; D. Kohnert, 'EU-African

General Agreement on Tariffs and Trade (GATT), such free trade areas are legally allowed as an exception to the most favored nation principle as long as a deregulation of 'substantially all the trade' is intended.[70]

Up to now, negotiations regarding mutual reduction of trade barriers within these new partnership agreements have proven to be remarkably difficult. Thus far, the European Union has only been able to enter into one agreement with the Caribbean states. Other members of the ACP community accepted only interim agreements in order to keep up basic preference rules until the conclusion of a permanent agreement.[71] These difficulties are due to the fear, that a broad and efficient deregulation of

Economic Relations: Continuing Dominance Traded for Aid?', *GIGA Working Paper No* 82 (2008), 12-15; C. Stevens *et al., The new EPAs: comparative analysis of their content and the challenges for 2008. Final Report* (2008); Flint, *supra* note 10, 145-159; R. Kappel, 'Die Economic Partnership Agreements – kein Allheilmittel für Afrika', *GIGA Focus* (2008), No. 6; G. Faber & J. Orbie (eds), *Beyond Market Access for Economic Development. EU-Africa relations in transition* (2009); S. Bilal *et al.*, 'Global Financial and Economic Crisis: Analysis of and Implications for ACP-EU Economic Partnership Agreements (EPAs)', *ECDPM Discussion Paper No* 92 (2009).

70 Although the question what is meant by "substantially all the trade" in this clause has been discussed for more than sixty years, the problem is still not solved; see Appellate Body Report, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, 19 November 1999, para 48: "Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision." The WTO Appellate Body (id.) preferred a flexible interpretation by stating that substantially all the trade is "not the same as all the trade, and […] something considerably more than merely some the trade". For an analysis of this provision see generally M. Matsushita, 'Legal Aspects of Free Trade Agreements in the Context of Art. XXIV of the GATT 1994', in M. Matsushita & D. Ahn (eds), *WTO and East Asia: New Perspectives* (2004), 497-515; M. T. Hausmann, *Das Cotonou-Handelsregime und das Recht der WTO* (2006), 124; A. H. Qureshi, *Interpreting WTO Agreements. Problems and Perspectives* (2006), 102; M. Matsushita *et al., The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (2006), 568; S. Lester & B. Mercurio, World Trade Law (2008), 361-363; K. Nowrot, ‚Steuerungssubjekte und –mechanismen im Internationalen Wirtschaftsrecht', in C. Tietje (ed.), *Internationales Wirtschaftsrecht* (2009), § 2, 131; A. A. Mitchell & N. J. S. Lockhart, 'Legal Requirements for PTAs under the WTO', in S. Lester & B. Mercurio (eds), *Bilateral and Regional Trade Agreements. Commentary and Analysis* (2009), 93.

71 For detailed information on the current status of the EPA-negotiations see the „Trade Negotiations Insight" of the International Centre for Trade and Sustainable Development, available at http://ictsd.org/news/tni/ (last visited 18 December 2010).

bilateral trade relations might overcharge the adaptability of the ACP-countries´ national economies.[72]

It is not certain whether the differences between the negotiating parties can be settled and EU-ACP-partnerships according to WTO law can be maintained. Another solution could be the amendment of the relevant GATT regulations, in order to provide moderate reciprocity demands for free trade agreements between industrial and developing countries. In fact the GATT-regulations regarding trade preference regimes are part of the reform plans of the Doha Round. It is intended to provide an adequate scope for absorbing the adjustment costs of trade liberalization for developing countries. For instance, Art. XXIV:8 GATT, which is actually rather inflexible, could be redesigned according to the more modern equivalent in the General Agreement on Trade in Services (GATS)[73], which stipulates that the legitimacy of treaties on free trade areas with regard to trade in services has to be handled with 'flexibility […] in accordance with the level of development of the countries concerned'.[74] So it will mainly depend on the results of the WTO negotiations whether such a flexible provision can

72 A. Borrmann, H. Großmann & Georg Koopmann, 'The WTO Compatibility of the Economic Partnership Agreements between the EU and the ACP Countries', 41 *Intereconomics* (2006) 2, 115-116.

73 *Id*., 117; M. G. Desta, 'EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Inter-Regional Agreements?', 43 *Common Market Law Review* (2006) 5, 1375; A. Zimmermann, 'Die neuen Wirtschaftspartnerschaftsabkommen der EU: WTO-Konformität versus Entwicklungsorientierung?', 20 *Europäische Zeitschrift für Wirtschaftsrecht* (2009) 1, 6; see also G. Thallinger, 'From apology to Utopia: EU-ACP economic partnership agreements oscillating between WTO conformity and sustainability', 12 *European Foreign Affairs Review* (2007) 4, 514-515; ACP Group, Developmental aspects of Regional Trade Agreements and Special and Differential Treatment in WTO Rules: GATT 1994 Art. XXIV and the Enabling Clause, Commission Communication by the Mission of Botswana on behalf of the ACP Group of States, WTO Doc. TN/RL/W/155, 28 April 2004. For a broader discussion of the compatibility of the EPAs with WTO rules see furthermore C. M. Obote Ochieng, 'The EU-ACP Economic Partnership agreements and the 'Development Question'', 10 *Journal of International Economic Law* (2007) 2, 363-395; *id.*, 'Legal and systematic Issues in the Interim Economic Partnership agreements. Which Way Now?', *ICTSD Issue Paper* No. 2 (September 2009), 7, available at http://ictsd.org/downloads/2009/11/ochieng_web_final.pdf (last visited 18 December 2010); L. Cernat *et al.*, 'RTAs and WTO compatibility: Catch me if you can? The case of EPA Negotiations', 23 *Journal of Economic Integration* (2008) 3, 489-517.

74 Art. V GATS.

also be incorporated into the law on the trade of goods and – as a consequence – North-South free trade agreements in future still deserve the name 'development partnerships'.

2. International Environmental Law and Human Rights Protection

In addition to international trade law, other fields of public international law also establish a framework for the development policy of the European Union. One important example in this context is international environmental law. Apart from reducing poverty, the problem of climate change certainly provides the major challenge in current development policy. It goes without saying that Europeans as much as most other industrial nations find themselves far away from having made all necessary efforts in this context, especially with regard to the vast industrial backlog demand of the developing countries. At the UN Climate Change Conference 2009 in Copenhagen, EU leaders announced the commitment of $ 3.6 billion per year until 2012 to help developing countries combat global warming.[75] NGOs, however, doubt that this contribution will be an adequate amount; according to Oxfam International at least $ 200 billion per year are needed to help poor countries reduce their emissions and adapt to a changing climate.[76]

International human rights protection is another example for the importance of public international law for global development partnerships. Here again, there are still deficits in the cooperation of the Europeans with their partners in the Global South. For instance it is doubtful, whether the European Union actually makes sufficient use of all instruments of human rights protection where it seems to be necessary. As already mentioned, the Cotonou-Agreement – like its predecessor, the Lomé-Convention – provides

[75] see http://en.cop15.dk/news/view+news?newsid=2933 (last visited 18 December 2010). See also para 8 of the Copenhagen Accord of 18 December 2009: „[…] The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching USD 30 billion for the period 2010 – 2012 with balanced allocation between adaptation and mitigation."; available at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf (last visited 18 December 2010).

[76] http://www.oxfam.org/en/pressroom/pressrelease/2009-12-07/200bn-price-of-success-copenhagen (last visited 18 December 2010).

regulations for human rights protection. According to Art. 96 of the Cotonou-Agreement, the contracting parties can take 'appropriate measures' in case of violation of human rights. At the extreme, these measures can even comprise the suspension of the agreement with regard to a particular country. Such sanctions are also possible on the basis of other agreements or with regard to the Generalized System of Preferences.[77] However, in practice these instruments have not been exercised very often so far.[78] There definitely remains much scope for enhancing the importance that is accorded to human rights protection in the implementation of the EU's development policy.[79]

D. Conclusion: European Development Cooperation as Part of the International Law of Development

The topics discussed above – the legal framework of the TEU and the TFEU, the requirements of the WTO, the problem of climate change and the human rights clauses of partnership agreements – are just examples of a broad range of questions which come up when considering European

[77] See e.g. Council Regulation 552/97 of 24 March 1997, OJ 1997 L 85/8; see also *Portugal v. Council*, Case C-268/94 (Eur.Ct.J. 3 December 1996) ECR, I-6177, paras 23; see generally M. L. Cremona, 'Human Rights and Democracy Clauses in the EC's Trade Agreements', in N. Emiliou & D. O'Keeffe (eds), *The European Union and World Trade* (1996), 62-80; B. Bandtner & A. Rosas, 'Trade Preferences and Human Rights', in Ph. Alston (ed.), *The EU and Human Rights* (1999), 699-722; E. Fierro, 'Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?', 7 *European Law Journal* (2001) 1, 41-68; L. Bartels, *Human Rights Conditionality in the EU's Internationl Agreements* (2005); P. Leino, 'The Journey Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law', in Cremona & de Witte (eds), *supra* note 43, 259-290.

[78] See Bartels, *supra* note 77, 37: "Nonetheless, compared to the range of possible scenarios in which human rights clauses might be applied, their actual impact on the EU's external human rights policies has been relatively modest. There have been some positive measures in form of dialogue on human rights and democratic principles […] However, negative reactions under human rights clauses have been limited to the Cotonou Agreement and its predecessor, the Lomé IV Convention, and even there it has been the very poorest of ACP countries that have been targeted, usually in response to military coups."

[79] See also R. Gropas, *Human Rights and Foreign Policy. The Case of the European Union*, (2006), 132.

development policy from a legal perspective. But apart from the restrictions, being imposed on development policy by European Union law and public international law on the one hand, and, on the other hand, its impetus to the evolution of this political area, one should not lose sight of the fact that reciprocal effects can also be recognized: Political positions within North-South relations are decisive for the further development of the international legal framework, too. European development cooperation has made an important contribution to the establishment of a new field of law, the so-called 'international law of development'. Most scholars regard it as a new section of public international law which – as a cross-section discipline – comprises aspects of each part of international law referring to North-South relations.[80] Some experts on international law (especially in France and the North-African countries) even consider the international law of development as a new dimension of the international legal order, following the phases of international law of coexistence and international law of cooperation.[81] This new dimension is characterized by the fact that it is primarily dedicated to a special objective: overcoming the North-South contrast and global development disparities. This objective is to be reached primarily by the use of programmatic and prospective-working norms. Both states and international organizations are making efforts to establish the new legal structure, for example by formulating legal principles, that have to be substantiated further, or by mutual consent on political goals which are not explicitly fixed in legally binding treaties but remain – at least for a certain time – in a 'soft law' status, such as recommendations or resolutions.

80 For a general overview see, M. Kaltenborn, 'Entwicklungs- und Schwellenländer in der Völkerrechtsgemeinschaft', 46 *Archiv des Völkerrechts* (2008) 2, 205-232.

81 The main publications in this context are: Societé Française pour le Droit International (ed.), *Pays en voie de développement et transformation du droit international* (1974); M. Flory, *Droit international du développement* (1977); Office des Publications Universitaires d'Alger (ed.), *Droit international du développement* (1978); R.-J. Dupuy, 'Communauté internationale et disparités de développement', 4 *Recueil des Cours de l'Académie du Droit international de la Haye (*1979) 165, 11-231, 169; M. Bennouna, *Droit international du développement* (1983); M. Benchikh, *Droit international du sous-développement* (1983); M. Flory *et al.* (eds), *La formation des normes en droit international du développement* (1984); A. Pellet, *Le droit international du développement*, 2nd ed. (1987); G. Feuer & H. Cassan, *Droit international du développement*, 2nd ed. (1991). For a critical analysis of this approach see R. Sarkar, *International Development Law. Rule of Law, Human Rights and Global Finance* (2009), 75-148.

Quite often, international law of development is to a certain extent disregarded due to these specific characteristics. The mainly vague and indefinite legal principles, such as the right to development or the principle of solidarity in international economic law, and the non-binding declarations adopted by the General Assembly or other conferences held by the United Nations, are frequently dismissed as legally irrelevant. However, it has been proved by various experts on international law, that in fact these 'soft law' instruments have a great role in establishing new 'hard law' provisions.[82] Moreover, international law of development by no means only consists of 'soft' elements, but also has – as shown in this Article – a well accepted position within the 'hard' part of the international legal framework. The regulations on the competences and procedures of the European institutions fixed by the TFEU, the Cotonou-Agreement, the new Economic Partnership Agreements and last but not least by the WTO rules are all in all thoroughly legally binding and partly even enforceable provisions which the European Union has to respect while establishing global partnerships with developing countries. They are examples of a steadily increasing framework that, on the one hand, helps to structure and stabilize global development partnerships and, on the other hand, encourage international stakeholders both in the North and in the Southern countries to continue their work on establishing a 'just' world order.

[82] For a discussion of the functions of soft law in the international legal structure see e.g. U. Fastenrath, 'Relative Normativity in International Law', 4 *European Journal of International Law* (1993) 1, 305-340; J. Klabbers, 'The Redundancy of Soft Law', 65 *Nordic Journal of International Law* (1996) 2, 167-182; H. Hillgenberg, 'A Fresh Look at Soft Law', 10 *European Journal of International Law* (1999) 3, 499-515; K. Zemanek, 'Is the Term 'Soft Law' Convenient?', in G. Hafner *et al.* (eds), *Liber amicorum in honour of I. Seidl-Hohenveldern* (1998), 843-862; J. J. Kirton & M. J. Trebilcock (eds), *Hard choices, soft law: voluntary standards in global trade, environment, and social governance* (2007); A. Boyle & C. Chinkin, *The Making of International Law* (2007), 211-229; S. H. Nasser, *Sources and Norms of international Law: a Study on Soft Law* (2008); H. Neuhold, 'Variations on the theme of 'soft international law', in International law between universalism and fragmentation', in I. Buffard, *et al.* (eds), *Festschrift in honour of G. Hafner* (2008), 343-360; D. Shelton, 'Soft Law', in D. Armstrong (ed.), *Routledge Handbook of Internatiol Law* (2009), 68-80.

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Defending the Emergence of the Superior Orders Defense in the Contemporary Context

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Table of Contents

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Abstract

The defense of superior orders is one of the most controversial defenses to be pleaded under criminal law. In effect, it condones ignorance of the law and allows a subordinate to escape criminal liability on a basis other than culpability. It may therefore come as a surprise that sixty years after the Nuremberg and Tokyo trials, the resort to superior orders has re-emerged as a complete defense for certain types of crimes. I argue that this defense is based on sound policy reasons of military necessity, and should be made available on the condition that the order is not 'manifestly illegal'. In contrast to blunt absolutist approaches, the manifest illegality doctrine presents the most workable test for distinguishing between the culpability of conduct committed by soldiers in circumstances of exigency. This 'middle-way' successfully balances the dichotomous ends of legality and military efficiency and should be the preferred test under international law.

A. Introduction

As one of the most controversial pleadings within criminal law, the defense of superior orders has waxed and waned in its application in the history of international law. The resort to this defense, sometimes termed the 'Nuremberg defense', has achieved infamy through its frequent invocations by war criminals on trial for the most heinous of crimes. It may therefore come as a surprise that sixty years after the Nuremberg and Tokyo trials, the resort to superior orders has re-emerged as a complete defense in contemporary times. This paper examines the polemic and attempts to define the most appropriate and workable means of presenting such a defense. This paper is structured as follows. Part II identifies the basis of the problem that the defense of superior orders is designed to resolve. Part III offers a brief summary of the current and historical operation of the defense under international law. Part IV canvasses the varying forms in which criminal liability can be attributed when a crime has been committed pursuant to an order, and concludes that an approach based on manifest illegality is the preferred format for constructing a superior orders defense. Finally, Part V looks to the frontiers of the doctrine to examine the implications of extending the defense to civilian orders.

B. Superior Orders and the Soldier's Dilemma

The defense of superior orders is pleaded by soldiers who seek to be excused from otherwise criminal behavior on the basis of policy. This policy

finds its utmost justification in the strict sense of discipline which binds members of the military.[1] The soldier is confronted with an inescapable dilemma. He has a duty to obey the orders of his superior officers or be liable to face disciplinary proceedings in a military court. At the same time, national and international laws threaten to impose individual criminal responsibility for any unlawful acts committed by a soldier while following orders. The full force of this dilemma has been historically recognized by leading jurists. Dicey presents the two extreme alternatives:

> [a soldier] may be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and a jury if he obeys it.[2]

Yet the soldier's dilemma not only derives from a legal duty that encases his actions, but from the process of military training and indoctrination which demands a psychological reaction to obey.[3] When a soldier undergoes a period of 'transmogrification' from civilian to military personnel, 'his actions and thoughts are controlled and channeled… [such that] he is taught to have confidence and faith in the military ability of his superiors and to respond without hesitation to their instructions.'[4]

The third factor compounding the soldier's position is the special circumstances, experienced in a military context, that precludes him from ascertaining the legality of an order. In contrast to civilian conditions, where the onus of knowing the law is borne by individuals, during the 'heat of the battle' it is neither feasible for the soldier to analyze the lawfulness of his actions; nor possible for him to have knowledge of the full factual circumstances which may justify the legality of the order.

Notwithstanding the above, the very existence of a dilemma has been questioned.[5] It has been suggested that the dilemma is illusory and easily resolvable: the soldier shall obey only *lawful* orders, and reject any unlawful orders, with an order's illegality providing a complete defense against sanctions imposed for disobedience. However, this view fails to account for the practical realities of being a soldier in two ways. First, a soldier's ability to exercise a fully-informed choice is severely impaired in the exigencies of battle. Second, the choice to disobey may be accompanied by summary punishment, or by the

1 See e.g. *Defence Force Discipline Act 1982* (Cth) s 27(1), *National Defence Act 1985* (Canada) s 83.

2 A. V. Dicey, *Introduction to The Study of The Law of the Constitution*, 10th ed. (1959), 303.

3 See T.C. Brewer, 'Their's not to reason why – some aspects of the defence of superior orders in New Zealand Military Law', 10 *Victoria University Wellington Law Review* (1979-1980) 1, 45, 45.

4 *Id.*

5 W. Solf, 'War Crimes and the Nuremberg Principles', in J. N. Moore *et al.* (eds) *National Security Law* (1990) 391, cited in M. J. Osiel, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (1999) 51.

reality that immediate resignation is not an option.[6] This underscores the grave dilemma that the defense of superior orders seeks to mitigate.

For these reasons, it is said that '[t]he military command structure imposes upon the subordinate an antagonistic and paradoxical necessity to respond'[7] to orders. Among the complexities posed by such a situation, the defense of superior orders emerges as a central means of mediating the conflict of duties faced by a soldier.

Traditional military justifications stress the essentiality of a strict chain of command for the efficacy of military operations.[8] Herein lies the crux of the controversy surrounding the defense. To the extent that validity is given to a defense based on ignorance of the lawfulness of a superior order, legality becomes subjugated to military discipline. Ultimately, therefore, the justification for the superior orders defense hinges on the value that is given to the policy of military efficiency and the degree to which adherence to orders is considered indispensable to the conduct of successful warfare. The persuasiveness of this policy in a contemporary context will be discussed in the latter part of this essay.

C. A Brief History of the Superior Orders Defense under International Law

A great deal of interpretative controversy surrounds the historical position of the superior orders defense under customary international law. For the purposes of background understanding, this section attempts to elicit a brief summary.[9] The trend, until very recently, has been to take an increasingly expansive position on the degree to which subordinates are exposed to criminal liability.

It has been posited that prior to World War One, international law inclined towards a complete defense of obedience to superior orders. Oppenheim stated in 1906 that '[i]n case members of forces commit violations ordered by their commanders, the members cannot be punished, for the

6 The existence of a 'moral option to resign' varies between countries. In the United States for example, the ability to resign is more restrictive than in other Western democracies: see Osiel, *supra* note 5, 51 fn 33.

7 G.-J. Knoops, *Defenses in Contemporary International Criminal Law*, 2nd ed (2007), 43.

8 See Brewer *supra* note 3, 45.

9 For a more detailed discussion of the history of the superior orders defense under international law, see H. Sato, 'The Defense of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law', 9 *International Criminal Law Review* (2009) 1, 117; J. N. Maogoto, 'The Superior Orders Defence: A Game of Musical Chairs and the Jury is Still Out', 10 *Flinders Journal of Law Reform* (2007), 185.

commanders are alone responsible.'[10] This view has been questioned[11] but for a period remained authoritative.[12] After the conclusion of World War One, the Allied powers demonstrated a willingness to move away from the absolute defense position[13] but ultimately acceded the authority to conduct war crime trials to Germany under its Military Penal Code. In response to the pleading of the defense to charges of homicide, the court took the view that the subordinate in *Dover Castle* was not guilty due to a genuine belief in the lawfulness of reprisals,[14] while the defendant in *Llandovery Castle* was guilty because the order he had executed was 'universally known to everybody [...] to be without any doubt whatever against the law'.[15] The position taken thus concurred with the manifest illegality doctrine.

By the end of World War Two the debate again experienced a marked shift. The validation of the resort to superior orders may have exculpated the most heinous of Nazi war crimes. Socially, conscription drawn from all sectors of society had raised the intellectual consciousness of the soldier body. The result was increased autonomy for soldiers to question orders.[16] In examining the codification of the superior orders defense in international instruments thereafter, the overwhelming position has been to reject the defense. The Statute for the International Military Tribunal at Nuremberg marked the first occasion in which the defense was codified in an international instrument. Article 8 provided that

> '[t]he fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility but may be

10 L. Oppenheim, *International Law*, Volume 2, 1st ed. (1906), 264-265; see also Y. Dinstein, 'International Criminal Law' 20 *Israel Law Review* (1985), 206, 237, which treats Oppenheim as the authority for this position.

11 See e.g., N. C. H. Dunbar, 'Some Aspects of the Problem of Superior Orders in the Law of War' 63 *Juridical Review* (1951), 234, 243, who regards Oppenheim's view as a 'fallacy'.

12 Oppenheim's view was incorporated into the *British Manual of Military Law*, 6th ed (1914) Chapter XIV, art 443 and the *United States Rules of Land Warfare* (1914) art 366.

13 See *Treaty of Peace between the Allied and Associated Powers and Germany*, 28 June 1919 [1920] ATS 1, Arts 228, 229 .

14 'Judgment in the Case of Commander Karl Neumann, Hospital Ship "Dover Castle"', 16 *American Journal of International Law* (1922) 4, 704, 707. Under §47 para 1 of the German Military Penal Code (1917), 'when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible', *Id*. But the court also found that this position 'accords with the legal principles of all other civilized states' at 707.

15 'Judgment in Case of Lieutenants Dithmar and Boldt, Hospital Ship "Llandovery Castle"', 16 *American Journal of International Law* (1922) 4, 708, 722.

16 L. C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed (2008), 337.

considered in mitigation of punishment if the Tribunal determines that justice so requires.'[17]

Bound by the articles of its Charter, the International Military Tribunal also sought to justify the absolute liability position under general customary principles. 'The true test which is found in varying degrees in the criminal law of most nations is not the existence of the order, but whether moral choice was in fact possible.'[18] The use of 'moral choice' by the Tribunal is in fact an allusion to the concept of duress.[19] In qualifying the limited extent to which obedience to superior orders can be said to exist, the Tribunal amalgamated the concept of superior orders under the concept of duress. Elucidating the full extent of the convergence between duress and the defense of superior orders is beyond the scope of this essay.[20] It is emphasized that the modern form of the superior orders defense is based on a legal duty to obey, which is wholly distinct from, but operates in parallel to, the element of compulsion that underlies the doctrine of duress.[21]

The defense of superior orders was rejected in similar terms by the statutes of the Charter of the International Military Tribunal for the Far East[22]

17 *Charter of the International Military Tribunal, annexed to the Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, Art. 8, 82 U.N.T.S. 280, 288 [London Charter].

18 'International Military Tribunal (Nuremberg), Judgment and Sentences' 41 *American Journal of International Law* (1947) 1, 172, 221.

19 See I. Bantekas and S. Nash, *International Criminal Law*. 3rd ed. (2007), 59.

20 The two defenses converge where a soldier obeys an order that is not manifestly illegal while under compulsion to act. The defense of duress provides a further exculpatory avenue for the soldier who is compelled to obey a manifestly illegal order: see *Rome Statute*, 17 July 1998, Art. 31(1)(d), 2187 U.N.T.S. 3, 107 [Rome Statute].

21 The distinction has been stressed by numerous scholars: see, for eg, C. L. Blakesley, 'Atrocity and Its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda', in T. L.H. McCormack & G. J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997), 220. *Contra* Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed (2005), 142–143, who cites in support *Prosecutor v Erdemovic*, Sentencing Appeals, ICTY Case No. IT-96-22-A, 1997 [33]-[36]: at 143 fn 166 (Joint Separate Opinions of Judges McDonald and Vohrah). However, it is argued that the comments in *Erdemovic* were made in the context of the ICTY Statute, which explicitly forbids superior orders as a defense except when the same factual scenario can be characterized as duress. Judges McDonald and Vohrah themselves admit that 'superior orders and duress are conceptually distinct and separate issues' at [33]-[34].

22 *Charter of the International Military Tribunal for the Far East*, arts 5(a), 5(b), 5(c), 19 January 1946, TIAS 1589.

(IMTFE) and by Control Council Law No. 10,[23] the Allied Control Commission for Germany. Half a century later, the position, and even the wording, remained unchanged in its application within modern day ad-hoc Tribunals: the International Criminal Tribunal for Rwanda,[24] International Criminal Tribunal for the former Yugoslavia,[25] the Panel for Timor-Leste,[26] the Special Tribunal for Lebanon,[27] the Special Court for Sierra Leone[28] and the Iraqi Special Tribunal.[29] The overwhelming preference towards absolute liability has been suggested as evidence of such a position prevailing under customary international law.[30] However, these ad-hoc tribunals were designed to try special international crimes, the seriousness of which may be implicitly regarded as manifestly illegal.[31]

Disagreements in attempts to codify a permanent position suggest otherwise of the existence of such a customary norm. While the absolute liability position has achieved consistent codification in statutes of ad-hoc tribunals, the general application of the superior orders defense remained a topic of constant controversy under customary international law. Within the 1949 Geneva Conventions[32] and the 1977 Protocol I,[33] the strictness of the

23 *Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, enacted 20 December 1945, Art. II.4.b, 3 Official Gazette of the Control Council for Germany (1946), 50-5 [Control Council Law No. 10].

24 *Statute to the International Criminal Tribunal for Rwanda*, art. 6 para. 4, annexed to SC Res 955, UN Doc S/RES/955, 8 November 1994.

25 *Statute to the International Criminal Tribunal for the Former Yugoslavia*, art. 7 para. 4, annexed to SC Res 827, UN Doc S/RES/827, 25 May 1993.

26 Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, Add.3 sec. 21.

27 *Statute of the Special Tribunal for Lebanon*, art. 3 para. 3, annexed to *Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon*, annexed to SC Res 1757, UN Doc S/RES/1757, 30 May 2007.

28 *Statute of the Special Court for Sierra Leone*, 12 April 2002, art. 6 para. 4, annexed to *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002, 2178 U.N.T.S. 137.

29 *Delegation of Authority regarding Establishment of an Iraqi Special Tribunal*, Order No 48, CPA/ORD/9 Dec 2003/48 (2003) ('*IST Statute*'), annexed to Coalition Provisional Authority (Iraq).

30 P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law', 10 *European Journal of International Law* (1999) 1, 172; see also Green, *supra* note 16, 339.

31 Gaeta, *supra* note 30, 185–186; A. Cassese, *International Criminal Law*, 2nd ed (2008), 279.

32 International Committee of the Red Cross, *Remarks and Proposals* (1948) *19, 34, 64, 85*; Federal Political Department Berne, *Final Record of the Diplomatic Conference of Geneva of 1949*, Volume II, Section B (1949), 114.

33 See Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Official Records* (CDDH/SR.10) (1978) 307.

Nuremberg standard came under opposition from diplomatic parties.[34] The lack of consensus over the evolution of customary law of the superior orders defense underscored the debate behind the codification of art 33 of the *Rome Statute*,[35] where general codification was finally achieved after a difficult compromise.[36]

D. Alternative Degrees of Attributing Criminal Responsibility: Finding the Right Solution to the Soldier's Dilemma

Three discrete formulations of the superior orders defense have emerged in international law. Both the absolute defense and the absolute liability doctrines draw a bright-line at exculpatory behavior with little reference to the individual circumstances under which the order was executed. These blunt formulations elevate particular policy concerns above the pursuit of a 'just' solution in the individual case. This section attempts to provide a critique of each approach and seeks to articulate why a formulation based on conditional liability would be the most preferable resolution to the soldier's dilemma. It concludes that the 'manifest illegality' principle presents the most workable criterion for a conditional test of criminal liability.

I. Absolute Defense

The *respondeat superior* principle recognizes the difficult predicament of a soldier in being forced upon a strict duty to obey the commands of his superiors. The notion of fairness underpinning such a principle is embodied in St Augustine's acknowledgement that while leaders may wage wars without legitimate cause, for soldiers, the 'conditions of […] service' characterizes their innocence.[37] Indeed, this principle transpired in such times when unwavering obedience was enforced by corporal punishment[38] or even death.[39] Inasmuch as obedience is duty-based, in the 19th Century it was tainted by a pervasive sense

34 Maogoto, *supra* note 9, 185–186; see also L. C. Green, 'The Defence of Superior Orders in the Modern Law of Armed Conflict', 31 *Alberta Law Review* (1993) 2, 320, 330–331.

35 *Rome Statute*, Art. 33(2).

36 *Rome Statute*, Art. 33(2) which deems crimes against humanity and genocides as crimes which are manifestly illegal.

37 St Augustine, *Civitas Dei*, Book 22 Chapter 75, cited in L. C. Green, *Superior Orders in National and International Law* (1976) 5–6.

38 See, e.g., *Wilkes v. Dinsman*, US Supreme Court (1849) 48 U.S. 89, 127 (Woodbury J).

39 See, e.g., *Clark v. State*, Supreme Court Georgia (1867) 37 Ga. 191, 194 (Harris J).

of coercion.[40] Partly because of the dire repercussions inflicted for disobedience, the complete defense doctrine imposes no individual liability on a soldier whenever a crime has been committed under an official order.

The principle was also motivated by practical considerations. Kelsen viewed discipline as being 'possible only on the basis of unconditional obedience of the subordinate to the superior.'[41] Even when unconditional obedience eventually gave way to obedience qualified by the lawfulness of orders, *respondeat superior* functioned to preserve military discipline. Heralding an absolute defense formulation presupposes that by necessity of duty, the acts of a soldier, and therefore his culpability, are subsumed under those of his commander. It assumes, in a utilitarian sense, that following the orders of a central commander would produce the most favorable outcome for all soldiers during the disorientation of a military offensive. In condoning and being under-inclusive of criminal culpability, ignorance of the law is legitimated in this special circumstance.

In addition to policy considerations, the absolute defense finds support in positivist conceptions of authoritarian philosophies. Hobbes writes:

> 'What is ordered by the legitimate King is made lawful by his command and what he forbids is made unlawful by his prohibition. Contrariwise, when single citizens arrogate to themselves to judge right and wrong, they want to make themselves equal to the King, which counters the State's prosperity [...] When I do, by order, an act which is wrong for the one who commands it, it is not my wrongdoing, as far as the commander is my legitimate master.'[42]

This conception deems the fundamental legality of an order as solely deriving from the legitimacy of the superior authority.[43] Framed in somewhat patriarchal terms, it is neither necessary nor desirable for a subordinate to question an order as long as it emanates from a *de jure* authority. Yet taken in its entirety, this argument could 'lead to a sort of *reduction ad absurdum'*, by

40 N. Keijzer, 'A Plea for the Defence of Superior Order', 8 *Israel Yearbook on Human Rights* (1978), 78, 82.

41 H. Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31 *California Law Review* (1943), 530, 556 (emphasis added).

42 T. Hobbes, *Elementa Philosophica de Cive*, Ch 12 §§ 1, 2 cited in N. Keijzer, *Military Obedience* (1978), 146-147.

43 For a fuller discussion, see M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd ed. (1999), 454–455.

resulting in a situation where only the Leader of the Armed Forces, or the Head of State, could be held criminally accountable.[44]

Incontrovertibly, the applicability of the defense in its absolute form has fallen out of favor in modern discourse. The expansive jurisdiction of international law, first into the realm of individuals and then to impose criminal liability onto those individuals,[45] has resulted in a trend of individual accountability that is antithetical to the very concept of *respondeat superior*. Corresponding to this has been a progressive reduction in the severity of punishment given out to soldiers, as well as a shift in the nature of warfare, which henceforth relaxed the requirement of strict obedience.[46] Momentum advocating against the automatic immunity approach has accelerated,[47] in part due to the increasingly documented violations of international law in modern warfare. *Respondeat superio*r is clearly insufficient for deterrence purposes, and as such, the crux of the debate has now swiftly progressed beyond the rejection of the complete defense.

II. Absolute Liability

Under the doctrine of absolute liability, the imposition of full responsibility elevates the supremacy of the law above countervailing considerations of military necessity. Acting in obedience is not a defense in itself but can be raised as a mitigating factor in sentencing.

In contrast to Hobbesian thought, the absolute liability approach is grounded in democratic conceptions of legality. Thus, the lawfulness of an order does not derive from the legitimacy of the source, but is ultimately dependent on an overriding higher principle of legality. It was Locke who saw that obedience was only to law (in the form of public will):

> '[A]llegiance being nothing but *obedience according to law*, which when he violates, he has no right to obedience […] and thus he has no will, no power, but that of the law.'[48]

Grotius, following natural law ideals, reached a similar conclusion. He lectured that responsibility lay with the soldiers to desist from illegality. '[I]f

44 Gaeta, *supra* note 30, 175 fn 4.

45 See Cassese, *supra* note 31, 40; H. Sato *supra* note 9, 119.

46 Keijzer, *supra* note 40, 82-83.

47 *Id.*, 83.

48 J. Locke, *The Second Treatise of Civil Government* (first published in 1690), 6th ed. (1764), § 151 (emphasis in original).

the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out.'[49]

The primacy given to legality is the underpinning of common law democratic systems. But in pursuit of this end, the absolute liability approach is over-inclusive and makes subordinates criminally liable even when circumstances preclude the exercise of proper judgment. This is unsatisfactory when measured against Western standards of criminal culpability, which with its 'beyond reasonable doubt standard,' is predisposed towards finding innocence where culpability is subject to reasonable doubt. Discomfort with the extremity of absolute liability may explain why the international community has failed to agree to the permanent codification of this principle, beyond the statutes of the ad-hoc international criminal tribunals.

III. Conditional Liability

Establishing a conditional form of criminal liability on the basis of a distinguishing criterion creates a compromise between the needs of military efficiency and the ideals of legality. By contrast to absolutist positions, conditional liability represents a concerted attempt at finding a just determination for the implicated soldier. In this section, I argue that on practical and doctrinal considerations, the preferred criterion for culpability should be manifest illegality, and not reasonableness.

1. Manifest Illegality

Manifest illegality recognizes the special circumstances that confront a soldier upon receiving an order. Extenuating conditions, *prima facie*, point against circumstances that would make it fair to impose criminal culpability. This does not apply if an order can be objectively regarded as 'manifestly illegal.'

Indeed, manifest illegality has emerged as the dominant test in which the extremes of absolute liability and absolute defense can be moderated.[50] A partial operation of this position is now codified in the *Rome Statute*.[51] Yet manifest illegality is not merely a modern construct: early resorts can be found

49 H. Grotius, *De Jure Belli Ac Pacis Libri Tres* (F. W. Kelsey trans) Vol II (1925 ed), 138.

50 See, for e.g., J. B. Insco, 'Defense of Superior Orders before Military Commissions', 13 *Duke Journal of Comparative and International Law* (2003) 2, 389, 393; P. White, 'Defence of obedience to superior orders reconsidered', 79 *The Australian Law Journal* (2005), 50, 54.

51 *Rome Statute*, Art. 33(1)(c). The defence is only available for war crimes, as crimes against humanity and genocide are both deemed to be manifestly illegal.

in Roman law, where crimes of 'heinous enormity' became disqualified from a plea of superior orders defense.[52]

The strongest objections to manifest illegality concern its relevance. Gaeta and Cassese both argue that, in contrast to the wide variety of crimes tried under national law, the serious nature of international crimes are such that they are all implicitly 'manifestly illegal'.[53] Therefore as a matter of logic the absolute liability position should prevail in the international context. While this assumption holds true in most cases, the contrary can also be conceived of in limited situations. On its face this may appear to be paradoxical, but consider, for example, the war crime of excessive attacks. Article 8(2)(b)(iv) of the *Rome Statute* criminalizes the act of intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury which would clearly exceed the claimed military advantage. The problem is that, in many circumstances, a soldier on the front-line cannot assess the military advantage of the attack he is committing. As such, if the order did amount to a war crime then this cannot be regarded as manifestly unlawful.[54] Examples like these are rare, and in most cases the conduct of the accused may not attract criminal liability due to the lack of the requisite *mens rea*.[55] However, as a matter of doctrinal consistency and practical fairness, it is preferable to allow the existence of a defense, albeit in a limited operation, than to deny the defense wholly on the basis of a questionable assumption.

Further objections centre on defects in the drafting of the defense rather than the principle of the doctrine itself. Under Art. 33(1)(b) of the *Rome Statute*, the accused must 'not know that the order was unlawful' to be able to attract the protection of the defense. Dinstein argues that this renders the defense of superior orders redundant, as in the same situation the soldier's lack of *mens rea* could equally attract the mistake of law defense under Art. 32(2).[56] With respect to this argument, it is first submitted that the operation of the mistake of law defense is limited in scope and would not cover all situations envisaged by Art. 33(1)(b).[57] Second, not knowing the unlawfulness of an order

52 See Osiel, *supra* note 5, 2 fn 6. See generally D. Daube, 'The Defence of Superior Orders in Roman Law 72 *The Law Quarterly Review* (1956), 494; Keijzer, *supra* note 40, 80–82.

53 Gaeta, *supra* note 30, 185–186. Cassese, *supra* note 31, 279.

54 Similar situations may arise, for e.g., under Art 8(2)(b)(xxv) of the *Rome Statute*.

55 See *Rome Statute*, Art. 32(2) for the defence of mistake of law. Cf the views of Y. Dinstein in G. Kirk McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts: A Commentary*, volume 1 (2000), 381–382.

56 Dinstein, *supra* note 55, 381.

57 See K. J. Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis, 6 *Journal of International Criminal Justice* (2008), 419; G. Werle, *Principles of International Criminal Law*, 2nd ed. (2009), 212.

must be distinguished from a mental state where the defendant entirely lacks the requisite degree of intent and knowledge.[58] The superior orders defense foresees situations where soldiers, because of the exigencies of battle, do not know the unlawfulness of an order due to ignorance that would not normally be excused and would render them culpable.

An additional criticism concerns the reasons behind restrictions in the availability of the defense only for certain types of international crimes. Under the *Rome Statute*, the defense can be invoked for war crimes but not for crimes against humanity or genocide, since the latter two are deemed 'manifestly illegal'.[59] This may reflect the perception that crimes against humanity and genocide are of a more serious nature than war crimes.[60] Yet in many ways the distinction may be regarded as somewhat arbitrary. Given that the elements of crimes against humanity are specified in substantial detail under Art. 7(2)[61], it is oxymoronic to harbor the expectation that it would always appear manifestly illegal to soldiers.[62] Further, since both crimes against humanity and war crimes can be pleaded cumulatively, one can foresee the peculiar situation where a defendant who is indicted for both crimes may automatically resort to the defense for the latter charge but not for the former.[63] In principle, it is difficult to see why such a blanket distinction would be necessary. For cases concerning crimes against humanity or genocide, there is no reason why the Court could not determine, on the facts of the particular case, whether the commission was indeed manifestly illegal. This manner of drafting merely reflects the compromise that has been struck in relation to the acceptance of this defense,[64] but in no way detracts from the soundness of the manifest illegality principle.

Inevitably, the notion of manifest illegality carries inherent assumptions about the universality of morals. It does so by linking culpability with the moral imperative to refrain from the commissioning of an order whose illegality arises at an instance so easily identifiable that it is instinctive. Such an order, by

58 *Rome Statute*, Art. 30(1).
59 *Rome Statute*, Art. 33(2).
60 M. Frulli, 'Are Crimes Against Humanity more Serious than War Crimes?', 12 *European Journal of International Law* (2001) 2, 329. See also Werle, *supra* note 57, 218. *Contra* Gaeta, *supra* note 30, 190, who argue that it is difficult to envisage any international crime which would not be manifestly illegal. See above fn 53.
61 *Rome Statute.*
62 See Dinstein, *supra* note 55, 382; *contra* Cassese, *supra* note 31, 279; see also above fn 53.
63 See Cassese, *supra* note 31, 279.
64 See R. Cryer, 'The Boundaries of Liability in International Criminal Law', 6 *Journal of Conflict and Security Law* (2001) 3, 15 fn 80.

example, is the killing of an enemy soldier who has surrendered or been rendered defenseless.[65]

In elucidating the notion of manifest illegality, remarks by Judge Halevy— accepted in the *Eichmann* trial — reflects the high water-mark definition for this concept:

> 'The distinguishing mark of a 'manifestly unlawful order' should fly like a black flag above the order given, as a warning saying 'Prohibited!'. Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but a *flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of […] the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, […].*'[66]

Eichmann had pleaded the absolute form of the defense, having already acknowledged his complicity.[67] By consequence of the court's rejection of *respondeat superior* he was not able to raise the defense in the face of the manifest illegality of his crimes.

In military-court jurisprudence from North America, the manifest illegality principle has been similarly expressed.[68] Such an order is something 'so palpably illegal on its face', seen in the eyes of 'a man of ordinary sense and understanding.'[69] The reference to a 'reasonable man standard' has been repeated in numerous other judgments,[70] mediated according to the defendant's

65 *US v. Kinder* (1954) 14 CMR 742, 770 (U.S. Air Force Board of Review). In *US v. Kinder*, the victim was a Korean intruder in an 'unconscious or semi-conscious state from injuries' and 'was subdued and […] not resistant to the exercise of physical control over him', 769.

66 *Chief Military Prosecutor v Melinki* (1956) 13 Pesakim Mehoziim 90 (District Court), 44 Peksakim Elyonim 362 (Military Court of Appeal) cited in 'Attorney-General of the Government of Israel v Eichmann', 36 *International Law Reports* (1961) 5, 256 (District Court of Jerusalem); *International Law Reports* (1962) 277, 296 (Supreme Court of Israel) (emphasis added).

67 *Attorney-General of the Government of Israel v Eichmann*, 36 *International Law Reports* (1961) 5, 258 (District Court of Jerusalem).

68 See generally, L. C. Green, 'Superior Orders and Command Responsibility', 27 *The Canadian Yearbook of International Law* (1989), 167, 170–171.

69 *US v. Kinder* (1954) 14 CMR 746, 776 (U.S. Air Force Board of Review). For a general discussion of how illegal conduct under a superior order was evaluated according to The Manual for Courts-Martial, US Army, see 769–777.

70 See, e.g., *US v. Keenan* (1969) 39 CMR 117, 118; *US v. Griffen* (1968) 39 CMR 586, 588–589; *US v. Clark* (1887) 31 Fed, 710, 717.

background, age, education and military experience.[71] Professor Green has raised a more detailed list of factors relating to the circumstances which influence the decision to obey, including: the conditions and urgency surrounding the receipt of orders, the period of deployment, the nature of hostilities and the characteristics of the enemy party faced by the soldier.[72] It follows that the higher the rank of the defendant, the less likely it appears that the defense could be successfully pleaded. Indeed, courts have highlighted the enhanced expertise which they consider to be associated with the holding of an officer's rank.[73]

At the heart of the principle is a considered exercise of the different subjective circumstances that contribute to the decision-making process of a soldier. Only after taking this into account can culpability be decided on the objective basis of whether the order could be regarded as manifestly illegal. This demonstrates the capacity of the manifest illegality doctrine to absorb within its evaluation particulars pertaining to the individual case. Compellingly, it substitutes the blunt absolutist approaches with a more nuanced and just determination of individual culpability.

2. A Reasonableness Standard

A broad consensus currently supports the employment of the manifest illegality doctrine. However, some scholars have presented alternative criteria which could impose a higher level of moral responsibility.[74] Professor Osiel has, for example, argued for a 'civilianization' of the current position into a standard based on general notions of reasonableness.[75] This would be applied, at the very least, to officers and non-commissioned officers in developed countries.[76] He contends, from a sociological perspective, that the manifest illegality standard serves as an inadequate deterrent for the commission of atrocities. As a relatively undemanding criterion, it adversely skews the incentives for a soldier to understand the law. In light of this, the next question for consideration is whether it is appropriate for international standards of criminal culpability to experience a further shift in priorities.

71 *US v. Kinder* (1954) 14 CMR 746, 774 (U.S. Air Force Board of Review); see L. C. Green, *supra* note 16, 340.

72 L. C. Green, 'Superior Orders and the Reasonable Man', 8 *The Canadian Yearbook of International Law* (1970), 61, 102; see also N. C. H. Dunbar, *supra* note 11, 261.

73 See, e.g., *Chenoweth v. R* (1954) 1 CMAR 253; *Hryhoriw v. R* (1954) 1 CMAR 277.

74 B. Paskins and M. Dockrill, *The Ethics of War* (1979), 275–276.

75 Osiel, *supra* note 5, 358.

76 *Id.*, 8.

From the very beginning of this debate, it has been clear that Kelsen's reference to the *unconditional* nature of military obedience is no longer justifiable through ethics or practical necessity. The clear rejection of the absolute defense in the early 20th Century by the international community represented a paradigm shift towards individual responsibility.

This was based on the acknowledgement that

> '[t]he obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery.'[77]

If such a 'reasoning agent' construct is to be accepted, then prima facie a 'reasonableness' standard is feasible. But the proper question is whether it is desirable, on a policy level, for the international community to further move towards the paradigm of individualism. Two key considerations may influence this.

The first factor relates to a change in the nature of warfare which may diminish the practical importance of military discipline. Osiel argues that '[e]fficacy in combat now depends more on tactical imagination and loyalty to combat buddies than on immediate, unreflective adherence to the letter of superiors' orders […].'[78] Due to this evolution, traditional justifications based on the necessity of military discipline are less persuasive. In examining his proposition, certainly the decentralization of military structure is quite apparent. The pre-modern characterization of the military unit — the blunt, 'machine-like' mass of foot soldiers, [79] has regressed for a number of reasons. After the First World War, militaries underwent increasing specialization that is commensurate with more complex warfare and the availability of new technology. A somewhat decentralized structure features the existence of smaller, independent groups.[80] This predisposed decision-making towards a cooperative design rather than a strict hierarchy.[81] At the same time, due to the advanced technicality of military equipment, superiors have come to rely on the specialized expertise of subordinates.[82] This special expertise has eroded the traditional imperative to follow superior orders unquestioningly. In parallel to

77 *United States v Ohlendorf* (1950) IV *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No.10*, 470 ('*Einsatzgruppen Case'*).

78 Osiel, *supra* note 5, 7.

79 See Keijzer, *supra* note 42, 33–48 for a detailed summary of the key trends in the organizational structure of military organizations from ancient Rome to the modern era.

80 *Id*. 43.

81 *Id*. 43, 65.

82 *Id*.

this has been an inexorable societal emphasis towards accountability. Keijzer cites the creation of independent 'functionaries' such as military ombudsmen, inspector-general and military trade unions as having an indirect ability to undermine the strict authority of superior orders.[83]

While the character of the typical military structure has evolved, the impact of this event should not be over-emphasized. The sophistication of military warfare does not necessarily imply a seismic shift that justifies a disregard for discipline. An effective response to hazardous circumstances is still achieved through the instructions of a central command, and indeed in some cases the sophistication of communications technology has strengthened the ability of superiors to effect on-the-ground coordination.[84] On the whole, the top-down hierarchy continues to loom as the dominant framework, and remains necessary and desirable.[85] As Keijzer reminds us, 'the military organization is an instrument of violence in the hands of the state.'[86] At the crux of this notion is the crucial nexus between political control by the state, and the control of violence itself, which is to be held in check by a strict system of hierarchy. Therefore, a structural decentralization of the military chain of command does not destroy the hierarchical attribution of responsibility which defines the military. The changing nature of warfare alone cannot be a conclusive reason for radically downplaying the importance of military discipline.

The second argument for imposing the reasonableness standard concerns the policy objectives of deterrence. A reasonableness standard imposes a significantly greater onus on an individual soldier to assess the legality of his actions. Traditionally, the commission of atrocities has been regarded as a process 'originat[ing] "from below" as a result of violent passions or [a] process of brutalization unleashed by combat.'[87] The manifest illegality principle can serve as an effective deterrent to these acts because it aligns legal wrongs squarely with basic moral wrongs. However, in totalitarian regimes where criminal acts are sanctioned by the state "from above" and bureaucratized into smaller tasks, the manifest illegality of the conduct may be easily overlooked. Exemplified by the Eichmann trial, the perpetrator here is what Arendt conceives as a creation characterized by the 'banality of evil.'[88] In

83 *Id.* 45.
84 *Id.* 47.
85 *Id.* 46.
86 *Id.*
87 See S. G. Fritz, Book Review for 'Obeying Orders: Atrocity, Military Discipline and the Law of War, Mark J Osiel' 14 *Holocaust and Genocide Studies* (2000) 3, 432; see also Osiel, *supra* note 5, 173.
88 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994), 287. 'From the viewpoint of our legal institutions and of our moral standards of judgment, [Eichmann's]

this situation, legal wrongs cannot be aligned with moral wrongs. Legally sanctioned acts obscure the capacity of the individual to recognize moral wrongs in themselves.[89] Osiel argues that in these situations, manifest illegality fails in its function to alert against the commission of atrocities. This is because a reasonableness standard is inherently murkier, it encourages individuals to question orders. Instead of unconsciously resolving questions of legal or moral difficulty in favor of obedience, the process of ascertaining reasonableness incentivizes individuals to alert themselves about problems with an order. Acts falling within the grey area between manifest illegality, and probable illegality, may be further prevented.

The arguments behind Osiel's reasonableness standard are most persuasive for 'mass administrative massacres'[90] committed in sophisticated and developed political systems. Whether this can be applied as a general international standard is a different question altogether. Certainly, state sanctioned violence can occur equally in developed and developing states. But in recent times, the international community, and the International Criminal Court, has returned their preoccupation to acts of mass violence within Africa.[91] By contrast to Nazi Germany, the basis for this violence is associated more closely with issues of peace and order than mere bureaucratic ignorance. In these developing states, the threat of external punishment is often more important for the decision to obey than any reasonableness standard set by international law.[92] Clearly, the increased autonomy given to soldiers in professionalized armies has yet to manifest in many developing states. Thus, Osiel himself concludes that the workability of the reasonableness standard is limited in an international setting. In preference, 'the manifest illegality approach provides a useful "floor" for international law, in that it is a norm to which most states can realistically aspire'[93] to notwithstanding that 'much of contemporary warfare occurs in precisely those societies where it may be unrealistic to expect widespread adherence even to this seemingly indulgent requirement.'[94] In the face of these circumstances, the 'manifest illegality'

normality was much more terrifying than all the atrocities put together, for it implied […] that this new type of criminal […] commits his crimes under circumstances that make it well-nigh impossible [for him] to know or feel that he is doing wrong', 276.

89 Osiel, *supra* note 5, 147–148.

90 *Id.*, 151.

91 See e.g., Human Rights Watch, 'Statement by Human Rights Watch to the General Debate of the International Criminal Court's 7th Assembly of States Parties' (15 November 2008) available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-ASP7-GenDebe-HumanRW-ENG.pdf (last visited 9 December 2010) 3-4.

92 Fritz, *supra* note 87, 434–435.

93 Osiel, *supra* note 5, 362.

94 *Id.*, 362 fn 9.

standard remains the most politically acceptable option for the international community.

Finally, as a matter of practicality, the reasonableness test is difficult to accept because the onus it exacts is excessive. Much of the warfare conducted today still entails the exigencies of combat. While this factor can be taken into account in assessing the reasonableness of actions, the inherently uncertain nature of the 'reasonableness' concept detracts from its workability. Such a standard is bound to vary infinitely across social and cultural lines compared to a criterion of 'manifest illegality'. As such it would exacerbate the soldier's dilemma rather than resolve it. When a heavy onus is imposed by lawyers removed from the front-lines of battle, or in a court that considers facts with the benefit of hindsight, the credibility of the standard diminishes along with its adherence in practice. As a final consideration, the utilitarian virtues of deterrence should not compromise the importance of attaining individual justice for soldiers whose duty, ultimately, is to obey.[95] Manifest illegality by resort remains a more concrete and workable standard that can be used internationally; to this end such a test is preferred.

E. Frontiers of the Defense: Obedience to Civilian Orders?

For the majority of this paper, the defense of superior orders has been persistently justified on the basis of the demands of military cohesion and the rigidity of military discipline. It follows that the concept does not fluidly extend to civilian orders, absent of these special circumstances. Surprisingly however, the defense of obedience to civilian orders doctrine has yet to come under rigorous academic scrutiny. This section discusses the application of the defense in the context of civilian orders under the *Rome Statute* and examines whether the position taken is satisfactory.

I. Operation under the Rome Statute

Under the *Rome Statute,* the defense of superior orders can be pleaded 'pursuant to an order of a Government or of a superior, whether military or civilian.'[96] In doing so, it unambiguously signals that the defense is not

95 Osiel argues that the uncertainty of the standard can be alleviated by a multi-factor test which 'specify a limited set of circumstances and their relative priority' (*supra* note 5, 360). However, the multi-factor test itself would involve complex issues of value judgment. This is not a test that can work easily across diverse cultural lines.

96 *Rome Statute,* Art. 33(1).

confined to a military framework. There is an express requirement, to be proven positively, that the subordinate had a legal duty to obey the order,[97] that he or she did not know that the order was unlawful[98] and that it is not manifestly illegal.[99] However, the precise limits of Art. 33 are yet to be settled.

The scope of the defense as applied to civilian orders is unclear. A defendant must have received the order either as part of a chain of command — military or civilian — or the order must be prescribed by law. [100] In civilian contexts, this takes account of orders prescribed by law as well as orders imparted by a governing official that are within authority and not *ultra vires*.[101] But it is unclear whether this includes orders issued by an unofficial, *de facto* authority. On the one hand, it may be a small step to include unofficial commands, if command responsibility already recognizes the level of effective control on the subordinate exerted by the *de facto* body.[102] However, in a defense context, 'control' is more closely aligned with the notion of compulsion and duress, while the receipt of superior orders is a distinct concept based on the legal duty to obey.[103] It follows that such a duty cannot exist in cases of 'unofficial subordination'[104] and therefore, the better view is that *de facto* orders would not validly meet threshold requirements. From the recipient's viewpoint, it is at the very least logically acceptable to allow the defense where the civilian superior '*purports* to exercise official authority.'[105] This would conclusively exclude situations emanating from a private body.

II. How far should the Defense of Superior Orders Extend to Civilian Contexts?

In line with the expansion of command responsibility to civilian commanders,[106] it is warranted that its corollary, the superior orders defense,

97 *Rome Statute*, Art. 33(1)(a).
98 *Rome Statute*, Art. 33(1)(b).
99 *Rome Statute*, Art. 33(1)(c).
100 *Rome Statute*, Art. 33, heading.
101 A. Zimmerman, 'Superior Orders', in A. Cassese *et al*. (eds), *The* Rome Statute *of the International Criminal Court: A Commentary*, Volume I (2002), 968.
102 *Id*. 968–969. See also O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed (2008), 929, who regards command responsibility and superior orders defence as 'represent[ing] two sides of the same coin.'
103 *Rome Statute*, Art. 33(1)(a).
104 E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), 323–324. *Contra* Triffterer, *supra* note 102, 924, who argues that the meaning of government extends to *de facto* governments of the State.
105 Zimmerman, *supra* note 101, 696. Cf. Triffterer, *supra* note 102, 926.
106 See *Rome Statute*, Art. 28(b).

should also be widened to include civilian subordinates.[107] On a doctrinal level, it is accepted that the existence of such a defense for civilians 'can provide for a more nuanced and comprehensive moral response to the (non-) sincerity of the intentions of defendants.'[108] As international law takes an increasingly expansive view of its jurisdiction over individual criminal responsibility, its doctrines should evolve to reflect a more just and flexible approach towards dealing with the actual culpability of an individual.

At the same time, the extension of the application of superior orders to civilian contexts is fraught with conceptual difficulty. This is because the assumptions which underlie the existence of superior orders in the military sphere cannot be directly transferred to a civilian context.

While the legal duty of obedience may apply to a civilian subordinate, a strict system of discipline, and the exigencies surrounding the consummation of the order, is less likely to be present. Precisely for this reason, national laws for civilians generally do not allow ignorance of the law to be an excuse. [109] The superior orders defense operates under the presumption of military conditions. As these conditions cannot be presumed in the civilian context, the onus should be on the civilian subordinate to characterize the situation by analogy to the extraordinary circumstances faced by a soldier that necessitates strict adherence to the chain of command.[110] The imposition of this element of proof is necessary to prevent an excessively broad manifestation of the defense. In any situation where the primacy of legality is subjugated on the grounds of policy, exculpation on a basis other than the actual culpability of the defendant must be treated cautiously. In civilian contexts, where policy arguments of necessity are weak, a circumscribed approach to the defense of superior orders becomes even more acutely justified.

F. Conclusion

The defense of the superior orders represents an attempt at finding a balance between the 'dictates of absolute discipline and efficiency in what is essentially an instrumentality of power and the equally inescapable subjection

107 See Knoops, *supra* note 7, 40–41.

108 Knoops, *supra* note 7, 42. Cf Triffterer, *supra* note 102, 925, who argues that 'it is necessary that […] civilian superiors exercise a degree of control over their subordinates which is similar to that of military commanders.' Contrary to this I argue that effective control is not relevant in the defense context.

109 This is the position in Australia: see, e.g., *A v. Hayden*, High Court of Australia (1984) 156 CLR 532, 554.

110 Zimmerman, *supra* note 101, 969.

of that instrument of power to the authority of the law.'[111] The various characterizations in which the defense has emerged historically are indicative of the difficulties in such an exercise. In spite of this, adopting a test based on manifest illegality resolves many of the problems that arise from the extremity of the absolute liability and absolute defense positions. This is the characterization upon which the re-emergence of the superior orders defense can be justified in contemporary contexts. The justification is ultimately predicated on the acknowledgement of the significant pressures faced by soldiers. Conditions on the battlefield may reasonably impair and restrict the ability to make well thought out decisions. Thus, strict adherence to military command is an essential element of a soldier's duty.

Outside of a situation where strict discipline is the assumed norm, the justification weakens considerably. In examining the frontier of the defense in a civilian context, a conceptual difficulty arises when we consider the underlying basis for the existence of the defense in the first place — given that civilians are not generally subjected to the same pressures or the strict discipline of the military. Therefore, the scope of the superior order defense in the civilian context ought to be limited in deference to preserving doctrinal consistency.

111 H. Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', 21 *British Yearbook of International Law* (1944), 58, 71.

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The Post-9/11 Discourse Revisited – The Self-Image of the International Legal Scientific Discipline

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Abstract

A few years ago, the legality of Operation Enduring Freedom (OEF) was a topic much discussed in the international legal literature. This article approaches the problem from a new angle. Rather than investigating the relevant issue of legal substance – whether or not OEF was ever consistent with international law – the article focuses attention on the general scholarly performance in dealing with this issue. Scrutinizing the literature published immediately following upon the events of 11 September 2001, the author suggests that overall, the scholarly debate on the legality of OEF did not live up to the standards normally applied in serious legal analysis, and that hence, the debate should be characterized as poor science. The article presents this criticism in further detail. With said criticism as a basis, in a concluding part of this article, the author takes the investigation one step further. As he suggests, when scholars engaged in the post-9/11 discourse, there was something about the whole situation that greatly constrained them. They were obviously hesitant to conclude that in circumstances like those of 9/11, there would still not be any right of self-defense to exercise. So much did they hesitate that they thought the opposite conclusion worth the prize of far-reaching infringements of the most basic of scientific quality standards. Why this hesitation, the article asks. What force or forces are compelling international legal scientists? As the author suggests, this question bears directly on the particular self-image of the legal scientific discipline and the role it envisages for itself in the international community. He concludes the article by initiating a discussion on this very delicate issue specifically, introducing for this purpose a description of the international legal scientist as archetype.

A. Part I

I. Introduction

Legal science is a concept generally honored among the legal profession. As we are used to thinking, legal science is the activity typically engaging professors of law, research fellows at legal departments, and doctoral candidates. It produces descriptions and assessments of a legal system, including the way that system is created and developed. Stated generically, it provides what legal scholars communicate and deliberate at legal conferences and through the agency of law journals and scientific

publishing companies. Two assumptions are implicit in this activity.[1] First, there is the idea that legal science is a good to be desired and pursued. As most people in the legal profession tend to believe, legal science is an activity that *should* be practiced. For some reason – not often openly declared – we are better off *with* legal science than without it. Secondly, there is the idea that legal scientific activities can be assessed in comparative terms such as *better* and *worse*. In the conceptual world of the legal profession, obviously, there is an ideal legal scholarship that can be used as a basis for criticism of legal scientific activities. The more legal scholars can approximate the ideal, the better it is; and vice versa.

All things considered, the mere existence of legal scientific activity would seem to raise the claim for quality control and review. Generally speaking, such reviews are warranted for several reasons. First, they are a means to safeguard the internal rationality of legal science. To be able to communicate and perform their task efficiently, legal scientists are dependent on the instrumentality of specific intellectual tools, such as legal terminology and legal concepts. Largely, these tools are created and developed through the activities of legal scholarship itself. Legal scientific activities should be reviewed to ensure that the intellectual tools remain functional.[2] Second, reviewing legal scientific activity is a means to promote and protect the authority of the legal scientific discipline. Every legal proposition raises the claim that it be considered correct.[3] Therefore, if on further scrutiny, time after time, the outcome of legal scientific activities is revealed to be incorrect, the credibility of all legal science will be jeopardized. Legal scientific activities should be reviewed to ensure that this does not happen. Third, reviewing legal scientific activity serves as a means

1 Support for this proposition can be found in speech act theory. Searle gave the example of a person, who says "The cat is on the mat", see J. R. Searle, *Speech Acts* (1969), 11. In *Speech Acts* he argued that by merely uttering this proposition, a person inevitably commits herself to its truthfulness. This line of argument can be applied to legal scientific activity as well. If people engage in legal scientific activities, they commit themselves to the assumption that legal science is a good to be desired and pursued. Similarly, if legal scholars spend time comparing and assessing legal scientific activities, they commit themselves to the assumption that legal scientific activities can be assessed in comparative terms such as better or worse.

2 Cf. U. Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology: The Role of Language for an Understanding of the International Legal System', 78 *Nordic Journal of International Law* (2009) 1, 53.

3 See R. Alexy, *A Theory of Legal Argumentation – The Theory of Rational Discourse as Theory of Legal Justification* (1989), 214-217.

to protect the internal rationality of legal systems. Legal science has a unique task, for which no other legal actor takes responsibility. It systemizes and analyzes the relevant "legal activities", that is, the activities of all those who participate in the creation and development of a legal system. If legal science does not perform this task well, the coherence of the legal system will be put at risk. Legal scientific activities should be reviewed to ensure that this does not happen. Fourth, reviewing legal scientific activities is a means to protect the legitimacy of law as a form of governance. When legal research is performed on a legal order, it raises an implicit claim that overall, the legal order is legitimate.[4] Therefore, the continued confidence of the community in legal science inevitably entails its confidence also in the legal order. Legal scientific activities should be reviewed to ensure that this confidence remains intact.

This essay is intended as a contribution to the ideally ever-on-going quality control of international legal scholarship. The essay will conduct a review of a particular legal discourse on a particular legal question: the legality of Operation Enduring Freedom. I assume the reader is already fairly acquainted with the setting. On 11 September 2001, four commercial aircraft were hijacked to be used in a large-scale attack carried out in and against the United States of America. Two of the jets were deliberately flown into the World Trade Center of New York City, a third struck the Pentagon in Washington, D.C., and a fourth crashed into a field in Shanksville, Pennsylvania, apparently heading for another target in the Washington area. The attacks were immediately attributed to a group of loosely affiliated terrorist organizations, known as the Al-Qaeda network. On the evening of 11 September, the United States Government declared itself to be engaged in a "war against terrorism",[5] and five days later, the Government of the United Kingdom followed suit by issuing a similar statement.[6] On 7 October 2001, the two governments ordered armed forces to initiate military actions in Afghanistan. Air strikes were launched against terrorist training camps, but also against military targets – such as air defense, communication centers, and air bases – throughout the country, followed by a military campaign on the ground. This military action was

4 See K. Tuori, *Critical Legal Positivism* (2002), 283-322.

5 Statement by the President of the United States in his Address to the Nation, 11 September 2001, available at http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html (last visited on 19 November 2010).

6 See *Keesing's Record of World Events*, 44336.

referred to as Operation Enduring Freedom.[7] In an attempt to justify it the two governments invoked their inherent right of self-defense.[8]

In the international legal literature, the tragic events of 9/11 and the subsequent military operation in Afghanistan attracted considerable attention. Articles and monographs were produced in great quantity,[9] the

7 As of November 2010, Operation Enduring Freedom still continues.

8 Letters of 7 October 2001, UN Doc S/2001/946 and UN Doc S/2001/947.

9 See Y. Arai-Takahashi, 'Shifting Boundaries of the Right of Self-Defence: Appraising the Impact of the September 11 Attacks on *Jus Ad Bellum*', 36 *The International Lawyer* (2002) 4, 1081; J. M. Beard, 'America's New War on Terror: The Case for Self-Defense Under International Law', 25 *Harvard Journal of Law and Public Policy* (2001-2002) 2, 559; M. C. Bonafede, 'Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks', 88 *Cornell Law Review* (2002-2003) 1, 155; O. Bring & D. I. Fisher, 'Post-September 11: A Right of Self-Defence Against International Terrorism?', in D. Amnéus & K. Svanberg-Torpman (eds), *Peace and Security* (2004), 177-191; D. Brown, 'Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses', 11 *Cardozo Journal of International and Comparative Law* (2003) 1, 1; M. Byers, 'Terrorism, the Use of Force and International Law After 11 September', 51 *International and Comparative Law Quarterly* (2002) 2, 401; A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12 *European Journal of International Law* (2001) 5, 993 [Cassese, 2001]; J. A. Cohan, 'The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law', 15 *Pace International Law Review* (2003) 2, 283; J. Delbrück, 'The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the 'War Against Terrorism'', 44 *German Yearbook of International Law* (2001), 9; Y. Dinstein, 'Humanitarian Law on the Conflict In Afghanistan, Remarks by Yoram Dinstein', 96 *Proceedings of the American Society of International Law* (2002), 23; H. Duffy, *The 'War on Terror' and the Framework of International Law* (2005); P. M. Dupuy, 'The Law After the Destruction of the Towers', *European Journal of International Law, Discussion Forum, The Attack on the World Trade Center: Legal Responses*, once but not any more available at the web page of the European Journal: http://www.ejil.org, in file with the author of this essay; T. M. Franck, 'Terrorism and the Right of Self-Defense', 95 *American Journal of International Law* (2001) 4, 839; G. Gaja, 'In What Sense Was There an 'Armed Attack'?', *European Journal of International Law, Discussion Forum, The Attack on the World Trade Center: Legal Responses*, once but not any more available at the web page of the European Journal: http://www.ejil.org, in file with the author of this essay; M. J. Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter', 25 *Harvard Journal of Law and Public Policy* (2002) 2, 539; C. Gray, *International Law and the Use of Force*, 2nd ed. (2004), 159-194; C. Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 *San Diego International Law Journal* (2003), 7; E. Gross, 'Thwarting Terrorist Acts by

Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens', 15 *Temple International and Comparative Law Journal* (2001) 2, 195; E. Katselli & S. Shah, 'September 11 and the UK Response', 52 *International and Comparative Law Quarterly* (2003) 1, 245; F. L. Kirgis, 'Terrorist Attacks on the World Trade Center and the Pentagon' (September 2001) available at http://www.asil.org/insigh77.cfm (last visited 19 November 2010); B. Langille, 'It's 'Instant Custom': How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001', 26 *Boston College International and Comparative Law Review* (2003) 1, 145; L. Martinez, 'September 11th, Iraq and the Doctrine of Anticipatory Self-Defense', 72 *UMKC Law Review* (2003) 1, 123; K. M. Meessen, 'Unilateral Recourse to Military Force Against Terrorist Attacks', 28 *Yale Journal of International Law* (2003) 2, 341; S. D. Murphy, 'Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter', 43 *Harvard International Law Journal* (2002) 1 [Murphy, 2002a], 41; E. P. J. Myjer & N. D. White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?', 7 *Journal of Conflict and Security Law* (2002) 1, 5; R. Müllerson, 'Jus Ad Bellum and International Terrorism', 32 *Israel Yearbook of International Law* (2002), 1; M. E. O'Connell, 'Lawful Self-Defense to Terrorism', 63 *University of Pittsburgh Law Review* (2002) 4, 889 [O'Connell, 2002]; M. E. O'Connell, 'American Exceptionalism and the International Law of Self-Defense', 31 *Denver Journal of International Law and Policy* (2002-2003) 1, 43 [O'Connell, 2002-2003]; E. Papastavridis, 'Security Council Resolutions 1368/2001 and 1373/2001: Collective Security or the Right of Self-Defence', 55 *Revue Hellénique de Droit International* (2002), 501; J. J. Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond', 35 *Cornell International Law Journal* (2001-2002) 3, 533 [Paust, 2001-2002]; A. Pellet, 'No, This is not War!', *European Journal of International Law, Discussion Forum, The Attack on the World Trade Center: Legal Responses*, once but not any more available at the web page of the European Journal: http://www.ejil.org, in file with the author of this essay; N. G. Printer, 'The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen', 8 *UCLA Journal of International Law and Foreign Affairs* (2003) 2, 331; N. Quénivet, 'The Legality of the Use of Force by the United States and the United Kingdom Against Afghanistan', 6 *Austrian Review of International and European Law* (2001), 205; J. Quigley, 'The Afghanistan War and Self-Defense', 37 *Valparaiso University Law Review* (2003) 2, 541; S. R. Ratner, 'Jus Ad Bellum and Jus In Bello After September 11', 96 *American Journal of International Law* (2002) 4, 905; P. Rowe, 'Responses to Terror: The New 'War'', 3 *Melbourne Journal of International Law* (2002) 2, 301; M. N. Schmitt, 'Counter-Terrorism and the Use of Force in International Law', 32 *Israel Yearbook on Human Rights* (2002), 53; N. Schrijver, 'Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedom'?', 48 *Netherlands International Law Review* (2001) 3, 271; C. Stahn, 'Terrorist Acts As 'Armed Attack': The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism', 27 *The Fletcher Forum of World Affairs* (2003) 2, 35 [Stahn, 2003]; C. Stahn, 'Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say', *European Journal of International Law, Discussion Forum, The Attack on the World Trade Center: Legal Responses*, once but not any more available at the

main part dating from September 2001 to the late fall of 2003. Although a wide range of legal issues were brought to analysis and commented upon, the center of all discussion remained the meaning and application of the two rights of self-defense – those laid down in Article 51 of the UN Charter and contained in customary international law, respectively; each requires the existence of an armed attack.[10] For two reasons, the categorization of Operation Enduring Freedom as induced by an armed attack raised the interest of international legal scholars. First, the assault on New York and Washington, D.C., had not been performed by any state organ but by a group of private individuals – the Al-Qaeda terrorist network. Second, although the Al-Qaeda network had been harbored by Afghanistan for many years, according to the general international law of state responsibility, that in itself would not make the 9/11 attack attributable to this state.

Personally, I have studied the post-9/11 international legal discourse with great interest. As expected – considering the great number of scholars that engaged in the debate, and the complexity of the many legal issues involved – commentators disagreed on a wide range of issues. Given this context, it is surprising that something like a general doctrine might transpire; but this is exactly what happened. It was the opinion expressed or implied by the great majority of text-writers that at some point between 11 September and 7 October 2001, when Operation Enduring Freedom was officially launched,[11] the international law of self-defense changed.[12] When

web page of the European Journal: http://www.ejil.org, in file with the author of this essay, henceforth referred to as Security Council Resolutions 1368 and 1373; C. Stahn, 'International Law at a Crossroads? The Impact of September 11', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 183 [Stahn, 2002]; G. Travalio & J. Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force', 4 *Chicago Journal of International Law* (2003) 1, 97; G. K. Walker, 'The Lawfulness of Operation Enduring Freedom's Self-Defense Responses', 37 *Valparaiso University Law Review* (2003) 2, 489; R. Wolfrum, 'The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?', 7 *Max Planck Yearbook of United Nations* Law (2003), 1.

10 See e.g. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, ICJ Reports 1986, 14, 103, para. 195.

11 Note that in the Afghanistan Combat Zone Executive Order of 12 December 2001, 19 September was designated as the date of commencement of combat activities. See http://georgewbush-whitehouse.archives.gov/news/releases/2001/12/ (last visited 19 November 2010).

12 See e.g. Arai-Takahashi, *supra* note 9, 1087, 1096 and 1101; Beard, *supra* note 9, *passim*, but see especially 589-590; Bonafede, *supra* note 9, 206, *et passim*; Bring &

a forcible measure is employed by a group of private individuals, whose conduct – judged by the general international law of state responsibility – cannot be attributed to any state, considered from the point-of-view of the international law of self-defense existing on the morning of 11 September 2001, that measure would never be classified as an armed attack. Considered from the point-of-view of the international law of self-defense existing on 7 October 2001, it sometimes would. To facilitate reference, henceforth, I will refer to this doctrine as the *proposition of change*.

Strictly speaking, the proposition of change comes in two versions, depending on the exact rule commentators thought had evolved. According to the argument of some legal scholars, in the relevant period from 11 September to 7 October 2001, *alongside the general international law of state responsibility*, states developed a new criterion of attribution: when a group of private individuals has been harbored by a state for an extensive period of time, the conduct of that group will be attributable to said state.[13] This criterion bore specifically on the understanding of the concept of an armed attack.[14] Henceforth, according to the international law of self-defense existing on 7 October 2001, a forcible measure would sometimes

Fischer, *supra* note 9, 185-191; Brown, *supra* note 9, 24-29; Byers, *supra* note 9, 409-410; Cassese, 2001, *supra* note 9, 996-997; Cohan, *supra* note 9, 320-328; Delbrück, *supra* note 9, 15-16, implicitly; Glennon, *supra* note 9, 549-553; Greenwood, *supra* note 9, 17; Langille, *supra* note 9, 146.; Martinez, *supra* note 9, 160-161, implicitly; Meessen, *supra* note 9, 345, *et passim*; Murphy, 2002a, *supra* note 9, 45-51; Müllerson, *supra* note 9, 43 and 47; O'Connell, 2002-2003, *supra* note 9, 45-47; Printer, *supra* note 9, 344-352; Quénivet, *supra* note 9, 221-225; Ratner, *supra* note 9, 914; Rowe, *supra* note 9, 304 and 307-308; Schmitt, *supra* note 9, 77 and 104; Schrijver, *supra* note 9, 285; Stahn, 2002, *supra* note 9, 189 and 211-214; Stahn, 2003, *supra* note 9, 38 and 39, speaking about "Article 51(½)"; Travalio & Altenburg, *supra* note 9, 101-111 and 116-117; Walker, *supra* note 9, 532, fn. 182; Wolfrum, *supra* note 9, 2, 27-28, 35-39 and 75. For a contrary opinion, see Franck, *supra* note 9, 840-841; Gaja, *supra* note 9; Paust, 2001-2002, *supra* note 9, *passim*; Pellet, *supra* note 9. According to Franck, a terrorist attack like that of 9/11 would have been classified as an "armed attack" already by the international law of 11 September a.m. According to Paust, Gaja, and Pellet, at no point – neither before 11 September, nor after – did a terrorist attack like that of 9/11 classify as an "armed attack".

13 See e.g. Byers, *supra* note 9, 409-410; Cohan, *supra* note 9, 320-328; O'Connell, 2002-2003, *supra* note 9, 45-47; Rowe, *supra* note 9, 304 and 307-308; Stahn, 2002, *supra* note 9, 189 and 211-214; Schrijver, *supra* note 9, 285; Travalio & Altenburg, *supra* note 9, 101-111 and 116-117.

14 Hence, as *lex specialis*, it would have to be applied prior to the criteria provided in the general international law of state responsibility. Cf. *Articles on Responsibility of States for Internationally Wrongful Acts* (GA Res. 56/83, 28 January 2002, Annex), Art. 55.

classify as an armed attack, although, as far as general international law goes, it would not be attributable to any state. Other commentators viewed things differently. According to them, from 11 September to 7 October 2001, the question of attribution had been done away with entirely. Henceforth, according to the international law of self-defense, a forcible measure would classify as an armed attack, irrespective of whether it was performed by a state or a non-state agent.[15] Whether commentators endorsed the one version of the proposition of change or the other, henceforth they will be referred to as *proponents of change*.

For several reasons, I insist, the post-9/11 debate is an exceptionally interesting object of scientific study. First of all, it raises some very interesting questions with respect to the integrity of the international legal scholarship. Certainly, from 11 September to 7 October 2001 there may have been a change in the way people conceptually conceive of attacks perpetrated by international terrorists. However, this is not in itself tantamount to a change of the relevant international law. A change of international law is effected using the particular norm-creating processes recognized by international law. Considering the oft-cited inertness of those processes, the proposition of change comes out as rather drastic. If, generally, a change of international law is difficult to accomplish, then it seems a rather remote idea that a universally or near-universally applicable rule, such as the right of self-defense, could be changed over a period of just four weeks. How did text-writers argue to defend this conclusion? To what extent did their arguments conform to the standards normally demanded of a well-functioning legal science? For a proper understanding of the international legal scholarship, these are critical questions. It is the purpose set for this essay to provide them with an answer.

Subsequent section II of Part I will set the proposition of change into the context of the wider legal discourse. It remains a fact, that in order to correctly understand and assess international legal scholars when arguing that from 11 September to 7 October 2001 the international law of self-defense changed, some background knowledge is required. We need to have an idea of the arguments that scholars thought were supporting their

[15] See e.g. Arai-Takahashi, *supra* note 9, 1087, 1096 and 1101; Bonafede, *supra* note 9, 206, *et passim*; Bring & Fischer, *supra* note 9, 185-191; Brown, *supra* note 9, 24-29; Delbrück, *supra* note 9, 15-16; Langille, *supra* note 9, 153; Meessen, *supra* note 9, 345, *et passim*; Müllerson, *supra* note 9, 43 and 47; Ratner, *supra* note 9, 914; Schrijver, *supra* note 9, 285; Stahn, 2003, *supra* note 9, 38 and 39; Travalio & Altenburg, *supra* note 9, 101-111 and 116-117; Walker, *supra* note 9, 532, fn. 182.

assumption about the contents of that law on the morning of 11 September. It is the purpose of section II of Part I to impart such an idea. Part II of the essay will establish and critically investigate the series of argumentative behavior patterns that emerge by a closer reading of the post-9/11 international legal literature. As the investigation will show, discussants gravely and repeatedly violated a number of the most basic of scientific quality standards. To put it bluntly, overall, the discourse on the legality of Operation Enduring Freedom was poor legal science. This conclusion provokes another host of very interesting questions. Quite clearly, commentators were hesitant to conclude that Operation Enduring Freedom was not consistent with international law, or – more generally – that in circumstances like those accompanying the events of 9/11, there would still not be any right of self-defense for states to exercise. So much did they hesitate that they thought the opposite conclusion worth the prize of far-reaching infringements of the most basic of scientific quality standards. Why this hesitation, one might ask. What force or forces are compelling international legal scientists? As it seems, the answer to this question bears directly on the particular self-image of the legal scientific discipline and the role it envisages for itself in the international community – and that is the second reason for why I find the post-9/11 discourse so interesting. In the concluding part III of this essay, I will allow myself to share a few thoughts on this delicate issue. Based on generalized personal experience, I will venture a description of the international legal scientist as archetype. The description involves a distinction between six different kinds. They are denoted as the External Observer, the Legal Idealist, The Legal Activist, the Moral Messenger, the Preserver of the Legal Self, and the Guardian of the Legal System, respectively. As I will argue, the six types all serve as possible explanations of the poor scientific quality characterizing the post-9/11 international legal discourse. Considered from the perspective of the international legal scholarship in general, they may explain some of the relationships that obviously exist between the self-image of the legal scientific discipline and what tends to be the outcome of international legal scientific activities. Hopefully they may also provide a basis for a more penetrating general discussion on the role of the legal scientific discipline in the international community.

II. The Law of 11 September a.m.

As earlier indicated, the proposition of change entails an assumption about the contents of the international law of self-defense existing on the

morning of 11 September 2001: When a forcible measure is employed by a group of private individuals, whose conduct – judged by the general international law of state responsibility – cannot be attributed to any state, that measure can never be classified as an armed attack.[16] To support this assumption, apart from earlier scholarly opinions,[17] the proponents of change put their trust in the following authorities:

The 1986 judgment of the International Court of Justice in the Nicaragua Case.[18] According to the argument invoked by the US Government in defense of its support for the *contras*, the Government of

16 See *supra* section I.

17 See e.g. M. Brennan 'Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law', 9 *Louisiana Law Review* (1998-1999), 1195, 1207, 1209; A. Cassese, 'The International Community's 'Legal' Response to Terrorism', 38 *International and Comparative Law Quarterly* (1989), 589 [Cassese, 1989], 596-597; Y. Daudet, 'International Action Against State Terrorism', in R. Higgins & M. Flory (eds), *Terrorism and International Law* (1997), 201, 203-205; S. R. Knauft, 'Propertosed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks', 19 *Hastings International and Comparative Law Review* (1995-96), 763, 773; J. Lobel, 'Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', 24 *Yale Journal of International Law* (1999), 537, 541; M. F. Lohr, 'Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism', 34 *Naval Law Review* (1985), 1, 7-10, implicitly, *et passim*; J. Paust, 'Responding Lawfully to International Terrorism: The Use of Force Abroad', 8 *Whittier Law Review* (1986-87), 711 [Paust, 1986-1987], 720-721, 723, but note that according to Paust, if a state uses "clinical" force for the purpose of quashing terrorists residing within the territory of some other state, that force should not be considered directed against the territorial integrity or political independence of that state; O. Schachter, *International Law in Theory and Practice* (1991) [Schachter, 1991], 164-167; O. Schachter, 'The Lawful Use of Force by a State Against Terrorists in another Country', 19 *Israel Yearbook of Human Rights* (1989) 209 [Schachter, 1989], 216-219; G. M. Travalio, 'Terrorism, International Law, and the Use of Military Force', 18 *Wisconsin International Law Journal* (2000), 145, 152, 156; Contra, Y. Dinstein, *War, Aggression and Self-Defence*, 3rd ed. (2001), 213-22; R. Wedgwood, 'Responding to Terrorism: The Strikes Against bin Laden', 24 *Yale Journal of International Law* (1999), 559, 564, arguing that "[t]here is nothing in the U.N. Charter or state practice that restricts the identity of aggressors against whom states may respond – for privates as well as governments may be the sources of aggressive conduct".

18 For commentaries citing this authority, see e.g. Brown, *supra* note 9, 24; Cassese, 2001, *supra* note 9, 996-997; Cohan, *supra* note 9, 317; Glennon, *supra* note 9, 543-544; Meessen, *supra* note 9, 345; Schmitt, *supra* note 9, 69-70 and 92-200; Murphy, 2002a, *supra* note 9, 44-45 and 51; Ratner, *supra* note 9, 908; Schrijver, *supra* note 9, 285-286; Stahn, 2002, *supra* note 9, 213 and 218-235; Travalio & Altenburg, *supra* note 9, 102-104.

Nicaragua had supplied the armed opposition in El Salvador with weapons. By doing so – this was the argument – Nicaragua had subjected El Salvador to an armed attack. The Court found that, irrespective of whether or not the supply of arms to the Salvadorian guerrillas could be treated as imputable to the government of Nicaragua, it was "unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State".[19] This statement invites an argument *a fortiori*. If the supply of arms by a government of a state to a group of non-state agents does not make the activities of that group attributable to the state in question, then neither should the mere harboring of such a group.

The work done by the International Law Commission on the topic of state responsibility.[20] In 1980, the ILC provisionally adopted a set of 35 *Draft Articles on State Responsibility*. According to Draft Article 34, "[t]he wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations"[21]. In the ILC Commentary to this Article, the concept of an armed attack is consistently referred to in inter-state terms. According to the words of paragraph 3, for instance, "for action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of internationally wrongful act, entailing wrongful recourse to the use of armed force, by the subject against which the action is taken"[22]. The ILC Commentary adopted in 1996 confirms completely what was already stated in 1980.[23] As for the Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts finally adopted in 2001, it is a revised and abbreviated version of the earlier Commentaries. Interestingly it, too, is permeated by the assumption that armed attacks are performed by states and states only. Hence, according to text explaining the wording of Article 21, "[t]he essential effect of Article 21 is to preclude the

19 See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua, supra* note 10, 103, para. 195, para. 119 and paras 229-230.

20 For commentaries citing this authority, see e.g. Brennan, *supra* note 17, 1207; Schachter, 1989, *supra* note 17, 217-218; Schachter, 1991, *supra* note 17, 164-165.

21 Yearbook of the International Law Commission [ILC Yearbook] (1980), Vol. II, Part 2, 33.

22 ILC Yearbook (1980), Vol. II, Part 2, 53. For other examples, see *id.*, 52, para. 1, and 53-54, para. 5.

23 ILC Yearbook (1996), Vol. 1, 258-267.

wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State"[24].

International reactions to the bombing by Israeli military aircraft of the PLO headquarters in Tunis, 1985.[25] In late September 1985, three Israeli citizens were assassinated by a group of terrorists in the port of Larnaca, Cyprus. Israel imputed the PLO, making the Larnaca killings the latest in a series of PLO terrorist attacks carried out against Israel and Israeli targets. On 1 October 1985, Israeli military aircraft penetrated Tunisian airspace and dropped several bombs at the PLO headquarters, some 20 km south of the Tunisian capital. In a meeting of the UN Security Council, the Israeli representative defended the action of his country invoking "its legitimate right of self-defence". Interestingly, he used language very similar to that resorted to by President Bush in his several speeches post-9/11:

> "For the past year, the PLO headquarter in Tunisia has initiated, planned, organized and launched hundreds of terrorist attacks against Israel, against Israeli targets outside Israel and against Jews everywhere in the world [...]. Tunisia knew, and it was strong enough to stop them. It knowingly harboured the PLO and allowed it complete freedom of action in planning, training, organizing and launching murderous attacks from its soil [...]. Under no circumstances can Israel accept the notion that bases and headquarters of terrorist killers should enjoy immunity anywhere, any time. It was against them that our action was directed, not against their host country. Nevertheless, the host country does bear considerable responsibility."[26]

All members of the Council, with the exception of the United States, condemned Israel.[27] Statements suggest that not only did members consider the Israeli bomb raid disproportionate to the original wrong, but they also rejected the argument that Tunisia, by harboring the PLO, should be considered responsible for the acts of terror performed in its name.[28]

[24] ILC Yearbook (2001), Vol. 2, 75, para. 5.

[25] For commentaries citing this authority, see e.g. Byers, *supra* note 9, 407; Murphy, 2002a, *supra* note 9, 46-47.

[26] UN Doc S/PV.2611, 2 October 1985, paras 60 and 65-66.

[27] UN Doc S/PV.2611, 2 October 1985 and 2615, 4 October 1985.

[28] See e.g. statements made by Mr. Bierring (Denmark), UN Doc S/PV.2611, 2 October 1985, 2, para. 17; Mr. Halefoğlu (Turkey), *id.*, 4, para. 44; Mr. Woolcott (Australia), *id.*, 5, para. 52; Mr. Kusumaatmadja (Indonesia), UN Doc S/PV.2615, 4 October 1985, 6, para. 60. See also SC Res. 573, 4 October 1985, para. 1, condemning

The Strategic Concept of the Alliance, adopted by NATO in 1999.[29] On 24 April 1999, the heads of state and government participating in a meeting of the North Atlantic Council in Washington DC approved a new Strategic Concept of the Alliance. According to paragraph 24 of this document

> "[a]ny armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty. However, Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of wider nature, including *acts of terrorism* [...]. Arrangements exist within the Alliance for consultation among the Allies under Article 4 of the Washington Treaty and, where appropriate, co-ordination of their efforts including their responses to risks of this kind."[30]

By the description of terrorism, not as a matter covered by Article 5 of the Washington Treaty (North Atlantic Treaty), but as *another risk of a wider nature*, clearly, what the Alliance implies is that acts of terrorism are not to be seen as armed attacks in the sense of Article 51 of the UN Charter.[31]

"vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct".

29 For commentaries citing this authority, see e.g. Arai-Takahashi, *supra* note 9, 1087.

30 NATO, 'The Alliance's Strategic Concept' (24 April 1999), Press Release, NAC-S(99)65, available at http://www.nato.int/cps/en/natolive/official_texts_27433.htm?mode=pressrelease (last visited on 19 November 2010), para. 24. Emphasis added.

31 Article 5 of the Washington Treaty reads as follows: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." (*North Atlantic Treaty*, 4 April 1949, Art. 5, 34 U.N.T.S. 243, available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm (last visited on 19 November 2010).

The international reactions to the missile attack carried out by the USA on Sudan and Afghanistan in 1998.[32] On 7 August 1998, bombs exploded outside the two American Embassies in Nairobi and Dar-es-Salaam, respectively, completely destroying all buildings and killing some 200 people. As in the case of the terrorist assault of 11 September 2001, the United States Government identified Osama bin Laden and the Al-Qaeda network as the perpetrators. On August 20, US warships fired some 75 to 100 cruise missiles at alleged terrorist training camps in Afghanistan, and at a Sudanese chemical plant suspected of involvement in the production of chemical weapons. In a letter sent to the UN Security Council on that same day, the United States government announced that it had been exercising "its right of self-defence in response to a series of armed attacks against United States embassies and United States nationals"[33]. Reactions from the international community were mixed. As stated by Professor Sean Murphy, some states and inter-governmental organizations condemned the attack,[34] while others were more understanding.[35] Few statements were vested in express legal terms. The one important exception is the Final Document that the Non-Aligned Movement (NAM) adopted when, on 2-3 September 1998, it met at Durban, South Africa, to discuss (among other things) the military actions taken one year earlier by the US against one of its members (the Sudan). Paragraph 179 of the Document reads as follows:

> "The Heads of State or Government […] expressed their deep concern over the air attack carried out by the United States Government against the El-Shifa Pharmaceutical Plant in the Sudan on 20 August 1998, and considered this as a serious violation of *the principles of international law* and the United Nations Charter and contrary to the principles of peaceful settlement of disputes as well as a serious threat to the sovereignty and territorial integrity of the Sudan and the regional stability and international peace and security. They further

[32] For commentaries citing this authority, see e.g. Beard, *supra* note 9, 562-565; Bring & Fischer, *supra* note 9, 181-185; Byers, *supra* note 9, 407 and 409-410; Murphy, 2002a, *supra* note 9, 49-50; Schmitt, *supra* note 9, 106-109.

[33] UN Doc S/1998/780, para. 1.

[34] See S. D. Murphy, 'Contemporary Practice of the United States Relating to International Law', 93 *American Journal of International Law* (1999) 1, 161 [Murphy, 1999], 164-165, citing statements by the Sudan, Afghanistan, Iran, Iraq, Libya, Pakistan, Russia, the Yemen, and the League of Arab States.

[35] Murphy, 1999, *supra* note 34, 165, citing statements by Australia, France, Germany, Japan, Spain and the UK.

> considered this attack as a unilateral and unwarranted act. The Heads of State and Government condemned *this act of aggression*."[36]

Although the exact legal basis used for the condemnation is not clearly stated, there is room for the argument that NAM considered the assault on the two American Embassies not to form an armed attack in the sense of the international law of self-defense.

The commonly accepted definition of aggression.[37] According to the English language version of Article 51 of the UN Charter, the exercise of a right of self-defense requires the occurrence of an "armed attack". Interestingly, the equivalent term used for the equally authentic French version is "agression armée".[38] This would seem to provide an argument relevant for the interpretation of Article 51, considering what must be seen as the ordinary usage of this term in the parlance of international lawyers. From the time of the 1945 London Agreement,[39] up until 11 September 2001, international law has always defined *aggression* in clear and unambiguous inter-state terms. Prominent examples of this legal usage include the 1974 *Definition of Aggression*,[40] and the 1996 *Draft Code of Crimes Against the Peace and Security of Mankind*.[41] It can be objected to

36 Final Document of the 12th Meeting of the Non-Aligned Movement, held at Durban, South Africa, on 2 to 3 September 1998, para. 179, available at http://www.nam.gov.za/xiisummit/chap1.htm (last visited 19 November 2010).

37 For commentaries citing this authority, see e.g. Arai-Takahashi, *supra* note 9, 1087; Delbrück, supra note 9, 15; Meessen, *supra* note 9, 345; Ratner, *supra* note 9, 907; Schmitt, *supra* note 9, 90-100 and 109; Stahn, 2002, *supra* note 9, 213.

38 The full provision reads as follows: "Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies est l'objet d'une agression armée".

39 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 279.

40 See GA Res. 3314, 14 December 1974, Annex, Art. 1: "L'agression est l'emploi de la force armée par un Etat contre la souverainité, l'integrité territorial ou l'indépendence politique d'un autre Etat, ou de toute autre manière incompatible avec la Chartre des Nations Unies, ainsi qu'il ressort de la présente Définition." ("Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.")

41 In French, Article 16 of the Draft Code reads as follows: "Tout individu qui, en qualité de dirigeant ou d'organisateur, prend une part active dans – ou ordonne – la planification, la preparation, de déclanchement ou la conduite d'une aggression commise par un État, est responsible de crime d'agression." ("An individual who, as leader or organizer, actively participates in or orders the planning, preparation,

this line of reasoning that in the process of drafting the 1974 Definition of Aggression, Western states warned about the risk that an act of aggression be confused with an armed attack, which according to them was a distinct concept.[42] The fact remains, however, that in its decision of the Nicaragua Case – when facing a situation where the concept of an armed attack had to be expounded – the International Court of Justice resorted to this definition exactly.[43]

B. Part II

As indicated earlier, in defending their assumption that at some point between 11 September and 7 October 2001, the international law of self-defense changed, proponents of change argued along two different tracks. Some spent great effort on convincing us that there had been a revision of the right of self-defense contained in customary international law. They tailored their arguments to establish the existence of a new *opinio juris*. Others described the developments in terms of an evolution of the Charter-based right of self-defense. They argued that on 7 October 2001, the relevant legal context was different than the one that they assumed had obtained on the morning of 11 September a.m., and hence, we would now be justified for interpreting Article 51 differently. In the organization of my further review of the post-9/11 legal discourse, I will follow the logic of this reasoning. Hence, in section III, I will begin my assessment with the arguments that according to the proponents of change supported a new interpretation of Article 51 of the UN Charter. In sections IV and V, I will then continue with the arguments that allegedly established the creation of a new rule of customary international law.

initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.") See also the Commentary adopted by the ILC to this Article: "[T]he violation by a State of the rule of international law prohibiting aggression gives rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression. The words 'aggression committed by a State' clearly indicate that such a violation of the law by a State is a sine qua non condition for the possible attribution to an individual of responsibility for a crime of aggression." (Articles of the Draft Code of Crimes Against the Peace and Security of Mankind, with Commentary, ILC Yearbook, 1996, Vol. II, Part 2, 43, para. 4.)

42 Cf. A. Randelzhofer, 'Article 51', in B. Simma (ed.), *The Charter of the United Nations. A Commentary*, Volume 1, 2nd ed. (2002), 788, 795.

43 See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 103, para. 195.

I. The New Interpretation of Article 51 of the Charter

1. The Relevant Legal Context Defined

Like any other treaty governed by international law, the legally correct understanding of the UN Charter is determined by reference to the rules of interpretation expressed in the 1969 *Vienna Convention on the Law of Treaties* (VCLT).[44] According to Articles 31-33 of this Convention, the interpretation of a treaty is a process that draws on certain means of interpretation, commonly referred to as primary and supplementary means of interpretation.[45] The primary means of interpretation are those that can be employed according to Article 31: conventional language ("the ordinary meaning"), the context, and the object and purpose of the treaty. The supplementary means of interpretation are those that can be employed according to Article 32, including among others "the preparatory work of the treaty and the circumstances of its conclusion". Stated differently, the primary and supplementary means of interpretation form the legally relevant context, upon which we are expected to draw for the understanding of a treaty. When a proposition is put forth about the legally correct meaning of a treaty provision, the proposition shall be based on the relationship or relationships assumed to exist between a primary or supplementary means of interpretation and the written utterance interpreted.[46] Applied to the case at hand, it would seem that for the purpose of establishing the correct interpretation of UN Charter Article 51, the legally relevant context is identical with the contents of the primary and supplementary means of interpretation. If someone suggests that between 11 September and 7 October 2001, the legally relevant context was altered, so that on 7 October we would be justified for conferring a meaning on Article 51 that we would not have been able to defend by legal argument four weeks earlier, then this

44 23 May 1969, 1155 U.N.T.S. 331. Today, it is the generally held opinion, confirmed repeatedly by the ICJ, that Arts 31-33 of the Vienna Convention not only give expression to the rules of interpretation that apply according to the Convention, between its parties. They are also reflective of the rules that apply according to customary international law, between states in general. (For further references, see U. Linderfalk, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 7.)

45 Although the Vienna Convention itself does not speak about primary means of interpretation, this terminology seems to be commonly accepted. For references, see Linderfalk, *supra* note 44, 19-20, fn. 60.

46 See Linderfalk, *supra* note 44, 47-52.

assumes that during said period, the contents of the primary and supplementary means of interpretation changed to that very effect. I will structure my further analysis based on this observation.

Roughly speaking, it can be said that in defending their assumption of a new interpretation of Article 51, the proponents of change used arguments of three kinds. They used arguments based on the everyday meaning of the English expression "armed attack"; they used arguments based on the object and purpose of the Charter; and they used arguments based on subsequent practice. I will now proceed to investigate each of these arguments. I will construe the arguments in terms of the Vienna Convention, and I will give the reasons for why I think they should be considered evidence of a legal science not working properly.

2. The Everyday Meaning of the English "Armed Attack"

In the post-9/11 international legal discourse, several commentators built arguments on the everyday meaning of the English term "armed attack".[47] They noted that in the sense of everyday English language, "armed attack" means simply an attack performed with arms or weapons. Such an attack, they argued, may be performed by any group of persons, regardless of whether they act as private agents or as agents of a state. For two reasons, this argument should be criticized.

First of all, it can be objected that there is really nothing new about the situation. Obviously, the everyday meaning of the English "armed attack" did not develop in the period from 11 September to 7 October 2001. It existed well before the attack on New York City and Washington, D.C. Hence, the everyday meaning of the English "armed attack" cannot be used to support the proposition of change. As already stated, in order for the proposition of change to be considered justified, it would have to be shown that, in some respect, on 7 October 2001, the contents of the primary and supplementary means of interpretation was different than four weeks earlier.

[47] See e.g. Arai-Takahashi, *supra* note 9, 1084 and 1093; Franck, *supra* note 9, 840; Gaja, *supra* note 9; Paust, 2001-2002, *supra* note 9, 534; Schrijver, *supra* note 9, 285; Schmitt, *supra* note 9, 76; Stahn, 2002, *supra* note 9, 213; Stahn, 2003, *supra* note 9, 35-36; Walker, *supra* note 9, 530.

Second, although the everyday meaning of a treaty might be seen as a natural start of any treaty interpretation process,[48] it is a mistake to regard this as the end of all discussion. According to the modern international law of treaty interpretation expressed in the 1969 Vienna Convention, the ordinary meaning of a treaty expression is not determined by reference to everyday language alone. The determining factor is conventional language, which includes apart from everyday language any possible technical language using the interpreted expression.[49] In the case confronted here, this observation is of great importance, since it would seem that in the sense of the language of international law, "armed attack" means a forcible measure attributable to a state.[50] Even assuming that an established legal meaning of the English term "armed attack" does not exist, we still have the corresponding French language to consider. As may be recalled, whereas the English language version of Article 51 requires the occurrence of an "armed attack", the equivalent term used for the equally authentic French version is "agression armée".[51] "Agression", in the parlance of international lawyers, means a forcible measure performed by a state, as defined by the general international law of state responsibility.[52]

In a situation like the one just described, where the everyday and legal-technical meaning of a treaty expression produce different interpretation results, no legal hierarchies exist that will automatically allow preference to be given to either one of the two conflicting meanings.[53] As we will then have to conclude, the ordinary meaning of the expression is ambiguous. In other words, in deciding whether "agression armée" should be interpreted in the broader sense of an attack performed by any group of persons, or in the more limited sense of an attack attributable to a state, we will have to depend on other means of interpretation than conventional language. This notwithstanding, a remarkable number of text-writers confined themselves to an analysis of the everyday meaning of the English

48 Cf. U. Linderfalk, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation', 54 *Netherlands International Law Review* (2007) 1, 133.

49 See Linderfalk, *supra* note 44, 61-73, and the further references cited there.

50 See *supra*, section II.

51 See *supra*, section II.

52 See *supra*, section II.

53 See e.g. Linderfalk, *supra* note 44, 62-73; M. E. Villiger, *Customary International Law and Treaties* (1985), 321-322; M. K. Yasseen, 'L'interprétation des traits d'après la Convention de Vienne sur le droit des traites', *Recueil des Cours*, Volume 151 (1976), 58.

expression "armed attack", implicitly claiming this meaning as decisive for the entire interpretation exercise. As I would suggest, such reasoning shows scant understanding of the modern law of treaty interpretation, and therefore, it establishes good reason for criticism. In a scholarly discussion on the interpretation of a treaty provision like Article 51 of the UN Charter, discussants are expected to have a fairly robust knowledge of the system of rules laid down in the 1969 Vienna Convention. Alternatively, assuming I am wrong and that despite all appearances proponents of change *were not unfamiliar* with the broad definition given to the concept of an ordinary meaning, by their strong emphasis on the everyday English language they revealed bias. According to the criteria of general scientific ethics, scientific analysis assumes the investigation of an issue from all possible sides. Failing to conform to this standard, a text-writer will always expose herself to the criticism of having concluded all discussions before even beginning her analysis.

3. The Object and Purpose

Judging by the way some proponents of change approached the issue, the reason why Article 51 of the UN Charter would suddenly have to be understood differently lies mainly in the object and purpose conferred on this provision. In the international legal literature of 2001 to 2003, I have noted the following suggestion to be quite commonly represented: 'A state must always have the possibility of averting a threat to its existence (or – put somewhat differently – to its territorial integrity or political independence); hence, we can assume that the expression "armed attack" in Article 51 of the UN Charter refers to any large-scale attack directed at a state, whether performed by a state or not.'[54] Expressed in such general terms, the idea that a state should be able to avert a threat to its existence is indeed a persuasive one. Still, there is nothing really new about it. In the organization of the UN Charter, Article 51 is a part of Chapter VII. It has always been said about the provisions of that Chapter that they form a delicate balance between two interests: that of establishing a system of collective security, and that of states being able effectively to protect their

[54] See e.g. Bonafede, *supra* note 9, 185-186; Bring & Fischer, *supra* note 9, 182; Gross, supra note 9, 214; Meessen, *supra* note 9, 353; Printer, *supra* note 9, 348-349 and 351-352; Quénivet, *supra* note 9, 222; Stahn, 2002, *supra* note 9, 213; Walker, *supra* note 9, 531, implicitly; Wolfrum, *supra* note 9, 36.

existence.[55] Viewed in this light, the argument cited above is hardly relevant to the suggestion that on 7 October 2001, the objects and purposes conferred on Article 51 of the UN Charter were different than those that had been conferred four weeks earlier.

Of course, the argument could be stated in more elaborate terms. It could be argued that the events of 11 September brought about a change of attitude among the members of the UN, in the sense that the relative weight of the objects and purposes conferred on Article 51 is no longer the same. After the assault on Washington, D.C., and New York – this is how the argument goes – states were generally prepared to make greater sacrifices in the pursuit of national security than they were before. Hence, even if we consider the objects and purposes of 7 October to be perfectly identical with those of 11 September, their relationship would be different, and therefore, any interpreter using the teleological approach would be left with a different outcome.[56]

There is a flaw in this argument. It builds on a misunderstanding of the contents of VCLT Articles 31 and 32. Although Article 31 para. 1 speaks of "the object and purpose" of a treaty in the singular, international law accepts that a treaty can be interpreted using several of its objects and purposes.[57] Of course, depending on the specific object and purpose drawn upon, the interpretation of a treaty in the light of its object and purpose might lead to different results. When it does, the interpreter will simply have to consider the meaning of the interpreted treaty ambiguous, upon which he will have to proceed to the context or to the supplementary means of interpretation. If we consider the two objects and purposes conferred on Article 51 – that of establishing a system of collective security, and that of states being able to effectively protect their existence – it is quite clear that in the case of an attack performed by a non-state agent, the use of the one object and purpose leads to a different interpretation result than the other, regardless of whether the interpretation is done at a point in time previous to 11 September 2001, or in the four weeks that ensued. It is possible that those of us observing the developments experienced a shift in the main emphasis placed by UN members on the two objects and purposes. But that would not have involved a significant change of the relevant legal context. Both before and after 11 September, any person who interprets Article 51 in the light of its objects and purposes will fail to achieve a clear result.

55 See e.g. Myjer & White, *supra* note 9, 11-12.
56 Cf. Martinez, *supra* note 9, 179-181; Cohan, *supra* note 9, 316.
57 See Linderfalk, *supra* note 44, 211-217.

4. Subsequent Practice

In search of more convincing arguments, some authors invoked the existence of a new subsequent practice. In the period of 11 September to 7 October 2001 – this is how the argument goes – developments amounted to the formation of a practice, which established a new agreement among the member states of the UN with regard to the meaning of Article 51.[58] As I will insist, this argument must also be regarded as futile.

First of all, it can be questioned whether there is any practice at all. Arguably, in order for us to conclude that a practice exists in the application of Article 51 with regard to the interpretation investigated here, the following three conditions need to be satisfied:[59]

- The application of Article 51 must be general.
- The application must be constant – it must have occurred on repeated occasions.
- The application must be fairly uniform.

It is debatable whether this is a fair description of the state of affairs that prevailed during the period of 11 September to 7 October 2001. Much depends on whether we limit ourselves to the way Article 51 was applied in that sole period, or whether we broaden our perspective to include previous acts of states. The problem can be approached in two different ways. According to the one approach, the relevant practice developed entirely in the period of 11 September to 7 October 2001. According to the other, practice developed over a longer period, but the acts performed from 11 September to 7 October provided the conclusive element that we needed to be able to speak about a true practice. Since this is a discussion that largely coincides with the subsequent investigation of a possible change of the right of self-defense contained in customary international law, I will save it for section IV.

At present, I will limit my observations to a second aspect of the problem. When we speak about a subsequent practice as material for the interpretation of a treaty, we must keep a constant eye on the relevant provisions of the Vienna Convention. Article 31 para. 3 lit. b of that

[58] See e.g. Arai-Takahashi, *supra* note 9, 1093 and 1095; Beard, *supra* note 9, 568-57; Bring and Fischer, *supra* note 9, 186-188; Paust, 2001-2002, *supra* note 9, 535; Stahn, 2002, *supra* note 9, 213-214; Walker, *supra* note 9, 531-532.

[59] Compare the criteria established by the ICJ in the case of customary law. See e.g. I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 7-8.

Convention reads as follows: "[For the purpose of the interpretation of a treaty, there] shall be taken into account, together with the context: [...] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Obviously, in order for the state acts of 11 September to 7 October 2001 to be relevant for the interpretation of Article 51 of the UN Charter, not only must we show that on 7 October 2001, a practice existed in the sense of a general, constant and uniform application of Article 51. We must also show the practice to be one "which establishes the agreement of the parties". The practice must be good reason for the assumption that on 7 October 2001, *all member states of the UN* were prepared to understand Article 51 in the way the proponents of change suggested.[60] Stated in inverse terms, Article 31 para. 3 lit. b does not apply to the state acts of 11 September to 7 October 2001 if it can be shown that one or more states explicitly disassociated themselves from this interpretation.

Considering such stringent conditions, it appears we have good cause to ponder the following statement made by Mr. Rodríguez Parilla of Cuba at a plenary meeting of the UN General Assembly on 1 October 2001:

> "Terrorist acts are usually carried out by extremist groups or even individuals. Faced with such an event, however serious it might be, a powerful State must not invoke the right to self-defence in order unilaterally to unleash a war that might have unpredictable effects on a global scale and result in the death of an incalculable number of innocent people. Instead, the right of all to the common defence of all must be exercised [...]. It is Cuba's opinion that any use of force against terrorism will require the explicit and prior authorization of the Security Council, as established in the Charter. Cuba also believes that neither of the two resolutions adopted by the Council in the wake of the attacks of September 11 could be invoked to launch unilateral military actions or other acts of force."[61]

Obviously, Cuba *did not* share the opinion that according to Article 51 of the UN Charter, a right of self-defense may be exercised upon a large-

[60] See W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983), 188-194; Linderfalk, *supra* note 44, 167; H. Thirlway, 'The Law and Procedure of the International Court of Justice: 1960-1989, Part III', 62 *British Yearbook of International Law*, (1991), 1, 52.

[61] United Nations General Assembly, UN Doc A/56/PV.13, 1 October 2001, 15 and 17.

scale attack, regardless of whether according to the general international law of state responsibility the attack can be attributed to a state or not. This itself is reason enough to revoke the argument that from 11 September to 7 October 2001, a new practice developed in the sense of VCLT Article 31 para. 3 lit. b.

In conclusion, we might say that regardless of whether the proponents of change tried to defend their position by reference to the object and purpose conferred on Article 51, or by reference to a new subsequent practice, their arguments could be easily discarded. The question can be asked whether these arguments were intended at all as contributions to a scientific discourse. Especially the suggestion that a new subsequent practice had developed looks very much a long shot. The conclusion that immediately presents itself is that, in fact – contrary to all appearances – text-writers were not pursuing the task of disengaged scientific investigation, attentive to the persuasive force of good reason. Rather, they were engaged in advocacy. But, of course, this is pure speculation. After all, perhaps the behavior of text-writers should be attributed simply to a scant knowledge of the modern law of treaty interpretation. In any case, there are good reasons for criticism. As already stated in sub-section III 2, in a scholarly discussion on the interpretation of a treaty provision like Article 51 of the UN Charter, discussants are expected to have a fairly robust knowledge of the system of rules regulating the discussed field of activity.

5. Why the Treaty Interpretation Debate was Irrelevant

To the very skeptical attitude I expressed in the previous sub-section III 4, I would like to add a point of clarification. Generally speaking, I do not exclude the possibility that VCLT Articles 31-33 may sometimes be invoked to justify a new understanding of a treaty when primary and supplementary means of interpretation are altered – what is sometimes referred to as *dynamic interpretation*.[62] Certainly, dynamic interpretation is a possibility, and from a perspective of principle, nothing prevents a means of interpretation from changing over such short periods as four weeks. The point of my argument is that the possibilities for changes are limited. This is especially so when we deal with treaties having so many parties as the UN Charter.

[62] See e.g. U. Linderfalk, 'Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken to the Interpretation of Treaties', 10 *International Community Law Review* (2008) 2, 109.

As I would argue, given the contents of VCLT Articles 31-33 and the circumstances of the specific case, a proponent of change would have to argue her position on the basis of any one of the following four propositions:

(1) On 7 October 2001, the ordinary meaning of the expression "armed attack" (French: "agression armée") was not the same as that given to the expression on 11 September a.m.
(2) On 7 October 2001, the objects and purposes conferred on Article 51 by the members of the UN were not the same as those conferred on the morning of 11 September.
(3) In the period of 11 September to 7 October 2001, developments amounted to the formation of a new practice, which established the agreement of the member states of the UN with regard to the meaning of Article 51.
(4) In the period of 11 September to 7 October 2001, developments amounted to the creation of a new relevant rule of international law applicable in the relations between the member states of the UN.

As noted in sub-sections III 2 to III 4, propositions (1), (2), and (3) are untenable. For those proponents of change, who because of the developments post-9/11 made the claim that a new interpretation of Article 51 was merited, proposition (4) seems the only avenue of defense.

Now, with these observations fresh in our minds, let us return to the review of the treaty interpretation debate. I will conclude section III with a critique that addresses the debate in its entirety. Obviously, proposition (4) assumes the contents of VCLT Article 31 para. 3 lit. b. The provision reads as follows: "[For the purpose of the interpretation of a treaty, there] shall be taken into account, together with the context: .... (b) any relevant rules of international law applicable in the relations between the parties". In the terminology of the Vienna Convention, "parties" means *all parties* to a treaty.[63] Hence, in order for a rule of international law to be applicable in

[63] See Linderfalk, *supra* note 44, 178. For further discussions of this issue, see U. Linderfalk, 'Who are 'the Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited', 55 *Netherlands International Law Review* (2008) 3, 343. For a different opinion, see G. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties', 35 *Journal of World Trade* (2001) 6, 1081.

the relations between the member states of the UN, it must be binding for each and every one of those states. No international agreement of this magnitude was concluded in the relevant period. As it appears, the validity of proposition (4) depends on whether it can be established that in the time span, the developments affected the contents of customary international law.

With this observation, focus shifts immediately from the debate on the Charter-based international law to the law of international custom. As explained earlier, considering how states behaved and expressed themselves in the period of 11 September to 7 October 2001, the action of states may have affected the contents of international law in two ways. First, it may have affected the right of self-defense expressed in Article 51 of the UN Charter. Secondly, it may have affected the right of self-defense contained in customary international law. In the present section of this essay, we have focused on the debate surrounding the allegedly changed UN Charter. The debate on an allegedly changed customary international law is meant to be the focus of our attention in the following sections IV to IV. As it now seems, the identities of the two debates are blurred to some extent: the former debate cannot be separated from the latter. In the final analysis, the difficult question to be answered in the treaty interpretation debate is not so much whether a large-scale attack performed by a group of non-state agents should be considered to come within the scope of application of Article 51. The really crucial issue is whether such attacks should be considered to come within the scope of application of the right of self-defense contained in customary international law. The treaty interpretation debate seems like a blind track: it does not lead anywhere.

Still, the fact remains that in light of the developments in the period of 11 September to 7 October 2001 text-writers spent great time discussing issues relating to the interpretation of Article 51 of the UN Charter. If I am to make a general assessment of this discussion, it would be my conclusion that it diverted attention from the truly relevant legal questions. This is serious criticism. In an international community based on a rule of law, it should be considered a task for legal scientists to assist judicial and political decision-makers in determining the scope of their discretion. Legal scientific analysis should bring focus to the legal questions that are relevant for judicial and political decision-making, rather than the opposite. Considering this standard, as I conceive of the issue, we should simply dismiss as poor science the entire interpretation debate.

II. The New Rule of Customary International Law

1. The Relevant Legal Context

For centuries, the international law literature has struggled to explain the existence of customary international law. Considering the discourse as a whole – and risking the criticism of oversimplification – we may say that there are two competing theories. According to a traditional understanding of the concept, a rule of customary international law is derived from the existence of a state practice and an *opinio juris*.[64] When a person suggests that, given the existence of some certain conditions $\{C_1, C_2, C_3\}$, a right of self-defense can be exercised by a state under customary international law, then two things must be shown by that person in order to establish the proposition as valid. First, the person must prove the existence of a general, constant, and uniform usage.[65] She would have to show that over a certain period of time, faced with the conditions $\{C_1, C_2, C_3\}$, states have repeatedly and consistently resorted to force. Secondly, the person must prove the existence of the relevant attitude. Based on the utterances and behavior of states, she would have to show that in instances where the conditions $\{C_1, C_2, C_3\}$ prevail, states generally consider the use of force warranted according to a rule of customary international law.

According to a second theoretical approach, most prominently advocated by Professor Bin Cheng, a rule of customary international law is derived from the mere existence of an *opinio juris*.[66] When a person suggests that, given the existence of some certain conditions $\{C_1, C_2, C_3\}$, a right of self-defense can be exercised by a state under customary international law, then she must show only one thing: that in instances where the conditions $\{C_1, C_2, C_3\}$ prevail, states generally consider the use of force warranted according to a rule of customary international law. She would not have to establish that in instances where the conditions $\{C_1, C_2, C_3\}$ prevail, states generally resort to force. For the same reasons, she would

64 See e.g. Brownlie, *supra* note 59, 7-8.

65 See e.g. *Colombian-Peruvian Asylum Case (Colombia v. Peru)*, ICJ Reports 1950, 266, 276-277; *Case Concerning Right of Passage Over Indian Territory (Portugal v. India)*, Merits, Judgment, ICJ Reports 1960, 6, 40.

66 See B. Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?', 5 *Indian Journal of International Law* (1968) 1, 23, later developed in B. Cheng, 'Custom: The Future of General State Practice In a Divided World', in R. St. J. Macdonald & D. M. Johnston (eds), *The Structure and Process of International Law* (1983), 513-554.

not have to be overly concerned about the requirements that practice be general, constant, and uniform. Certainly, if it is established that over a certain period of time, faced with the conditions $\{C_1, C_2, C_3\}$, states have repeatedly and consistently resorted to force, then that would be good reason for the assumption that the relevant *opinio juris* exists. But it does not form a necessary condition. As long as the relevant *opinio juris* can be shown to exist, this should be considered sufficient. This is why the idea advocated by Professor Bin Cheng and others is often referred to as *the theory of instant customary law*.[67]

On closer analysis, it would seem that a traditional theory of customary international law cannot explain the creation of a new right of self-defense in the period of 11 September to 7 October 2001. Clearly, the acts and omissions of states dating from this period alone did not amount to a practice in the proper sense. In order for a general, constant, and uniform usage to develop, some time is required,[68] and four weeks is simply not enough time. Admittedly, the proposition of change can be interpreted differently. It can be argued that the necessary practice developed over a longer period, but that the acts and omissions dating from 11 September to 7 October 2001 provided the conclusive element we needed to be able to speak about a practice in the sense of a general, constant, and uniform usage. Assessing the proposition of change, a crucial question would then be whether it can be shown that on the morning of 11 September 2001, a new rule of customary international law was already emerging. In the recent past, whenever states were confronted with a situation in all relevant respects similar to that of 11 September, did they act in favor of an extension of the hitherto existing rule of self-defense? As revealed by the earlier section II of this essay, the answer to this question would have to be in the negative.

All things considered, the proposition of change would seem to rely entirely on the theory of instant customary law.[69] Faced with the suggestion that on 7 October, customary international law allowed for a right of self-defense to be exercised upon a large-scale attack performed by a non-state agent, despite the fact that – judged by the criteria provided in the general international law of state responsibility – this attack cannot be attributed to any state, what we have to ask for is evidence of a new *opinio juris*

67 See e.g. Arai-Takahashi, *supra* note 9, 1094.

68 See e.g. *Colombian-Peruvian Asylum Case*, *supra* note 65, 276-277.

69 Few commentators recognized this explicitly. See, however, Arai-Takahashi, *supra* note 9, 1093-1094; Cassese, 2001, *supra* note 9, 997; Langille, *supra* note 9, *passim*.

generalis to this effect. I will structure my further analysis based on this observation.

Generally speaking, it can be said that in defending their assumption of a new *opinio juris generalis*, the proponents of change cited evidence of three kinds. They cited statements made by states and international organizations pertaining directly to the contents of international law; they cited statements constituting pledges of support made to the US Government; and they cited the inaction of states pursuant to the events of 11 September. I will now proceed to investigate each such group of evidence.

2. Statements Pertaining Directly to International Law

This is the evidence that proponents of change typically cited: UN Security Council resolutions 1368 and 1373.[70] Both resolutions – adopted on 12 and 28 September, respectively – make express reference to a right of self-defense.[71] In preambular paragraph 3 of resolution 1368, the Security Council "[recognizes] the inherent right of individual or collective self-defence in accordance with the Charter". In preambular paragraph 4 of resolution 1373, the Council "[reaffirms] the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)".

[70] For commentaries citing this evidence, see e.g. Arai-Takahashi, *supra* note 9, 1081-1082; Beard, *supra* note 9, 565-566 and 568; Bring & Fischer, *supra* note 9, 187; Brown, *supra* note 9, 29; Byers, *supra* note 9, 409; Greenwood, *supra* note 9, 17; Langille, *supra* note 9, 153-154; Myjer & White, *supra* note 9, 6; Murphy, 2002a, *supra* note 9, 48; O'Connell, 2002-2003, *supra* note 9, 49; Ratner, *supra* note 9, 909; Schmitt, *supra* note 9, 60-61and 77; Schrijver, *supra* note 9, 282; Stahn, 2002, *supra* note 9, 214.

[71] Judged by the way some commentators put it, it seems they were of the opinion that by these references the whole issue would be finally settled: no doubt, customary international law allows for a right of self-defense to be exercised upon a large-scale attack performed by a group of non-state agents. Personally, I think we should be sceptical about this argument. The Security Council is not empowered under the UN Charter to decide on the contents of the right of self-defense laid down in Article 51. Even less is it empowered to decide on the contents of the right of self-defense contained in customary international law. For a contrary opinion, see Arai-Takahashi, *supra* note 9, 1081-1082; Gross, *supra* note 9, 213; O'Connell, 2002, *supra* note 9, 892-893; Papastavridis, *supra* note 9, 507; Stahn, 2003, *supra* note 9, 39.

Debates held from 1 to 5 October, 2001 during the 56th session of the UN General Assembly.[72] In discussions on Agenda Item 166 ("Measures to eliminate international terrorism"), several delegates commented on the meaning and contents of the right of self-defense held by states under international law. Mr. Kolby of Norway announced that since "[i]nternational law confirms the right to self-defence [...] Norway is fully committed to contributing to the broad alliance that is now forming."[73] Mr. Šimonović of Croatia reiterated that according to indications given in the Charter of the UN, "terrorism is a threat to international peace and security and that every country has the solemn right to defend itself, its citizens and their peace and security. Therefore, such a right on the part the United States should not be questioned."[74] Mr. Valdes of Chile remarked that in the view of his government, Security Council resolution 1373, "together with Article 51 of the Charter, provides the necessary legitimacy and the support of international law to actions directed at punishing those responsible for this act of terrorism."[75] In the same vein, Mr. Cowen of Ireland rhetorically asked: "Who can reasonably argue that the United States does not have the right to defend itself, in a targeted and proportionate manner, by bringing to justice those who planned, perpetrated and assisted in these outrages and who continue to threaten international peace and security?"[76] Still with regard to the debate on Agenda Item 166, Mr. Hussein of Ethiopia reminded the Assembly "that if and when terrorists do attack a country, as happened on 11 September, that country has the legitimate right to defend itself."[77] According to Mr. Heinbecker of Canada, "[t]he right of Canada, and of the United States and of all other United Nations Members, to self-defence is clear under international law, enshrined in the Charter of the United Nations and recognized again most recently in Security Council resolutions 1368 (2001) and 1373 (2001)."[78] Finally, Mr. Andino Salazar of El Salvador reiterated the support of his Government "for the right of the United States, as an aggressed State, to adopt measures of legitimate individual and

72 For commentaries citing this evidence, see e.g. Arai-Takahashi, *supra* note 9, 1093; Bring & Fischer, *supra* note 9, 187; Byers, *supra* note 9, 409-410, note 46.
73 United Nations General Assembly, UN Doc. A/56/PV.12, 1 October 2001, 14.
74 United Nations General Assembly, *supra* note 73, 24.
75 United Nations General Assembly, *supra* note 61, 21.
76 United Nations General Assembly, UN Doc. A/56/PV.14, 2 October 2001, 6-7.
77 United Nations General Assembly, UN Doc A/56/PV.17, 3 October 2001, 13.
78 United Nations General Assembly, UN Doc A/56/PV.18, 4 October 2001, 22.

collective self-defence to ensure the security of its citizens, property and institutions."[79]

Action taken by the NATO.[80] On 12 September, the North Atlantic Council issued a press release with the following contents: "On September 12th, the North Atlantic Council met again in response to the appalling attacks perpetrated yesterday against the United States. The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty". According to Article 5 of the Washington Treaty,

> "[t]he Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

In a statement of 2 October, NATO Secretary General, Lord Robertson, confirmed that evidence pointed conclusively "to an Al-Qaida role in the September 11 attack", and that hence, the attack should be regarded an action covered by Article 5 of the Washington Treaty.[81]

Action taken by the Organization of American States (OAS).[82] On 21 September, the OAS Consultation of Ministers of Foreign Affairs adopted a resolution resolving

79 United Nations General Assembly, UN Doc A/56/PV.19, 4 October 2001, 18.

80 For commentaries citing this evidence, see e.g. Beard, supra note 9, 568; Bring & Fischer, *supra* note 9, 181 and 186; Brown, *supra* note 9, 28; Byers, *supra* note 9, 409; Cassese, 2001, supra note 9, 996; Greenwood, *supra* note 9, 17; Ratner, *supra* note 9, 909; Schrijver, *supra* note 9, 282; Stahn, 2002, *supra* note 9, 214; Schmitt, supra note 9, 61; Stahn, 2003, *supra* note 9, 42.

81 NATO Secretary General, Lord Robertson, 'Statement' (October 2, 2001) available at http://www.nato.int/cps/en/natolive/opinions_19011.htm (last visited on 19 November 2010).

82 For commentaries citing this evidence, see e.g. Brown, *supra* note 9, 28; Byers, *supra* note 9, 409; Greenwood, *supra* note 9, 18; Murphy, 2002a, *supra* note 9, 48; Ratner, *supra* note 9, 909; Stahn, 2002, *supra* note 9, 214.

> "[t]hat these terrorist attacks against the United States of America are attacks against all American States and that in accordance with the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent."[83]

According to Article 3 para. 1 of the Rio Treaty,[84]

> "[t]he High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an armed attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations."

Action taken under the Australia, New Zealand, United States Security Treaty (ANZUS Treaty or ANZUS).[85] On 15 September, the Government of Australia publicly invoked the so-called ANZUS Treaty. The ANZUS is a Security Treaty concluded in 1951 between Australia, New Zeeland, and the United States of America.[86] According to Article IV para. 2 of this agreement, any armed attack in the Pacific Area on any of the parties "and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations". The relevant provision on which the Australian Government based its action is that contained in Article V:

> "For the purpose of Article IV, an armed attack on any of the Parties is deemed to include an armed attack on the metropolitan territory of any of the Parties."

83 'Terrorist Threat to the Americas', OEA/Ser.F/II.24, RC.24/RES.1/01, available at http://www.oas.org/OASpage/crisis/RC.24e.htm (last visited on 19 November 2010).

84 *Inter-American Treaty of Reciprocal Assistance*, 2 September 1947, 21 U.N.T.S. 93.

85 For commentaries citing this evidence, see e.g. Beard, *supra* note 9, 569; Brown, *supra* note 9, 29; Schmitt, *supra* note 9, 62; Walker, *supra* note 9, 499.

86 *Australia, New Zealand, United States Security Treaty*, 1 September 1951, 131 U.N.T.S. 83 [ANZUS].

In order to correctly assess the value of all these statements, a word of caution is required. We must be mindful of the fact that in no case have states and organizations made clear reference to customary international law. In some cases, statements refer to the right of self-defense "recognized in Article 51 of the UN Charter". In others, they refer to the right of self-defense "laid down in the UN Charter", or – using terms of a generic character – they simply refer to the right of self-defense, without paying very much attention to whether this is the right of self-defense laid down in Article 51, or the right contained in customary international law. Obviously, the value of these statements as indicators of an *opinio juris* is contingent on the assumption that according to the belief of the utterers, the two rights of self-defense are in every relevant respect identical. Of course, this lowers the evidential value of these statements considerably, compared to the hypothetical situation that they clearly referred to the right of self-defense contained in customary international law. In the post-9/11 international legal discourse, no one author posed this as a problem. This forms the first point of my critique. Proponents of change did not openly confess to the relative weakness of their argument, which is contrary to what we expect from a legal science working properly.

There is also a second point of critique. Considering the international legal literature at large, the assumption that the two rights of self-defense are identical is not free from objection; on the contrary: generally, legal doctrine has described the two rights as partly different.[87] The right contained in customary international law has been seen to allow the use of force in situations where the right laid down in Article 51 does not. For example, it is a fact that while many commentators accept that according to Article 51, force may not be used by a state for anticipatory purposes, they still claim the existence of a right of anticipatory or pre-emptive self-defense in customary international law.[88] The question quite naturally follows: if the

87 See e.g. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 93-94, paras 174-176.

88 See e.g. A. C. Arendt & R. J. Beck, *International Law and the Use of Force* (2003), 71-79; D. W. Bowett, *Self Defence in International Law* (1958), 192; J. Brunnée & S. J. Toope, 'Slouching Towards New 'Just' Wars: International Law and the Use of Force After September 11th', 51 *Netherlands International Law Review* (2004) 3, 363, 373; Delbrück, *supra* note 9, 14; Gross, *supra* note 9, 211 and 213; Martinez, *supra* note 9, 157-158; Printer, *supra* note 9, 351-352; Wolfrum, *supra* note 9, 28-29; . See also Military *and Paramilitary Activities in and against Nicaragua (Nicaragua v.*

two rights of self-defense reflect differently upon the case of force used for anticipatory purposes, then why should they so obviously speak a common language in the case of a large-scale attack performed by a non-state agent? Among the great number of text-writers who took the position of a proponent of change, no one posed this as a problem. I find this striking reticence good cause for criticism. If legal scholars generally reject the idea that the two rights of self-defense are identical, but at the same time are prepared to accept this idea on a case-by-case basis, and they fail to see this as a problem, then it might seem they have given up on the idea of logical consistency.

3. Pledges of Support

Among the various statements used by the proponents of change as evidence of an *opinio juris*, many display the character of an assurance.[89] In the period of 11 September to 7 October 2001, a great number of states showed their sympathy with the specific case of the United States Government by pledging to support its projected military campaign. Some such pledges of support were very specific. Examples include offers to assist with intelligence matters;[90] offers to grant clearance for the overflight and landing of US military aircraft;[91] offers for the provision of medical services and transportation;[92] as well as offers for the provision of military equipment;[93] and in some cases even military troops.[94] Other assurances remained rather vague, as illustrated by the following list:

- On 23 September, the Gulf Cooperation Council issued a joint statement expressing "the willingness of its members to participate in any joint action that has clearly defined

United States of America), Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, 259, 347-348, para. 173.

89 For commentaries citing such statements, see e.g. Beard, *supra* note 9, 569-573; Bring & Fischer, *supra* note 9, 186; Brown, *supra* note 9, 29; Langille, *supra* note 9, 155; Murphy, 2002a, *supra* note 9, 49; Myjer & White, *supra* note 9, 8; Schmitt, *supra* note 9, 62-63; Stahn, 2003, *supra* note 9, 35; Walker, *supra* note 9, 500-505.

90 See e.g. Walker, *supra* note 9, 502, citing a statement by the People's Republic of China.

91 See e.g. Murphy, 2002a, *supra* note 9, 49, citing statements by Georgia, Oman, Pakistan, Qatar, Saudi Arabia, Turkey, and Uzbekistan.

92 See e.g. Brown, *supra* note 9, p. 29, citing a statement by Japan.

93 See e.g. Walker, *supra* note 9, p. 502, citing a statement by Russia.

94 See e.g. Beard, *supra* note 9, 569, fn. 37, citing a statement by the Philippines.

objectives", and "to enter into an alliance that enjoys the support of the international community to fight international terrorism and to punish its perpetrators".[95]

- On 1 October, the UN Secretary General circulated a letter from the Permanent Representative of Saudi Arabia to the United Nations. According to this letter – citing a telephone call to the President of the United States – Crown Prince and Deputy Prime Minister Abdullah ibn Abdul Aziz had conveyed to the President of the United States and its people "the full readiness of the Kingdom of Saudi Arabia to cooperate with the United States Government in all matters that might assist in the identification and pursuit of the perpetrators of this criminal episode"[96].
- According to Professor George K. Walker of the Wake Forest University School of Law, citing the International Herald Tribune of 19 September, India – presumably on the 18th of that same month – had announced its "fullest co-operation" with US-led forces.[97]

In order to assess the value of all these assurances, I find it appropriate to divide them into two groups, depending on their characterization as either vague or specific. As to the first group – illustrated by the statements of the Gulf Cooperation Council, Saudi Arabia, and India – I would hesitate to ascribe to them any value at all. In my mind, they are simply not specific enough. Naturally, if a state S offers to support US military action, this can be an expression of a belief on the part of state S as to whether or not a right of self-defense can be exercised by the United States. But it cannot be interpreted in this way until we know more specifically both the contents and extent of the support and the purpose for which it is given. To illustrate the problem, we may compare an offer made by state S to assist the US military campaign in Afghanistan with military troops with an offer simply to cooperate in the application of existing international agreements for the

95 As quoted by S. D. Murphy, 'Contemporary Practice of the United States Relating to International Law', 96 *American Journal of International Law* (2002) 1, 237 [Murphy, 2002b], 245, quoting H. Schneider, 'Persian Gulf Arab States Support Anti-Terror Efforts', *The Washington Post*, 24 September 2001. The member states of the Gulf Cooperation Council are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

96 See e.g. Walker, *supra* note 9, 504. The document number of the letter is UN Doc. A/56/423.

97 See Walker, *supra* note 9, 503 and fn. 67, citing *The International Herald Tribune*.

prosecution of international terrorists. The implications are quite different. In the former case, the offer made by state S may possibly be seen as an indication of an *opinio juris individualis* to the effect that in the prevailing circumstances, a right of self-defense can be exercised by the United States. In the latter case, the offer may be equally well interpreted as an indication of the exactly opposite opinion.

As to the second group of assurances, they are certainly worthy of more serious consideration. Still, considered as indicators of an *opinio juris generalis* they are far from self-explanatory. Most importantly, it is not clear on what basis offers were made. Admittedly, any offer of this kind would have to be understood in the light of the broader context, including among other things international law in general. Of particular interest are the two principles of territorial integrity and non-intervention. According to the principle of territorial integrity, a state may not knowingly allow its territory to be used for activities that are detrimental to the rights of other states.[98] According to the principle of non-intervention, a state A may not offer its intelligence services to a state B for the planning and realization of a large-scale military operation in and against a third state C, if the purpose of the operation is the violent overthrow of the existing government of that state.[99] Considering this context, it might be assumed about a state, which offers its intelligence services to the US government, or offers to grant clearance for the overflight and landing of US military aircraft on its territory, that it acts on the basis of a very specific belief: that of the projected US military operation being in accordance with law. However – and this is my point – the assumption may not be as compelling as it first appears. To put things in perspective, we may broaden the context even further to include international politics. Could it not have been the case that states pledging to support the US military operation in Afghanistan simply chose to temporarily disregard the legal implications of their behavior? Allowing airspace and intelligence to be used by US military forces might have been seen as just or politically advisable – irrespective of whether or not it was legal – in which case, of course, the only plausible assumption is that through this behavior a state did not express its *opinio juris*. Given how

98 *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, ICJ Reports 1949, 4, 22.

99 See e.g. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 124, para. 241.

foreign relations are sometimes conducted by powerful states,[100] this assumption is certainly worthy of serious consideration.

Now, although the significance of said statements can be seriously doubted, the fact remains that quite a few scholars advanced them as indicators of an *opinio juris generalis*. What is more, this was done unreservedly – without the slightest discussion with respect to the weight that these statements should be afforded. One would expect at least some degree of critical response. Since such responses were apparently absent, I think a critical remark might be called for. It is a distinguishing trait of scientific analysis that it is performed with a critical mind. A good scientist is aware of the strength borne by her argument, and she discusses it openly. In the case of those authors who cited vague statements such as those of the Gulf Cooperation Council, Saudi Arabia, and India, I am prepared to take the argument a step further. I will insist that, for reasons already explained, authors gave the impression of being biased.

4. The Non-Action of States

To further substantiate their proposition of change, several commentators drew heavily, not on the express statements and reactions of states in the period of 11 September to 7 October, but on their *failure to react*.[101] As claimed by these commentators, the inaction of states gave implicit evidence of an *opinio juris generalis* to the effect that according to customary international law, a right of self-defense can be exercised upon a large-scale attack performed by a non-state agent, despite the fact that – judged by the criteria provided in the general international law of state responsibility – this attack cannot be attributed to any state. No doubt, very few states explicitly objected to the claim expressed by the US Government and others that under the prevailing circumstances, a military operation on Afghan soil would be allowed by international law. Considering that we are

[100] According to Professor George K. Walker of the Wake Forest University School of Law, only a few days after India and Pakistan had pledged their fullest cooperation with the US Government, President Bush revoked sanctions imposed on the two countries in 1998, subsequent to the nuclear tests then performed. The US Government also agreed to reschedule a debt of USD 379 million owed by Pakistan to the USA. (Walker, *supra* note 9, 503.)

[101] Commentators invoking the non-action of states include Arai-Takahashi, *supra* note 9, 1082 and 1095; Bring & Fischer, *supra* note 9, 190; Cassese, 2001, *supra* note 9, 996-997; Greenwood, *supra* note 9, 23O'Connell, 2002-2003, *supra* note 9, 46; Ratner, *supra* note 9, 910; Schmitt, *supra* note 9, 77.

concerned here with a rule of general applicability, by many considered to be one of the most important upheld by international law, we have to admit that on the whole states remained surprisingly inactive. In principle, inaction of this kind may have legal consequences. According to repeated pronouncements by the International Court of Justice, the inaction of states may be evidence of their *opinio juris*.[102] However – and this should be emphasized – the Court never talked of inaction in general. The inaction referred to was always a qualified one. Hence, in order for the inaction of a state S to be considered evidence of an *opinio juris individualis* to the effect that according to customary international law, some certain behavior B is allowed, circumstances need to give good reason for the assumption that state S would have taken positive action if it believed behavior B was not prohibited.[103]

It is against this background that we must assess the apparent inaction of states in the wake of the September 11 attacks. If states were of the opinion that according to customary international law, a right of self-defense may *not* be exercised by a state under such circumstances as those accompanying the events of 9/11, I would say that they had little reason to openly give voice to such a conviction. Quite the contrary: they had good reason to keep quiet. Few states – apart from those reputed for harboring international terrorists themselves – had very much of a self-interest to protect. Of course, if a government believed that according to customary international law, a right of self-defense could not be exercised, and other governments had started to champion the exact opposite view, we might expect the former government to object *in the interest of law and order*. However, every government knows the risk that such a message will be misread or misrepresented. The statement about what is contrary to *the law* will often be received as expressing an opinion about what is contrary to *moral standards*. We have to remember the enormous social and political pressure to which governments all over the world were exposed. In the heated political climate that prevailed, a statement to the effect that the United States had no right to take up arms to defend itself would have been regarded as an insult to the American nation and its people. The objector would have risked retaliatory measures, including not only the cessation of diplomatic relations, but also economic sanctions, such as the discontinuance of economic aid, the suspension of projected investments, or

[102] See e.g. *Fisheries Case (United Kingdom v. Norway)*, Judgment ICJ Reports 1951, 116, 138-139.

[103] *Id.*

the introduction of heavy fiscal duties on imported goods. Maybe some people would even have seen the objector as an accomplice of the terrorists. Consider the remark made by President Bush in his Address to the Nation, on 20 September:

> "We will starve terrorists of funding, turn them one against another, drive them from place to place until there is no refuge or no rest. […] Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists."[104]

All things considered, I would insist that if most states did not explicitly object to the assertion that the USA and the UK were allowed to use force pursuant to a right of self-defense, this inaction should be taken very lightly. It cannot be considered a very weighty evidence of any existing *opinio juris generalis*. This notwithstanding, the inaction of states was invoked by a great number of scholars as forming an important argument to this effect – with no reservations attached. Because of this, in my opinion, scholars should be criticized. Obviously, they failed to perform the necessary critical analysis. This is not good science.

III. The New Rule of Customary International Law (cont'd)

In my review of the post-9/11 international legal debate, assessing the allegation that between 11 September and 7 October 2001, a new rule of customary international law was created, up to this point, I have concentrated on the evidence that the proponents of change themselves used to support this allegation. My criticism of the debate has concerned partly the way evidence was presented; partly it has concerned the inferences that the evidence was claimed to allow. In this section, I will continue my review from a new angle. I will argue that as much as the proponents of change should be criticized for what they brought to bear on the discussion, just as much should they be reproached for what they omitted. Once again, my criticism can be said to fall into three different categories: proponents of change paid little regard to negative statements; they did not cite their sources properly; and they failed to reflect upon the fact that according to

[104] U.S. President G. W. Bush, 'Address to a Joint Session of Congress and the American People' (20 September 2001) available at http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html (last visited 19 November 2010).

most international lawyers, the principle of non-use of force is *jus cogens*. I will structure this section accordingly.

1. Discussants Paid Little Regard to Negative Statements

The way many scholars described developments between 11 September and 7 October 2001, one gets the impression that at least among the approximately 200 states of the world, the legality of the projected British-American military campaign in Afghanistan was never really in doubt.[105] The following passages may serve as an illustration of the very neat picture rendered in the literature:

> "No voices were raised claiming that either the customary right of self-defense or Article 51 was limited to the context of State action. On the contrary, there were very visible illustrations […] of the fact that most States viewed 9/11 as an armed attack meriting actions in self-defense; in no case, [sic!] was there any suggestion that the right was dependent on identifying a State as the attacker."[106]

> "Whatever criticism this [i.e. the characterization of the threat of future attacks from Al-Qaida as an armed attack] may have evoked from commentators, it appears to have met with no hostility from states, even from those normally opposed to U.S. positions."[107]

> "No state argued that such attacks [i.e. attacks performed by non-state agents] should not give rise to self-defense."[108]

> "This widespread, worldwide practice, to which few if any states persistently objected, further vindicated the legality of U.K.-U.S. Enduring Freedom operations."[109]

105 Apart from the scholars cited in *supra* notes 104-108, see Cassese, 2001, *supra* note 9, 996-997; Cohan, *supra* note 9, 326; Duffy, *supra* note 9, 187; Langille, *supra* note 9, 154-156; Murphy, 2002a, *supra*, note 9, 48; O'Connell, 2002, *supra* note 9, 893; Ratner, *supra* note 9, 909; Stahn, 2003, *supra* note 9, 35-36; Stahn, 2002, *supra* note 9, 187.

106 Schmitt, *supra* note 9, 77.

107 Greenwood, *supra* note 9, 23. A footnote is omitted.

108 O'Connell, 2002-2003, *supra* note 9, 46.

109 Walker, *supra* note 9, 532. A footnote is omitted.

> "State practice has clearly established that an attack of the scale and effect of September 11th is an armed attack against a state, giving rise to the inherent right of self-defense."[110]

As I insist, descriptions such as these misrepresented reality. Contrary to what they suggest, a number of states expressed criticism of the projected British-American military campaign. Some respectfully called upon the two governments involved to exercise restraint. Examples of this can be drawn from debates held in the UN General Assembly, from 1 to 5 October, during its 56th session. Discussing Agenda Item 166 ("Measures to eliminate international terrorism"), Mr. Rodríguez Parrilla of Cuba expounded the view of his country that

> "[t]errorist acts are usually carried out by extremist groups or even individuals. Faced with such an event, however serious it might be, a powerful State must not invoke the right to self-defence in order unilaterally to unleash a war that might have unpredictable effects on a global scale and result in the death of an incalculable number of innocent people. Instead, the right of all to the common defence of all must be exercised. [...] It is Cuba's opinion that any use of force against terrorism will require the explicit and prior authorization of the Security Council, as established in the Charter. Cuba also believes that neither of the two resolutions adopted by the Council in the wake of the attacks of September 11 could be invoked to launch unilateral military actions or other acts of force."[111]

Mr. Hasmy of Malaysia quoted the Prime Minister of his country, Dr. Mahathir Mohamad:

> "While he understood the reasons for the ongoing planning to hunt down terrorist groups and stop terrorism, he was against the use of force that resulted in the victimization of innocent civilians. He felt that retaliatory actions through the use of force would not solve the problem, as they might only provoke counter-retaliation and were therefore fraught with risks to international peace and security."[112]

110 Brown, *supra* note 9, 29.
111 United Nations General Assembly, *supra* notes 61, 15 and 17.
112 United Nations General Assembly, *supra* note 76, 10.

Mr. Widodo of Indonesia maintained that

> "[i]t is in this context that the United Nations, as the only multilateral organization with universal membership, is uniquely placed to advance global efforts and to take necessary and effective measures to combat this alarming increase in terrorist activity. It is the only appropriate forum to accord legitimacy to undertaking the resolute action needed to eradicate this phenomenon."[113]

According to Mr. Ling of Belarus,

> "[t]he possibility of any military intervention to combat international terrorism on the territories of other States today can and must be considered from the point of view of threats to international peace and security, exclusively by the Security Council, which has been given authority for this under the Charter."[114]

According to his colleague of Turkmenistan, Mrs. Ateava,

> "[t]he United Nations is the only forum for establishing a global coalition, as only in this way can we lend global legitimacy to the long-term struggle against terrorism."[115]

To conclude the series of examples, we may consider also the letter sent by the Permanent Representative of Iraq to the United Nations, circulated by the Secretary General on 19 September. In this letter, President Saddam Hussein of Iraq emphatically condemned "Western Governments", and the Government of the United States in particular, using broad and emotional language of the following kind:

> "Some Western States are preparing to participate in a United States military action, and the indications are that it will be against an Islamic country. Who, in this case, are the fanatics? Is not the solidarity and the blanket approval in advance by some Western leaders of military *aggression* against an Islamic State the height of

113 United Nations General Assembly, UN Doc. A/56/PV.16, 3 October 2001, 16.
114 United Nations General Assembly, s*upra* note 73, 21.
115 United Nations General Assembly, UN Doc. A/56/PV.21, 5 October 2001, 17.

> the fanaticism of the new crusade? It reminds Arabs and Muslims of the crusade waged by the West and NATO against Iraq."[116]

Assessing these negative statements with the same critical eyes as those used for an assessment of the positive statements cited in sub-sections IV 2 and IV 3, we have to admit that only the statements of Iraq and Cuba clearly indicate an *opinio juris* on the part of those states.[117] Without any doubt, Iraq and Cuba were unfavorable to the proposition that under such circumstances as those accompanying the events of 9/11, according to customary international law, a right of self-defense may be exercised by the United States and the UK. The positions held by Malaysia, Indonesia, Belarus and Turkmenistan are ambiguous. Their statements can be interpreted to express the opinion that the projected military operation in Afghanistan would not be consistent with the right of self-defense contained in customary international law. But they can also be interpreted to express the opinion that even if the operation certainly would be consistent with the right of self-defense contained in customary law, for various reasons it would still be advisable to abstain from exercising that right. This notwithstanding, I would argue that, taken at large, these negative statements partly neutralize the effect of the alleged positive ones. They weaken the proposition that according to a generally held opinion among states on the morning of 7 October 2001, customary international law allowed for a right of self-defense to be exercised upon a large-scale attack performed by a non-state agent, although – judged by the criteria provided in the general international law of state responsibility – this attack cannot be

116 Annex I to the letter dated 18 September 2001 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General – Open letter from Saddam Hussein to the American peoples and the Western peoples and their Governments, UN Doc. S/2001/888, 19 September 2001, 5. (Emphasis added.) Compare the statement made by the Iraqi delegate (Mr. Aldouri), at the 56th session of the UN General Assembly, during discussions on Agenda Item 166 ("Measures to eliminate international terrorism"), United Nations General Assembly, *supra* note 79, 13-16.

117 In the earlier sub-section IV 2, some positive statements were considered ambiguous since they did not say clearly whether they concerned the right of self-defense laid down in Article 51 of the UN Charter, or the right of self-defense contained in customary international law. The negative statements referred to in the present sub-section V 1 are equally ambiguous, but in this case ambiguity is not a problem. If, according to what a state utters, no right of self-defense can be invoked upon a large-scale attack performed by a group of non-state agents, then obviously this means that according to that state, neither one of the two rights applies.

attributed to any state. Hence, in an assessment of those scholars who acted as if these negative statements simply did not exist, I would definitely plead for a reproach. Scientific analysis should be comprehensive: it assumes the investigation of an issue from all possible sides. Failing to conform to this standard, a text-writer will always expose himself to the criticism of being biased.

2. Discussants Failed to Cite their Sources Properly

In academic writing courses, a large amount of time is typically spent on discussing the issue of citation. The use of endnotes or footnotes is one among the many characteristics that make academic writing so peculiar, distinguishing the authoring of scholarly papers, theses, and research articles from writing in general. It is explained by the idea of science as an ever-continuing exchange of ideas. In a scientific exchange, the last word on a topic will never be uttered. Every idea or suggestion submitted is amenable to appraisal, re-appraisal, and renewed appraisal ad infinitum. In order for a reader to be able to verify and appraise the propositions submitted by a writer to a scientific discourse, it is required that the writer states her sources of information – those sources on which the proposition is allegedly based. If the reader cannot revisit the sources, appraisal will be impossible, and the founding idea of all science will be lost entirely.

For similar reasons, academic writing should be attentive to the use of secondary sources. To grasp the information contents conveyed by an utterance, we often have to interpret this utterance. Consequently, the more people that intervene in the communication of an utterance from its original source to the person using it, the greater the risk that the source will be misrepresented. Good reasons suggest that secondary sources should be avoided. However, as every academic knows, for various reasons, this principle must sometimes be set aside. In such cases, it is of utmost importance that readers are at least kept informed of the fact that a secondary source was exploited. If readers are not informed, how can they ever be expected to make a correct assessment of the proposition or propositions put forth? Naturally, the same applies to those cases where a writer builds upon a secondary source of information that cannot possibly be retrieved or accessed for inspection.

These are basic principles of scientific ethics that ought to be well known to scientists working in all disciplines. Nevertheless, in the post-9/11 international legal discourse they were repeatedly infringed upon, especially by text-writers reporting on the various state acts allegedly performed in the

period of 11 September to 7 October. In some cases, commentators claimed the existence of statements without citing any source of information whatsoever. As already stated, this is contrary to the idea of science as an ever-continuing appraisal of ideas. When an author submits a proposition to a discourse, but does not care to state his sources of support, the only remaining reason to adopt the proposition is the personal authority or credibility of the author. In this particular case, this is hardly sufficient. In other cases, text-writers cited sources of a secondary nature, including daily newspapers, articles by other commentators of international law, who themselves were unable to specify their sources of information, and telephone calls allegedly overheard by colleagues. Generally speaking, in a scientific discourse, secondary sources should always be treated with suspicion. Naturally, in the particular case addressed – given the overwhelming sentiments and political rhetoric that infected legal debate in the period immediately following upon the events of 9/11 – we should be more than normally skeptical. I have criticized scholars earlier in this article for underachieving; now I must go for something stronger. This is unacceptable!

3. The Missing Jus Cogens Argument

Contrary to what was indicated in sections IV and V, let us assume that based on the utterances and behavior of states between 11 September and 7 October 2001, the alleged *opinio juris generalis* can indeed be shown to exist. Let us assume that according to a generally held opinion among states on the morning of 7 October, under circumstances of the kind accompanying the events of 9/11, customary international law allowed for a right of self-defense to be exercised by the United States and the UK. Even if we accept this assumption, it does not really solve the matter. Obviously, anyone who chooses to advocate the creation of a new right of self-defense according to the assumption above still has one difficulty to confront. The complication is that she assumes the creation of not just any norm of customary international law, but a norm of a very particular kind. She assumes the creation of *jus cogens*.

This suggestion that the right of self-defense should be regarded as a norm of *jus cogens* might not appear as natural to everyone. The thing is that if we choose to characterize as *jus cogens* the principle on the non-use of force (as enshrined in Article 2 para. 4 of the UN Charter) – indeed, this

is the description habitually offered[118] – we simply have no other alternative. The right of self-defense forms an exception to the principle on the non-use of force. Thus, the relevant *jus cogens* norm cannot possibly be identical with the principle on the non-use of force as such. If it were, this would imply that whenever a state exercises a right of self-defense, it would in fact be unlawfully derogating from a norm of *jus cogens*.[119] Obviously, the following description of the relevant *jus cogens* norm simply does not hold: 'If, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or force otherwise inconsistent with the purposes of the United Nations, then this shall be considered a violation of the international *jus cogens*.' A correct description would have to account for the fact that the principle on the non-use of force does have exceptions, such as the right of self-defense. To borrow a term from legal theory, the principle on the non-use of force is *supervenient* on the right of self-defense.[120] Hence, compared to the description above, a better way of representing the relevant *jus cogens* norm would be by the following norm sentence:

> 'If, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or force otherwise inconsistent with the purposes of the United Nations, and this action is not prompted by an armed attack, or, given that it is indeed prompted by such an attack, fail to meet the twofold criterion of necessity and proportionality, then this shall be considered a violation of the international *jus cogens*.'[121]

118 See e.g. the opinions expressed by the US and Nicaragua Governments, and by the International Law Commission, as reiterated by the ICJ in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 100-101, para. 190.

119 Cf. VCLT Art. 53: A *jus cogens* norm "is a norm […] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

120 See e.g. R. M. Hare, *Essays in Ethical Theory* (1993), 66-81.

121 I am not saying that this is the correct way of representing the relevant *jus cogens* norm. As I have argued extensively elsewhere, it might be that this norm would have to be put in even more comprehensive terms. See U. Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened the Pandora's Box, Did You Ever Think About the Consequences?', 18 *European Journal of International Law* (2007) 5, 853.

In order for a norm of customary international law to fit the description of *jus cogens*, it must be regarded as peremptory by the international community of states as a whole. This is evident from the definition provided in Article 53 of the 1969 Vienna Convention on the Law of Treaties: A *jus cogens* norm "is a norm *accepted and recognized by the international community of States as a whole* as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[122] Stated somewhat differently, a norm of *jus cogens* presupposes the existence of two kinds of *opinio juris*. Let us say we wish to argue the position that the principle on the non-use of force is a norm of *jus cogens*. Then, first of all, we would have to show it to be a widely held opinion among states throughout the world that, according to a rule of customary international law, a state shall refrain in its international relations from the use of force directed against the territorial integrity or political independence of any other state, or in any other manner inconsistent with the purposes of the United Nations. Secondly, we would have to show it to be a widely held opinion among states that the principle on the non-use of force has a *jus cogens* character.

This requirement for a double *opinio juris* is of great relevance for the post-9/11 international legal discourse. If scholars advocated the proposition that from 11 September to 7 October 2001, the right of self-defense contained in customary international law was put through a process of revision, then obviously it would not be enough for them to show that in said period, states changed their opinion with regard to the contents of the right of self-defense. They would also have to show that states changed their opinion with regard to the contents of peremptory international law. Considering the circumstances, this second requirement can hardly be met. Even if we accept the assumption that an ordinary norm of customary international law can be brought into existence or modified in a period of four weeks, it is indeed absurd to imagine that in such a short period, a similar development could ever be effected with regard to a norm of *jus cogens*. It is entirely inimical to the idea of *jus cogens* as an uncommonly permanent set of norms. Not one text-writer commenting upon the developments post-9/11 brought this issue up for discussion. That is why I refer to it as the missing *jus cogens* argument.

[122] Emphasis added.

In my understanding, the conclusion for sections IV and V of this essay would have to be very much the same as that for sub-section III 5. If we accept that the principle on the non-use of force forms part of the international *jus cogens*, the proposition of change is doomed from the very beginning. If a host of international legal scholars suggested that according to the *opinio juris* of states on 7 October 2001, under circumstances of the kind accompanying the events of 9/11 customary international law allowed for a right of self-defense to be exercised, spending time on carefully analyzing the invoked evidence to that effect was a meaningless exercise. What is more, it diverted attention from the legally relevant questions. Those questions obviously lied elsewhere. These are harsh words indeed; but in my opinion, if a *jus cogens* character is conferred on the principle on the non-use of force, we will simply have to dismiss as poor legal science the entire legal debate considered in this essay.

C. Part III

I. The Self-Image of the International Legal Scientific Discipline

I began this essay by sharing my opinion about the post-9/11 international legal discourse. I declared that I have studied with exceptional interest what international legal scholars wrote about the international law of self-defense relative to the initiation of Operation Enduring Freedom in Afghanistan. I have done so for several reasons. First of all, the post-9/11 international legal literature raises some very interesting questions with respect to the integrity of the legal scientific discipline. As I explained in the introduction of this essay, a great majority of text-writers expressed the opinion that at some point between the attack of 11 September 2001 and the initiation of Operation Enduring Freedom on 7 October that same year, the international law of self-defense substantially changed. Considering how radical this proposition must appear to most international lawyers, a legitimate question is to what extent good arguments were actually used to defend it. By submitting the post-9/11 international legal literature to a critical legal review, I have tried to provide this question with an answer. As argued in Part II of this essay, according to the quality standards normally used for criticism of legal scientific activities, legal science should engage in independent critical legal analysis. Legal science should bring focus to the operationally relevant legal questions – it should ask questions that help determining the scope of discretion conferred on political and judicial

decision-makers, rather than the opposite. Furthermore, legal science should fulfill the criteria of general scientific ethics. As the review clearly showed, in the post-9/11 international legal discourse, legal science failed on all counts.

Arguably, this conclusion forms a reason for a number of further actions. To begin with, obviously, it justifies the categorization of the post-9/11 discourse as poor legal science. It is good cause to express disapproval of the way proponents of change acted, and it urges people to be more skeptical about what they read in the international legal literature – whether they choose to distrust only the specific literature on international terrorism and the right of self-defense, or go as far as to be greatly skeptical about the entire international legal scholarship. Personally, I will approach the issue from a different angle. As I conceive of the results of Part II, more than anything else, they give us reason to submit to scrutiny and further discussion the self-image of the international legal scientific discipline. I will finish this essay by initiating something of that kind.

1. The International Legal Scientist as Archetype

If we wish to understand the international legal scholarship as it presented itself in the post-9/11 international legal discourse, I assume we have to know something about the forces influencing that scholarship. When scholars wrote about the international law of self-defense relative to the initiation of Operation Enduring Freedom in Afghanistan, clearly, there was something about the whole situation that greatly constrained them. Something urged scholars to avoid the conclusion that the initiation of Operation Enduring Freedom was contrary to international law, or – if we state this in general terms – that in circumstances like those accompanying the events of 9/11, there would still not be any right of self-defense to exercise. Given the importance of the legal issue discussed, it would be interesting to know more about this urge or influencing force – what it is, and how it works.

Some people would probably say that international legal scholars acted for ulterior motives, such as, for instance: a personally felt hatred or sorrow; solidarity with families directly affected by the terrorist assault of 9/11; a loyalty to one's country, government, or employer; or a will to secure future promotions and research funds. Although factors such as these certainly must have played a part – I would be a fool if I did not admit it – in my opinion, this explanation is oversimplistic. My reading of the post-9/11 debate tells me – and my earlier experience of the international legal

literature confirms this – we have to approach the problem at a deeper level. As I would like to suggest, the main motivating reason lies rather in the self-image of the international legal scientific discipline and the role it envisages for itself in the international community. Of course, approaching the issue on the level of the individual, we cannot speak about the "one role" assumed by the international legal scholar. Different scholars conceive of their role differently. They may share the conviction that something like a legal framework exists, but they certainly have different ideas of what this framework is and how they, as scholars, should approach it. However, since these different ideas and approaches would seem to lend themselves to general classification, I believe we can still talk about the *genus* of the international legal scholar. Consequently, I will now venture a description of the international legal scientist as archetype.[123] In fact, according to the description, there are several archetypes. I will denote them as the External Observer, the Legal Idealist, The Legal Activist, the Moral Messenger, the Preserver of the Legal Self, and the Guardian of the Legal System, respectively. If earlier I have referred to the post-9/11 international legal discourse as an interesting object of study, it is mainly because in this discourse, these archetypes are more than usually apparent.

For *the External Observer* the distinction between descriptive and normative legal statements is crucial. According to her, since international law exists in much the same way as natural phenomena, legal scientists can describe legal norms unaffected by whatever moral or political opinions they may personally hold. The External Observer admits that in legal discourses, people may utter statements defending legal norms on moral or political grounds. Also, people may utter criticism of the law and share opinions about the new legal norms they think ought to be created. This is an activity that the External Observer herself refuses to engage in, however. The role she has assumed is to be a provider of descriptive legal statements, and descriptive legal statements only. What tends to make her work complicated is the fact that, like most human beings, the External Observer is a moral and socially responsive creature. Therefore, when she reaches a conclusion (C) with regard to the contents of international law, sometimes she will experience great internal conflict. This conflict is owed either to the fact that the External Observer finds the conclusion C morally or politically

123 For a similar approach, see e.g. J. Kammerhofer, 'Law-Making by Scholarship? The Dark Side of 21st Century International Legal 'Methodology'', working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631510 (last visited 11 December 2010).

offensive and feels an inner need to express this openly. In the alternative, the External Observer may feel that she is under great social pressure: she knows that people generally will not understand that she is taking a neutral stance, but will think that she considers the conclusion C morally or politically defensible; and since she believes that most people will not share this assessment, this bothers her. The External Observer faces a dilemma. The easy way out of this dilemma is to make sure that the legal description and the morally or socially more attractive conclusion -C coincide. Arguably, the greater the External Observer perceives the moral or social values at stake to be, the more attractive this solution will seem to her. Considering the strong moral sentiments expressed in the public debate post-9/11, my suggestion is that the External Observer serves as a possible explanation for the poor scientific quality characterizing the post-9/11 international legal discourse.

The self-assumed role of *the Legal Idealist* is to pronounce on the way states, international organizations, and other international legal subjects *should* act, given the existing positive international law. For the Legal Idealist, international law is a means for the regulation of the behavior and interaction of its various subjects. Regulation is not seen as an end in itself, however, and this is where the Legal Idealist parts with the External Observer. In the view of the Legal Idealist, justice is an essential quality of law, and therefore, it is a constant requirement that regulation be just. By very definition, a rule that belongs to the system of international law is morally sound, and if it is not, it simply does not belong to that system. Stated in slightly different terms, for the Legal Idealist, international law is a representation of the set of moral values that justice stands for in the conceptual world she assumes. Consequently, if the Legal Idealist reaches a certain conclusion (C) with regard to the contents of international law, and she finds this conclusion morally offensive, then she will not regard C as correct, but will search for alternative conclusions. In the public debate post-9/11, many people regarded as inconceivable the idea that in circumstances like those then prevailing, the United States would have no right to defend itself. “National security” and “the self-preservation of states” were said to demand such a right. Strong moral language of this kind would seem to reinforce the conception of the Legal Idealist as a valid explanation of the post-9/11 international legal discourse.

For *the Legal Activist*, law is a means for the realization of some particular political agenda. If the Legal Activist reaches a certain conclusion (C) with regard to the contents of international law, and she finds that this conclusion is contrary to the political agenda she assumes, then the legal

Activist will argue for a legal change. The same goes for the situation where the Legal Activist finds that international law does not provide a clear answer to a given question, but believes that it should. The Legal Activist shares with the External Observer the task of analyzing and describing international law, but unlike her "colleague", the Legal Activist has assumed also the further role of taking normative action. The distinguishing mark of the Legal Activist is the way this is done. The Legal Activist acts on the belief that as long as she acknowledges that something like a legal framework exists, she has the right to bring arguments to further her political agenda, even though this is done in a fully partial fashion. A clear risk comes with this approach. When the Legal Activist makes a statement on what she thinks the law *should be* people will easily understand this as a statement on *what the law is*; for several reasons. The Legal Activist might be vague about whether, in her opinion, international law provides a clear answer to the particular question investigated or not. Or, she might be vague about what in her account is a description of *the law that is*, and what is her opinion of *the law that should be*. (A conspiratorial mind would perhaps say that it remains in the interest of the Legal Activist to be vague about these things exactly.) Given the political importance often attached to the international law on the use of force, the conception of the Legal Activist would seem to serve as a valid explanation of the post-9/11 international legal discourse.

Although it might be said about *the Moral Messenger* that in a way she, too, approaches international law from a normative angle, we must be careful not to confuse her with other archetypes. Unlike the Legal Idealist and the Legal Activist., the Moral Messenger does not work on the basis of any general normative concept. What influences her is not so much the deeply felt conviction that beyond positive international law, a fact or a state of affairs can be generally desired on moral or political grounds. The Moral Messenger acts on the basis of more temporary motives. She acts under the influence of a pathos – the perceived pathos of the particular legal provision (P) she happens to be studying at the moment. By appealing to the emotions of the legal scientist – for instance, by warning of immanent threats or consequences, by appealing to pathetic circumstances, or invoking supposedly shared values – some agent – be it the law-makers, an NGO, a lobby group, or a collegiums of other legal scientist – has convinced the scientist that the provision P stands as a representative of some important moral value or values. Having adopted this view, for the legal scientist it will morally obviously make a great difference whether she comes to the conclusion that P allows a certain line of action or not. To say that a certain

line of action is not allowed by P will be tantamount to saying that this line of action is morally offensive. Add to this the unique position that the international law on the use of force occupies in international politics and to some extent also in international legal science. The international law on the use of force is often referred to as forming something of "an international constitution". People speak of it as part of an "international *ordre public*" and as *jus cogens*. Consider also the language of Article 51 of the UN Charter, where the right of self-defense is described as having an "inherent" character. Pathetic language of this kind reinforces the suggestion that the Moral Messenger might be one explanation for the poor scientific quality characterizing the post-9/11 international legal discourse.

The *Preserver of the Legal Self* and *the Guardian of the Legal System* have very much in common, and therefore, to some extent, they can be dealt with jointly. When the Preserver of the Legal Self or the Guardian of the Legal System inquirers into the contents of international law, she works under the influence of the perceived morality of the international community at large. She may or she may not have an opinion about the moral virtues of a particular conclusion (C), but this is immaterial. What influences the behavior of the Preserver of the Legal Self and the Guardian of the Legal System is not the set of moral principles that the particular scientist herself happens to hold. The source of influence, rather, is the scientist's assumption that C will be received by the international community as morally offensive. For some reason she does not want her conclusion to be received this way. Therefore, if the Preserver of the Legal Self or the Guardian of the Legal System reaches a certain conclusion C with regard to the contents of international law, and she makes the prediction that the international community will find this conclusion morally offensive, she will reject C and search for alternative conclusions. In other words, the predicted reaction of the international community causes the scientist to give a different description of international law than she would have given if she would have acted independently of this community. Why is this? The Preserver of the Legal Self and the Guardian of the Legal System would answer this question differently. The Preserver of the Legal Self would answer that she considers it her duty to protect the authority of international legal science. She is afraid that if the international community perceives of her conclusions as morally offensive, it will increasingly look upon international legal science as irrelevant and ignore it. The Guardian of the Legal System, on the other hand, would answer that it is incumbent upon her to protect the legitimacy of the international legal system. If, generally, people tend to think of the international law on the use of force as

something of a core of an international legal system working properly, the morally dubious conclusion C will inevitably raise doubts as to whether international law is at all an appropriate form of governance. For the Guardian of the Legal System, as for the Preserver of the Legal Self, it is of course relevant that in dealing with the spectacular events of 9/11, international legal science was given an attention in the public debate far beyond normal. This is why I suggest that the Preserver of the Legal Self and the Guardian of the Legal System serves as valid explanations of the post-9/11 international legal discourse.

2. The Way Ahead

Naturally, my description of the international legal scientist as archetype must be taken for what it is. First of all, since the description is based not so much on sociological research proper as on generalized personal experience, it remains rather speculative. Furthermore, let it be clear that I do not claim to be providing a description of the personalities of individual legal scientists. Normally, individual legal scientists do not lend themselves to easy-found categorizations such as those suggested in this essay. This is mainly because legal scientists act consistent with different archetypes at different occasions, and because, seemingly, in particular legal discourses a legal scientist can act consistent with several archetypes at the same time. Finally, my description of the international legal scientist as archetype is not intended to be exhaustive. Obviously, the genus of the international legal scientist can be described on the basis of different criteria, and depending on the criteria used the ensuing description will inevitably be different. Nevertheless, even assuming that we were all to agree on the particular criterion used in this essay – the forces influencing international legal scientists – I do not exclude the possibility that on further analysis, additions would have to be made to the description that sub-section VI 1 provided.

Despite these reservations, it is my understanding that the current description of the international legal scientist as archetype has great explanatory value; for several reasons:

- It explains some of the relationships that obviously exist between, on the one hand, the way we look upon ourselves as international legal scientists, and, on the other hand, what tends to be the outcome of our scientific activities. Understanding these relationships, international legal scientists will be more

keen observers of, and participants in, the international legal discourse. International legal scientific activities will emerge as more transparent. Thus, the description provided in sub-section VI 1 will contribute to a more rational international legal discourse. Perhaps, for this same reason, it will also help re-establish the ethos of international legal science.

- As I would suggest, a good legal scientist continuously reflects upon her professional personality. Who am I? What am I doing? What exactly motivates my action? The description of sub-section VI 1 will not only encourage these questions, but it will also to some extent assist in answering them.

Possibly, my description of the international legal scientist as archetype will form a basis for a more penetrating general discussion on the role of the legal scientific discipline in the international community. What exactly is the international community expecting from international legal science? What role or roles should international legal science be taking in situations like that of 9/11? To what extent – particularly in 9/11-like situations – should the international legal scientist feel that she bears responsibility for the perceived moral deficiencies of international law? To what extent should the legal scientist be considered responsible for the authority of the entire international legal scientific discipline and for the legitimacy of the international legal system? If we agree that the international legal scientific discipline is constructed by its action in acute situations in particular, as international legal scholars we should consider these questions exceptionally important.

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Humanitarian Action – A Scope for the Responsibility to Protect: Part II: Responsibility to Protect – A Legal Device Ready for Use?

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Abstract

Throughout three issues of the Goettingen Journal of International Law we are trying and answering the same question: with the recognition of responsibility to protect, is humanitarian action at last guaranteed? Will this concept avoid some avoidable deaths and lack of rescue? Our first issue was devoted to the long quest for a legal regime in favor of humanitarian action effective delivery. After a step by step review of the many solutions which have been tried, the paper ended with the "discovery" of physical protection. After mentioning the Kosovo (and Serbia) air strikes and the 3rd millennium UN field missions, the paper ended with a worrying assessment: no device over the past 150 years has succeeded in guarantying neither assistance' provision nor protection. And we raised the issue of responsibility to protect (R to P) as a possible help to solution. Our today's paper goes down this way.

A. Introduction

> "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. […] We accept that responsibility and will act in accordance with it. […] The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means. […]. In this context, we are prepared to take collective action, in a timely and decisive manner […]."[1]

This excerpt from the summit outcome of the UN's 60th anniversary is strong and generally speaking, the wording "Responsibility to protect" still sounds, if no longer quite brand new, at least, a recent conquest of humanitarianism.

This is the starting point of our present issue, but we have to discuss it more in-depth. Indeed, the very concept was already underlying many aspects of contemporary international law; and, in the aftermath of the formalization of the concept in a UNGA Resolution, the situation is not that clear cut. Many authors envisage R to P as a legal way for armed operations,

[1] GA Res. 60/1, 24 October 2005, para. 138.

with some of them also suspicious as to the very possibility of such interventions being carried out with a protective goal. And the literature practically ignores the other ways of protection that are yet to be found in the famous summit outcome.

Speaking of armed protective intervention, a long way was necessary for a narrow opening (B). Yet, broadly speaking, the responsibility to protect should open onto a wide area with far-reaching consequences (C).

B. The Responsibility to Protect Through an Armed Operation: A Long Way for a Narrow Opening

It will thus be necessary to focus upon each of these two elements: the way and the achievement. International humanitarian law and international human rights law do protect the human being. However, international law still encompasses sovereignty. In some cases, between human protective norms and the possibility to have them implemented, there is a gap. It took years to find a solution to overcome it. We will trace back this way, including the tentative solutions put forward (I) before describing the solution found (II).

I. Assessing the Gap and Some Non-Solutions

Some glimpses at some steps of this long way appeared in our previous issue, as side effects of humanitarian action history review. However, we are now tackling with quite a different investigation, which concerns the legal set of rules.

In humanitarian affairs, action is often emotion-driven. Sometimes, a sense of moral duty brings actors (organizations or States) to disregard certain legal constraints and to intervene in spite of them; whereas in other times and places, legalism inspires abstention for the worse. The last thirty years have shown tremendous efforts made by humanitarian workers in order to put concepts forward (1) which have to be read in light of a customary rule of the ancient times, the so-called *intervention d'humanité* (2).

1. Humanitarian Sensitivity, Between too Much and too Little

Each decade has brought its legal contribution to answering distress in difficult conditions.

a) In the Late 1980s: Choosing *ingérence* (or the "Right to Intervene") in Order "not to let them die"

The concept was proudly and provocatively put forward by the then "French doctor" Bernard Kouchner and his friend the law professor Mario Bettati. Beyond the provocative wording, the idea was not meant to subvert the principle of sovereignty. Mario Bettati knew all too well how fundamental it is, and in Bernard Kouchner's approach to the question, there was more indifference towards sovereignty than hostility. The name "Medecins sans Frontières" – the organization he created – signifies a dedication to rescue efforts throughout the world, but nothing of the kind of imperialism some "southern" countries have denounced.

The French diplomats took up the motto "don't let them die". Moreover, they attempted to get it accepted by the United Nations as the basis for a new norm. France put forward a draft UNGA resolution, aimed at the adoption of a strong position that could help if a local government showed a lack of cooperation regarding assistance. It was about a legal device aimed at bypassing this kind of bad will.[2]

But the topic was handled conservatively by the UNGA. The rationale behind the proposition was that respecting such sovereign refusal of help would amount to letting people die without rescue. Every precaution was used to have this declared on a large basis; therefore France sought as many co-sponsors as possible for the text. Negotiations ensued, the result of which was that only a few States – most of West – accepted to co-sponsor a text with a reference to "right to life" in its preamble. The final output was resolution 43/131, which left the "right to life" unmentioned, passed on December 8 1988. It was however construed in a misleading atmosphere. For France and most European States – as well as for the so-called *"Sans frontierist"* movement – it was taken as a victory due to the importance granted to humanitarian assistance (even without the wording "right to life") and the fact that NGOs were placed on the same footing as IGOs when it comes to the responsibilities for rescuing. But, on the latter chapter, the text gives the local State priority[3], reaffirming "the sovereignty of the affected States and their primary role in the initiation, organization, co-ordination

2 Cf. M.-J. Domestici-Met, 'Aspects juridiques récents de l'assistance humanitaire', 35 *Annuaire français de droit international* (1989), 117.

3 GA Res. 43/131, 8 December 1988, para. 2.

and implementation of humanitarian assistance within their respective territories"[4]. The same occurred once again in resolution 45/100 (1990).

b) In the 1990s: Peacekeeping Preferred to *ingérence*… and Some Shortcomings

The UNSC raised great hopes when it identified a "threat to peace" in some activities aimed at hindering the delivery of humanitarian assistance of utmost and vital importance.[5] The same was stated for activities directly targeting civilian populations. Thus, according to UN Charter Chapter VII, namely Art. 39, problems which sought a legal solution eventually came under UNSC jurisdiction. Hence, the UNSC was, whenever populations where at risk, entitled to make necessary decisions. And the latter resulted in entrusting peacekeeping forces with a protective mandate, first in favor of humanitarian assistance and then in favor of civilian populations.[6]

But hope turned into disappointment with difficult crises to which the UNSC jurisdiction was inherently unable to bring remedy. The decision to rely upon peacekeeping forces, even if entrusting them with the mandate to defend besieged cities qualified "security zones", proved a lack of security.[7] Therefore, after the Rwandese genocide and the Srebrenica slaughter, in 1999, most States embraced a type of operation by-passing both sovereignty and the UNSC jurisdiction, insofar as it was conducted under the aegis of protection of populations.

In the Kosovo area, there were two opposing approaches to legitimacy. Serbia invoked its multi-secular presence in the region it considers as its birthplace while Albanian Kosovars could invoke their right to self-determination on a territory in which they constitute 90% of the population. But legally, Serbia was sovereign and in a position to rely upon the *uti possidetis* principle.[8] UNSC, in resolution 1199 (1998) ignored any contestation of Serbian sovereignty and established a commission – the Kosovo Verification Mission to be set up by the OSCE – in order to monitor

4 *Id.*

5 SC Res. 767, 24 July 1992, SC Res. 770, 13 August 1992.

6 Cf. M. Bothe, 'Peace-keeping', in B. Simma (Ed.), *The Charter of the United Nations. A Commentary*, 2nd ed. (2002), paras 13-71.

7 SC Res. 819, 16 April 1993, SC Res. 824, 6 May 1993 and SC Res. 836, 4 June 1993.

8 Cf., for the latter point, Opinion No. 2 of the (Badinter) Arbitration Commission of the Peace Conference on the Former Yugoslavia, reprinted in 31 *International Legal Materials* (1992), 1497, 1498.

a cease-fire while checking the conditions for the Albanian Kosovar population. Protection was then in the forefront. Protection, precisely, was the ground on which NATO launched its military intervention in March 1999. Neither authorized nor condemned and certainly not prized by UNSC, was the so-called "humanitarian intervention", or "humanitarian intervention" or even "humanitarian war", which ended up with the UN simply taking into account the new situation[9] – the end of Serbian control over the territory – and organizing what was due to be the "substantial autonomy" of Kosovo.[10]

However, the fact that NATO had fostered the release of the Serbian grasp on Kosovo was prized by large parts of public opinion, which showed evidence of an "International moral consensus".[11] The fact that NATO had achieved the result through the use of force without any UN mandate was strongly challenging the UN. Was it the survival of an old customary exception to sovereignty?

Indeed, the pre-UN and pre-League of Nations era offered a device for which the French language has a specific word: "*intervention d'humanité"*, not to be confused with *intervention humanitaire*[12], while in English "humanitarian intervention" covers both. Was something in the old customary rule helpful for finding the requested solution to the gap in protection?

2. The Legacy of the So-Called "*intervention d'humanité"*

The given concept is a legacy rooted in previous centuries. In the 19th and early 20th centuries, the formula stood for a short military operation aimed at saving lives that were immediately threatened.[13] From the then

9 SC Res. 1244, 10 June 1999.

10 *Id.*

11 The Kosovo Report by the Independent International Commission on Kosovo (also known as Goldstone Commission), available at http://www.reliefweb.int/library/documents/thekosovoreport.htm (last visited 28 December 2010).

12 The expression "*intervention humanitaire*" can be used with a very wide scope, as a synonym of "humanitarian operations" encompassing all activities of humanitarian assistance and protection. Some authors however use it instead of "*intervention d'humanité*".

13 Indeed Lebanon is only a part of the "Syrian province", but it is the part where the intervention took place. *Cf.* with regard to the legal nature A. Pillet, *Revue générale de droit international public* (1894), 1, 13, who pointed at the starting point of this concept the so-called "droit commun de l'humanité".

"Syrian province" – of Ottoman Empire (1860) – today Lebanon[14] to Beijing – (where western diplomats had underwent a 55 days nightmare in 1901) – a kind of legal regime had arisen from practice. That regime encompassed a partial collective approach – the authorization or ratification according to the *Concert des Nations*, together with proportionality, the prohibition of using this intervention with a purpose different from what was alleged. This customary exception to the major rule of sovereignty has been theorized in the last years of this period.[15]

In some later cases the given rule has been invoked in troubled areas such as Congo – in 1960 (Leopoldville), 1964 (Stanleyville-Paulis) and 1978 (Kolwezi) – but also in Cambodia (1978)[16] and Uganda (1979)[17].

Two false interpretations must be refuted with regard to *intervention d'humanité*. Many say that it is a western practice.[18] However, the last two aforementioned cases involved both Vietnam putting an end to the Khmer Rouge regime, and Tanzania putting an end to the Idi Amin Dada regime. Another false statement refers to the so-called rescue operation in favor of nationals. Both of these cases, as well as older ones, demonstrate that the operations do not necessarily benefit to nationals of the intervening State. For instance during the Kolwezi operation, French (and also some Senegalese) soldiers rescued people of 54 diverse nationalities.

14 Cf. I. Pogany, 'Humanitarian Intervention in International Law: The French Intervention in Syria re-examined', 35 *International and Comparative Law Quarterly* (1986), 182, 186; S. Chesterman, *Just war or Just Peace?: Humanitarian Intervention and International Law* (2001), 32.

15 A. Rougier, 'La théorie de l'intervention d'humanité', 17 *Revue Générale de Droit International Public* (1910) 1, 468; Brownlie says that by the end of the nineteenth century the scholars had accepted the existence of a right of humanitarian intervention but notes that the doctrine was 'inherently vague' and 'open to abuse by powerful states. Cf. I. Brownlie, *International Law and the Use of Force by States* (1963), 338.

16 Cf. T. M. Franck, 'Interpretation and change in the law of humanitarian intervention' in J. L. Holzgrefe & R. O. Keohane (eds), *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas* (2003), 204.

17 F. Tesón, *Humanitarian Intervention. An Inquiry into Law and Morality*, 3rd ed. (2005), 228.

18 This impression may derive from the important French – and also British – activity in this regard. Besides, the topic is especially popular among American authors, *cf.* e.g. M. Reisman & M. McDougal, 'Humanitarian Intervention to protect the Ibos', in R. Lillich (ed) *Humanitarian Intervention and the United Nations* (1973), 167, 172; J. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention : Its Current Validity Under the U.N. Charter', 4 *California Western International Law Journal* (1973), 203; W. M. Reisman, 'Editorial Comments', 94 *American Journal of International Law* (1999), 824.

One last peculiarity makes the so-called "*intervention d'humanité"* distinct from humanitarian action. If the latter helps mitigate a disaster, the former helps prevent or stop it. Humanitarian intervention is active upon the consequences of the slaughter, while the "*intervention d'humanité"* is active upstream, upon the causes of suffering.

From the 1960s to the 1980s, at the onset of the associative humanitarian adventure, this legacy was still vivid for associations which – unlike the ICRC – do not rely upon the local State's cooperation. Proof of this rests with the fact that States or politicians that want to criticize a given *intervention d'humanité*, usually accuse its authors of having forged a "false" or "pseudo" *intervention d'humanité.* A good example is to be found in the USSR's criticism towards the US intervention to Stanleyville-Paulis (Congo, 1964).[19]

Thus, after the UN Charter entered into force, States went on referring to this customary rule,[20] which had become contrary to a general treaty. If an explication is to be found, it can be that the inefficiency of the UN collective security system made it appear as something virtual.

But with the new international paradigms, and namely the end of Security Council paralysis, both sovereignty and the UN security system have to be taken into account even more. The Kosovo case showed an up-to-then hidden reality: behind the aforementioned failed attempts (so-called "*ingérence*", peacekeeping…), there was a real need for a solution bridging the protection gap. In order to put an end to both deadly abstention and unilateral intervention, an answer had to be found.

After the 1999 operation, Kofi Annan tackled two challenges. One was peacekeeping operations efficiency, which he knew well, as a former head of the Department of Peacekeeping Operations. Ways to better UN peacekeeping missions were sought after in 2000 by the Brahimi report,

[19] More precisely, this criticism was forwarded by *Pravda*, the official newspaper of the Communist Party of the USSR; cf. M.-J. Domestici-Met, 'Aspects juridiques récents de l'assistance humanitaire', *Annuaire Français de Droit International*, 35 (1989), 117.

[20] There is evidence for a State practice, e.g. Vietnam in Cambodia, (1978), Tanzania in Uganda (1979), NATO in Kosovo; however it is not clear whether this practice was based on an *opinio juris*. In the literature, Bowett and Stone still considered the humanitarian intervention legal under the Charter, since Art. 51 does not exclude the right of self defense which derives from customary law. The case of Humanitarian Intervention as part of customary law should then still be admissible, D. W. Bowett, *Self-Defence in International Law* (1958), 154, 182; J. Stone, *Aggression and World Order. A Critique of United Nations Theories of Aggression* (1958), 95.

which was the first of a series of documents leading to the CAPSTONE doctrine.[21] In a less technical way, there was the problem of a norm allowing emergency protection, often aimed at minority groups' safety.[22] He addressed the issue as follows:

> "(…) if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?"[23]

A new approach developed throughout some group reports, and led to Kofi Annan's own report.[24] The ICISS established by Canada issued its report in December 2001 with the title: "*The Responsibility to Protect*".[25] The timing was not ideal, since after September 11, the common approach to security shifted from mass killing to terrorism. Indeed, it could have been an opportunity to think of human security, since terrorism intrinsically targets civilian population. Even though the September 11th attacks' death toll was "only" around 3000: killing some 3000 people is already mass killing. However, the UNSC focusing its resolutions upon the United States' right to self-defense and the George W. Bush's announcement of the "war on terror",[26] together shifted the focus upon the State's security. And with the 2003 Iraq war, many small States raised concerns about the possible use

21 *United Nations Peacekeeping Operations. Principles and Guidelines* (2008) available at http://www.peacekeepingbestpractices.unlb.org/PBPS/Pages/Public/Download.aspx?docid=895&cat=10&scat=0 (last visited 28 December 2010).

22 "On constate l'émergence lente, mais inexorable, je pense, d'une norme internationale contre la répression violente des minorités, qui aura et doit avoir préséance sur les questions de souveraineté", Kofi Annan, cited in 3 *Revue de l'OTAN* (1999) 3, 24-27 available at http://www.nato.int/docu/rev-pdf/fra/9903-fr.pdf (last visited 30 November 2010).

23 Report of the Secretary- General, We, the peoples: the role of the United Nations in the twenty-first century, UN Doc A/54/2000, 27 March 2000, para. 217.

24 Report of the Secretary General, In larger freedom: towards development, security and human rights for all, UN Doc A/59/2005, 21 March 2005.

25 *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty* available at http://www.iciss.ca/pdf/Commission-Report.pdf (last visited 30 November 2010), as to this concept cf. M. Zambelli, 'Putting People at the Centre of the International Agenda': The Human Security Apporach', 77 *Die Friedenswarte* (2002), 17.

26 SC Res. 1368, 12 September 2001 and SC Res. 1373, 28 September 2001.

of the "Responsibility to Protect" as a pretext for invasion. Thus, enthusiasm was lowered, and the first conceptions of the ICISS did not immediately result in official inter-states documents. But Kofi Annan entrusted a High Level Panel on Threat, Challenges and Change, with a view to include genocide prevention in the 2005 UN reform. In December 2004, the High Level Panel released a report "*A more secure world. Our shared responsibility*",[27] where the "responsibility to protect" was qualified an "emerging norm"[28]. That same year, the 2005 World Summit Outcome showed the success of the latter norm.

The legacy of *intervention d'humanité* and that of the 1990 Security Council major resolutions merge into a new concept.

> "[…] paragraphs 138 and 139 of the R2P may signify the crystallization of customary international law, as evidenced by state practice and opinio juris in respect of the interpretation of 'threat to peace' in chapter VII of the United Nations Charter. That is, in the wake of 1990s developments such as the Security Council's determination on more than one occasion, that serious or systematic, widespread and flagrant violations of international humanitarian law may contribute to a threat to international peace and security, as well as action taken outside the Security Council in Kosova, the General Assembly has seen fit to acquiesce to such an interpretation."[29]

The following year, the Security Council solemnly recalled paragraphs 138 and 139, in a kind of quasi legislative resolution, adopted on April, 28 2006 under number 1674 and devoted to the protection of civilians in armed conflicts.

However, on this long way towards R to P, the International community has not yet reached the end, as will be shown in Section II and point C. Still, the debate is now well framed in new terms: the hypothesis of an armed intervention has to be linked to the UN, since the present state of the world makes it impossible to rely on the old *intervention d'humanité* without taking into account world institutionalization. And the responsibility

27 A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, UN Doc A/59/565, 2 December 2004, 8.

28 *Id.*, 57, para. 203.

29 E. Massingham, 'Military intervention for humanitarian purposes: does the responsibility to protect doctrine advance the legality of the use of force for humanitarian ends?',91 *International Red Cross Review* (2009) 876, 803, 823-824.

to protect regime does take it into account. Filling the gap called for some precise conditions that R to P was due to fulfill.

II. At Last a State-Friendly and UN-Friendly Solution?

The long expected solution for answering the protection gap was shaped by some collective reflexions aimed at shifting the stress from the intervention and its actors to those in need of rescue; from a right to intervene, to a responsibility to protect. And this was an answer to a call for a re-appraisal of sovereignty. In this regard, former UN SG Boutros Boutros Ghali was a forerunner. In 1992, when reporting upon UN activities in 1991,[30] he warned against any counterproductive dilemma of "sovereignty–protection". And the new approach had been drafted, even before the Kosovo intervention, with the very concept of "sovereignty as a responsibility" by Francis Deng – the present UNSG Special adviser for the Prevention of Genocide – then working within the framework of the Brookings Institution. Here lies the change: as quoted in the introduction, "each individual State"[31] endorses the responsibility to protect its population and UN members are "prepared to take collective action"[32], as a substitute means of protection. It is now up to us to focus upon the possible substitution of a State by the International community. And as for armed intervention, the result is by no means a revolutionary one. On the one hand, there is a strange convergence between the criteria set up for armed intervention in the name of the responsibility to protect and those of the old *intervention d'humanité* (1). On the other hand, a kind of shyness in practice goes against the primary impression that a big step forward has been made (2).

1. The Substitutive R to P Scheme is That of "*intervention d'humanité*", now put in Line With Modern International Law's Main Features

This convergence is worth highlighting since it concerns rules belonging to two dramatically different ages of international law.

30 Report of the Secretary-General on the Work of the Organization, UN Doc. A/46/1, 13 September 1991, 5.

31 GA Res. 60/1, *supra* note 1, para. 138.

32 *Id.*, para. 139.

Not all of the conditions of legality of the old *intervention d'humanité* are stated in the World Summit Outcome. The given only refers to

- on the one hand a "right authority" – through an institutional process – which is in line with ICISS's statement that

> "A. […] The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has. B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out."[33]

- and, on the other hand, a threshold of atrocities, which is to be read in the light of the concept of "just cause"**.**

The present state of international law allows for a better framing of the four "horsemen of the apocalypse" that constitute the scope of substitutive protection (a). And the existing institutional system allows an institutional process (b). However, further conditions were envisaged in the ICISS and High Level Panel reports and by Kofi Annan[34] as a "set of guidelines […] which […] the Security Council […] should always address in considering whether to authorize or apply military force."[35]

a) Strictly Limited Triggering Events as an Avatar of "Just Cause"

As ICISS states in its report "Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure".[36] This is in line with both the ban of the unilateral use of force in the UN Charter (Art. 2 para. 4) and the prohibition made to the organization to interfere in domestic affairs (Art. 2 para. 7). And not every attempt against life or physical integrity can be taken as a pretext. This was perhaps possible in the pre-UN era, but it is no longer the case today. Some groups in the international community could have been in favor of a broader

33 The Responsibility to Protect, *supra* note 25, para. 6.14.

34 Report of the Secretary General, In larger freedom: towards development, security and human rights for all, *supra* note 24.

35 A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, *supra* note 27, 53.

36 The Responsibility to Protect, *supra* note 25, para. 4.18.

approach.[37] But in the aftermath of the Kosovo affair, a resolutely limitative scope has been chosen. However, it is possible to notice an evolution in the wording in terms of time and context.

The 2000 African Union Constitutive Act enshrines in art 4 (h) "the right of the Union to intervene in a member State in respect of graves circumstances".

In the ICISS report (2001), the given events are mainly approached through their result, more or less regardless of the means carried out. It considers a military intervention aimed at averting a "large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate State action, or State neglect or inability to act, or a failed state situation"[38]. The same result-based approach prevails for a "large scale 'ethnic cleansing", actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape"[39].

In the High Level Panel, it is not just the wording that evolves.[40] Moreover, there is a noticeable addition: "serious violations of international humanitarian law"[41].

In the 2005 World Summit Outcome, the topic was rephrased and the language is now ripe. It is about genocide (already targeted by the convention since 1948), crimes against humanity (condemned since Nuremberg), crimes of war (condemned by a full corpus of law) and ethnic cleansing (condemned since ICC), which we consider as being "the four horsemen of the apocalypse".

37 According to Massingham "Some African states had favoured the inclusion of the overthrow of democratically elected regimes as part of the doctrine; this was (and still is) also supported by some academics. In 1945 France unsuccessfully proposed that the United Nations Charter be drafted so as to allow intervention in situations where 'the clear violation of essential liberties and of human rights constitutes a threat capable of compromising peace'. Others have more recently suggested that the irradiation of weapons of mass destruction and terrorism should also invoke a responsibility to protect.", Massingham, *supra* note 31, 818.

38 The Responsibility to Protect, *supra* note 26, para. 4.19.

39 *Id.*

40 "in the event of genocide and other large-scale killing, ethnic cleansing or serious violations", A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, *supra* note 27, para 203.

41 *Id.*

b) An Institutional Process as an Avatar of "Just Authority"

This one can be defined by the central role of international organizations. Unlike what would have been authorized with Tony Blair's "doctrine of the international community"[42] and in line with the 1948 Convention for repression and prevention of the crime of genocide, the UN is the one called upon to decide and act whenever the world's fate is at stake.

As already quoted, "[t]he task is not to find alternatives to the Security Council as a source of authority, but to make it work better than it has"[43]. The UN Security Council's jurisdiction in this domain is self evident. Kofi Annan notices: "As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?"[44] But the SC is not the only one involved.

Apart from the "Uniting for peace", which can involve the General Assembly, what about regional organizations? There was a strong position taken by the African Union in the Ezulwini consensus. "Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organizations, in areas of proximity to conflicts are empowered to take actions in this regard. The African Union agrees with the Panel that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted "after the fact" in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations.[45] But the text of paragraph 139 does not ratify this large approach. Chapter VIII of the Charter is referenced with regard to "diplomatic, humanitarian and other peaceful means"; and "should peaceful means be inadequate and

42 T. Blair, *Doctrine of the International Community*, speech given at the Economic Club of Chicago, 24 April 1999 available at http://www.number-10.gov.uk/output/Page1297.asp (last visited 28 December 2010).

43 A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, *supra* note 27, para. 54.

44 Report of the Secretary General, In larger freedom: towards development, security and human rights for all, *supra* note 24, para. 125.

45 *The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"*, 7 March 2005.

national authorities are manifestly failing to protect their populations"[46], the recourse to Chapter VII is foreseen "in cooperation with relevant regional organizations"[47].

Another point in the institutional process should be devoted to decision making. It is well known that the UN Security Council has for decades severely suffered from its decision making process. And if the end of the Cold War gave it some added efficiency, the veto system is not dead; and , precisely, the topic of protection could become one field for veto, due to the high level of the stakes, both protection of the human being and sovereignty. Therefore, the ICISS has tried and drafted in advance a kind of check list or memento for decision stakeholders, which amounts to listing a set of conditions. And these have not been invented in the conceptual framework of the R to P; but they are close to the *intervention d'humanité* legacy, and also paralleled to "just war" conditions. But the Summit outcome seems to stand back on this topic.

c) A Set of Guidelines and Conditions That Hardly Bind the Decision Makers

Even though the nature of the given guidelines is not clear, and their compulsory character not guaranteed,[48] we cannot avoid quoting the way in which they were envisaged by the preparatory reports of the Summit:

- Right intention: "The primary purpose of the intervention must be to halt or avert human suffering"[49]. The wording is important. It is not about the deep motive but the official intention. And it is about the primary purpose unlike in the early *intervention d'humanité* doctrine, where it was the only one.[50]

46 GA Res. 60/1, *supra* note 1, para. 139.

47 *Id.*

48 Barbara Delcourt has listed the diverse qualifications given by different States to R to P: guidelines, principles, joint commitment, concept. The author speaks of "moral obligation", B. Delcourt, 'La communauté international reactions coercitives: la responsabilité de protéger et le principe de l'interdiction du recours à la force. Communication de Barbara Delcourt' in Société Française de Droit, *Colloque de Nanterre. La Responsabilité de Protéger* (2007), 311.

49 The Responsibility to Protect, *supra* note 25, para 4.33.

50 Bellamy gives as an example a country wanting both to halt injustice and to secure borders. (A. J. Bellamy, 'Motives, outcomes, intent and the legitimacy of humanitarian intervention', 3 *Journal of Military Ethics* (2004) 3, 216) This was the

- Last resort: "Every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored […] with reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded"[51]. There is some similitude with the relation between Arts 41 and 42 of the UN Charter. Second, if the stage before intervention is a pacific one, it is also a preventive one, compared to a reactive one. With great accuracy of judgment, the ICISS adds: "The responsibility to react… can only be justified when the responsibility to prevent has been fully discharged"[52].

- Proportional means: "The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question"[53]. This was a significant aspect of the *intervention d'humanité*.

- Reasonable prospects: There must be "a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place. Military intervention is not justified if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all"[54].

However, the World Summit did not take up the given items, preferring to envisage the decisions for recourse to arms to be taken "on a case-by-case basis". Was this a real choice for a method, or simply the quickest way to reach a consensus?

Anyhow, the precise scheme drawn in the Summit outcome has hardly been implemented. Is it shyness?

case of Viet-Nam as to the Khmer Democratic Republic and Tanzania as to Idi Amin's Uganda.

51 The Responsibility to Protect, *supra* note 25, para. 4.37.

52 *Id.*

53 The Responsibility to Protect, *supra* note 25, para. 4.39.

54 *Id.*

2. A shy Implementation?

The situation in Darfur, raised large expectations for international protection, which has not yet been met; and the Nargis Hurricane was followed by a rough refusal of humanitarian workers, which sounded like a set back.

a) Darfur

The alert was given by UN Deputy Secretary General Egeland regarding Darfur in 2003. Humanitarian assistance hardly arrived several months later, but the killings did not stop. Due to chronology, Darfur could have been a striking case study for protection by the international community. In October 2004 the Secretary General appointed Antonio Cassese as Chairperson for the International Commission of Inquiry on Darfur. And January 2005 offered two important milestones. On the one hand, the Cassese Commission issued its report: while there was evidence of war crimes and crimes against humanity, there was no intent for a genocide. And, on the other hand, almost simultaneously, a peace agreement was finalized in Naivasha (Kenya) about the South Sudan conflict.

Soon after, in a resolution 1590 from March 24, 2005, which was devoted both to south Sudan and Darfur, the UNMIS – UN mission in Sudan – was created and was due to settle first in the South. A week later on March 31, in resolution 1593, the Security Council, "acting under Chapter VII of the Charter, [decided] to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court".

Thus, both substitutive protection and punishment where on the tracks when, in September 2005, the World Summit issued its outcome, with paragraphs 138 and 139 devoted to the responsibility to protect.

On August 31, 2006, the Security Council, in resolution 1706, making reference to R to P, decided that "UNMIS' mandate shall be expanded […], that it shall deploy to Darfur"[55]. It was building upon Darfur peace talks in Abuja[56] and on the desire expressed by the African Union to transmit the peacekeeping mission it had had in Darfur to the UN. In the given resolution, the Council immediately added "*and therefore invites the*

[55] SC Res. 1706, 31 August 2006, para. 1.

[56] Peace agreement dated 5 May , 2006, after a Humanitarian cease fire dated N'djamena 2 April 2004.

consent of the Government of National Unity for this deployment"[57]. This latter sentence is not commonly used in UNSC resolutions that aim at creating peacekeeping forces even though the consensual nature of peace keeping forces is well known. Was this a forerunning element of a necessary failure?

To Sudan, this UN military presence in Darfur was not easy to admit. While UNMIS was due to begin in October and complete its deployment in December. In November High level consultations were still on the agenda. Held in Addis Ababa, and endorsed by the AU Peace and Security Council[58] they resulted in the creation of a Hybrid AU–UN operation instead of UNMIS deploying directly to Darfur. The latter was created by SC Res. 1769 with the symbolic name of UNAMID, D meaning Darfur even though Darfur is part of Sudan. Dated July 31, 2007, and welcomed as an audacious step forward, it reflects a climate of strong cooperation between organizations[59], but also the reduced presence of extra African forces.[60] The resolution was not implemented until January 2008. And organizing a relatively strong presence of European forces in the area was made possible for the Security Council only when it started addressing the Chad and Central African Republic situation. This resulted in another complex device made of the UN so-called MINURCAT[61], reinforced for some months by the EUFOR[62]. This device itself took a long time to set up. February 2008 was, finally, the moment when a force able to oppose the Janjaweed became settled. Moreover, it only had jurisdiction for their cross border razzes; still it was in a position to defend the Darfuri refugee camps.

Thus, four years were needed and the death toll had risen. Indeed, it was not really expedient. And the legal analysis shows that the UNSC was reluctant to use the coercive device provided by UN Charter Chapter VII. The latter is not quoted at the end of the preamble in 1706 or in 1769, but is only devoted to the "necessary actions" it authorizes the force to take in remote paragraphs.

57 SC Res. 1706, *supra* note 56, para 1.

58 30 November 2006.

59 Appointment of the AU-UN Joint Special Representative for Darfur, Rodolphe Adada, and Force Commander Martin Agwai.

60 "UNAMID […] shall incorporate AMIS personnel and the UN Heavy and Light Support Packages to AMIS", SC Res 1769, 31 July 2007, para. 2.

61 SC Res. 1778, 25 September 2007.

62 *Id.*, para. 6.

Even worse, the judiciary reaction has itself proven to be weakened by politics. After the case was referred to the ICC, the ICC Procurer Office requested the pre-trial chamber to issue a warrant of arrest for Ahmad Al Bashir, the President of Sudan. The first warrant was issued in March 2009 against him as an indirect perpetrator, or as an indirect co-perpetrator, under Art. 25 para. 3(a) of the statute regarding war crimes and crimes against humanity.[63]

Bashir not only considered it a political decision inspired by the western and humanitarian world, but also had many of his fellow heads of State join him in this interpretation. As a matter of retaliation, he expelled 13 humanitarian organizations in early 2009. The African Union, although audacious in principle upon these kind of affairs (cf. *supra I,B,1)*, showed solidarity to Bashir, who goes on participating in international meetings. Even more, after his re-election in May 2010, he was sworn in front of a sizable part of the international community.

Is there a possible comparison with Myanmar/Burma?

b) Nargis Hurricane in Burma

The situation seems quite different. However, the Myanmar regime, by refusing any entry to rescuers, helped to increase the number of casualties. Furthermore, part of the affected populations belonged to ethnic minorities, which could entail the suspicion of hostile intent, beyond the "pure" refusal of foreign humanitarian workers.

But, when the situation had been evoked in the Security Council in January 2007 upon human rights purposes, Russia and China vetoed a resolution, which led the international community to proceed with great caution in 2008. Therefore, when relief supplies and workers were shipped

63 The Court found "reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator, under Art. 25 para. 3(a) of the Statute, for: i. intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime, within the meaning of Art. 8 para. 2(e)(i) of the Statute; ii. pillage as a war crime, within the meaning of Art. 8 para. 2(e)(v) of the Statute; iii. murder as a crime against humanity, within the meaning of Art. 7 para. l(a) of the Statute; iv. extermination as a crime against humanity, within the meaning of Art. 7 para. l(b) of the Statute; v. forcible transfer as a crime against humanity, within the meaning of Art. 7 para. 1(d) of the Statute", *.Situation in Dafur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, ICC-02/05-01/09 (Pre-Trial Chamber I), 4 March 2009, 7.

on some western navy vessels to Burma, and when the Myanmar Junta pretended to fear an invasion, little was made to make it change its mind.

Thus, up to now, the 2005 Summit outcome has not dramatically changed the face of protection when the local State is unwilling to hear the international community's plea for its population's protection from of an imminent danger. However, when it comes to less tense situations, where the danger is not as imminent as in the aforementioned cases, things can be different.

c) The Responsibility to Protect in a General Sense – A Wide Domain With Possible Far-Reaching Consequences

Up to now in the part B of this paper we have concentrated upon protection through an armed operation. As we have just seen, certain conditions are exacting and difficult to meet. At the same time, guidelines for making decisions on intervention have not been adopted. Thus, the probability of a licit intervention carried out in the name of the international community, and according to a mandate conferred by the Security Council, seems very low. The Darfur case, in spite of the above mentioned resolution 1706, has proven not to be the expected case for a first successful application of the responsibility to protect.

Yet, responsibility to protect is not necessarily linked to armed intervention, since other ways are possible even if they are not as popular as military operations (I). And there is room for raising the question of potential responsibility to protect from more than the mere four events listed in the Summit outcome (II).

III. The Responsibility to Protect Upstream and Downstream of the Peak of Crisis

Though it constitutes the major concern of authors,[64] military intervention is not systematically necessary to protect. It can be so only at

[64] Some of whom show scepticism like Massingham: "As such, genocide, war crimes, ethnic cleansing and crimes against humanity, can now surely be said to constitute 'threats to peace' pursuant to the United Nations Charter. This is the most significant legal advance provided by the R to P, and in effect its crowning glory. […]However, […] it seems little will change in respect of humanitarian intervention. [Whilst] the crux of the doctrine remains devoted to the question of military intervention", Massingham, *supra* note 31, 815.

the peak of crisis – and even then, it is not always efficient. Military intervention is a response to the extreme consequence of the lack of protection. Actions can be taken upstream and downstream by the relevant State or by the international community in its substitutive protection. And the latter substitution has proven to be sensitive and to encounter reluctance from some States.

However, the responsibility lies with the international community over a wide scope, from reacting to early warnings with soft measures, upon re-building the potentially war-torn society. It is what Ban Ki-moon names his "deep" approach in the Berlin Speech: "Our conception of Responsibility to Protect, then, is narrow but deep. Its scope is narrow […] At the same time, our response should be deep, utilizing the whole prevention and protection tool kit available"[65].

1. Protecting Upstream Through Prevention

Here, protection is granted at an early stage. Ban Ki-moon asserts: "Our goal is to help States succeed, not just to react once they have failed to meet their prevention and protection obligations"[66], commenting in bold terms that "[i]t would be neither sound morality, nor wise policy, to limit the world's options to watching the slaughter of innocents or to send in the marines. The magnitude of these four crimes and violations demands early, preventive steps – and these steps should require neither unanimity in the Security Council nor pictures of unfolding atrocities that shock the conscience of the world".[67]

The Concept is that of "Sovereignty as a Responsibility", according to the expression put forward by Francis Deng the change is of importance, even if one may quarrel Weiss' interpretation. According to him, the responsibility to protect adds a fourth characteristic, "respect for human rights", to the other three characteristics dating back to the Westphalian treaties.

According to the vision adopted by the Summit outcome, each State has to enhance protection of its population through all possible means. Its

65 Ban Ki-moon, speech given at Berlin event on 'Responsible sovereignty: International cooperation for a changed world', 15 July 2008 available at http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm (last visited 28 December 2010).

66 *Id.*

67 *Id.*

judiciary system must be independent and efficient, allowing due recourses by people whose rights seem to have been encroached upon. Safety must be guaranteed to everyone through effective governance, a wise policy *vis a vis* the clans when they do exist, and a strong struggle against gangs in order to effectively control its territory. Civil society must find the necessary freedom to be able to organize the defense of rights. The police must be carefully overlooked and monitored by the government, as well as all forces using arms. This is the picture of the society in a State duly protecting its population.

However, the relevant State may show bad will or be unable to give its population due protection.

Hence, the international community may be entitled to help a State in order to prevent it from failing.

According to Ban Ki-moon, its implementation can be eased by the innovative recognition of a third "pillar" apart from the State's responsibility to protect and the subsidiary responsibility of the international community. This third pillar was put forward in 2008, when he, first, highlighted the strength with which in the 2005 Summit outcome

> "Governments unanimously affirmed the primary and continuing legal obligations of States to protect their populations -- whether citizens or not -- from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. They declared -- and this, is the bedrock of RtoP -- that 'we accept that responsibility and will act in accordance with it'"[68].

Building upon this assessment in his 2008 Berlin speech, Ban Ki-moon underlined that:

> "In this context, capacity-building could cover a range of areas -- from development, good governance and human rights to gender equality, the rule of law and security sector reform. Our goal is not to add a new layer of bureaucracy, or to re-label existing United Nations programmes; it is to incorporate the responsibility to protect as a perspective into ongoing efforts"[69].

[68] *Id.*
[69] *Id.*

No genocide will occur in a State with good governance or in a State that respects human rights. Moreover, helping a State "succeed" means capacity building, i.e. developing what is needed for protective governance. Hence, capacity building may entail institutional building… As a consequence, almost the entire scope of UN activities according to Art. 1 para. 3[70] of the Charter comes under this heading… To incorporate the responsibility to protect "as a perspective into ongoing efforts", is to create "mainstreaming", which finally gives more coherence to UN policies.

Another role of the international community in prevention is early warning, which makes it possible to take measures aimed at stopping a lethal process. For example, discriminatory laws may prepare persecutions against a group within the population. Furthermore and more upstream, identifying members of the population by their religion or their ethnicity may lead to discriminatory laws. Hence, diplomatic measures can be taken when such a situation is assessed (like the Council of Europe has done with some of its members).

2. Protecting Downstream Through Reconstruction

After a crisis, stigmas make sufferings last. Reconstruction has to begin and, in the more and more frequent case of a civil conflict, the social fabric has to be repaired through a sense of reconciliation, which often needs emblematic punishment of some criminals.

Indeed, when a civil war ends, the role of the State in control may seem ambiguous, since it does not necessarily reflect the whole population. Often, the people in charge will emanate from the so-called "victims" group, as in the case of Rwanda. In other cases, power will remain with the main group, even though the minorities' position is improved. Such was the situation between North and South Sudan when a peace agreement was brokered in 1972. And the situation may be the same at the end of an inter-States conflict, due to the destabilization which can entail the overthrow of the defeated State's regime.

Whereas the task is difficult for State authorities, it can be easier for the international community.

[70] Which reads as follows "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging universal respect for, and observance of, human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion".

It could be easier with stakeholders which are external to past disputes. The international community has developed a range of means to rebuild war-torn societies. It starts with power sharing, a formula which tightly associates former enemies for the exercise of power. And, in addition, it reconstitutes the very power of authorities by restoring the actors of constraint through two major ways: DDR – the result of which is the suppression of irregular troops, and SSR – which amounts to vetting those in the police or other regular armed forces, who are major offenders of the law and/or do not show the necessary loyalty to common interests. The latter, according to the theory is represented and carried out by the State; thus police and military officers have to obey the State first.

The international community is often equally associated with the struggle against impunity, which allows for reconstruction of the social fabric through criminal justice or transitional justice. A striking example of the responsibility to protect – even before the latter was proclaimed — rests with the case of Sierra Leone. The Lomé agreement provided amnesty for RUF warriors in spite of (or – alas – perhaps thanks to) their terrible actions. Kofi Annan, then UN Secretary General, pushed in the opposite direction, so as to have the Special Tribunal created.

Another strong benchmark of the international community acting in the name of R to P is the creation of international authorities in charge, or partially in charge, of a country during a transition period. There, the international community goes beyond influencing the situation. In the sense that it considers being mandated for, possibly up to the exercise of direct control over the territory and the population of the affected State or region. In a softer formula, it may restrict giving assistance to a young power in need of effectiveness: such is the case of UNAMA in Afghanistan, whereas MINUK in Kosovo – at least in the beginning – *had* the power. Moreover, be it local or international, a young power needs a safe environment to impose its rule. Therefore, certain stabilization forces have been created: SFOR[71], ISAF[72], MINUSTAH[73] and MONUSCO[74].

[71] Stabilization force, in Bosnia Herzegovina, the creation of which was authorized by UNSC resolution (after the Implementation force), SC Res. 1088, 12 December 1996, para. 18.

[72] International Security Assistance Force, SC Res. 1386, 20 December 2001.

[73] United Nations Stabilisation Mission in Haiti, created by SC Res. 1542, 30 April 2004, para. 1.

[74] United Nations Stabilization Mission in DRC. The mission was initially created as MONUC and slightly transformed in order to mark of the 50th anniversary of Congo, SC Res. 1925, 28 May 2010, para. 1.

Thus, upstream and downstream the peak of crisis, there is room for national or international actions aimed at protection and – which is more – carried out in the name of the responsibility to do so. However, we believe it is possible to go even beyond this "narrow but deep" approach developed by Ban Ki-moon.

IV. Protecting Against More Than the Four Major Dangers Listed in the Summit Outcome?

The summit outcome expresses a vision of responsibility to protect which is narrower than what was in view in some former documents. Therefore, we can envisage an enlargement in different directions.

Let us quote *pro memoria* some authors who have argued for "a collective 'duty to prevent' nations […] from acquiring or using WMD", namely those "run by rulers without internal checks on their power"[75]. This brings to mind policies run by the UN – sometimes unilaterally – with regard to North Korea, Iran and Iraq. In resolutions, the UN Security Council, acts in the name of his mandate. But, since peace is invoked, it is not directly about protecting the threatened population of one State.

Personally, we shall focus more on natural disasters. Cyclone Nargis, which hit Burma on May 3, 2008, gave a field for arguing in a broader sense about R to P. Whereas 2.4 million people were heavily affected, the Burmese authorities obstructed relief operations in the name of sovereignty. French Foreign Minister Bernard Kouchner – who once put forward the *ingérence* or "right to intervene"- invoked the R to P. Unlike what has been commented[76] by some critics, it was not with the intent of deploying a non-consensual force, but with the intent of getting the Security Council to adopt a resolution in line with the ones previously adopted when humanitarian assistance was endangered in Somalia and in Bosnia-Herzegovina.[77] Kouchner's position read as follows:

75 L. Feinstein & A.-M. Slaughter, 'A duty to prevent', 83 *Foreign Affairs* (2004) 1, 136, 137.

76 "Mr. Kouchner is one of the unrepentant 'humanitarian warriors' who gave 'humanitarian intervention' such a bad name that we had to rescue the deeply divisive idea […]. There would be no better way to damage R2P beyond repair in Asia and the developing world than to have humanitarian assistance delivered into Myanmar [Burma] backed by Western soldiers", R. Thakur, 'Should the UN invoke the 'Responsibility to Protect', *The Globe and Mail*, 8 Mai 2008.

77 SC Res. 751, 24 April 1992 (Somalia) and SC Res. 776, 14 September 1992 (Bosnia-Herzegovina).

> "We are seeing at the United Nations whether we can implement the Responsibility to Protect, given that food, boats and relief teams are there, and obtain a United Nations' resolution which authorizes the delivery (of aid) and imposes this on the Burmese government".[78]

But the Security Council did not adopt any such resolution. The cause is likely (as already mentioned hereabove) that in January 2007, upon human rights purposes, Russia and China vetoed a resolution which led the International community to great caution in 2008.

Enthusiasm was absent around Kouchner's solution, on the side of institutions as well as on that of R to P proponents. Common sense favored great caution in order to maintain the consensus reached in 2005. Edward Luck, special advisor to the UN Secretary General on the Responsibility to Protect was clear: "We should take care not to undermine the historic but fragile international consensus behind the responsibility to protect by succumbing to the temptation to stretch it beyond what was intended".[79] More theoretically, according to UNSG Ban Ki-moon

> "extending the principle (of the responsibility to protect) to cover other calamities, such as HIV/AIDS, climate change or response to natural disasters, would […] stretch the concept beyond […]operational utility."[80]

However, on the opposite side, Lloyd Axorthy, initiator of the ICISS as Canadian Foreign Minister argued that R to P applied to Nargis and could provide "the basis for a resolution to expedite relief efforts".[81]

One cannot but understand the difference between natural disasters and the four criminal activities referred to in the Summit outcome. Distinguishing natural from man-made disasters is, of course, relevant.

78 Communiqué issued by the Minister of Foreign and European Affairs, 8 May 2008.

79 Statement of Dr. Edward C. Luck, Special Adviser to the Secretary General, United Nations, New York, NY in *International Disaster Assistance: Policy Options. Hearing Before the Subcommittee on International Development and Foreign Assistance, Economic Affairs, and International Environmental Protection of the Committee on Foreign Relations. United States Senate*, 17 June 2008, 29.

80 Ban Ki-moon, *supra* note 65.

81 L. Axworthy, 'International community has a responsibility to protect Myanmar', *Edmonton Journal*,, 13 May 2008.

But we both agree and disagree with Gareth Evans when he writes that in front of a natural disaster, "human security language is sufficient".[82] For sure, a natural disaster triggers human insecurity, both personal, sanitary, economic, as well as food insecurity. And, probably, it will likely be the result of political insecurity leading to environmental insecurity. Moreover, a natural disaster can hit a specific community, displace its members in different directions and affect the community security.

However, this analysis in terms of human security/insecurity is not enough, since it does not tell much about what is to be done. The assessment about human security/insecurity does not provide a solution *per se*, when public authorities neither bring a remedy, nor allow others to do so. And is it not still a crime –at least in the broad sense – to impede rescue attempts? When such an attitude amounts to raising the toll paid by the population is it not somehow a kind of indirect "mass killing"? Would the responsibility to protect not help?

Indeed, R to P in its narrow sense could already be invoked after a natural disaster under specific circumstances. Given the frequent diversity of a State's population, minorities may be at risk. And, sometimes, a natural disaster striking a particular community is followed by the State's refusal of access to it for foreign rescuers nor allow others to. When Armenia was struck in Spitak (1988), the USSR did not immediately open its borders. Such a case might enlighten the Nargis affair, since the cyclone , namely, stroke the Karen community. For this aspect of Nargis, one could perhaps have identified a hostile intent, not to say the very beginning of a genocidal process which could have led to R to P even in the "narrow but deep sense" if there had been enough sensitivity to Karens' fate.

Thus, one perceives a possible difference in status between refusing rescuers' access to a minority and refusing rescuers' access to people belonging to the branch of a population from which the rulers stem. Indeed, in the Nargis case, the question was not put forward in those terms. But another ethnic group, in another case, could catch more attention.

Yet, the treatment of such problems must not rely on the popularity of a given ethnic group. Is it not better to consider that there is a responsibility to protect the whole population in front of a natural disaster? Refusing such an assertion would have the dangerous consequence of denying any State's obligation to prevent and/or prepare for catastrophes.

[82] G. Evans, *The Responsibility to Protect – Ending Mass Atrocity Crimes Once and for All* (2008), 349.

And, still, such an activity is the basis for risk reduction. The same refusal would have the even more dangerous consequence of exempting the State from maintaining a civil protection mechanism and service, whereas the given are mentioned in the Geneva Law[83]. And, in line with what has just been argued, the ICISS report (2001) provided a condemnation of State neglect.

In comparison, the 2005 Summit outcome text looks as an *ad minima* consensus. And, as we have seen, this consensus could, today, be seen as even more fragile and threatened with promotion as big powers of States which used to traditionally oppose any supposed threat to their sovereignty (e.g. India). This is a sufficient explanation for the Security Council not passing, in the name of the responsibility to protect, a resolution calling upon Burma, to either promptly and efficiently offer rescue, or accept foreign rescue efforts.

And things went on after the Nargis case, namely with the 2009 debate in the UN General Assembly. Indeed, the Summit outcome foresaw a further debate of the UN GA. The latter took place in 2009 after Ban Ki-moon delimited the target by his report "*Implementing the responsibility to protect".* The debate showed that the concept of responsibility to protect is still subject to reluctance in some segments of the international community. A large group of sponsors[84] and additional sponsors[85] proposed a short but positive text for the resolution due to conclude the debate:

> "1. Takes note with appreciation of the report of the Secretary General and of the timely and productive debate organised.
> 2. Decides to continue its consideration of the responsibility to protect."[86]

[83] In the first 1977 Protocol, civil defence is presented as something the targeting of which would be an offence to civilian population (Arts 63 and 64).

[84] Argentina, Armenia, Belgium, Benin, Bulgaria, Canada, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Dominican Republic, El Salvador, Estonia, Fiji, Finland, France, Germany, Guatemala, Haiti, Hungary, India, Italy, Luxembourg, Mexico, Monaco, the Netherlands, New Zealand, Panama, Peru, Poland, Republic of Korea, Romania, Rwanda; Senegal, Slovenia, Spain, Swaziland, Sweden, East Timor, Trinidad and Tobago, United Republic of Tanzania, Uruguay.

[85] Andorra, Australia, Austria, Denmark, Greece, Guinea, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Madagascar, Malta, Norway, Paraguay, Papua-New Guinea, Slovakia.

[86] GA Res. 63/308, 7 October 2009.

But Cuba, Venezuela, Nicaragua, Equator, Syria, Sudan and Iran expressed their defiance towards the proposed text for this final resolution. These States spoke of manipulation "by the powerful to justify intervention in the weaker States". A compromise was proposed by Guatemala: it was the suppression of the words "*with appreciation*"[87] in the final text of the resolution.

But, with the development of civil society in the so-called "emerging states", will this kind of "setback"[88] of R to P be sustainable?

We have now to go back to humanitarian action. As exposed in the previous issue, humanitarian action has suffered for decades from what we can call a "protection gap". Therefore humanitarian actors have been constantly looking for concepts that provide for access in view of delivery to persons in need. The famous UNGA resolutions 43/131 (1988) and 45/100 (1990)[89], without using the expression, are written in R to P-friendly terms. Twenty years ago, the picture was already in place for a dual level responsibility: first the State, and an important contribution of the international community. And up to the formulation of the responsibility to protect in 2005, the process was long and winding throughout a rather hectic decade, the 1990s, which have offered great hopes and great failures. Even though the task is not yet completed,[90] perhaps could R to P provide the expected concept?

87 One could find a follow-up of the given resolution in the 6th commission debates upon the protection of persons in front of natural disasters.

88 S. K. Sharma, 'Towards a Global Responsibility to Protect: Setbacks on the Path to Implementation', 16 *Review Essay Global governance* (2010), 121-138.

89 GA Res. 43/131, *supra* note 3, GA Res. 45/100, 14 December 1990. Of course the legal basis for humanitarian assistance in war times lies in the Geneva Conventions and Protocols.

90 "Today, the responsibility to protect is a concept, not yet a policy, an aspiration, not yet a reality. […] Friends, the task is considerable […] to turn promise into practice, words into deeds.", Ban Ki-moon, *supra* note 64.

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The Rise of Self-Determination Versus the Rise of Democracy

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Abstract

This article challenges the traditional conception that the right to self-determination does not require a certain outcome. This article examines what restrictions international law imposes on peoples' choice to freely determine their political status. This article concludes that the right to self-determination calls for the installment of a form of government which is based on the consent of the governed, is substantially representative of all distinct groups in the country and respects human rights. Regardless of these duties imposed on governments one may only conclude from State practice that it is not observed by many States. As such the rise of self-determination may not automatically be equated to the rise of democracy.

A. Introduction

The existence of the right to self-determination is well established in international law.[1] It evolved from a political principle to a human right, codified in several human rights treaties,[2] and is accepted as a rule of customary international law.[3] Several scholars even argue that the right has acquired *jus cogens* status.[4]

Despite the prominent status of the right to self-determination within various international treaties and instruments and many scholarly writings on the subject "no norm has emerged that comprehensively defines the scope of the right to self-determination"[5]. Notwithstanding the differing interpretations of the right to self-determination, there does seem to be a consensus on the fact that there are two dimensions of self-determination: an

1 Thomas Franck even traces the principle of self-determination back to 1000 B.C.. See T. M. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 1, 46, 53.

2 *Id.*, 52-56; H. Hannum, 'The Right to Self-Determination in the Twenty-First Century', 55 *Washington and Lee Law Review* (1998) 3, 773, 774-775.

3 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 31, para. 52.

4 Supporters of this view include I. Brownlie, *Principle of Public International Law* 7th ed. (2008), 553; A. Cassese, *International Law*, 2nd ed. (2005), 65.

5 A. Kreuter, 'Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession', 19 *Minnesota Journal of International Law* (2010) 2, 363, 367-368.

external one and an internal one.[6] However, no consensus seems to exist on the exact relationship between the two. During the Cold War more emphasis was put on the external dimension, while currently more attention is being paid to the internal meaning.[7] Although some authors claim that the internal meaning has fully supplanted the external meaning,[8] the majority of scholars does seem to accept that the two dimensions coexist.[9]

The external dimension is said to define the status of a people in relation to another people or States, meaning the right to political independence from alien domination or an already existing sovereign State.[10] Whether this right applies to minorities and thus includes a right to secession from sovereign States is disputed.[11] The wording in Article 1 Charter of the United Nations is said to refer to the external dimension.[12]

The internal dimension is said to concern the relationship between a people and its own State or government.[13] It entails a people's choice about its governance.[14] Some authors argue that the internal dimension is formulated in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic,

6 *Id*., 368-369.

7 R. Ezetah, 'The Right to Democracy: A Qualitative Inquiry', 22 *Brooklyn Journal of International Law* (1996-1997) 3, 495, 504.

8 G. H. Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?', 16 *Michigan Journal of International Law* (1994-1995), 733.

9 See for example A. E. Eckert, 'Free Determination of the Determination to be Free? Self-Determination and the Democratic Entitlement', 4 *UCLA Journal of International Law and Foreign Affairs* (1999-2000) 1, 55, 68; R. Ezetah, *supra* note 7, 503-504; R. A. Miller, 'Self-Determination in International Law and the Demise of Democracy?', 41 *Columbia Journal of Transnational* Law (2002-2003) 3, 601, 617.

10 Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism', in C. Tomuschat (ed.), *Modern Law of Self-Determination: Towards a Democratic Legitimacy Principle?* (1993), 101; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), 5; Ezetah, *supra* note 7, 503-504.

11 Fox, *supra* note 8, 738-739.

12 This is supported by Art. 1 (3) *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which reads "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations"; see also Fox, *supra* note 8, 738-739.

13 Cassese, *supra* note 10, 101; Thornberry, *supra* note 10, 101.

14 Ezetah, *supra* note 7, 504.

Social and Cultural Rights (ICESCR).[15] Others disagree.[16] Another contested element of the right to self-determination is the definition of *peoples*.[17]

This paper will examine the scope of the internal dimension of the right to self-determination. Article 1 (1) ICCPR and ICESCR states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[18] But what exactly do the Covenants entitle peoples to do? Do peoples have the freedom to choose any form of government, including a dictatorship? Or does international law impose certain restrictions on the peoples' choice?

The international community has historically answered the latter question negatively; otherwise, it was argued, one would confuse the necessary means, a free determination of political status, with a particular end, a determination to be free or democratic. A determination in which there can be only one legitimate outcome, democracy, cannot truly be considered a free act of self-determination.[19]

This article will question that statement. Currently, the international community already accepts that the right to self-determination is non-absolute and may be limited by the principle of territorial integrity.[20] This article will argue that international law also imposes at least two other limitations and possibly a third one, concluding that the right to self-determination only contains the right to opt for a certain type of government, namely a government that fulfills certain standards. These standards are derived from the limitations that will be examined in the following paragraphs.

The two first limitations are explicitly formulated in international law: they are the prohibition of racist and segregating regimes, and the international obligation to protect human rights. The third limitation is more controversial and stems from the emerging entitlement to democratic governance. Since the beginning of the 1990s it has been argued by some

15 Miller, *supra* note 9, 620; Ezetah, *supra* note 7, 509.

16 Fox, *supra* note 8, 739; Hannum, *supra* note 2, 773-777.

17 *Id*., 739; Hannum, *supra* note 2, 774.

18 *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 1, 999 U.N.T.S. 171; [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 1, 993 U.N.T.S. 3 [ICESCR].

19 Eckert, *supra* note 9, 69-70.

20 J. Vidmar, 'The Right of Self-determination and Multiparty Democracy: Two Sides of the Same Coin?', 10 *Human Rights Law Review* (2010) 2, 239.

scholars that the internal aspect of self-determination entails "a people's *democratic* choice about its governance (emphasis added)"[21]. As the existence and content of a possible right to democratic governance is disputed, its ability to possibly limit the exercise of the right to self-determination is also disputable. The three limitations will be examined next.

B. The International Prohibition of Racist and Segregating Regimes

On two occasions in history the international community has explicitly outlawed a political regime, i.e. after World War II the Nazi regime and in the 1970s the Apartheid regime. The Nazi regime was called by the Nuremberg Tribunal a "complete dictatorship"[22]. The Nuremberg judgment describes in detail how Hitler came to power and how he used and maintained it. In addition, the Tribunal criminalized membership in certain organizations.[23]

Hitler's political program consisted of twenty-five points, of which the following is of particular interest in this context: "*Point 1*. We demand the unification of all Germans in the Greater Germany, on the basis of the right of self-determination of peoples"[24]. This goal was to be achieved through a policy of aggressive war. In order to be able to pursue such a policy the regime had to gain complete control of the machinery of government. In addition to the series of measures aimed at subjecting all branches of government to their control, the Nazi Government also took active steps to increase its power over the German population.[25] In the field of education, everything was done to ensure that the youth of Germany was brought up in the atmosphere of National Socialism and accepted National Socialist teachings. The Nazi Government endeavored to unite the nation in support of their policies through the extensive use of propaganda. As a result,

21 Ezetah, *supra* note 7, 504. Ezetah bases this argument on Thomas Franck's revolutionary idea that a democratic entitlement is emerging in international law, see Franck, *supra* note 1, 52.

22 *Trial of the Major War Criminals before the International Military Tribunal*, (14 November 1945 – 1 October 1946) available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf (last visited 14 June 2010), at 225.

23 *Id*., 12.

24 *Id*., 174.

25 *Id*., 176.

independent judgment, based on freedom of thought, was rendered quite impossible.

The second, more recent, example of a universal[26] condemnation of a political regime is the Apartheid regime. The crime of Apartheid is defined in both the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA)[27] and in the ICC Statute[28]

[26] It should be noted that "Western" nations have never signed nor ratified the *International Convention*. *on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 U.N.T.S. 243 [ICSPCA]. For a complete list of ratifications see http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-7&chapter=4&lang=en#Participants (last visited 24 September 2010). However, the crime of Apartheid has been endorsed – albeit in a weaker form – in other instruments, for instance in the 1977 First Additional Protocol to the Geneva Conventions (Art. 85, para. 4(c)), Art. 18(f) of the Draft Code of Crimes against the Peace and Security of Mankind, which does not mention the word "Apartheid", but refers to "institutionalized racial discrimination" as species of crime against humanity and Art. 7 of the Rome Statute of the International Criminal Court.

[27] Art. 1 ICSPCA states that "Apartheid is a crime against humanity and inhumane acts resulting from the policies and practices of Apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security". Art.2 defines the term "the crime of Apartheid", "which shall include similar policies and practices of racial segregation and discrimination as practiced in Southern Africa [and] shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: Denial to a member or members of a racial group or groups of the right to life and liberty of person: By murder of members of a racial group or groups; By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development such a groups or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

and criminalizes certain acts committed in the context of institutionalized regimes of racial segregation and discrimination. Apart from the specific situation in South Africa, the crime was used to sanction the political regime in South Rhodesia.[29] The term has also been used by human rights defenders and the media with regard to the Israeli occupation of Gaza.[30]

From this it follows that the right to self-determination cannot be understood to include the right to choose a system of Apartheid or a Nazi regime. Should peoples opt for such a system, international law would not consider it to be legitimate and would possibly subject the system to sanctions, as illustrated by the South Africa and South Rhodesia cases.[31]

> Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or members thereof Exploitation of the labor or the members of a racial group or groups, in particular by submitting them to forced labor; Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose Apartheid." See GA Res. 3068, 30 November 1973.

28 Art. 7 of the Statute of the International Criminal Court states that "'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". In Art. 7 para. 2(h) the term is further explained: "'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime".

29 M. S. McDougal & W. M. Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern', 62 *American Journal of International Law* (1968) 1, 1.

30 See for instance J. Dugard, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, UN Doc A/HRC 4/17, 29 January 2007; an open letter written by International Solidarity Movement: *Open letter to Bono: entertaining apartheid Israel… U 2 Bono?* available at http://palsolidarity.org/2010/01/10627/ (last visited 20 October 2010) and Boycot Israel Apartheid Campaign: *Tell MEC to Stop Supporting Israeli Apartheid!* available at http://www.boycottisraeliapartheid.org/node/48 (last visited 9 June 2010).

31 Regarding South Africa: The UN Security Council imposed sanctions upon South Africa. See for instance SC Res. 311, 4 February 1972, para. 1. The United Nations refused to recognize the South African representatives' credentials to the UN General Assembly in 1974. See GA Res. 3206, (XXIX), 30 September 1974. See also A. Barnard, 'Slegs Suid Afrikaners – South Africans Only? A Review and Evaluation of the International Crime of Apartheid', 7 *New Zealand Journal of Public and International Law (2009) 2*, 317, 335-336. Regarding South Rhodesia: The UN did not recognize the regime in Rhodesia as the legitimate government. See for instance

C. The Interdependence of Human Rights

A second limitation flows from the duty under international law on all States regardless of their political, economic and cultural systems to respect human rights. This obligation is not controversial in principle, as it is enshrined in the Articles 55 and 56 of the United Nations Charter and in Article 6 of the Draft Declaration on Rights and Duties of States. Moreover, all States who voluntarily have accepted jurisdiction of a human rights court capable of evaluating its human rights record clearly accept the legality of the principle; otherwise they would not accept possible conviction when a violation has been established. Even States who are not members of regional human rights mechanisms or who frequently violate human rights do not claim that they are not bound by human rights law. They justify violations on alternative grounds.

Human rights law strives to have States respect all human rights as they are indivisible, interdependent and interrelated. The exercise of one human right may not lead to the violation or abolishment of another human right. Article 30 Universal Declaration of Human Rights (UDHR) and Article 5 ICCPR and ICESCR state that "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein". Consequential, this means that the exercise of the right to self-determination may not lead to the violation or abolishment of other human rights.

D. The Emerging Norm of Democratic Governance in International Law

The possible existence of a right to democracy in international law has been the subject of fierce debates in several international[32], regional[33] and

SC Res. 288, 17 November 1970. See also McDougal & Reisman, *supra* note 29, 17-18.

32 For the discussion within the United Nations framework see *inter alia* an Agenda for Development, Report of the Secretary-General, U.N. Doc. A/48/935, 6 May 1994; Human Rights Commission Res. Human Rights U.N. Doc. E/CN.4/RES/1999/57, 27 April 1999; for the Inter-Parliamentary Union see the Universal Declaration on Democracy (1997).

33 The right to democracy has only been explicitly recognized within one region, namely by the Organization of American States (OAS). See Art. 1 of the Inter-American Democratic Charter (2001) available at http://www.oas.org/charter/docs/resolution1

national[34] fora. In international scholarship, the idea was first expressed in 1988 by Professor Henry Steiner, but it was only through Professor Thomas Franks' article "The Emerging Right to Democratic Governance" that the idea gained fame internationally.[35] Over the years the notion has been both widely supported[36] and criticized[37] in the literature. One of the theory's

_en_p4.htm (last visited 21 October 2010); Declaration of Nuevo León (2004) available at http://www.oas.org/documents/specialsummitmexico/DeclaracionLeon_eng.pdf (last visited 21 October 2010), Draft Declaration of Quito on Social Development and Democracy, and the Impact of Corruption (2004) available at http://www.oas.org/xxxivga/DeclaracionQuito_eng.pdf (last visited 21 October 2010). Nevertheless, the issue of democracy has been widely discussed within the other regions: for Europe see for instance the OSCE Document of the Copenhagen Meeting on the Conference on the Human Dimension of the CSCE (1990) available at http://www.osce.org/documents/odihr/1990/06/13992_en.pdf (last visited 21 October 2010) and the OSCE Charter of Paris for a New Europe (1990) available at http://www.osce.org/documents/mcs/1990/11/4045_en.pdf (last visited 21 October 2010); for Africa see for instance Lomé Declaration (2000) available at http://www.africa-union.org/root/au/conferences/past/2006/april/ pa/apr7/meeting.htm (last visited 21 October 2010), African Union Declaration on the Principles governing Democratic Elections in Africa (2002) available at http://www.pogar.org/publications/other/elections/declaration -africa-02.pdf (last visited 21 October 2010); for the Arab Region see the Sana'a Declaration on Democracy, Human Rights and the Role of the International Criminal Court (2004) available at http://www.undp.org.ye/reports/Sanaa%20Decleration%20on%20Democracy%20Human%20RIghts%20and%20the%20Role%20of%20the%20International%20Criminal%20Court.pdf (last visited 21 October 2010); for Asia see the Asian Charter on Human Rights (1998) available at http://www.unhcr.org/refworld/publisher,ASIA,,,4 52678304,0.html (last visited 21 October 2010) which contains a specific section on the right to democracy.

34 The national legal German system is unique because it considers democracy to be an individually assertable right: "what is guaranteed to Germans entitled to vote is the individually assertable right to participate in the election of the Bundestag and thereby to cooperate in the legitimation of state power by the people at federal level and to have an influence over its exercise". Therefore functions and powers of substantial importance must remain for the German Bundestag. See Manfred Brunner and Others v. The European Union Treaty, Cases 2 BvR 2134/92 & 2159/92, reprinted in *1 Common Market Law Report* (1994), 57, para. 247 and Judgment of 30 June 2009, Cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09 available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (last visited 22 October 2010), paras 40-41.

35 H. J. Steiner, 'Political Participation as a Human Right', 1 *Harvard. Human. Rights. Yearbook* (1988), 77 and T. Franck, *supra* note 1.

36 G. H. Fox and B. R. Roth, 'Democracy and International Law', 27 *Review of International Studies* (2001) 3, 327; G. H. Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992) 2, 539; Ezetah, *supra* note 7; S. Wheatley, 'Democracy and International Law: A European Perspective',

most contested elements is the formulation of the right and implicitly the underlying understanding of the concept of democracy.[38]

Not only its content is disputed – also its relationship to other human rights remains unclear. The definition proposed by most proponents is generally deducted from, and connected to, an existing human right, i.e. the right to political participation[39], the right to free and fair elections[40] or the right to self-determination[41]. Support for such a limited approach is said to be found in the current state of international law and the current limited willingness of the international community to accept a broader concept.[42] Such a limited conception is also endorsed in the national German legal system.[43] The choice for a limited conception of (the right to) democracy is contested by other authors,[44] the OAS Inter-Democratic Charter[45] and the

51 *International and Comparative Law Quarterly* (2002) 2, 225; C. M. Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', 27 *New York University Journal of International Law and Politics* (1995) 2, 289; J. N. Maogoto, 'Democratic Governance: An Emerging Customary Norm?', 5 *University of Notre Dame Australia Law Review* (2003), 55.

37 Eckert, *supra* note 9; N. J. Udombana, 'Articulating the Right to Democratic Governance in Africa', 24 *Michigan Journal of International Law* (2003) 4, 1209; J. Ebersole (reporter), ''National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law' (panel discussion), 86 *American Society of International Law Proceedings* (1992), 249; Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (2000), 164.

38 See for instance S. Marks, 'The "Emerging Norm": Conceptualizing "Democratic Governance"', 91 *American Society of International Law Proceedings* (1997), 372.

39 Steiner, *supra* note 35.

40 Franck, *supra* note 1; Fox, *supra* note 36.

41 Wheatley, *supra* note 36; Ezetah, *supra* note 7.

42 R. Burchill, 'The EU and European Democracy –Social Democracy or Democracy with a Social Dimension?', 17 *Canadian Journal of Law and Jurisprudence* (2004) 1, 185, 186. In addition Gregory Fox points out that "elections are something that international institutions can be very good at monitoring and evaluating". See Ebersole (reporter), *supra* note 37, 270.

43 See footnote 34.

44 Marks, *supra* note 37; Miller, *supra* note 9, 608-609.

45 Art. 1 Inter-Democratic Charter grants "the peoples of the Americas […] a right to democracy" and imposes on "their governments […] an obligation to promote and defend it", however it does not define the right. The Charter does stipulate in Arts 2 and 3 that democracy should be representative and participatory. As essential elements of representative democracy the Charter lists, inter alia, respect for human rights and fundamental freedoms in their universality, indivisibility and interdependence, access to and the exercise of power in accordance with the rule of law, the holding of periodic free and fair elections based on secret balloting and universal suffrage as an

former United Nations Commission on Human Rights,[46] who all seem to favor a more comprehensive definition of democracy.

Although international consensus on, and recognition of, the existence of a right to democracy in international law might still be considered to be premature, let us assume for the purpose of this article that the right to democracy exists in international law. Regardless of whether one accepts a limited or a more comprehensive definition, it is clear that respect for human rights is at the heart of the discussion.

A consensus does appear to exist on the fact that no single model of democracy can exist.[47] However, the absence of a universal political model does not negate universal democracy. Both proponents of broad and limited perceptions of democracy consider the legitimation of governance by the consent of the governed to be the core element of a democracy.

Governance is legitimated through political participation which includes, but is not limited to free and fair elections. The right to political participation is enunciated in both Article 21 UDHR and Article 25 ICCPR. Article 25 ICCPR reads "[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives".

expression of the sovereignty of the people, the pluralistic system of political parties and organizations and the separation of powers and independence of the branches of government (see Arts 3 and 7). The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are also mentioned as essential elements of democracy (Art. 4).

46 Operational para. 2 Commission for Human Rights Res., Human Rights Documents. E/CN.4/RES/1999/57, 28 April 1999; stated that "the rights (*sic*) of democratic governance include, inter alia, the following:(a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly;(b) The right to freedom to seek, receive and impart information and ideas through any media;(c) The rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary;(d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections;(e) The right of political participation, including equal opportunity for all citizens to become candidates; (f) Transparent and accountable government institutions;(g) The right of citizens to choose their governmental system through constitutional or other democratic means;(h) The right to equal access to public service in one's own country".

47 This principle has been reaffirmed on multiple occasions by the UN General Assembly: preambular para. 7 GA Res. 62/7, 13 December 2007; preambular para. 7 GA Res. 61/226, 14 March 2007; preambular para. 10 GA Res. 60/253, 2 May 2006. Also mentioned in preambular para. 8 GA Res. 55/96, 28 February 2001.

Based on Article 21 UDHR and Article 25 ICCPR, a government that is not based on the consent of the governed is not considered to be legitimate. In addition, the government must be substantially representative of all distinct groups in the country.[48] Representation should be manifest in active participation such that "representation and participation [are] experienced as part of a continuum."[49] This means that true participation goes beyond the initial consent expressed through free and fair elections. Consequently, its exercise should continuously be guaranteed. When a State precludes effective participation, it also denies its people their right to self-determination. Acts such as mass electoral fraud, anti-democratic coups, or persecution of minority groups constitute violations of a people's collective rights by which it is ruled.[50]

As a consequence, the right to self-determination – tempered by the core components of universal democracy – only allows opting for a system that is based on the consent of the governed and that is substantially representative of all distinct groups in the country. Electing any other government could be sanctioned by national or international courts, as illustrated below.

As the exercise of one human right may not lead to the violation or abolishment of another human right, the exercise of the right to self-determination may not limit or exclude the future exercise of that right by particular groups or individuals. For instance, the right to take part in the conduct of public affairs includes not only the right to free and fair elections but also comprises of the right to participate in the elections as a candidate. The right to freedom of association allows for the establishment of political parties. However, one may not form any kind of political party. Political parties engaging in activities aimed at the destruction of any of the rights and freedoms [set forth in the European Convention on Human Rights] may

48 This follows logically from the wording "everyone has the right to take part in the conduct of public affairs".

49 Thornberry, *supra* note 10, 116.

50 The true exercise of the right to self-determination supposes a governmental system which takes into account the rights of minorities. Pure majoritarianism will by definition exclude some citizens from the decision-making process, thus making the consultation at the core of self-determination incomplete. Only a theory of democracy that takes into account the concerns of all individual components of state-based "self" is convincing as a species of self-determination. See Fox, *supra* note 8, 771.

be dissoluted by the government or by a court.[51] In addition to the cases brought before the European Court of Justice, a similar event has taken place in Belgium. On 21 April 2004 the Ghent Court of Appeals found three nonprofit organizations in breach of the anti-racism law as they all three assisted a political party ("Vlaams Blok") that had clearly and repeatedly committed acts of racism and discrimination. This judgment led to the transformation of the "Vlaams Blok" into "Vlaams Belang".[52]

Moreover, election of a non-democratic party may also cause international institutions or other States to take sanctions. This question was raised within the European Union when Austrian elections in 1999 brought the controversial People's Party into the government. The EU members felt that this was contrary to European values, including the value of democracy, and downgraded unilateral relations with Austria. There were calls from certain Member States for EU action to be taken but no clear legal action under the EU treaties could be taken as there had been no clear violation of Article 6 Treaty on the European Union (current Article 2).[53] It was argued that all Austria did was to recognize the results of a free and fair election. At the same time it was said, that had the Austrian government engaged in any practices which were contrary to established human rights protection, questions could have been raised about adherence to the principles of Article 6 TEU.[54]

In conclusion, the exercise of the right to self-determination is currently limited by the core components of universal democracy. Consequently, the right to self-determination only allows peoples to opt for a system that is based on the consent of the governed and that is substantially representative of all distinct groups in the country. The reality

51 *United Communist Party of Turkey and Others v. Turkey* (1998), 26 E.H.R.R. 121, para. 60; *Socialist Party and Others v. Turkey* (1998) 27 E.H.R.R. 51, para. 53; *Freedom and Democracy Party (ÖZDEP) v. Turkey* (1999) 26 E.H.R.R. 12, para. 45.

52 Cour d'Appel Ghent, Decision of 21 April 2004, available at http://www.diversiteit.be/index.php?action=rechtspraak_detail&id=322 (last visited 18 November 2010) and Cour de Cassation, Decision of 9 November 2004, available at http://www.diversiteit.be/index.php?action=rechtspraak_detail&id=45 (last visited 18 November 2010); See also E. Brems, Belgium: The Vlaams Blok Political Party Convicted Indirectly of Racism, 4 *International Journal of Constitutional Law* (2006) 4, 702.

53 *Treaty on the European Union*, 7 February 1992, O.J. C 224/1 (1992) [TEU].

54 R. Burchill, 'The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria', 7 *European Public Law* (2001) 1, 79, 84-85 and Burchill, *supra* note 42, 197.

must however be acknowledged that peoples may opt for a form of government violating these components. However, by doing so, such a government would expose itself to possible sanctions.

E. Testing the Hypothesis: The Situation in Iraq

After the 2003 invasion, the UN Security Council has reaffirmed on several occasions "the right of the Iraqi people to freely to determine their own political future and control their own natural resources."[55] From the wording listed in subsequent resolutions it becomes clear that the Security Council imposes the restrictions discussed above on the Iraqi people. The Security Council encouraged "the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender".[56] Another paragraph reads "[*w*]*elcoming* the commitment of the Transitional Government of Iraq to work towards a federal, democratic, pluralistic, and unified Iraq, in which there is full respect for political and human rights"[57]. Finally, the Security Council welcomed "the assumption of full governmental authority by the Interim Government of Iraq on 28 June 2004, the direct democratic elections of the Transitional National Assembly on 30 January 2005, the drafting of a new constitution for Iraq and the recent approval of the draft constitution by the people of Iraq on 15 October 2005"[58].

The Security Council added to these restrictions that the Government has to "play a critical role in continuing to promote national dialogue and reconciliation and in shaping the democratic future of Iraq"[59].

This supports the idea argued in the above paragraphs, namely that international law calls for the installation of a system of representative government that respects human rights and must continue to do so. The Security Council also accepts other characteristics of democracy, namely the peaceful settlement of disputes and respect for the principle of the rule of law.

55 SC Res. 1483, 22 May 2003; See also SC Res. 1546, 8 June 2004; SC Res. 1637, 8 November 2005, SC Res. 1723, 28 November 2006.
56 SC Res. 1483, 22 May 2003.
57 SC Res. 1637, 8 November 2005.
58 *Id.*
59 *Id.*

F. Conclusion

This article examined whether international law imposes certain restrictions on the right to self-determination and has come to the conclusion that current international law imposes two restrictions on the right to self-determination, and possibly a future third one. Taken into account these limitations, the "internal" right to self-determination calls for the installment of a form of government that is based on the consent of the governed, is substantially representative of all distinct groups in the country and respects human rights.

As the international law of democracy further develops, in the future a third limitation may be imposed, namely respect for the right to democracy. This norm's currently disputed character makes it very difficult to correctly assess its future effect on the right to self-determination.

Regardless of which definition of the right to democracy the international community will adopt in the future it is clear that the respect for human rights is at the core of the discussion. Both minimalist and more comprehensive conceptions consider the consent of the governed and the true representative character of the government to be the core components of a democratic government.

As these two core elements are currently protected under human rights law[60] it may be said that they already influence the exercise of the right to self-determination, that is in theory at least.

As stated above, respect for internal self-determination is a continuous process. The international right to self-determination does not end when a certain mode of government has been elected. The right to self-determination imposes on the government a duty to ensure that peoples under his jurisdiction have the opportunity to continuously exercise its right to self-determination. As such internal self-determination may be considered to be the extension of the external right to self-determination. As the choice for independence or a certain level of autonomy does not grant the peoples a blank check, theoretically the exercise of external self-determination should equate to the promotion or expansion of democracy, or at least democracy's two core elements. Unfortunately history has illustrated that that is not the case, for example the creation of numerous post Cold-War States has not

[60] Although acknowledging that if the right to democracy would be recognized, a more extensive interpretation might be given to these rights as is the case in the German legal system.

dramatically increased the number of democracies, rather it has been said to have advanced an undemocratic climate in which ethnic-nationalism has blossomed.[61]

Similarly, any exercise of internal self-determination should respect human rights and the core components of democracy in a nation. However, in many nations – both democracies and non democracies – which formally respect the right to self-determination, the participatory rights of certain groups remain very controversial.

For these reasons the rise of self-determination may not automatically be equated to the rise of truly representative and participatory democracy.

[61] Miller, *supra* note 9, 608; T. Franck, 'Tribe, Nation, World: Self-Identification in the Evolving International System', *11 Ethics and International Affairs* (1997) 1, 151; B. R. Roth, 'Evaluating Democratic Progress', in G. H. Fox & B. R. Roth (eds), *Democratic Governance and International Law* (2000), 493, 493-494.

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From Kosovo to Catalonia: Separatism and Integration in Europe

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Abstract

In July 2010 the International Court of Justice rendered its Advisory Opinion on the legality of Kosovo's declaration of independence and the Constitutional Court of Spain rendered an opinion concerning the autonomy of Catalonia. Two very different cases, from very different places, decided by very different courts. Nonetheless, they each provide insights on the issue of separatism in the midst of European integration. Does the Kosovo opinion open the door for other separatist groups? Does the process of European integration increase or undercut separatism? In addressing these questions, this article proceeds in three main parts. Part A briefly recaps the legal issues involved in the Kosovo Advisory Opinion. Part B discusses the relationship between self-determination and EU institutions and practices with a particular focus on Catalonia and the Basque country. Finally, part C assesses the seemingly contradictory impulses of separatism and European integration.

A. Introduction: A Tale of Two Opinions

On July 10, 2010 over a million people marched in the streets of a major European city, spurred to action by the legal furor over a court case that was perceived to be about the self-determination of peoples. The city was not Belgrade or Pristina (although there had been demonstrations in those cities regarding another, better known, case), but Barcelona.

Catalonia, one of the seventeen Autonomous Communities (AC's) recognized by the Spanish Constitution, had revised its Autonomy Statute in 2006. On July 9, 2010 Spain's Constitutional Court issued an opinion striking down various expansions of authority in those revisions and finding that there was no legal basis to define Catalonia as a "nation"[1]. The result was many Catalonians arguing that autonomy within Spain was no longer feasible; separation was required to defend their language, their culture, their national identity.

[1] 'Catalan protesters rally for greater autonomy in Spain' (10 July 2010) available at http://www.bbc.co.uk/news/10588494 (last visited 17 Dec. 2010); see also, D. Fombonne, 'Madrid 1 – Barcelona 0: Spain's Constitutional Court stops Catalonian Nationalist Ambitions' (10 November 2010) available at http://www.legalfrontiers.ca/2010/11/madrid-1-barcelona-0-spains-constitutional-court-stops-catalonian-nationalist-ambitions/ (last visited 17 Dec. 2010).

On a weekend when Spanish flags were flying high in anticipation of the July 11 World Cup final between Spain and the Netherlands, Catalonian flags were fluttered above protesters who filled block after block in Barcelona. For many Catalonians, the affront to the Catalonian region eclipsed the World Cup aspirations of the Spanish State. But, aside from a few short articles in the international press, not many people around the world took notice.

Less than two weeks later, on July 22, the International Court of Justice (ICJ) issued its Advisory Opinion finding that Kosovo's declaration of independence did not contravene international law. Although opinions of the ICJ do not often garner much attention by journalists, the Kosovo opinion was in the spotlight of the world press corps. Moreover, foreign ministries, political parties, and separatist enclaves from all around the world issued official statements concerning the opinion. Interpretations of what the opinion meant abounded: some said it made declarations of independence legal under international law; others said it was a special case that could not apply to other secessionist disputes.

While these two opinions dealt with very different situations and were issued by very different courts, there is an important overlap: they each provide insights on the issue of separatism in the midst of European integration. Does the Kosovo opinion open the door for separatist groups in Scotland, Flanders, Corsica, Catalonia, the Basque country, or elsewhere? Does the process of European integration increase or undercut separatism?

In addressing these questions, this article proceeds in three main parts. Part A briefly recaps the legal issues involved in the Kosovo Advisory Opinion. part B discusses the relationship between self-determination and EU institutions and practices with a particular focus on Catalonia and the Basque country. Finally, part C assesses the seemingly contradictory impulses of separatism and European integration.

In the end, I argue that while commentators tend to focus more on the pronouncements of the ICJ in delineating the scope of self-determination as a legal right, we are entering into an era where, at least in regards to separatist struggles in Europe, the definition and viability of self-determination norms will relate primarily to the institutional regulations and policies of the EU and other international organization. Although heralded as a right applicable to all peoples, the realities of self-determination in Europe will have more to do with bureaucratic push-and-pull among States, their regions, and Brussels and less with the decisions of the World Court.

B. Kosovo and the Law of Self Determination

I. Kosovo's Declaration

On February 17, 2008, members of the Assembly of Kosovo issued a statement declaring "Kosovo to be an independent and sovereign state"[2]. The Declaration stated: "[W]e shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244"[3].

Nonetheless, Kosovo's declaration started a diplomatic firestorm. The U.S., the U.K., France, Germany, most other EU Member States, and a host of other countries recognized Kosovo as a new State almost immediately.[4] They were cautious to say, however, that Kosovo's declaration and the subsequent recognition did not constitute legal precedent regarding the creation of a State under international law.[5]

2 Kosovo Declaration of Independence, 47 *I.L.M.* (2008) 1, 467, 467; C. J. Borgen, 'Introductory Note to Kosovo's Declaration of Independence', 47 *I.L.M.* (2008), 461.

3 Kosovo Declaration of Independence, *supra* note 2, 468, para. 12. Security Council Resolution 1244 provided the framework for the conflict resolution process in Kosovo after the 1999 NATO air campaign.

4 For an updated list of recognitions, including dates of recognition, see 'Who Recognized Kosova as an Independent State?' available at http://www.kosovothanksyou.com (last visited 14 December 2010).

5 For example, in announcing the recognition of Kosovo by the United States, Secretary of State Condoleezza Rice explained:
"The unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today.",
Secretary of State C. Rice, 'U.S. Recognizes Kosovo as Independent State' (18 February 2008) available at http://kosova.org/docs/independence/United-States-Recognizes-Kosovo-1.pdf (last visited 16 December 2010).
Moreover, in a statement to the UN Security Council following Kosovo's declaration, British Ambassador John Sawers said that
"the unique circumstances of the violent break-up of the former Yugoslavia and the unprecedented UN administration of Kosovo make this a sui generis case, which creates no wider precedent, as all EU member States today agreed",
'Ban Ki-Moon urges restraint by all sides after Kosovo declares independence', (18 February 2008), available at http://www.un.org/apps/news/story.asp?NewsID =25659&Cr=Kosovo&Cr1= (last visited 14 December 2010).

However, European States that themselves had ongoing concerns regarding minority populations criticized the declaration. The Romanian Defense Minister, perhaps mindful of the ethnic Hungarian population in Transylvania, said that such a declaration "is not in keeping with international law"[6]. The Cypriot Foreign Minister warned against the EU "breaking international law" by recognizing Kosovo.[7] And, on the day of Kosovo's declaration, Spain's Foreign Minister Miguel Angel Moratinos said: "'We will not recognise [Kosovo] because we consider … this does not respect international law'"[8].

While some States were in favor of recognizing Kosovo but against enunciating a more general legal principle in support of Kosovar independence and other States were against the idea of even recognizing Kosovo, separatist groups embraced the declaration of the Kosovars. The European Free Alliance, a coalition of national independence parties in the European Parliament (such as the Scottish National Party, Plaid Cymru of Wales, and Basque and Catalan separatist parties) issued a joint declaration stating that the Kosovo declaration was a "historic event which underlines the rights of all European nations to decide freely their own futures, and which demonstrates that this right is an essential democratic principle of the European Union"[9].

On October 8, 2008, at the request of Serbia, the UN General Assembly, by a vote of seventy-seven in favor, six against, and seventy-four abstaining, referred to the ICJ the following question for an Advisory Opinion: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[10]

6 'Romania not to recognize unilateral Kosovo independence, says minister', available at http://news.xinhuanet.com/english/2007-12/12/content_7231934.htm (last visited 14 December 2010).

7 H. de Quetteville & B. Waterfield, 'EU-US showdown with Russia over Kosovo', (12 December 2007), available at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/12/11/wkosovo111.xml (last visited 14 December 2010).

8 S. James, 'EU Reactions to Kosovo's Independence: The Lessons for Scotland' (August 2008) available at http://www.docstoc.com/docs/39433019/EU-Reactions-to-Kosovos-Independence-The-Lessons-for-Scotland, 5, quoting from Spain says won't recognize Kosovo independence, Reuters (18 Feb. 2008).

9 European Free Alliance in the European Parliament, 'Kosovo – Independence declaration welcomed', *Press Release* (19 February 2008) available at http://www.greens-efa.org/cms/pressreleases/dok/220/220880.htm (last visited 16 December 2010).

10 GA Res. 63/3, 8. October 2008. The voting record is as follows:

This placed the ICJ center stage in the drama that was unfolding. And yet, its dialogue would be muted, at best. Before turning to the Advisory Opinion, I will consider briefly the disagreements over how to define self-determination as a legal concept.

II. International Law and Self-Determination

Although self-determination was mentioned in Woodrow Wilson's 14 Points, the U.N. Charter,[11] and in major human rights treaties,[12] jurists at

"*In favor:*
Algeria, Angola, Antigua and Barbuda, Argentina, Azerbaijan, Belarus, Bolivia, Botswana, Brazil, Brunei Darussalam, Cambodia, Chile, China, Congo, Costa Rica, Cuba, Cyprus, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, El Salvador, Equatorial Guinea, Eritrea, Fiji, Greece, Guatemala, Guinea, Guyana, Honduras, Iceland, India, Indonesia, Iran (Islamic Republic of), Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Lesotho, Liechtenstein, Madagascar, Mauritius, Mexico, Montenegro, Myanmar, Namibia, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Philippines, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Timor-Leste, United Republic of Tanzania, Uruguay, Uzbekistan, Viet Nam, Zambia, Zimbabwe.
Against:
Albania, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, United States of America.
Abstaining:
Afghanistan, Andorra, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bhutan, Bulgaria, Burkina Faso, Cameroon, Canada, Colombia, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ghana, Grenada, Haiti, Hungary, Ireland, Israel, Italy, Japan, Jordan, Latvia, Lebanon, Lithuania, Luxembourg, Malaysia, Malta, Monaco, Mongolia, Morocco, Nepal, Netherlands, New Zealand, Oman, Pakistan, Peru, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Saint Lucia, Samoa, San Marino, Saudi Arabia, Senegal, Sierra Leone, Slovenia, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Vanuatu, Yemen",
U.N. Doc. A/63/PV.22, 8 October 2008, 10.

11 See Art. 1, para. 2 and Art. 55 Charter of the United Nations.

12 Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *International Covenant on Civil and Political Rights*, 16 December 1966, 999

least into the 1990's have found that "international law as it currently stands does not spell out all the implications of the right to self-determination"[13]. At its most basic level, the right to self-determination is generally understood to be "the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups"[14].

The assumption is that the choice of political system and pursuit of economic, social and cultural development would occur under the auspices of an existing State, and would not require the establishment of a new State. This conception of *internal* self-determination makes self-determination closely related to the respect of minority rights. Furthermore, modern views of self-determination also recognize the "federalist" option of allowing a certain level of cultural or political autonomy as a means to satisfy the norm of self-determination.[15]

As understood in the 1960s, self-determination was essentially another term for decolonization: stating that *all* peoples had a right to self-determination meant that all *colonies* had a right to be independent.[16] As the era of decolonization waned, the question became what effect would a right to self-determination have outside of the colonial context. There were thus two questions that needed to be resolved: (a) who has a right to self-determination; and, (b) what does the right entail outside of the decolonization context?

U.N.T.S. 171, Art. 1 para. 1; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Art. 1, para.1.

13 Conference on Yugoslavia Arbitration Commission Opinion No. 2, 31 I.L.M. 1497, 1498 (1992).

14 I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 580; see also D. Thurer, 'Self-Determination', in R. Bernhardt (ed.), 4 *Encyclopedia of Public International Law* (2000), 367.I have described elsewhere how the concept of "self-determination" is used in the diplomatic strategies of great powers and how it effects the diplomatic strategies of those powers, see C. J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia', 10 *Chicago Journal of International Law* (2009) 1, 1.

15 D. Thurer, 'Self-Determination, 1998 Addendum', in R. Bernhardt (ed.), 4 *Encyclopedia of Public International Law* (2000) 373.

16 P. Carley, *Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession*, (1996) 3–4. But see A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995) 51, stating that by the time the self-determination language of Article 1 of the International Covenant of Civil and Political Rights was adopted in 1955, few States argued that the principle only applied to colonial rule.

Both of these questions were considered by the Québec Commission, a group of experts convened by a committee of the National Assembly of Québec to provide advice concerning the legal issues implicated by a hypothetical secession of Québec. The Commission found that the right to self-determination is context dependent, that different definitions of "peoples" lead to different applications of the right to self-determination, and that secession is only recognized as a remedy in the case of decolonization.[17]

Academic commentators, particularly Europeans, argued that in cases other than decolonization, as long as a State allows a minority group the right to speak its language, practice its culture in a meaningful way, and participate effectively in the political community, then that group is said to have *internal* self-determination. Secession, or *external* self-determination, was strongly disfavored. According to this view, a right of self-determination was not a general right of secession.[18]

However, commentators also explained that one cannot say that international law made secession illegal. If anything, international law is largely silent regarding secession, and attempted secessions are, first and foremost, assessed under domestic law.[19]

Thus, the law of self-determination, as understood after the era of decolonization, can be summarized as follows:

- Self-determination for a colonized people allows for the ability to separate the colony from the colonial State so that the colony may gain independence and become a sovereign State;
- For a State as a whole, self-determination means the right to be free from external interference in its pursuit of its political, economic, and social goals;
- For communities that are not colonies and are within existing States, self-determination means internal self-

[17] T. M. Franck *et al.*, 'The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty', in A. F. Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned* (2000), 241, 248, 279–280.

[18] See Cassese, *supra* note 16, 40 (stating that self-determination does not mean a right to secede).

[19] Concerning the silence of international law, see, for example, P. Daillier, A. Pellet & N. Q. Dinh, *Droit International Public* (2002), 526, para. 344 no. 1: "la sécession n'est pas prise en compte en elle-même par le droit international," that is, "secession in itself is not taken into account by international law".

> determination, the pursuit of minority rights within the existing State.[20]

However, this view was not accepted by all. Some argue that in non-colonial cases, "[a] right to *external* self-determination […] [including at times the assertion of a right to unilateral secession] arises *in only the most extreme cases and, even then, under carefully defined circumstances*"[21]. The idea of secession as a right under certain circumstances has been, in the words of Professor Malcolm Shaw, "the subject of much debate"[22]. While the request for an Advisory Opinion related to Kosovo's declaration of independence may have seemed like an opportunity for the ICJ to clarify and define the relationship between self-determination and secession, it actually showed the limits of ICJ adjudication in the midst of a political dispute.

III. The ICJ and the Kosovo Advisory Opinion

The Advisory Opinion itself is misunderstood. Commentators oversimplified the opinion, saying that it found that the declaration of independence was legal. It did not quite do that. Rather, the ICJ stated that, based on the wording of the question, the answer "turns on whether or not the applicable international law *prohibited* the declaration of

20 See J. Crawford, *The Creation of States in International Law*, 2nd ed. (2006), 127–128.

21 *In re Secession of Quebec* [1998] 2 S.C.R 217, 126 (Canada) (second emphasis added).

22 M. N. Shaw, *International Law*, 5th ed. (2003), 271 fn. 140. Jurists who interpret the law of self-determination in this way generally contend that any attempt to claim secession as a remedy must at least show that: "(*a*) the secessionists were a 'people,' (*b*) the state in which they are currently part brutally violates human rights, and, (*c*) there are no other effective remedies under either domestic law or international law."
I discuss the evolution and application of the law of self-determination to issues of secession at greater length in Special Committee on European Affairs, 'Mission to Moldovia – Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova', 61 *Record of the Association of the Bar of the City of New York* (2006) 2, 196, 239 (hereinafter "Moldova Report"), a report of which I am the principal author, and also, generally, C. J. Borgen, 'Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"', 9 *Oregon Review of International Law* (2007) 2, 477.

independence"[23]. The Court concluded that the historical record "does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases"[24].

Significantly (although rarely noted by lay commentators), the Court also found that the principle of territorial integrity is not implicated in cases of declarations of independence. Instead, it "is confined to the sphere of relations between States"[25], as opposed to the actions of non-State entities.

As for whether there is a right to "remedial secession" under international law, the Court noted that there were "radically different views" among the States taking part in the proceedings regarding secession outside of the context of decolonization and, if such a remedy existed, whether it could be applied to Kosovo. But the ICJ did not further investigate this issue as it "consider[ed] that it [was] not necessary to resolve these questions in the present case"[26].

The ICJ chose restraint and narrow readings. We are left with what may have been the consensus before we started: declarations of independence are primarily domestic affairs, and the UN does not condemn such declarations unless there is a separate violation of international law (such as the prohibition on the use of force).

Rather than dismissing the idea of remedial secession outright, the Court merely said it was highly contentious, and there was no need to decide the issue.[27] This leaves the door open that there may be a right of remedial secession, a topic that many commentators previously thought was, in effect, closed.[28] Whether the ICJ, as a whole, meant its opinion to have such an implication is itself an open issue.

23 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice, Advisory Opinion, 22 July 2010, para. 56 (hereinafter Advisory Opinion) (emphasis added); see also C. J. Borgen, *Introductory Note to the International Court of Justice Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence of Kosovo*, 49 ILM (forthcoming 2010).

24 Advisory Opinion, *supra* note 23, para. 79.

25 *Id.*, para. 80. Thus, when the Security Council condemned particular declarations of independence, such as those of Rhodesia or Northern Cyprus, the issue related to an "unlawful use of force or other egregious violations of norms of international law," in particular, *jus cogens*. *Id.* para. 81.

26 *Id.*, paras 82-83.

27 *Id.*

28 See, *e.g.*, Crawford, *supra* note 20, 247; Dailler, Pellet & Dinh *et al*., *supra* note 19, 526, para. 344 no. 1 ("la sécession n'est pas prise en compte en elle-même par le droit international," that is, "secession in itself is not taken into account by international

IV. Reactions and Implications

While the ICJ may have cleared the way for recognition, concerns over domestic separatist groups made recognition of Kosovo politically risky for many governments. Serbia's B92 radio reported that Italian Foreign Minister Franco Frattini "added that the ICJ's decision clearly states that Kosovo must remain a unique case and that it cannot cause a domino effect, since such an event would lead to a crisis of international relations"[29]. None of the five members of the EU who had not previously recognized Kosovo have shown a new inclination to recognize Kosovo in the wake of the ICJ opinion.[30] In the words of the International Crisis Group: "The cascade of post-ICJ recognitions Pristina expected has not materialized, and there is little indication that Kosovo's friends are putting great effort into persuading others to accept it as a sovereign state"[31].

While States may be treating this opinion as "water under the bridge," and attempting to move on, separatists keep referring to the opinion, or at least to their interpretations of what it means. Sergei Bagapsh, the putative president of Abkhazia said that:

> "The decision of the International Court once more confirms the right of Abkhazia and [fellow breakaway Georgian region] South Ossetia to self-rule. And from a historical and legal point of view, Abkhazia and South Ossetia have much more right to independence than Kosovo."[32]

Within the EU, national minorities argued that the opinion backed their own claims and aspirations:

law"); Franck, *supra* note 17, 248, 279–280 (stating that secession is only recognized as a remedy in the case of decolonization); Cassese, *supra* note 16, 40 (stating that self-determination does not mean a right to secede). *But see* Shaw, *supra* note 22, 271 fn. 140 (stating that a posited right of remedial secession is "the subject of much debate").

29 'Italy: Kosovo Talks Must Continue' (July 25 2010) available at http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=25&nav_id=68669 (last visited 16 December 2010).

30 International Crisis Group, 'Kosovo and Serbia After the ICJ Opinion', Europe Report No. 206, 1 (last visited 14 December 2010) available at http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/206-kosovo-and-serbia-after-the-icj-opinion.aspx.

31 *Id.*

32 'Reaction in Quotes: UN Legal Ruling on Kosovo' (22 July 2010) available at http://www.bbc.co.uk/news/world-europe-10733837 (last visited 16 December 2010).

> "Laszlo Tokes, an ethnic Hungarian MEP [Member of the European Parliament] from Romania compared the situation with that of the Hungarian minority in the country, saying that Hungarians should now take to the streets to demand autonomy."[33]

Aitor Estaban, a representative from Spain's Basque Nationalist Party (PNV) said that "the main consequence is that Spain cannot keep saying that the international rules don't allow for a split of the country for a new Basque independent country into the European Union. So I think that should be already over and that's good news for us"[34]. Alyn Smith, a Member of the European Parliament (MEP) from the Scottish National Party, did not go into detail concerning the situation in Scotland, but did say that the opinion set an international precedent.[35] Frieda Brepoels, an MEP from the New Flemish Alliance, looked forward to "the prospect of EU membership" for Kosovo.[36]

While the Advisory Opinion has spawned (hopeful) rhetoric from separatist groups, has it really changed anything in regards to the European conflicts? Before addressing this, I will first consider the roles of nations, regions, and States in the EU.

C. Nationalism and the EU: Blood, Soil, and Globalization

I. Nations and States

Nationalism has been a major force in European history. It has been the source of conflict and, more generally, of anxiety. Bruno Coppieters

33 'Kosovo Independence No Violation of Law, Finds International Court of Justice' (22 July 2010) available at http://euobserver.com/9/30529 (last visited 16 December 2010).

34 H. Jamar & M. K. Vigness, 'Applying Kosovo: Looking to Russia, China, Spain, and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence', 11 *German Law Journal* (2010) 8, 913, 925.

35 'Court says Kosovo independence 'not illegal'' (July 23 2010) available at http://www.euractiv.com/en/enlargement/court-says-kosovo-independence-not-illegal-news-496583 (last visited 16 December 2010).

36 Kosovo Independence No Violation of Law, Finds International Court of Justice, *supra* note 33.

contends that "[t]he EU condemns exclusive types of nationalism as morally retrograde and conducive to conflict"[37]. Although – or perhaps because – Europe is in the process of constructing an ever closer union, there are currently twenty to twenty-five "significant" separatist movements across the continent.[38] Most are non-violent political and cultural movements; some groups seek greater autonomy within an existing State, others seek outright independence. Each of these hearkens back to a national community that does not currently have a State of its own.

The bomb-throwing radicals of years past are largely gone, but in some places popular support for autonomy or separation is stronger than ever.[39] Consider Scotland: although a 2008 opinion poll showed only about 19 percent of the population in favor of full independence, the ongoing politics makes majority support "not [...] inconceivable in the long term"[40]. The marriage that is Belgium is, at the time of this writing, facing the serious possibility of divorce, with Flanders and Wallonia each going their own way. In the summer of 2010 separatists from across Europe came together at a festival in Corsica called the Days of Corte to talk about… separating.[41]

The seeming irony that people from across Europe come together at a cook-out to talk about separating is an apt symbol for the phenomenon of local fragmentation in the midst of European integration. Some separatist movements are against both central and regional governments "but others either constitute or are part of the regional government or – in the case of *de facto* States – are in control of a population and a territory"[42].

Kosovo's declaration of independence and now the ICJ's Kosovo opinion have been very important events for these groups. But have the

37 B. Coppieters, 'Secessionist Conflicts in Europe', in D. H. Doyle (ed.), *Secession as an International Phenomenon: From America's Civil War to Contemporary Separatist Movements* (2010), 237, 247.

38 *Id.* 241.

39 See, e.g., B. R. Barber, *Jihad Vs. McWorld: How Globalism and Tribalism are reshaping the World* (1995), 172 (noting "In Brittany, though the old separatist bomb-throwers are gone and secession is no longer an issue, Breton cultural nationalism is probably running 'stronger today than at any other time this century.'").

40 Coppieters, *supra* note 37, 242.

41 M. Kimmelman, 'Cultures United to Honor Separatism', New York Times Online available at http://www.nytimes.com/2010/11/14/arts/14abroad.html?_r=2&pagewanted=1&ref=todayspaper (last visited 14 December 2010).

42 Coppieters, *supra* note 37, 242. Regarding *de facto* States, see Moldova Report, *supra* note 22.

recognition of Kosovo by over seventy States and the ICJ's opinion actually changed the legal context for these separatist groups, or are these events just symbolically important? Before answering these questions, I will turn to the stories of the Basque country and of Catalonia as two examples of regionalism and sub-State nationalism within the EU.

II. Many Nationalities in One Nation: Spain

Spain provides at least two different views into the issues of nationalism in the midst of integration. Despite both being within a single country, Catalonia and the Basque country have unique histories.

It has been said that many Spaniards put loyalty to the region or locality on the same level with, or above, loyalty to the country.[43] But such regional affinity is not the same as separatism.

Spain is a single State with at least three major languages – Spanish (Castilian), Catalan, and Basque – and a whole host of dialects. It is a country with a richness of regional cultures.

During the Franco regime (and at other times before Franco), the Spanish government treated such diversity as a threat and tried to force a linguistic and cultural uniformity on the various groups. Languages other than Spanish were not permitted and were devalorised: everyone was told to "speak Christian".

After Franco's death in 1975, Spain reacted against the centralization of the previous decades (if not centuries). A new Constitution was drafted and came into force in 1978. Article 2 touches on the issue of peoples and nations and reads:

> "The Constitution is based on the *indissoluble unity of the Spanish nation*, the common and indivisible homeland of *all Spaniards*; it recognizes and guarantees the right to *autonomy of the nationalities and regions* which make it up and the solidarity among them"[44].

The question became how to square the circle of a single Spanish nation made up of autonomous nationalities. The answer, at first, was to recognize the Basque country, Catalonia, and Galicia as "historical nationalities" that had a fast track to become Autonomous Communities within the Spanish State. Other regions within Spain also had their own path

[43] J. Hooper, *The New Spaniards* (2006), 218.

[44] Spanish Constitution (1978), Sec. 2 (emphasis added).

that they could follow to become AC's. Such a community could be comprised of a single province or several neighboring provinces. Each AC would have its own president, legislature, and supreme court.[45] The decentralization of the State accelerated as provinces either singly or together sought AC status.

Power shifted from Madrid to the new AC's as these new sub-State governments took on greater policy responsibilities. An autonomy statute may grant to the region any competence not reserved to the national government.[46] Others policy areas would be under the dual responsibility of the central government and of the AC's. Once power moved from the center to the AC's, it was difficult for Madrid to regain the power as action by both the regional and the central government is needed to amend an autonomy statute.[47] However, the central government in Madrid would maintain exclusive authority for "foreign affairs, external trade, defense, the administration of justice, merchant shipping, and civil aviation"[48].

While the government of Spain's fledgling democracy wanted to exorcise Franco's centralism from the country, they were also wary of the State flying apart. Also, none of the AC charters

> "give any right of secession, much as some Basques and Catalans would like one. Words are carefully chosen: Andalusia is a 'nationality', not a 'nation'. The Catalans' charter admits that, although they think of themselves as being a nation, the rest of Spain does not."[49]

Madrid opposed the use of "federal" terminology in describing this arrangement of power and responsibilities as overly divisive.[50] Today there are seventeen AC's.[51] As one observer wrote in 2007:

45 Hooper, *supra* note 43, 38.

46 Spanish Constitution (1978), Sec. 149, (3); see also H. Hannum, *Autonomy Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1996), 271.

47 *Spanish Constitution* (1978), Sec. 152 (2); see also Hannum, *supra* note 46, 270.

48 Hooper, *supra* note 43, 38.

49 'The Spanish Centrifuge' (1 March 2007) available at http://www.economist.com/ node/ 8786353 (last visited 14 December 2010).

50 Coppieters, *supra* note 37, 247.

51 J. Bengoetxea, 'The Participation of Infra-State Entities in European Union Affairs in Spain: the Basque Case', in S. Weatherill & U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (2005), 50.

> "Although the country is not a federation, it increasingly looks like one. Spain is one of Europe's most decentralised States—more than some overtly federal ones, says Francisco Balaguer, at Granada University. The regions control some 36% of public spending. Ministries in Madrid are seeing their budgets dwindle fast."[52]

As the focus of discussions on separatism turned to Kosovo in 2008, Spanish Prime Minister José Luis Rodríguez Zapatero was already four years into a program of revising the charters of the AC's. Valencia, Catalonia, and Andalusia were the first three AC's to have expanded powers. Prime Minister Zapatero was in favor of such an expansion of responsibilities for all seventeen regions. Once begun, decentralization had its own gravity: "The opposition is officially against, but their local chiefs, like politicians anywhere, rarely dislike extra power"[53].

While the various AC's want greater autonomy, Catalonia and the Basque country are the two that have the strongest separatist movements. If "all politics is local," (in the words of the American Congressperson Thomas "Tip" O'Neill) then the politics of self-determination and secession are the most local of politics. To understand separatism in any given instance, one must understand the local history and lore of the persons or groups involved. While there are certain similarities that will allow for comparison – the Basque Country and Catalonia are both in Spain and each have adopted very similar governmental functions in their AC's –[54] there are also striking contrasts, which will be discussed below.

1. The Basque Country

The Basque people are ethnically and linguistically different from the other peoples that surround them. Some anthropologists believe that the Basque predate the migrations that brought Indo-European languages to Europe 3,000 years ago.[55] There are references to the Basque in writings

52 The Spanish Centrifuge, *supra* note 49; see also James, *supra* note 8, 5; Hooper, *supra* note 43, 43 (stating "In just over four years, one of the most centralized nations on earth had been carved into seventeen self-governing administrative units, each with its own flag and capital".).

53 The Spanish Centrifuge, *supra* note 49.

54 Hannum, *supra* note 46, 271, fn. 798.

55 Hooper, *supra* note 43, 232.

from the Roman Empire and the end of Roman rule was the last time that all Basques were under the same political administration.[56] The Basque country took more or less its present form in 1530 when part of it was in the then-new Kingdom of Spain and part was across the border in France.[57]

Modern Basque nationalism was defined in the late nineteenth century by Sabino de Arana Goiri. Arana coined the word "Euskadi", meaning "collection of Basques", to refer to the Basque "nation" that exists within both Spain and France.[58]

By the 1930's, the Basques were on the road to gaining autonomy like the Catalans but then the Spanish Civil War began in 1936.[59] While the 1930's Basque peasantry was "deeply reactionary" and middle-class nationalists were "quasi-fascists"[60], the regions of Guipuzcoa and Biscay opted for autonomy, which in effect made them supportive of the Republic. The result was the horror of Guernica and, once Franco consolidated his power, punitive decrees ending autonomy.

It should be little surprise that these regions became the birthplace of Euskadi Ta Akatasuna ("ETA"), the violent Basque paramilitary group. ETA's history is one of factionalization and withering in which "each time the more violent, less intellectual group survived intact"[61]. ETA became widely condemned as a terrorist organization, responsible for killings and kidnapping. The cycle of violence, repression, radicalization, and further violence and repressions seemed endless. By the early 1970's about one quarter of the Guardia Civil was stationed in the Basque country. Residents of the Basque country, irrespective of whether or not they were ethnically Basque or even if they were a recent "immigrant" from another part of Spain, increasingly felt that they were a separate community, held apart from the rest of Spain. Franco's oppressive centralism spurred regionalism.

It is important to note, in this respect, that ETA should not be equated with the totality of Basque separatists. There was also a non-violent cultural resistance to Franco's policies. In the late 1950's, for example, the population of the Basque country founded the *ikastolas*, primary schools with education in *Euskera*,[62] the Basque language. Also. various Basque

56 *Id.* 235.
57 *Id.*
58 *Id.*, 242-243.
59 *Id.*, 229.
60 *Id.*, 244.
61 *Id.*, 245.
62 *Id.*, 246.

political parties took up the causes of autonomy or separatism in the political arena.

This sense of being apart from, if not in actual opposition to the rest of Spain, remained after Franco's death. The Basque country had the highest "no" vote regarding the 1978 Spanish Constitution,[63] possibly a sign of the Basque not wanting anything further to do with the Spanish central government or, at least, that it wanted even more autonomy than provided for the in AC-structure. Moreover, eight years later there was a sense that Spain's accession to the European Communities in 1986 "somehow pre-empted or dispossessed the [Basque Autonomous Community] of its recently assumed powers"[64].

There have been periodic "cease-fires" called by ETA. However, even if the use of violence as a tactic waxes and wanes, the sense of apartness remains among the ETA: "even if the [Spanish State] were to become a model of democracy […] it wouldn't change things as far as we were concerned. We are not, nor have we been, nor shall we ever be Spaniards"[65].

Herri Batasuna, one of the major Basque separatist political parties, states that Basque goals are independence from Spain and reunification with the French Basque territory; short of that they seek the withdrawal of national security forces, integration of Navarra, amnesty for Basque "political prisoners," the legalization of separatist political parties, and the possibility of independence.[66] However, Herri Batasuna was declared illegal by the Spanish Supreme Court in 2003 due to its alleged political ties with ETA. This decision was further ratified by the Spanish Constitutional Court and legislature. An appeal by Herri Batasuna to the European Court of Human Rights failed, on the logic that the government of Spain acted based on a "pressing social need"[67].

Basque separatism for the better part of its history conformed with common assumptions about separatism: a difficult, at times violent struggle, dotted with terrorism and atrocities from both sides. As between ETA and the Spanish government, it is a clash of absolutes. But while this oft-violent

63 *Id.*, 249.
64 Bengoetxea, *supra* note 51, 47, 48.
65 As quoted in Hooper, *supra* note 43, 247.
66 Hannum, *supra* note 46, 276-277.
67 U.S. Department of State, '2009 Human Rights Country Report on Spain' (11 March 2010) available at http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136059.htm (last visited 14 December 2010).

opposition exemplifies separatism's past, it is not necessarily indicative of the future of separatism in Europe.

2. Catalonia

Discussions of Basque separatism often emphasize the uniqueness of the Basque language and culture, the deep roots of the Basques in the land called "the Basque country," and, unfortunately, the violence of ETA. It is a story of blood (in both the ethnic and violent senses) and land. The stories that describe the Catalonian "national identity" often emphasize Catalonian pride and, related to this, whimsy. The pride is apparent: One Catalan website begins answering the questions "What is Catalonia?" by explaining "Catalonia is an old european nation. Today, Catalonia is nation [within] Spain. But in the past, Catalonia has been one of the greatest nations in the world"[68]. Jordi Pujol i Soley, the President of Catalonia's Generalitat from 1980 to 2003, has said that "Catalonia is as much a nation as Slovenia or Estonia"[69].

But the whimsy is also displayed: in response to Franco's attempt to quash Catalonian regional affinity, a Catalonian audience at a musical performance that he attended in Barcelona regaled him with the Catalan national anthem. In a response to Spain's adoption of a silhouetted bull (originally the mark of a sherry company) as a cultural symbol, Catalans responded with the "Planta't el burro" campaign to adopt the silhouette of a donkey as a symbol of Catalonia.[70] And then, following the decision of the Constitutional Court concerning the Autonomy Statute, Catalonia outlawed bullfighting in the Summer of 2010, in a move that was ostensibly about animal welfare but perhaps more pointedly about cultural practices that were not native to the region. And the list goes on.

Be they serious, whimsical, or somewhere in between, the underlying discourse in all of these activities has to do with the identity of Catalans as a distinct people with its own language and culture and a heritage as a significant nation in European history. Catalans may emphasize that they are different from Castilians, but they do not equate separation with insularity. The Catalans emphasize their desire to return Catalonia to what they see as its proper place as a nation within the broader European family of nations.

68 'What's Catalonia?' (31 August 2009) available at http://www.catalonianewstate.com/2009/08/whats-catalonia.html (last visited 14 December 2010).

69 Barber, *supra* note 39, 174.

70 Hooper, *supra* note 43, 218.

Whether that means "nation" in the sense of an autonomous people within the Spanish State or "nation" in the sense of independent nation-State is a topic of debate among Catalans. Catalanism is a big tent that includes those who want autonomy within Spain as well as those who seek Statehood.[71] (Nor, I should emphasize, are the Basques necessarily insular, although their rhetoric historically has been less about rejoining the European community of nations and more about just being left to govern themselves.)

This essay is too short to discuss the history of Catalonia in depth. Suffice it to say that the struggle between Catalonia and central authority has been a long one, though not always successful.[72]

The early years of the twentieth century held some small promise for Catalonian aspirations. In 1931 the Spanish parliament allowed for "the organization of autonomous regions within the Spanish State out of provinces 'with common history, culture and economy'"[73]. Catalonia assumed administrative responsibility over natural resources, certain property rights, and other issues of public policy.[74] There was also a complex revenue-sharing agreement. The Catalonian government was called the Generalitat.

But this was only a brief glimmer of hope. The statute was abolished by Franco in 1938. The last words of the president of the Generalitat before being executed by Franco's men were "Visca Catalunya! (Long live Catalonia!)"[75]. It would be a difficult life.

However, it was not an especially violent one. Catalonia did not have a significant guerilla opposition to the Franco regime (in contrast to the Basques). Although (or perhaps because) speaking in Catalan was all but outlawed under Franco, the lifeblood of Catalan nationalism during this era flowed from the Catalan linguistic and cultural renaissance of the nineteenth century.[76] Already a key part of cultural identity, after the death of the dictator in 1975, promotion of the Catalan language became a central part of regional policy. In 1993 Catalonia introduced Catalan-only education for children between three and eight years old; this was upheld by the Spanish

71 *Id.*, 258.

72 In 1640 Catalans and Portuguese rebelled against the centralism of Castile: the Portuguese succeeded in establishing their own State, the Catalans did not. In the War of Spanish Succession, from 1702 to 1713, the Catalans sided with the losing (Habsburg) side, reprisals from the victorious Bourbons followed. *Id.*, 226-27.

73 Hannum, *supra* note 46, 264.

74 *Id.*, 264-65.

75 Hooper, *supra* note 43, 260.

76 Hannum, *supra* note 46, 267.

Constitutional Court in 1994.[77] At the time of Franco's death 60% of Catalonians spoke Catalan; by 2001 the percentage had increased to 76%.[78] Walk in the Barcelona airport and you see main signs printed in Catalan, English, and Castilian – in that order. Bookstores in Catalonia are increasing the shelf-space for books being translated into, or originally written in, Catalan. Given that one can assume that nearly everyone who reads Catalan also reads Spanish, the decision by publishing houses to put the resources into increasing their holdings in Catalan is anecdotal evidence of a sense of a continuing trend towards the use of Catalan as the primary language in Catalonia.

In the mid 1990's Benjamin Barber wrote that the Catalans viewed theirs as a different kind of separatism, "deny[ing] that there is any relationship between what they advocate and the kinds of ethnic warfare being conducted further in the east. Some see themselves as securing bastions of local democracy, seedbeds for real participation in the all-European federation that will presumably emerge"[79]. He continued, Catalonia "integrates itself into Europe precisely by segregating itself from Spain"[80]. It is not an insular separatism, but a separatism geared for an era of globalization.

III. Kosovo (as Seen from Spain) and the Limits of the ICJ

As discussed above, separatist groups across Europe welcomed the Kosovo decision as "legalizing" calls for autonomy or independence. For its part, Spain was one of the five EU States that did not recognize Kosovo and stated that it viewed the separation as a violation of international law. In light of the preceding discussion of Catalan and Basque separatism, the arguments that Spain made in its written submission to the ICJ are instructive of the concerns of States regarding how self-determination may or may not be defined as a legal right.

Spain's original submission focused on sovereignty and territorial integrity and requested that the ICJ concludes that the declaration of independence was not in accordance with international law because it

77 *Id.*, 491-92.
78 Hooper, *supra* note 43, 264.
79 Barber, *supra* note 39, 173.
80 *Id.*, 174.

ignored Serbia's right to sovereignty and territorial integrity.[81] In subsequent written comments, Spain sought a statement that the acts of sub-State actors, such as independence movements, could be held to violate international law:

> "the fact should not be overlooked that a violation of the principle of territorial integrity through actions carried out by domestic actors with the State will inevitably bear international consequences […] Spain considers it untenable to reduce the principle of territorial integrity to a principle operating at an exclusively international level."[82]

The ICJ ultimately disagreed with this assessment, placing the obligation to respect territorial integrity as only running between State actors.

Spain also sought a statement that a right of self-determination does not have to ultimately result in independence. It argued, that international law allows for multiple ways to express self-determination, from self-government within an existing State (essentially autonomy) to full independence. Spain argued that, as international law does not favor one solution or another, one cannot assume that independence should be the result of a self-determination claim.[83] Moreover, the Government of Spain also wanted to emphasize that secession "as a form of sanction or remedy [...] has no proper place in contemporary international law"[84].

As described above, the ICJ was vague as to the issue of secession as a remedy, merely stating that there were radically different views on the issue and that it did not need to be decided here.

Spain and like-minded States may well be frustrated with this Advisory Opinion as it (a) declined to extend the respect of territorial integrity to sub-State actors; (b) refrained from closing the door to the possibility of remedial secession; and (c) found there was no general

81 Written Statement of Kingdom of Spain on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (April 2009), 55-56, available at http://www.icj-cij.org/docket/files/141/15644.pdf (last visited 22 December 2010).

82 Written Comments of the Kingdom of Spain on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (July 2009), 3-4, available at http://www.icj-cij.org/docket/files/141/15706.pdf (last visited 22 December 2010).

83 *Id.,* 4-5.

84 *Id.,* 5.

prohibition in international law against declarations of independence. However, this opinion has not led to a deluge of new recognitions for Kosovo. States that wanted to recognize Kosovo have done so; States that have had no interest in doing so show no change of heart.

The parties seem to have moved on, so to speak. For Serbia and Kosovo, the issue seems to no longer be what the ICJ has said, but rather what the EU will do. After Serbia submitted a failed draft resolution to the General Assembly seeking new negotiations on "all outstanding issues" concerning Kosovo,[85] Serbia and the EU had negotiations culminating in a new resolution with a compromise text drafted by Serbia and the twenty-seven members of the European Union.[86] The General Assembly passed the resolution by consensus on September 9, 2010. The released resolution draft "[a]cknowledges the content of the advisory opinion" and "[w]elcomes the readiness of the European Union to facilitate a process of dialogue between the parties […]"[87].

I have written elsewhere that the next chapter in the history of Serbia and Kosovo will likely be less about the ICJ and the UN, and more about the law and politics of EU accession for each of these aspirants.[88] As one ICJ observer put it, this was "an appropriate opportunity for the Court to voice its reluctance to be the receptacle of multilateral disputes that it cannot solve"[89]. Short of that, it was reluctant to write a grand opinion in the midst

85 UN Doc. A/64/L.65, 27 July 2010. *See also* International Crisis Group, *supra* note 30, 4.

86 General Assembly, 'Adopting Consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue', *U.N. Press Release GA/10980* (September 9 2010), available at http://www.un.org/News/Press/docs/2010/ga10980.doc.htm (last visited 14 December 2010) [hereinafter GA Consensus Resolution Press Release].

87 UN Doc. A/64/L.65/Rev.1, 8 September 2010. Serbia's Foreign minister described the resolution as a "status-neutral" document. General Assembly, *supra* note 86. The United States also welcomed the adoption of the resolution, emphasizing, for its part, that the ICJ's opinion was clear that the declaration did not violate international law.

88 Borgen, ICJ, *supra* note 23.

89 J. d'Aspremont, 'The Creation of States Before the International Court of Justice: Which (Il) Legality?', in *The International Court of Justice and Kosovo: Opinion or Non-Opinion?*, Amsterdam Center for International Law, 3 (September 28 2010) available at www.haguejusticeportal.net/eCache/DEF/12/079.html (last visited 14 December 2010).

of a "universal multilateral political dispute that the international community had not been able to settle itself"[90].

Inasmuch as the ongoing viability of Kosovo – and Serbia – is related to their relationships to the EU, it will be the EU more so than the ICJ that will be the key norm-maker concerning self-determination in Europe. But, unlike the ICJ, the norm-setting powers of the EU will rarely be through juridical opinions, as opposed to the ongoing discursive practice of EU politics.

IV. The EU and Conflicting Nationalisms

1. The Evolution of Regions

The relationship of EU institutions and of the process of European integration to separatist movements is complex. It is overly facile to say that European integration helps or hurts secessionism by national groups within current or aspirant EU Member States. What can be said is that European integration "will not necessarily resolve [secessionist disputes], but it will affect how the parties to a conflict perceive their own interests and identities"[91]. This next section will consider some of the ways in which EU institutions and the politics of accession affect claims of self-determination.

In considering the role of sub-State regions within the EU institutional structure, one should keep in mind that regions are being used here as proxies for "peoples" or "nations." EU regional policy has become the stalking-horse for discussions about autonomy or self-determination of sub-State groups. Neil McCormick, an alternative representative to the Convention on the Future of Europe and a Scottish nationalist, noted that it was inappropriate to use the general term "regions" for some sub-State entities that are better termed nations; he attempted to put "Stateless nations" on the agenda.[92] He did not succeed.

90 D'Aspremont, *supra* note 89, 2.

91 Coppieters, *supra* note 37, 243.

92 S. Weatherill, 'The Challenge of the Regional Dimension in the European Union', in S. Weatherill & U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (2005), 22.

Regions have historically had two basic responses to the EU: "Let us in" or "Leave us alone".[93] The first response is a call for allowing regions to become greater policy-making participants, while the second seeks to minimize the effects of EU policy-making on autonomous sub-State regions. Each response has been affected by, and has affected, the EU's institutional structure.

In order to provide official status for regions, a Committee of Regions was established by the Treaty of Maastricht. However, its function was only advisory, leading one commentator to conclude in 2005 that while there was much talk of a "Europe of the Regions," the reality was that it was still a "Europe of the States"[94]. States were the negotiators at the Commission level. The Committee of the Regions was weak, rife with structural problems.[95] Regions had no veto and only had as much real say as their State allowed. Even worse:

> "The result is a potential disempowering of the regional level of governance to the advantage of the EU level, and it is at the EU level that the central authorities of the State are themselves directly involved in law-making. The implication will frequently be that a State is induced the centralize power within its domestic order so as to secure an effective platform for engaging in negotiation and securing subsequent compliance at the EU level."[96]

The Regions lost policy prerogatives and were left to implement directives that they had no say in negotiating. The "Europeanization" of policy areas that had previously been the competence of a region could lead to tension between the regional leadership and the national government.[97]

Brussels was late in appreciating the differentiation among types of regions across EU Member States. Some regions had very little power within their State. Others, like Catalonia and the Basque country, had significant legislative capacities. Separatist groups existed across different types of regions, but it was the leadership of the regions with legislative

93 C. Jeffery, 'Regions and the European Union: Letting them In, and Leaving them Alone', in S. Weatherill & U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (2005), 34, 35, citing to the nomenclature of Ivo Duchacek.

94 Weatherill, *supra* note 92, 2; 19.

95 Jeffery, *supra* note 93, 36.

96 Weatherill, *supra* note 92, 7.

97 See, *e.g.*, Weatherill, *supra* note 92, 9.

capabilities that were especially affected by the State-centric policy-making process of the EU and the weakness of the Committee of the Regions. In response, they formed the unofficial REGLEG ("Regions with legislative power") network.[98] As of this writing, there are 73 EU regions with significant legislative power spread across eight Member States: Austria, Belgium, Finland, Germany, Italy, Portugal, Spain, and the UK.[99]

REGLEG has grafted an informal, non-hierarchical network onto a pre-existing formal hierarchy. Such networks "are designed both to share information among like-minded sub-State actors as well as allowing collective action designed to increase the chances of extracting a more vigorously influential role before EU institutions"[100]. The European Free Alliance (EFA) is another such network, this one made up of sub-State national parties in the European Parliament and in national parliaments.[101] Between 2004 and 2009, EFA member parties had six MEPs (Scottish, Welsh, Basque, Catalan, Latvian, and Transylvanian) and a broad network across national parliaments.[102]

While REGLEG and EFA were *ad hoc* attempts to give regions increased say in the corridors of power in Brussels or Strasbourg (and, arguable in EFA's case, within the home countries of its members), they could not make up for the structural weakness of regions in the Maastricht formulation of the Committee of the Regions. The Treaty of Lisbon, which

98 Weatherill, *supra* note 92, 20.

99 'About Regleg', available at http://www.regleg.eu/index.php?option=com_content&view=section&layout=blog& id=2&Itemid=2 (last visited 14 December 2010).

100 Weatherill, *supra* note 92, 21.

101 Members include: Alands Framtid, Bayernpartei, Bloque Nacionalista Galego, Chunta Aragonesista, Die Friesen, Enotna Lista, Esquerra Republicana de Catalunya, Eusko Alkartasuna, Fryske Nasjonale Partij, Libertà Emiliana-Nazione Emilia, Liga Repubblica Veneto, Ligue Savoisienne, Lithuanian Polish People's Party, Mebyon Kernow, Moravana, Mouvement Région Savoie, Omo Ilinden Pirin, Partei der Deutschsprachigen Belgier, Partido Andalucista, Partit Occitan, Partit Socialista de Mallorca i Menorca Entesa Nacionalista, Partito Sardo d'Azione, Partitu di a Nazione Corsa, Plaid Cymru-the Party of Wales, Rainbow-Vinozhito, Scottish National Party, Silesian Autonomy Movement, Slovenska Skupnost, Sociaal Liberale Partij, Strana regionov Slovenska, Süd Tiroler Freiheit, Union Démocratique Bretonne, Union du Peuple Alsacien, Unitat Catalana.
European Free Alliance (EFA), 'Manifesto for the June 2009 European elections: Vision for a People's Europe', available at http://www.e-f-a.org/efaactive.php?id=124 (last visited 14 December 2010).

102 *Id.*

entered into force on December 1, 2009, was avowedly an attempt to make real the idea of a Europe of the Regions. According to the EU's own description, the treaty gives more weight to local councils, county councils, and regional parliaments who must be consulted when new EU legislation is drafted. The Committee of the Regions can now challenge new EU laws in the European Court of Justice when it believes that those laws violate the subsidiarity principle. The Commission, Council, and the Parliament are required to consult the Committee of the Regions and if the Committee is not consulted, it can involve the ECJ. The treaty recognizes local and regional autonomy.[103]

In particular, Article 2 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, reads:

> "Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal."[104]

Whether and how much this empowers the regions remains to be seen. In considering the effects of regional policy on self-determination claims within the EU, one needs to consider two scenarios. In the first, regions remain comparatively weak in the policy process and, in the other, the Lisbon Treaty truly empowers regions, making them significant participants in EU policy-making, along with States and EU decision-makers.

If regions remain relatively weak, dissatisfaction with the EU among the regions is likely to grow and further strengthen the more separatist elements within the regions. Frustration with distant/culturally insensitive decision-makers is fodder for separatists. Such frustrations would not necessarily be aimed at the EU, but at the national government for refusing to represent regional interests in Brussels. However, if regions remain weak,

103 European Union: Committee of Regions, 'The Lisbon Treaty: More Democracy for Europe', available at http://www.cor.europa.eu/pages/DecentralizedDetailTemplate.aspx?view=detail&id=939712e9-6c54-4f49-a1fd-9cd610bdb57b (last visited 14 December 2010).

104 European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Art. 2.

separatists will increasingly argue that their region should seek Statehood in order to have a seat at the bargaining table.

But let us assume that the Lisbon Treaty (and/or other reforms) empowers regions into being significant brokers in the policy process. One possibility is that this will undercut the rhetoric of separation by strengthening the legal guarantees and political power of the minority group.[105] As a legal matter this would weaken claims for external self-determination (if one even accepts the claim that such a remedy may exist) and may, as a political matter, make separatist rhetoric more difficult to justify.

A second possible result, though, is that empowered and networked regions will effectively out-negotiate their central governments at the EU level. More direct ties between Brussels and the empowered regions could make the States seem increasingly irrelevant. Financial ties between the regions and Brussels already exist through programs such as the European Regional Development Fund.[106] If EU institutional reform results in national governments having less of a mediating role in financial transfers between Brussels and the regions, then,

> "there is ever more pressure on central governments to justify their existence.
> A complex circle, one sees ever more demands for regional autonomy.
> Autonomous regions demand more subsidies and transfer payments.
> Oft blackmailing already broke central governments with the threat of untying."[107]

This empowered autonomy may actually spur claims for more independence and, ultimately, separation.[108]

105 Coppieters, *supra* note 37, 254-255.

106 See, *e.g.*, 'Regional Policy – Operational Programme 'Catalonia'' available at http://ec.europa.eu/regional_policy/country/prordn/details_new.cfm?gv_PAY=ES&gv_reg=576&gv_PGM=1114&gv_defL=9&LAN=7 (last visited 14 December 2010) and 'Regional Policy – Operational Programme 'Basque Country'' available at http://ec.europa.eu/regional_policy/country/prordn/details_new.cfm?gv_PAY=ES&gv_reg=ALL&gv_PGM=1113&gv_defL=7&LAN=7 (last visited 14 December 2010).

107 J. Enriquez, *The United States of America: Polarization, Fracturing, and Our Future* (2005), 217.

108 See, *e.g.*, E. Jenne, 'National Self-Determination: A Deadly Mobilizing Device in Negotiating Self-Determination', in H. Hannum & E. F. Babbitt (eds), *Negotiating Self Determination* (2006), 7 noting: "a history of autonomy and military support are

While States will remain the main actors in the EU in the medium term, one can see that the discourse over a "Europe of the Regions", and the institutional reforms that will or will not occur, may have a significant effect on the arguments over the scope of what can be expected in terms of self-determination. If expectations are raised as to the "regionalization" of Europe and this does not occur, the rhetoric of frustrated self-determination will likely be amplified. If, on the other hand, regions are increasingly empowered, then one possible result is that the legal and political bases for arguing for separation will be undercut. Another result, though, is that increasing the institutional power of regional governments may allow them to continue exacting ever greater concessions from their central governments, a situation which may largely gut the central governments of any significant power over those regions.

2. EU Membership and Separatist Aspirations

The politics of recognition and accession to the EU are other areas that can affect the efficacy of secession as a remedy. Policies of recognition and accession have already played an important role in the entry of the new States formed from the dissolutions of Yugoslavia and the USSR, as well as in the democratization of the former Warsaw Pact countries.[109] These issues would be as – if not more – important in the case of a separatist region seceding from an EU Member State, yet these are issues that are often ignored.

Recognition of Statehood or EU membership cannot be assumed by any secessionist region.[110] Kosovo's track record on recognition demonstrates that EU members that themselves have sub-State groups with claims of inadequate respect of the rights of self-determination have been reluctant to recognize Kosovo's independence, even if the majority of their

the strongest predictors of minority claims to self-determination and, second, that wars over national self-determination are both bloodier and more protracted than other internal wars".

109 See, Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991) 31 I.L.M. 1485 (1992); Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991) 31 I.L.M. 1486 (1992).

110 See J. A. Frowein, 'Non-Recognition', in R. Bernhardt *et. al.* (eds), 3 *Encyclopedia of Public International Law* (1992), 627. Recognition itself is not a formal requirement of Statehood. Rather, recognition merely accepts a factual occurrence. Thus recognition is "declaratory" as opposed to "constitutive." Nonetheless, no State is required to recognize an entity claiming Statehood.

EU colleagues have. Whether Kosovo will be successful in entering the EU, when five Member States do not as of yet recognize it as a State, also remains to be seen. Article 237 of the Treaty of Rome requires unanimity of current Member States for the admission of a new State to the Union.

Nonetheless, regions within the EU that are contemplating secession rarely discuss the hurdles of recognition and accession. To the extent that they do, they do not see them as hurdles. The Scottish National Party (SNP), for instance, asserts that, if Scotland becomes independent, it will "automatically remain part of the EU"; they base their argument on Vienna Convention on State Succession in Respect to Treaties (VCSS).[111] As a matter of public international law, that argument is difficult to sustain. The VCSS may be in force, but there are only twenty-two parties, no large EU States, but for Poland,[112] and it is not widely accepted. As a simple matter then, it is not binding as a treaty on most of the members of the EU. Moreover, there is no strong argument that the VCSS has become customary international law.

Furthermore, the VCSS is not applied if it would be "incompatible with [the] object and purpose of the treaty"[113]. The SNP's argument would allow the VCSS to circumvent the Treaty of Rome's requirement for

[111] James, *supra* note 8, 1; Vienna Convention on State Succession in Respect to Treaties 946 U.N.T.S. 3; 17 I.L.M. (1978), 1488. Scottish nationalists (and other separatist groups) have extended this argument to apply to other international organizations. The Scottish executive wrote:

"3.22 With independence, Scotland would become a full member of the United Nations and other international bodies, such as the Commonwealth, the World Health Organization, the Organisation for Economic Co-operation and Development and the World Trade Organisation. This would give Scotland its own voice on the international stage, allow the distinctive views of its people to be expressed on the range of issues facing the world today, and allow Scottish Ministers to argue for Scottish interests in international negotiations directly affecting the interests of the nation (for example, on international trade)".

'Choosing Scotland's Future – A National Conversation: Independence and Responsibility in the Modern World', para 3.22 (14 August 2007) available at http://www.scotland.gov.uk/Publications/2007/08/13103747/0 (last visited 20 December 2010). Quebecois nationalists have also argued for Quebec's automatic succession to NAFTA.

[112] See, United Nations Treaty Collection Database, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en (last visited 14 December 2010).

[113] Vienna Convention on State Succession in Respect to Treaties, *supra* note 111, Art 34.

Member State unanimity, arguably frustrating an object or purpose of that treaty.[114]

Based on these arguments, it is clear that if a region of an EU Member State secedes, it will not only have to seek recognition as a State, but also apply to re-enter the EU, this time as a Member State. This makes outright separation less attractive than may have been assumed. While the power of regions within the EU may be increasing in relation to existing States, once a region secedes, thus leaving the EU, that region's bargaining power is greatly decreased in comparison to the pre-existing State, whose acquiescence is needed for any accession bid. In short, secession removes one from the bargaining table and reduces one to almost being a supplicant.[115]

Another scenario should be considered though, one that is more like the Kosovo scenario and less like Catalonia: the case of the separatist region in a State that is not as of yet a Member State of the EU, but hopes to accede in the short to medium term. This could apply to the "frozen conflict" States of Moldova (with Transnistrian separatism), Georgia (South Ossetia and Abkhazia), and Azerbaijan (Nagorno-Karabakh) as well as other potential aspirants. In these cases, the strategy is to use the possibility of EU accession as a carrot for a peaceful resolution of the dispute. In the case of Cyprus, the EU tried to use the possibility of a reunified Cyprus being the only way that Northern Cyprus would enter the EU as an inducement to settle the conflict. While the prospect did help the Northern Cypriots sign-on to a UN peace plan, the Greek Cypriots scuttled the deal, thus showing the fragility of such techniques. It may have worked if it was used as both a carrot and a stick, stating that the only way either part of the island would be allowed into the EU was if they resolved their conflict.

In the case of Kosovo and Serbia, although the separation has already occurred, the prospect of EU accession for each State seems to be a bargaining chip that is being used by EU negotiators to lead to better relations between the two parties. It has at least resulted in Serbia withdrawing is first post-Advisory Opinion resolution in favor of a compromise resolution with the EU. Where these negotiations may go from here remains to be seen. Ultimately, EU membership for both a pre-existing State and its former region provides a "common framework for [the] two

114 James, *supra* note 8, 2.
115 See, James, *supra* note 8, 13.

sovereign states, facilitating the process of reconciliation within a multilateral framework"[116].

Whether this technique may be useful regarding the frozen conflicts is related to how credible an aspirant each State is for membership in the EU. If a State is considered to be unlikely to be accepted into the EU, then trying to entice a separatist region to resolve a conflict so that it may enter along with the parent State is not a strong bargaining position. What this shows, at least, is another bargaining possibility in which EU accession policies may be used to help resolve separatist conflicts not only in the EU, but in the European neighborhood.

D. Separation in an Age of Integration (and Vice Versa)

The process of European integration has affected the interests and strategies of sub-State groups seeking greater autonomy and independence, and it has affected the States that are responding to such groups. Neither these putative nations nor the States in which they exist use purely local strategies. Transnational networks of regions and of States jostle for advantages at both the local and the European level. For local advantage, one must build global networks. And in the international competition for power, you need to be mindful of constituencies within your own State. The local and the global conflate. All politics is *glocal*.

As such, there are at least two "europeanizations" of regional issues. One strengthens national governments by providing a means to undo domestic political bargains between a region and a central government by making the central government the sole negotiator with Brussels and the other central governments. Another aspect of this State-supporting Europeanization is by defining separatists as terrorists and then addressing separatist conflicts "only under the auspices of antiterrorist cooperation"[117].

Another form of Europeanization empowers the regions *vis-a-vis* the national governments. This is the Europeanization where regions are given a seat at the bargaining table or direct access to supranational policy-makers in Brussels. To a certain extent, this is also the bootstrapping of regions into greater political power through the use of informal transnational networks. This version of Europeanization is still nascent. Article 2 of the Lisbon Treaty allows for greater consultation and for rights of action before the

116 Coppieters, *supra* note 37, 254-255.
117 Coppieters, *supra* note 37, 252.

European Court of Justice, but the preponderance of power still lies with the States. Over time, the interplay of informal networks, and the kernels of possibilities embedded in the Lisbon Treaty may grow into a more robust Europe of the Regions. Some have argued that this is the trend in European politics as there is an unstated alliance between supranationalists who want strong European institutions and separatists, who want increased regional power. Both parties have an interest in weakening the State. In the short to medium term, they can do this by increasing regional prerogatives and increasing the direct dialogue between regions and Brussels.[118]

Of what purpose is separation when many separatists also claim to be ardent Europeanists? Two issues seem to recur. One is a sense that local cultures and languages will be better respected via European institutions than by their own States. Maite Goientxe, a Basque representative at the Days of Corte, noted:

> "Like all cultural questions, language is ultimately a political matter. Basque is not permitted today in my part of France, *which means Basque representatives from my region can speak Basque at the Parliament in Brussels, but not back home.* From our perspective that's discrimination. Critics say separatists promote division and exclusion, but we say independence movements are about the opposite of exclusion. We want to get rid of the exclusion we feel today."[119]

The irony is that while the prospect of constructing a supranational Europe, rather than homogenizing, say, Basques and Occitanes, into undifferentiated "Europeans", has helped these movements to define themselves more clearly. At one time, this may have been due to founded or unfounded fears of homogenization spurring a group to action (or at least to a sharper sense of self-definition). Think of the Basque reticence to Spain's accession to the EC. But the effect of Europeanization seems to have changed the strategy of nationalists into an appreciation of the advantages of a supranational Europe. Perhaps more so than the much-anticipated ICJ Advisory Opinion on Kosovo, EU policies towards language rights and

[118] See, *e.g.*, Barber, *supra* note 39, 172-173 (arguing that some see in the work of the Western European Language Bureau, a group that encourages the use of regional languages, "a subtle strategy of national deconstruction by which the European whole nurtures the subnational fragments, all the better to undercut the resistance to wholeness on the part of the nation-states".).

[119] As quoted in Kimmelman, *supra* note 41.

cultural diversity will likely be important factors in framing the ongoing push-and-pull between national minorities and national governments in the EU. If the Days of Corte are any indication, linguistic and cultural politics (more so than ideological or ethnic politics) will likely remain the central issues in this debate.

Besides language and culture rights, a second reason driving separatist politics within a framework of European integration is economics. Various secessionist movements had elements of "tax exits" or resource control struggles in which the separating group wanted to stop paying rents to the central government and/or wanted to keep resources within their own territory for themselves. The Transnistrian, Slovenian, and Croatian separations or secessions all had elements of tax exits.[120] Separatist conflicts and insurgencies in East and Central Africa are in part over the control of diamond mines and other valuable resources. While tax exits or resource control may not be the only (or even the main) reason motivating calls for separation, the availability of local resources is an important aspect in the viability of such claims for separation.[121] The economic advantages of separation (for both Catalonia and the EU) has not been lost on the Catalans; Catalan MEP Oriol Junqueras has said:

> "There is a growing body of academic research which supports the assertion that smaller nations are better equipped to deal with economic difficulty in the longer term. This is particularly relevant during this current time of economic difficulty when we see how, for example, the size of the Spanish state has not helped avoid recession. Catalonia is netly contributing 10% of its GDP to Spain each year and yet the state has hugely increased its debt, threatening the euro and Euro stability. Catalan independence is clearly in the EU interest."[122]

120 P. Collier & A. Hoeffler, 'The Political Economy of Secession', in H. Hannum & E. F. Babbitt (eds), *Negotiating Self Determination* (2006), 46 (concerning Slovenia and Croatia). But see Slovakia as a counter-example, where maintaining federation would have been more economically advantageous, *id*., 50-51.

121 See, *e.g*., Collier & Hoeffler, *supra* note 120, 37, 46 (arguing "secessions depend upon the invention of an imagined political community and that natural resources will often be instrumental in transforming this invention from the pipe dream of a handful of romantics to the reality of a large political or military organization.").

122 European Free Alliance, 'EU must be ready for enlargement from within' (16 Nov. 2010) available at http://www.e-f-a.org/news.php?id=583 (last visited 14 December 2010).

This economic logic for separation from a current State and then reintegration in the EU is common. Juan Enriquez wrote:

> "Given that Europe, in 1500, had approximately five hundred political entities, and that the EU umbrella greatly reduced the cost of independence, the unwinding of existing countries might continue for a long time [...] Think about what would happen should the Basques become a sovereign country. No need to establish a new currency. They'd keep the euro. Nor would they need to build up a large army. Got NATO to protect them. EU passport allows them to trade, work, and travel anywhere in Europe. Not surprisingly, Europeans with separatist agendas, like Basques and Catalans, tend to be among the most supportive of EU integration."[123]

But while this may point to certain economic and administrative advantages, it misses the legal and political reality that these benefits of EU (and NATO) membership are predicated on first achieving recognition and actual membership, an issue which is not a foregone conclusion if the pre-existing State is already a member of these institutions and unhappy about the secession of its former territory. Bargaining over international organization membership is likely to become one of the key areas of disputation related to separatism in and around the EU.

The aftermath of the ICJ Advisory Opinion may be to show the limited relevance of that opinion and perhaps, more broadly, of the ICJ in relation to secessionist issues in Europe. The locus of norm-making has moved from the United Nations and its various organs to the EU. The key debates are no longer over the broad political-juridical issues such as "what is self-determination" but rather over narrower topics such as "what are the scope of language rights within the EU" or "how may one regulate cultural practices". Self-determination, in the sense of minority rights, is a given; the debate has moved on to implementation.

Related to this, the ongoing evolution of the power of regions within the EU will affect whether national aspirations will be realized within existing States or by attempted separations. In the case of attempted secession, the relevant issues now include questions of accession and succession to international organizations such as the EU (above and beyond the issue of recognition). Consequently, the technical body of laws

[123] Enriquez, *supra* note 107, 216.

concerning international organizations, as well as the internal regulations of the relevant organizations, may have as much – or even a greater – effect on the claims of (and the viability of) nationalist movements as the holdings of cases like the Kosovo Advisory Opinion. The Kosovo opinion has seemingly had little impact in terms of increasing recognition for Kosovo; had the opinion explicitly said Kosovo's declaration was illegal, one can be skeptical that any State that had previously recognized Kosovo would have withdrawn its recognition. But, whether a national group seeking separation will find itself without any recognitions or the ability to join a key regional trade group or a security alliance may affect whether or not that group even claims a right to secede. Moreover, the rules that may affect accession to these international organization may affect how a nationalist group makes its claims and how a State may respond to those claims. Thus, the administrative and organizational regulations of international organizations such as the EU may do more to frame national claims, at least in particular cases, than the opinions of the World Court. And, in doing so, new habits of State practice begin.

These developments may be viewed as the maturing of international law as a legal system, at least within one region. It may also mark the relative depth of regional norm-creation in contrast to the difficulty of global norm-creation. Within Europe (and to a lesser extent within other regions), policy-makers are moving from largely philosophical questions to more precise issues of implementation and administration. This may be a promising development. But then again, the devil is in the details: It remains to be seen whether this move from the aspirational rhetoric of self-determination to the technical language of organization will actually assist in conflict prevention or resolution.

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The Two Faces of the Internationalized *pouvoir constituant*: Independence and Constitution-Making Under External Influence in Kosovo

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Abstract

This article discusses the concept of the internationalized *pouvoir constituant* with regard to the ICJ's Advisory Opinion on Kosovo. It argues that independence and constitution-making under external influence in Kosovo represent two faces of the same internationalized constituent power aspiring for self-determination. It is submitted here that the ICJ's Opinion implicitly recognizes the constitutional law concept of *pouvoir constituant* and its relevance in international law. While the Court's reasoning is limited to the legality of the declaration of independence, international involvement in constitution-making in Kosovo equally raises questions of legality and legitimacy under international law. The paper discusses some of these questions by drawing from constitutional law and theory. In order to do so, the article briefly sets out the historical and political context, before describing how the two faces of the internationalized *pouvoir constituant* evolved during the period of international administration in Kosovo. In the next step, it analyzes the treatment of the constituent power in the ICJ's Advisory Opinion, and then attempts to assess the legality of international involvement in constitution-making in Kosovo. Finally, it discusses some potential standards of legitimacy for the internationalized *pouvoir constituant*.

A. Introduction

Traditionally, constitutional law and international law have been regarded as distinct legal orders and as distinct disciplinary fields of study. These distinctions have been eroding for some time. Three trends contribute to that erosion process: First, scholars have increasingly investigated the influence of international law on existing domestic constitutional regimes, notably with respect to human rights and democratization.[1] A second trend

[1] See for instance B.-O. Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', 42 *Der Staat* (2003), 61; J. A. Frowein, 'The transformation of constitutional law through the European Convention on Human Rights', 41 *Israel Law Review* (2008), 489; T. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 1, 46. On transition states, see the contributions by G. Nolte, G. Malinverni & J. Rubenfeld in 'The International Influences on National Constitutional Law in States in Transitions', 96 *ASIL Proceedings* (2002), 389. On Eastern Europe, see in particular P. Sonnevend, 'International Human Rights Standards and the Constitutional

is the discourse on constitutionalization of international law, which attempts to enrich the international legal order with principles familiar from domestic constitutionalism.[2] Finally, the international community has increasingly been involved in processes of state-building in recent years, and these processes have often included the creation of altogether new constitutional orders. Although this is not an entirely new phenomenon, state-building and internationalized constitution-making have gained particular momentum since the mid-1990s, notably in Bosnia, East Timor, Sudan, Afghanistan and Iraq – and most recently, Kosovo.[3]

The ICJ's Advisory Opinion on Kosovo stands at this crossroads between constitutional and international law, where ideas from both legal orders intersect, collide and sometimes merge into new concepts. One such new concept is the idea of the "internationalized *pouvoir constituant*"[4], which is the main theme of this article. Hence, this paper will describe the two faces of this internationalized constituent power in Kosovo, and address its legal framing and taming in international law. In doing so, the article will make three main arguments: First, it is submitted here that the ICJ Advisory Opinion presupposes the appearance of an internationalized Kosovar *pouvoir constituant* on the stage of international law. Arguably, the Court's reasoning mainly rests on the distinction between the *pouvoir constitué* established by international law and the *pouvoir constituant* emerging from both international and constitutional law.

Second, I hope to show that the internationalized constituent power has two faces, one turned to the outside and one to the inside: It has shown its first face when declaring independence, which can be seen as the external exercise of popular sovereignty by a Kosovar *pouvoir constituant*,

Jurisprudence of Transition States in Central and Eastern Europe', 96 *ASIL Proceedings* (2002), 397.

2 Bryde, *supra* note 1; J. A. Frowein, 'Konstitutionalisierung des Völkerrechts', 39 *Berichte der deutschen Gesellschaft für Völkerrecht* (2000), 427; J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law*, 2009.

3 For an overview, see A. v. Bogdandy *et al.*, 'State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches', in: A. v. Bogdandy & R. Wolfrum (eds), 9 *Max Planck Yearbook of United Nations Law* (2005), 579, and further contributions in that volume; S. Chesterman, *You, the People. The United Nations Transitional Administration, and State-Building* (2004); N. Feldman, 'Imposed Constitutionalism', 37 *Connecticut Law Review* (2004-5) 4, 857, and the responses to his contribution in the same issue.

4 P. Dann & Z. Al-Ali, 'The Internationalized Pouvoir Constituant: Constitution-Making Under External Influence in Iraq, Sudan and East Timor', in: A. v. Bogdandy & R. Wolfrum (eds), 10 *Max Planck Yearbook of United Nations Law* (2006), 423.

engineered by members of the international community. It has shown its second face when enacting a constitution, which can be considered as the internal manifestation of the constituent power. This manifestation was equally internationalized, because the international community has also accounted for a prolonged process of constitutionalization in Kosovo. This international involvement in constitution-making can be seen as the flipside of independence, which remains, in that sense, "supervised". While this intuitively seems to be a fair tradeoff for Kosovo, such international involvement does raise questions of legality and legitimacy under international law.

Hence, my third argument is that not only the external, but also the internal manifestation of the internationalized *pouvoir constituant* deserves attention when it comes to assessing its legality and legitimacy under international law. For the enactment of a constitution is not only one of the core attributes of sovereignty, but is also regarded as an inherently democratic exercise, at least in the liberal tradition of constitution-making. Consequently, the involvement of international actors in such constitutionalization processes raises the question of the legality and legitimacy of such external influence. In fact, it is submitted here that the ICJ's recognition of the internationalized *pouvoir constituant* in Kosovo draws attention to the fact that self-determination is not only about independence, but also about constitution-making.

While acknowledging the various understandings of the notion of *pouvoir constituant*,[5] and in particular a longstanding positivist tradition,[6] this article employs a more substantive concept and follows the tradition of liberal constitutionalist thinking. This tradition accentuates the values of individual and collective autonomy in constitution-making – a view which is not necessarily referring to natural law,[7] but can increasingly be grounded in evolving international law standards of human rights and democratic governance.[8]

In the following sections, I will first describe briefly the historical and political context and will then demonstrate how the two faces of the

5 On the notion, see C. Möllers, 'Pouvoir Constituant – Constitution – Constitutionalisation', in: A. v. Bogdandy_& J. Bast (eds), *Principles of European Constitutional Law* (2006) 183.

6 H. Kelsen, *Reine Rechtslehre*, 2nd ed. (1960), 201.

7 See for instance H. Maurer, 'Verfassungsänderung im Parteienstaat', in: K. Kästner, K. Nörr & K. Schlaich (eds), *Festschrift für Martin Heckel* (1999), 828.

8 Cf. *supra* note 1.

internationalized *pouvoir constituant* have evolved during the period of international administration (B). The next step analyzes the treatment of the constituent power in the ICJ's Advisory Opinion, and then attempts to assess the legality of international involvement in constitution-making in Kosovo (C.). The conclusion discusses some potential standards of legitimacy for the internationalized *pouvoir constituant* (D.).

B. The Historical Context and the Evolution of the two Faces of the Internationalized *pouvoir constituant* in Kosovo

The internationalized constitution-making in Kosovo did not take place in a vacuum, but in the context of Kosovo's earlier constitutional status within Yugoslavia and of the armed conflict in the late 1990s. I will briefly recall this context before setting out the internationalization of constitutional developments in Kosovo in more detail.

I. The Historical and Political Context

The story of Kosovo's status in former Yugoslavia and of the violent conflict need not be recounted again here in detail.[9] Suffice it to say that under the constitutional system of the Federal Republic of Yugoslavia and the Republic of Serbia, Kosovo had enjoyed considerable autonomy as an autonomous province since 1974. In 1989/90, a constitutional reform largely abrogated these prerogatives. In reaction, the former ethnic Albanian members of the Kosovo Assembly declared Kosovo an independent sovereign state, the 'Republic of Kosova', in September 1991. However, Albania was the only country to recognize this declaration of independence.[10]

The ensuing Kosovo conflict displayed at least three relevant characteristics which are important for the context of later internationalized constitution-making in the territory. The first aspect is the conflict's nature as an armed conflict in the international law sense, which has to be

9 For detailed accounts, see I. Cismas, 'Secession in Theory and Practice: The Case of Kosovo and Beyond', 2 *Goettingen Journal of International Law* (2010) 2, 531; L. Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (2002); Independent International Commission on Kosovo, *Kosovo Report. Conflict, International Response, Lessons Learned* (2000), Part I.; N. Malcolm, *Kosovo: A Short History* (1998).

10 Cismas, *supra* note 9, 555-580; Sell, *supra* note 9, 65-93.

considered when looking for potential international law standards for the *pouvoir constituant*. The second characteristic is the ethno-political nature of the conflict. Figures concerning current population shares in Kosovo vary, but range from 88-92% Albanian, 5-8% Serb and 4-5% others, with a total population of roughly two million inhabitants.[11] These demographics, and the prolonged history of inter-ethnic violence, had to be taken into account by any constitution-maker seeking to integrate a divided multi-ethnic society into one political polity.

The third aspect relevant to later constitution-making is the internationalization of the conflict. As is well known, Security Council Resolution 1244[12], adopted on the basis of Chapter VII on 10 June 1999, authorized an international peacekeeping force to deploy in Kosovo, placed the territory under UN interim administration and resulted in the establishment of numerous international presences, taking over basic governmental functions.[13] Hence, further constitutional developments in Kosovo took place in a highly internationalized setting, both in terms of applicable law and the nature of the actors involved.

II. Internationalizing the two Faces of the *pouvoir constituant* in Kosovo

During the following period of international administration, the two faces of the internationalized *pouvoir constituant* developed in parallel. Before analyzing the notion of *pouvoir constituant* in more detail, I would like to set out the factual developments. These were marked by four documents of constitutional relevance: First the "Constitutional Framework

11 Cf. UNMIK/Kosovo Ministry of Public Services, 'Kosovo in Figures' (2005), 9, available at http://web.archive.org/web/20080309073836/http://www.ks-gov.net/esk/esk/pdf/english/general/kosovo_figures_05.pdf (last visited 10 December 2010); CIA, 'World Factbook, Kosovo', available at https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html#People (last visited 17 November 2010).

12 Available at http://www.unmikonline.org/misc/N9917289.pdf (last visited 17 November 2010).

13 On international territorial administration, see for instance J. Friedrich, 'UNMIK in Kosovo: Struggling with Uncertainty', in: A v. Bogdandy & R. Wolfrum (eds), 9 *Max Planck Yearbook of United Nations Law* (2005), 225; C. Stahn, 'International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead', 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001), 107.

for Provisional Self-Government of Kosovo" promulgated in May 2001[14]; second, the "Comprehensive Settlement Proposal" put forward by Martti Ahtisaari in March 2007[15]; then the Unilateral Declaration of Independence (UDI) issued in February 2008; and finally the Constitution of the Republic of Kosovo which entered into force in June 2008.[16]

International involvement in these steps, and hence the internationalization of both faces of the *pouvoir constituant*, can be analyzed according to three criteria: First, the degree of international influence, which can be total, partial, or marginal. The second criterion regards the object of the influence, which can either be the procedure of the constitution-making or the substantive outcome of the process. A final distinction concerns the actors involved in the process, which can be either local, or individual states, or multilateral institutions.[17] Through the lens of this categorization, it will be seen that international actors initially were in full control of the process, but ceded power to local representatives over time, without however giving up their influence altogether.

1. Creating the International *pouvoir constitué* and Preconfiguring the *pouvoir constituant*

a) The Constitutional Framework for Provisional Self-Government of Kosovo

A first cautious step in the transfer of power to Kosovar authorities is represented by the "Constitutional Framework for Provisional Self-Government of Kosovo".[18] It was contained in UNMIK Regulation 2001/9 of 15 May 2001 and promulgated by the Special Representative of the Secretary General (SRSG) in Kosovo, who held broad legislative, executive and judicial powers under Security Council Resolution 1244.[19] These

14 Available at http://www.unmikonline.org/constframework.htm (last visited 17 November 2010).

15 Available at http://www.unosek.org/unosek/en/statusproposal.html (last visited 17 November 2010).

16 Both available at http://www.assembly-kosova.org (last visited 17 November 2010).

17 On these categories, see Dann & Al-Ali, *supra* note 4, 428-430.

18 On the Framework in detail, see C. Stahn, 'Constitution Without a State: Kosovo Under the United Nations Constitutional Framework for Self-Government', 14 *Leiden Journal of International Law* (2001) 3, 531.

19 Cf. SC Res. 1244 (1999), operative clauses 6, 10, 11; Friedrich, *supra* note 13, 233-242; Stahn, *supra* note 13, 134, 150.

included the responsibility to promote substantial autonomy and self government in Kosovo by "[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government" and transferring administrative responsibilities to these institutions.[20] The only real actor in constitution-making at this stage, however, was the SRSG, who retained total control over both procedure and substance of the law-making.[21]

Whether the Framework represents a constitution at all, has been disputed.[22] On the one hand, the Framework regulates matters which are ordinarily the subject of internal constitutional law: It contains provisions on human rights protection and the organization of government, including a rudimentary separation of powers among the PISG themselves and judicial review of acts of Parliament, and takes particular care to ensure participation of all ethnic communities in political affairs – notably of the Serb community, who had transformed from a majority within Serbia to a minority within Kosovo. In that sense, the Framework establishes a *pouvoir constitué* with classical features of government.

On the other hand, the Constitutional Framework reserved considerable discretionary powers to the SRSG, without subjecting him to any form of review. Also, there is no normative hierarchy with regard to other acts of the SRSG, who could at any time explicitly or impliedly repeal any aspect of the Framework. In addition, the SRSG could not be considered as a representative of those subjected to the legal order he created. As a consequence, the entire Framework lacks important material aspects of a constitution as understood in liberal constitutional theory.

Hence the *pouvoir constituant* in Kosovo was largely absent in the interim period – at least if understood in the liberal sense, which requires it to be connected in some way to the will of the people. Still, the Framework may contain a hint at the potential subject of future constitution-making: The preamble notes "the legitimate aspirations of the people of Kosovo

20 SC Res. 1244 (1999), operative clause 11 (a), (c), (d).

21 Friedrich, *supra* note 13, 256-260; A. Borgolivier, 'Behind the Framework', UNMIK/FR/0040/01 (25 May 2001), available at http://www.unmikonline.org/pub/features/fr040.html (last visited 17 November 2010); V. Morina, 'The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns', 35 *Review of Central and East European Law* (2010), 129, 131.

22 Cf. Friedrich, *supra* note 13, 260; Stahn, *supra* note 18, 543-549. Indeed, UNMIK resisted Kosovar desires to enact a proper constitution, pointing to Kosovo's unsettled status and SC Res. 1244, Borgolivier, *supra* note 21.

[…]", and Art. 1.1 holds that "Kosovo is an entity under international administration which, with its people, has unique historical, legal, cultural and linguistic attributes". While this clause can be interpreted in different ways, it can be read to acknowledge common attributes of a nation, the "people of Kosovo",[23] from which a *pouvoir constituant* may later emanate – after having gone through an internationalized status settlement process.

b) The Comprehensive Proposal for the Kosovo Status Settlement

The status settlement process launched in 2005 culminated in the "Comprehensive Proposal for the Kosovo Status Settlement" (CSP/Ahtisaari Plan). The CSP was submitted by the Special Envoy of the UN Secretary-General, Martti Ahtissaari, on 26 March 2007.[24] It framed both faces of the *pouvoir constituant*: First, it recommended supervised independence as the only viable solution for the Kosovo conflict. At the same time, the Ahtisaari Plan contained seven pages of detailed prescriptions for the future constitutional order of the new Republic of Kosovo (CSP Art. 1-3, 10 and Annex I). These pertained to the substance of the constitutional document as well as to the procedure according to which it was to be drafted and enacted. It envisaged a parliamentary republic with a modern human rights catalogue including directly applicable international human rights instruments, as well as a sophisticated system of minority protection and participation mechanisms, to be enforced by a constitutional court and, if need be, by an "International Civilian Representative" (ICR) replacing the SRSG.[25]

23 This would, however, be problematic in as much as it excludes the non-Albanian communities, who do not share the linguistic and cultural attributes, from the "people of Kosovo".

24 For detailed accounts of the status settlement process see H. Perrit, *The Road to Independence for Kosovo. A Chronicle of the Ahtisaari Plan* (2010); M. Weller, *Contested Statehood: Kosovo's Struggle for Independence* (2009).

25 On the international governance structures established by the CSP, see R. Muharremi, 'The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law', 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010) 2, 357; M. Spernbauer, 'EULEX in Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date', 11 *German Law Journal* (2010) 8, 769; E. de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of Eulex', 103 *American Journal of International Law* (2009) 1, 83.

The CSP was the result of prolonged diplomatic negotiations between delegations from Serbia and Kosovo, which comprised ministers and government officials on the Serbian side, while Kosovars were represented by a "Unity Team" mainly formed by political party leaders. The composition of the Kosovar delegation was influenced by the SRSG and was largely determined by the success of each respective party in the free elections held earlier in Kosovo. The negotiations touched upon all major issues of dispute between the parties, including such sensitive constitutional issues as local self-government and minority protection and participation.[26] Yet the two sides did not reach agreement, and Ahtisaari unilaterally submitted a final draft of the CSP to the Secretary-General. Due to disagreements with Serbia and Russia, it was neither included in an international agreement nor endorsed in a Security Council resolution, but only adopted by the Kosovo Assembly in 2007.[27]

In this phase, international involvement receded to partial influence, exerted mainly by Ahtisaari and his team, who had been appointed by the UN Secretary-General. It was largely multilateral and took the form of mediation in the beginning, but also involved some substantive decision-making in deadlock situations and towards the end of the process. In addition, some individual states represented in the so-called "Contact Group" and the "Troika" influenced the process, with the US inclined to push for independence and Russia tending to oppose it.[28] Other actors were Serbian diplomats, representing one individual state pursuing a particularly strong interest of preserving its own sovereignty, and representatives from Kosovo, mainly drawn from the Albanian majority population. As a consequence, Kosovo Serbs sometimes felt underrepresented in the negotiations.[29] The diplomatic modus also meant that the talks were mainly held behind closed doors, and consultations with other actors in Kosovo not directly taking part in the negotiations seem to have been rare. The substantive outcome reflected the international's and Serbia's commitment

[26] Perrit, *supra* note 24, 119-161.

[27] *Id.*, 171; 'Declaration of the Assembly of Kosovo in accordance to the Report Martti Ahtisaari' [*sic*] (5 April 2007), reprinted in English, in: OSCE, *Assembly Support Initiative Newsletter*, No. 27, (May 2007), 5, available at http://www.osce.org/publications/mik/2007/04/24145_831_en.pdf (last visited 17 November 2010).

[28] Perrit, *supra* note 24, 119-122, 128-131.

[29] *Id.*, 141, 145.

to minority protection, and did take over a number of important features from the Constitutional Framework.[30]

The CSP represented a significant step in the internationalization of both faces of the nascent *pouvoir constituant* in Kosovo. It was for the "people of Kosovo" that the CSP envisaged independence, while at the same time attaching conditions to such "supervised" independence. These conditions pertained in particular to constitutional standards for the internal organization of a future independent polity. These standards were mostly inspired by, or even identical with, widely accepted international human rights instruments and mechanisms for minority protection and participation.

To sum up, constitution-making was largely preconfigured by, and partly occurred in the guise of, diplomatic negotiations on independence. Independence was made conditional upon a constitutional order largely prescribed by the international community, or in other words: The *pouvoir constituant* in Kosovo was allowed to break free and declare independence if and when it subjected itself to the bonds of liberal constitutionalism and international law, with particular emphasis on minority protection. Thus, internationalization necessarily concerned both faces of the *pouvoir constituant*.

2. Exercising the *pouvoir constituant*

a) The Unilateral Declaration of Independence

During 2007, it became clear that neither a negotiated solution nor a Security Council resolution in relation to Kosovo's status were feasible. Since prolonging the dissatisfactory situation of international administration was seen less and less as a viable option, international actors were looking for an alternative solution. This solution was represented by the exercise of the local *pouvoir constituant*, albeit supervised in both of its faces by the international community.[31]

The result was the Unilateral Declaration of Independence (UDI) promulgated in Pristina on 17 February 2008. It was adopted in an extraordinary session of the members of the Assembly of Kosovo, who had been elected in largely free and fair elections under the Constitutional

30 On the details of the plan, see *id*., 163-170.

31 On the political options and decision making, see *id.*, 177-189.

Framework, supervised by the international community. All 109 deputies present at that session voted in favor, including nine representatives of non-Serb minority communities. Eleven deputies representing Serbian national minority boycotted the proceedings, so that the Serb minority population in Kosovo was not represented in the final vote.[32]

The language of the UDI itself makes no mention of the Assembly as a Provisional Institution of Self Governance. Rather, its authors identify themselves as the "democratically elected leaders of our people", who "declare Kosovo to be an independent and sovereign state", which "reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement". Hence the deputies claimed some sort of democratic legitimacy for themselves, aspiring to be the "representatives of the people" and a *pouvoir constituant* also in the liberal democratic sense.

Furthermore, the signatories of the declaration announce that "[w]e shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process." Finally, they "affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. […] We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship".

It emerges from the UDI's language that its authors consider themselves to be, at the same time, the framers of a future constitution, thereby equalizing the *pouvoir constituant* declaring independence and adopting the constitution. It becomes clear from the UDI's text that its framers were fully cognizant of the internationalized context, and the "supervised" nature, of their exercise of the *pouvoir constituant*. At this stage, the international community had stepped backstage and let local actors take the floor, while still retaining a partial influence over procedure and substance through the Ahtisaari Plan requirements and their inclusion in the UDI.

[32] See the official transcript of the Kosovar Assembly session, available in Albanian at http://www.assembly-kosova.org/common/docs/proc/trans_s_2008_02_17_al.pdf (last visited 17 November 2010).

b) The Constitution of the Republic of Kosovo

The final step in the exercise of the internationalized constituent power was the adoption of the "Constitution of the Republic of Kosovo". Formally, the constitution-making process meticulously followed the procedure set out in the CSP[33]: Two days after independence was declared, a Constitutional Commission was convened by the President of Kosovo. It elaborated a draft constitution, held a series of public debates and submitted a final draft in April. According to the CSP, this draft had to be "certified" by the ICR, which had largely replaced the SRSG. In his assessment, the ICR relied namely on expert advice from the Venice Commission, which represents another noteworthy form of multilateral involvement in constitution-making. Only after certification was the draft adopted by the Assembly, and entered into force on 15 June 2008. Its content reflected the substantive prescriptions of the CSP, sometimes even to the letter, including the normative supremacy of the Ahtisaari Plan over the Constitution in case of norm collisions as well as supra-constitutional prerogatives of the ICR.[34]

While the official process closely followed the procedure foreseen in the CSP, constitutional developments had in reality been set in motion already in March 2007 in parallel to the political discussions about the CSP.[35] Kosovar members of the Constitutional Commission were selected in early 2007 in consultation with international advisors, including the US Agency for International Development (USAID) and other donors. These advisors accompanied the drafting process and acted as mediators when Kosovar representatives were unable to reach an agreement. The subsequent draft texts were kept confidential pending a diplomatic settlement of Kosovo status, and even though a draft was ready by December 2007, it was published on a website only some hours after the declaration of independence.[36]

The role of the international community in the drafting process was twofold: First, it was involved in the selection of the Commission members,

33 Cf. Art. 10 and 11 of the CSP and the official website of the Constitutional Commission at http://www.kushtetutakosoves.info/?cid=2,1 (last visited 17 November 2010).

34 On the substance of the constitution see in detail J. Marko, 'The New Kosovo Constitution in a Regional Comparative Perspective', 33 *Review of Central and East European Law* (2008) 4, 437.

35 J. Tunheim, 'Rule of Law and the Kosovo Constitution', 18 *Minnesota Journal of International Law* (2009), 371, 374-375.

36 *Id.*, 376-378.

ensured the Ahtisaari Plan procedure was followed and provided technical assistance and legal expertise to the drafters. Second, it made sure that the substantive prescriptions of the CSP, to which the UDI had committed the Republic of Kosovo, were duly integrated into the new constitutional document. International influence remained partial and was exercised formally through the multilateral institutions created in Kosovo, namely the ICR and the Venice Commission, who retained a veto right over the final constitution. At the same time, the European Union and some individual states yielded more influence in the process than others. For instance, USAID provided strong technical support to the Constitutional Commission, and the Constitution's language is at times reminiscent of US constitutional law terminology, without however adopting other features such as the presidential system.[37]

In short, while the ultimate decision-making power in both independence and constitution-making lay with the representatives of the Kosovar population, these representatives were acting within the procedural and substantive limits set by the international community – and hence embodied the internationalized *pouvoir constituant*.

C. Assessing the Legality of the Exercises of the Internationalized *pouvoir constituant* in Kosovo

This article departed from the proposition that Kosovo represents an instance of the internationalized *pouvoir constituant* at work. The following part will substantiate that proposition. I would like to show that the ICJ implicitly recognized the internationalized *pouvoir constituant* in Kosovo, and inquire into the legality of its exercise, first with regard to independence, and second with regard to constitution-making. Since the legality of the declaration of independence has been covered widely elsewhere[38], I will mainly focus on standards for international involvement in the constitutionalization process.

37 On US-American influences and respective criticism see Marko, *supra* note 34, 442, 446.

38 See, *inter alia*, M. Vashakmadze & M. Lippold, '"Nothing but a Road Towards Secession"? – The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', 2 *Goettingen Journal of International Law* (2010) 2, 619; M. Bothe, 'Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo's Independence', 11 *German Law Journal* (2010) 8, 837; R. Howse & R. Teitel, 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of

I. Independence and the *pouvoir constituant* in the ICJ's Advisory Opinion

While the distinction between *pouvoir constituant* and *pouvoir constitué* is well established in constitutional theory, international law's relationship to the two concepts is less clear. However, it is argued here that the distinction between the two ideas is at the very heart of the ICJ's Advisory Opinion. This is less apparent in the first part of the Court's reasoning on the accordance of the UDI with general international law. However, when assessing whether the UDI is in violation of Security Council Resolution 1244 and the Constitutional Framework, the Court enters the crossroads between international and constitutional law in order to distinguish between the *pouvoir constitué* and the *pouvoir constituant*.

1. The Law Applicable to the Internationalized *pouvoir constitué* in Respect of the Declaration of Independence

When determining the law applicable to the UDI, the Court first had to make an important decision. While it was uncontroversial that Resolution 1244 was crucial in assessing the legality of the UDI, there was some dispute during the proceedings as to whether the Constitutional Framework was an act of internal law or of international law.[39] The Court explicitly ruled on this question and found that the Constitutional Framework possessed international legal character, because it derived its binding force from Resolution 1244 and ultimately the UN Charter.[40] In that sense, the Constitutional Framework represented an "international law constitution" for Kosovo, even if it lacked some attributes of liberal constitutionalism.

Law by its Ruling on Kosovo?', 11 *German Law Journal* (2010) 8, 841; R. Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo', 11 *German Law Journal* (2010) 8, 867; H. F. Koeck, D. Horn & F. Leidenmuehler, *From Protectorate to Statehood* (2009); R. Muharremi, 'Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited', 33 *Review of Central and East European Law* (2008) 4, 401; K. Wirth, 'Kosovo am Vorabend der Statusentscheidung: Überlegungen zur rechtlichen Begründung und Durchsetzung der Unabhängigkeit', 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 1065; C. Tomuschat (ed.), *Kosovo and the International Community* (2002).

39 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice, Advisory Opinion of 22 July 2010, ("Kosovo-Opinion"), para. 88.

40 *Id.*, para.88, 93.

This finding is an important step in the Court's reasoning for two reasons: First, the Constitutional Framework thus establishes an international *pouvoir constitué* and determines its shape, which is a prerequisite for being able to distinguish it from other actors involved in the process. Second, the international nature of the Framework enables the Court to argue that it established standards of legality only for the *pouvoir constitué*, because this is an international law institution. In contradistinction, according to the Court, international law does not set standards to assess the legality of declarations of independence by other actors.

Hence, an important next step in the Court's reasoning was to determine who, then, the authors of the UDI were. Were they to be identified with the PISG established by and under international law, or were they someone, or something, else? If the declaration had indeed been issued by the PISG, then they were surely bound by the legal framework which had established them, namely Resolution 1244 and the Constitutional Framework. Consequently, had the PISG themselves authored the UDI, the declaration would have been an act of the *pouvoir constitué* instituted by international law. Inevitably, the declaration would then have been *ultra vires*, because the legal order which had created the PISG did not allow them to declare independence unilaterally.

The Court however does not go down that avenue. Rather, it takes the view that the UDI was not an act of the *pouvoir constitué* in Kosovo: "[T]he Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order [established by Resolution 1244 and the Constitutional Framework] but, rather, set out to adopt a measure the significance and effects of which would lie outside that order."[41] The distinction between the *pouvoir constitué* and actual authors thus seems to rest on one decisive criterion: The authors' subjective intent to act, and to produce effects, outside the Constitutional Framework. Even though the Court proceeds to make an additional argument with regard to the language of the UDI and the special procedure chosen for adoption of the declaration[42], these factors are ultimately in the hands of the authors of the UDI themselves. So far, the subjective intent not to act as *pouvoir constitué* seems decisive.

41 *Id.*, para. 105.
42 *Id.*, para. 107.

This is question-begging, since the mere intent to evade an otherwise applicable legal order is generally insufficient to actually render it inapplicable. Even more importantly, it leaves open the question who, or what, the authors of the UDI were instead, if not the *pouvoir constitué*.

2. Identifying the *pouvoir constituant* as Author of the Declaration of Independence

In fact, the ICJ itself seems to feel uneasy with its focus on subjective intent, and provides two more arguments to back up its reasoning. These two arguments, taken together with the intent criterion, support the view that it was in fact the *pouvoir constituant* which declared independence of Kosovo.[43] Firstly, as regards intent, the finality of the UDI was not simply to "act outside" the Constitutional Framework. The declaration's language is unambiguous in that its intent is to effect independence and become a sovereign state. The UDI is an act of self-determination, and as such, an act of the *pouvoir constituant* if understood in the liberal sense.

This leads to the second criterion used by the ICJ: Popular sovereignty and democratic legitimacy. The Court holds that "the authors of the declaration of independence [acted] as persons […] in their capacity as representatives of the people of Kosovo outside the framework of the interim administration"[44]. The authors are not the *pouvoir constitué* but the "representatives of the people of Kosovo". This language is indeed reminiscent of liberal constitutional terminology, which requires the *pouvoir constituant*, if legitimate, to be connected in some way to the will of the people. Consequently, observers have noted that the Court itself seems to "flirt with ideas of popular sovereignty and *pouvoir constituant*"[45].

This view is supported by the language of the declaration itself: Its authors identify themselves as the "democratically-elected leaders of our people" and declare Kosovo "an independent and sovereign state". This aspect of democratic legitimacy is crucial, and it is one factor (among many others) which distinguishes the case of Kosovo from other secessionist movements. Another distinguishing factor is the internationalization of the process, which was crucial in creating the democratic legitimacy claimed by

43 In that sense, see also Z. Oklopcic, 'Preliminary Thoughts on the Kosovo Opinion', *EJIL Talk* (26 July 2010) available at http://www.ejiltalk.org/preliminary-thoughts-on-the-kosovo-opinion/ (last visited 17 November 2010).

44 Kosovo-Opinion, *supra* note 39, para 109.

45 Oklopcic, *supra* note 43.

the "representatives of the people": It was the international territorial administration that first established the basic requirements for a free and democratic system of government, which could then midwife a *pouvoir constituant* seen by many as legitimately representing the will of the majority of the Kosovo people.

However, even these two criteria seem insufficient to see the authors as the *pouvoir constituant*. In fact, the Court hints at a third criterion when discussing the acquiescence of the SRSG with the UDI, a criterion which is factual in nature: A sufficient degree of social acceptance of, or at least acquiescence in, the exercise of constituent power. In the words of the legal philosopher Hans Lindhal: The act of the constituent power must be "taken up", the "normative innovation must catch on"[46], or, put differently: The revolution must be successful, and for it to be successful it must trigger a certain degree of social acceptance. This points to a factual element in this context, which seems to be a common feature in the formation of new states and in the revolutionary tradition of constitution-making and tends to be relevant to constitutional theory and international law alike: While constitutional theory seems to accept the establishment of a new constitutional order by the constituent power retrospectively if it has become successful,[47] international law attaches importance to the effectiveness of governmental functions within an entity purporting to be an independent state, and, to some extent, recognition by other subjects of the international legal order.[48]

In the case of Kosovo, the exercise of the constituent power had triggered 71 recognitions by October 2010, a fact which clearly distinguishes the UDI from earlier declarations of independence and many other such attempts worldwide. What is more, the ICJ itself does hint at that factual element when it notes, in order to support its reasoning on authorship, that the SRSG did not take any action to revoke or repress the declaration of independence.[49] The Court takes this as evidence supporting the view that the UDI was not an act of the PISG. However, it can also be seen as the acceptance of a successful exercise of the *pouvoir constituant* – the representative of the old order gives way to a new order, instituted by

46 H. Lindahl, 'Acquiring a Community: The *Acquis* and the Institution of European Legal Order', 9 *European Journal of International Law* (2003) 4, 433, 441.

47 *Id.*, 442.

48 On state formation and recognition see generally J. Crawford, *The Creation of States in International Law* (2006).

49 Kosovo-Opinion, *supra* note 39, para. 108.

representatives claiming for themselves a higher degree of representativeness with regard to the will of the people.

3. No International Law Standards for Assessing the Legality of the Exercise of the *pouvoir constituant* with Regard to Independence

However, while the Court takes great pains to distinguish the authors of the UDI from the *pouvoir constitué*, it does not draw any consequences from its "off-the-cuff remark" on "the people of Kosovo"[50]: It simply goes on to find that the UDI is legal because neither general international law nor the legal framework of UN territorial administration contain a prohibition on declarations of independence by representatives of "the people of Kosovo". This refusal to draw any consequences from the *pouvoir constituant* concept begs the somewhat ironic question to what extent it would have damaged the Court's reasoning if independence had been declared "by envoys from the Planet Zoltar"[51].

Significantly, it seems that the high degree of internationalization of the entire process leading to independence, and a considerable international legal framing of the *pouvoir constituant*, are of no consequence at all for the regime of international law governing independence and secession. The international nature of the *pouvoir constitué* has no consequences for the *pouvoir constituant*, whose internationalization is equally obvious from the text of the UDI and its reference to its own preconfiguration by the Ahtisaari Plan. As a result, one is left with the impression that, according to the ICJ, international law is largely indifferent to the exercise of popular sovereignty by the *pouvoir constituant*, even if brought about by strong international involvement in a highly internationalized legal setting.

In short: Even though the *pouvoir constituant* is being framed by international law, this does not mean that it is necessarily being tamed by international law – at least in the view of the ICJ. While this reasoning of the ICJ with regard to independence has attracted much criticism,[52] I would now like to draw the attention here to the fact that not only independence,

50 Oklopcic, *supra* note 43.

51 *Id.*

52 See for instance the dissenting opinion of Judge Simma attached to the Kosovo-Opinion, available at http://www.icj-cij.org/docket/files/141/15993.pdf (last visited 1 December 2010); Vashakmadze & Lippold, *supra* note 38, 619; Bothe, *supra* note 38; Howse & Teitel, *supra* note 38; Muharremi, *supra* note 38; Oklopcic, *supra* note 43.

but also international involvement in *constitution-making* in Kosovo raises questions of legality and legitimacy under international law.

II. Potential Standards of Legality for the Internationalized *pouvoir constituant* with Regard to Constitution-Making

In the liberal tradition of the *pouvoir constituant*, the adoption of a constitution is not only one of the core attributes of sovereignty, but is also regarded as an inherently democratic exercise. Consequently, the involvement of external actors in such constitutionalization processes raises the question of the legality and legitimacy of such external influences. Hence, the well-known constitutional law debate on whether the *pouvoir constituant* is bound or unbound by law also arises in, and inspires, international law.[53]

Raising these questions is not tantamount to outright rejection of international involvement in constitution-making. To the contrary, it is widely accepted that the success or failure of a new a constitutional order depends at least partly on its legitimacy, or perceived legitimacy, which in turn is influenced by its legality. Inquiring into potential standards for the legitimacy and legality of internationalized constitution-making may thus prove to be important for the success of such constitutionalization efforts in Kosovo and beyond.

The legal regime governing international influences over the constitution-making process might be derived from at least three sources. A first set of norms potentially affecting the legality of external influences over constitution-making is the international law of belligerent occupation. Second, UN Security Council Resolution 1244 laid down obligations and limitations with regard to constitution-making. Third, the Ahtisaari Plan, although in itself not a source of international law, became binding upon Kosovo by virtue of its unilateral adoption in the UDI.

1. International Law of Belligerent Occupation as a Standard for Internationalized Constitution-Making?

Since Kosovo emerged from an international armed conflict between NATO and Serbia, the law of belligerent occupation is one potential source

[53] Cf. Möllers, *supra* note 5 and Kelsen, *supra* note 6; C. Sunstein, *Designing Democracy* (2001).

of (il)legality. In particular the Fourth Geneva Convention provides that where one state occupies another, the occupant must maintain an orderly system of governance; that the occupant has limited legislative powers and may not make permanent changes in fundamental institutions; and that it must utilize already existing local laws where possible.[54] Under this regime, instituting a new constitutional framework and institutions of (self-) government would probably be illegal, as has been argued for instance with regard to transitional constitutional arrangements in occupied Iraq.[55]

However, this set of norms is limited to situations where there is an occupation by a state bound by the Geneva Conventions. On the face of it, the international presence in Kosovo may look like an occupation, but the fundamental difference to Iraq, for instance, is the thorough multilateral foundation of the international presence in Resolution 1244. Since Resolution 1244 explicitly aimed to promote autonomy and self-government in Kosovo for an interim period, the law of belligerent occupation does not apply to the extent that the UN administration established the PISG under the Constitutional Framework for a transitional period – be it by virtue of Article 103 of the UN Charter or the *lex specialis* principle. Had the occupying powers attempted to institute a permanent order themselves, declared independence themselves, or annexed the territory, such actions would probably have been illegal under, *inter alia*, the law of belligerent occupation. This is not the case however, as the UDI and the Constitution are still attributable to the local, if internationalized, *pouvoir constituant.*

2. Security Council Resolution 1244

A second set of standards can be found in Resolution 1244, which contains three main requirements for the new international legal order established in Kosovo: It must, first, establish "substantial autonomy and self-government", second this self-government must be "democratic", including the holding of elections, and third the new order must be "provisional", pending a final settlement.[56] These were mainly requirements for the first step in the Kosovo constitutionalization process, i.e. the Constitutional Framework, but they have some bearing on later steps, too.

Whereas the Constitutional Framework certainly established autonomy and some degree of self-government, the question arises whether

54 Cf. Dann & Al-Ali, *supra* note 4, 450.
55 *Id.*, 452-453.
56 SC Res. 1244 (1999), para 11 lit a), c).

the legal order it created satisfied the requirement that it must be "democratic". Since the Constitutional Framework has become, at least de facto, obsolete, such a discussion may seem somewhat academic. Suffice it to say here that the unelected SRSG's virtually unlimited powers seemed to be at odds with essential features of a liberal concept of democracy, if taken to include the separation of powers as a democratic requirement, not only as a postulate of the rule of law.[57] On the other hand, historical experience from Bosnia and elsewhere shows that premature democratization may be detrimental to the long-term governance of a political entity, as it may lock in political constellations and elite influence prevalent at the time of devolution of power. Consequently, it is probably most convincing to interpret the "democracy" postulate in Resolution 1244 as a teleological principle,[58] which requires the UN administration to continuously adopt steps to the progressive realization of more democratic forms of governance. In that respect, the evolution in Kosovo may have been slow, but not to the extent to make UN administration and the Constitutional Framework illegal.

Some doubts also pertain to the "provisional" nature of the Constitutional Framework. Even though it was formally designed to be an interim regime, it preconfigured later constitutional arrangements in the CSP and the Constitution, ranging from the basic form of government (parliamentary republic, not presidential system) to such important details as the number of seats in the Kosovo Assembly reserved for minority representatives (consistently 20 out of 120 in all documents). In that sense, it tended to establish a *fait accompli* with regard to basic features of the *pouvoir constitué* envisaged in later constitutional documents. It is doubtful however whether this makes the Constitutional Framework itself illegal. Rather, the "provisional" condition should be taken to require later actions by international representatives to allow for an open-ended discursive process on constitutional arrangements among the eventual framers, which does not preclude these framers from drawing inspiration from the Framework.

A second aspect of the "provisional" requirement pertains to the continued role of the international community in the making of a permanent Constitution of Kosovo: As outlined above, international actors were

57 On varying conceptions of democracy in the face of international law, see A. v. Bogdandy, 'Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003), 853.

58 N. Petersen, *Demokratie als teleologisches Prinzip* (2009).

instrumental in the negotiation of the CSP, they supervised the drafting process of the final Constitution and ensured compliance with the Ahtisaari Plan requirements. Even after this stage, the Constitution itself reserves to the ICR the authority to ensure compliance of the Constitution and actions there under with the Ahtisaari Plan, including the power to oust public officials and annul acts violating the CSP. While international involvement in the status settlement negotiations is covered by Resolution 1244, which explicitly envisages such a process, it is doubtful whether the making of a permanent constitution for an independent Kosovo including a more permanent international supervisory function can be based on the Resolution. However, even if one assumes for the moment that such a legal base in international law was needed, and that Resolution 1244 did not provide it, another source is at hand.

3. The Unilateral Commitment to the Ahtisaari Plan in the Declaration of Independence

In fact, such a legal basis can be found in the UDI, read together with the Ahtisaari Plan. The latter's legal nature initially remained unclear, because it was neither endorsed by a Security Council resolution nor included into any other legally binding instrument, unlike for instance the Dayton Agreements which included a constitution for Bosnia-Herzegovina. However, the UDI itself represents a unilateral commitment in the sense of the sources doctrine in international law. It commits Kosovo to abide by the Ahtisaari Plan, and thus creates obligations of international law. Consequently, Kosovo, if considered a subject of international law at all, is under an obligation towards other states to respect the provisions of the CSP. In addition, the UDI represents an invitation under international law for the international presences, including the ICR.

This construction has the advantage of retracing the international community's continued constitutional role in Kosovo to the democratically legitimated *pouvoir constituant*. It is sometimes criticized for making the continued international involvement dependent on Kosovar consensus and for risking permanent minority protection in Kosovo. This however can be countered by two arguments: First, although the legal consequences of unilateral commitments in international law are not fully clear, the UDI explicitly states that its unilateral commitment is "irrevocable". Second, international supervision and minority protection have an additional legal basis in the Constitution. Both elements are safeguarded against constitutional amendments by three devices within the text of the

Constitution[59]: First, the supremacy of the Ahtisaari Plan over the constitution; second, the role of the ICR; and third, a super-majority rule for constitutional amendments which requires minority consent for any constitutional reform, a procedure in turn protected by the equally internationalized constitutional court.

Hence, international involvement in the Kosovo constitution-making process has a double legal basis in international and constitutional law. This holds true for the period following the UDI and the adoption of the Constitution and provides not only arguments for legality, but also for the legitimacy of international involvement, since it is retraced ultimately to the democratically legitimized *pouvoir constituant*.[60] This line of arguments does not cover, however, the period before the UDI was adopted, namely the important decisions made in the drafting process in 2007. Although these may be based internally on the adoption of the Ahtisaari Plan by the Kosovo Assembly in 2007, one is left with a legal vacuum in the international legal sphere. There is no apparent international legal basis for this period, which begs the question whether such a basis is needed at all. If applying the ICJ's approach, one would probably have to look for a rule of international law *prohibiting* or at least *regulating* external interference with the *pouvoir constituant*. Again, applying the Court's reasoning, such a rule can hardly be found in Resolution 1244, nor have attempts to find such rules in general international law yielded results.[61]

D. Conclusion: Emerging Standards of Legitimacy for the Internationalized *pouvoir constituant*

The absence of generally applicable international legal standards for exercises of the internationalized *pouvoir constituant* does not mean, however, that one is left with a complete normative vacuum. Instead, it is submitted here that constitutional theory does offer normative standards, if not for assessing legality, then at least for discussing the legitimacy of external involvement with the *pouvoir constituant*. Even if legitimacy may be a less clear-cut standard than legality under international law, asking the legitimacy question enables us to draw from two other discourses at the

59 Articles 143; 146 and 147; 144 (2) of the Constitution of Kosovo.

60 Whether the absence of any mechanisms for legal control of the ICR is in line with liberal constitutional doctrine is doubtful, but goes beyond the scope of this paper.

61 On the absence of standards in general international law see Dann & Al-Ali, *supra* note 4, 451.

crossroads between international constitutional law, mentioned at the beginning of this article: First the debate on constitutionalization of international law, and public law approaches to international law,[62] and second, discussions of international law's influence on established domestic constitutional orders. I will focus here on the discussion of the legitimacy of external involvement in constitution-making,[63] which may also offer, *mutatis mutandis*, some guidance when it comes to international influence on independence processes.

A public law perspective contributes in several respects to the legitimacy question in respect of internationalized constitution-making: In the first place, it enables lawyers to ask the question of legitimacy at all. If one accepts that international law is also public law, then issues of legitimacy of the exercise of public authority by international actors come to the fore. And what could be a more essential exercise of public authority than the genesis of a constitution, and involvement in such a process? Second, a public law perspective provides ideas and concepts for framing the legitimacy debate, without however succumbing to all too easy domestic analogies.[64] For instance, the concept of popular sovereignty offers a number of insights on legitimate forms of outside intervention in constitution-making: It may for example inspire calls for external actors to be as unobtrusive as possible.[65] Furthermore, it supports arguments that involvement should be transparent and geared towards specific aims, which are legitimate in themselves and do not seek to impose the self-interest of the external actor.[66]

Second, a constitutional perspective may help to identify which aims of external involvement exactly could be considered legitimate. For constitutional law inspires a certain desire to avoid self-interested factions taking over politics, and constitutional politics in particular. Consequently, one such legitimate aim for external involvement would be to ensure the inclusiveness of and equal access to the constitution-making process. If one accepts that there is no naturalistic "will of the people", but that

62 See A. v. Bogdandy, P. Dann, & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities', in: A. v. Bogdandy, *et. al.* (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2009), 3.

63 For a similar treatment of other processes see Dann & Al-Ali, *supra* note 4, 454-455.

64 v. Bogdandy, Dann & Goldmann, *supra* note 62, 19-20, 24.

65 In that sense, Dann & Al-Ali, *supra* note 4, 460.

66 *Id.*, 459.

constitution-making always bears features of elite consensus, too, then international involvement can be an important counterbalance to disproportionate factional influence on the process.[67] This is particularly true in multi-ethnic polities characterized by violent conflict and domination of one particular ethnic group.[68] Even if external actors may not represent the local people, the insistence on inclusiveness advocated here does lend some sort of functional legitimacy to external involvement, somewhat comparable to the role of constitutional courts and their counter-majoritarian tendency. In this respect, the involvement in Kosovo, which tended to be geared towards ensuring equal representation in the constitutional process, was one of the more successful examples of the internationalization of the *pouvoir constituant*, even if it could have been even more inclusive with regard to ethnic minorities living within Kosovo during the decisive phase of the Ahtisaari-led negotiations.

If disproportionate factional influence on constitution-making is to be avoided, so is domination by self-interested external actors. In this respect, a comparative analysis of internationalized constitution-making processes seems to point into the direction that a limited, disinterested and clearly focused international involvement is more likely to occur if and when external actors are multi-lateral in nature, because they tend to be less driven by self-interest than individual states.[69] Of course, this holds true only to the extent that these actors themselves remain true to their multilateral vocation and do not become a vehicle of one individual state's interests. Also in this respect, the Kosovo process seems comparatively positive, although it is sometimes difficult to distinguish necessary political leadership from undue self-interested influence.

A less positive assessment is warranted as regards calls to the effect that involvement in the procedure should be transparent.[70] As set out above, the Ahtisaari process and constitution-making throughout 2007 were largely conducted behind closed doors. This may have been due to diplomatic constraints, but made the process and external involvement not very transparent. It also led to the fact that many of the substantive decisions had already been made when public consultations on the actual text began. This

67 *Id.*, 458; Feldman, *supra* note 3, 880-883.

68 S. Choudhry, 'Old Imperal Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities', 37 *Connecticut Law Review* (2005) 4, 933, 936-939.

69 Dann & Al-Ali, *supra* note 4, 460-461.

70 For such a view, see *id.*, 461.

leaves room for improvement in an otherwise relatively progressive process of internationalized constitution-making, when compared to other such instances.

As regards international involvement with the substance of the constitution, research on international law influences on existing domestic constitutional orders offers insights on what states appear to consider as acceptable substantive influences. This perspective tends to show that the imposition of certain substantive outcomes seems to be perceived as more legitimate when based on universally or at least regionally accepted multilateral instruments, rather than on the legal order of a particular state. Consequently, drawing and borrowing from international or regional human rights instruments or minority protection regimes seems helpful. If comparative constitutional law is used as a source of inspiration, then a comparative basis of more than one country seems more likely to avoid self-interested solutions. In this respect, reference to widely accepted multilateral human rights instruments in the Kosovo Constitution adds a modicum of legitimacy to the otherwise rather obtrusive influence on the substance of the Kosovo constitution, even though the list of directly applicable treaties seems to have an element of selectivity to it.[71]

While these considerations apply to the legitimacy of external involvement in *constitution-making*, it may be worthwhile to examine in future in how far these categories are equally valid for processes leading to *independence*. Suffice it to say here that an "earned sovereignty" approach is connected to constitutional standards, too, which may be considered as prerequisites for independence. For the time being, we can conclude that international law is evolving and increasingly framing both faces of the *pouvoir constituant*. When it comes to its taming however, international law offers little guidance, even if there is strong international involvement in its exercise. One is left with the less clear-cut category of legitimacy of external influences on the *pouvoir constituant*. In this respect, the crossroads of international law and constitutional law still offers important signposts pointing down a road towards even more legitimate and legally tamed exercises of the internationalized *pouvoir constituant*.

[71] For instance, the Covenant on Economic, Social and Cultural Rights is conspicuously absent from the list, which otherwise contains most building blocks of the "international bill of rights", notably the Universal Declaration of Human Rights. See on this point Marko, *supra* note 34, 447.

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The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo: Rules or principles?

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Abstract

In its Advisory Opinion of 22 July 2010, the International Court of Justice concluded that the declaration of independence in respect of Kosovo in its precise historical circumstances "did not violate any applicable rule of international law". In its reasoning, the Opinion is concerned with territorial integrity, self-determination and Security Council competence under Chapter VII UN Charter. The Court's Opinion – its reasoning and outcome – can be assessed from several angles. Adopting instead the perspective of legal theory, our concern will be what we can learn from the Opinion about the normative structure of international law in general, and as applied in the context of secessions in a non-colonial context. The paper will argue that the approach of the International Court of Justice to international law, as evidenced in the case at hand, may be labeled rule-oriented. After reconstructing the main planks of the Court's reasoning, the paper will set out an alternative conceptual framework, arguing for a shift from a rule-centered to a principle-based approach to international law in the interest of legal certainty. It will then explore what room there is for such an approach to secessionist situations based on the understanding of self-determination as principle.

A. Introduction

A UN General Assembly resolution adopted on 8 October 2008 backed the request of Serbia to seek an Advisory Opinion from the International Court of Justice on the legality of Kosovo's unilaterally proclaimed independence.[1] The International Court of Justice delivered its Advisory Opinion on 22 July 2010.[2] It concluded that the declaration of independence in respect of Kosovo in its precise historical circumstances "did not violate any applicable rule of international law".[3] For the Court of Justice, this was a case of first impression insofar as it touches on the matter of secession in a non-colonial context, a matter concerning the fundamental

1 GA Res. 63/3, 8 October 2008.

2 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010 [Kosovo-Opinion], available at http://www.icj-cij.org/docket/files/141/15987.pdf (last visited 28.11.2010).

3 Para 3 of the operative clause, Kosovo-Opinion, supra note 2, 44, para. 123.

structure of international law. In its reasoning, the Opinion is concerned with territorial integrity, self-determination and Security Council competence under Chapter VII UN Charter. The Court's Opinion – its reasoning and outcome – can be assessed from several angles. A doctrinal standpoint for instance would query the compatibility of the Court's pronouncements with the system of international law as hitherto understood or properly to be understood. A consequentialist or functional standpoint for instance would ask whether the outcome of the opinion on secession in a non-colonial context is conducive to the values of the international community. In that respect, it could be stated that the Opinion furthers a negotiated outcome, by removing rights that either the territorial state or the group seeking secession may use to hold back. There is now no legal right against secession that the territorial state could invoke and which would allow it to hold out during the negotiations. Lacking a right to oppose the potential case of secession, the territorial state is well advised to fully engage in any international process of negotiations set up by the international community. But neither has the group a recognized right to remedial secession. They also can be assured of making a declaration of independence not running foul of the law only at the issue of fruitless negotiations. So they, too, have an incentive to engage in these negotiations.

None of these perspectives, all of them interesting in their own right, shall concern us in these pages. It is felt that these perspectives cannot exhaust the matter, or do justice to this rich Opinion. Adopting instead the perspective of legal theory, our concern will be what we can learn from the Opinion about the normative structure of international law in general, and as applied in the context of secessions in a non-colonial context.[4] The Court's Opinion lends itself to this perspective for it positions itself very clearly. The paper will argue that the approach of the International Court of Justice to international law, as evidenced in the case at hand, may be labeled rule-oriented. A Rule is any norm whose structure can be described as consecutive. If the conditions x are fulfilled, consequence y results. The first part of this paper will reconstruct the main planks of the Court's reasoning, showing that the Opinion's rule-centered approach. Part 2 will offer a critique that it does not further the value of legal certainty as much as the Court may have hoped. It will then set out an alternative conceptual framework. It will argue for a shift from a rule-centered to a principle-based

[4] For a more detailed account of the underlying legal theory see A. Halpin & V. Roeben, 'Introduction', in A. Halpin & V. Roeben (eds.), *Theorising the Global Legal Order* (2009).1-8

approach to international law. Part 3 will explore what room there is for such an approach to secessionist situations based on the understanding of self-determination as principle. The paper will finish with a number of conclusions.

B. What the Court Said: a Rules-Centered View of International Law, and its Application to the Case at Hand

This part of the paper will offer a reconstruction of the Kosovo-Opinion by focusing on four critical junctures. These junctures are: the premise that the Court must look for prohibitive rules of international law only (I), the "horizontal" rule-interpretation of territorial integrity (II), the equally rule-modeled interpretation of Security Council Resolution 1244 (III), and the inconclusiveness of a right to remedial self-determination in a non-colonial context (IV).

I. The Premise: There Must be a (Prohibitive or Permissive) Rule of International Law

Throughout the Opinion, the Court of Justice consistently adopts a specific lens or premise for identifying and construing relevant norms. This premise is articulated in the opening paragraphs of the Opinion,[5] shaping the subsequent reasoning of the Court. This premise of the Opinion is that it is the General Assembly's request for an Advisory Opinion on the "Accordance with international law of the declaration of independence" means "non-prohibition by international law". In other words, there must not be norms prohibiting the DI, or expressly permitting it as that would logically exclude a prohibition. It is noteworthy that the Court here relies on procedure only, on an interpretation of the request of the General Assembly for an Advisory Opinion. There is no attempt to link this procedural point to a consideration of underlying substantive structure of international law.[6] But

5 Kosovo-Opinion, supra note 2, 19, paras 49-51.

6 Kosovo-Opinion, supra note 2, 21, para. 55 and 56 seemingly do so. But they really consider the subtly different question of the consequences of a declaration of independence. By contrast, the Permanent Court of International Justice, in Lotus, placed the very notion of prohibitive rules in the context of substantive law, "*Lotus"*, Judgment, No. 9, 1927, P.C.I.J., Series A, No. 10, 18. See below sub III.1b).

folded into this explicitly articulated statement of the Court there is a second yet unarticulated premise. This second premise is that the relevant norms will be constructed as rules in the structural sense outlined above. They will not be seen or construed as principles.

This two-fold premise leaves the Court with a clean course for the remainder of the Opinion. It will be checking whether there are rules that prohibit (expressly permit) the declaration of independence in relation to Kosovo. The Court focuses in turn on general international law (2), S/Res 1244 (3) and self-determination (4), each of which it discards in turn.

II. General International Law: Territorial Integrity as a "Horizontal" Rule

The first substantive yardstick that the Court employs is territorial integrity, in this case of Serbia. This is seen as a norm of general (customary) international law although it is also enshrined in the Charter making it treaty law, but the Court really makes short shrift of it by simply and authoritatively stating that territorial integrity applies between States only, horizontally, but not vertically within one state.[7] It can therefore not prohibit acts of a non-state actor such as a declaration of independence expressed by a people claiming self-determination. Territorial integrity is directed against other states only. Not against non-state actors.

The Court is not ready to interpret territorial integrity in a more open way. As such it is not open to a broader interpretation that would have resort to the spirit of the norm as reflected in relevant documents. As a matter of positive international law, the exclusively horizontal understanding of territorial integrity is a somewhat problematic interpretation of the principle that may be seen as disconnected from the development of PIL since the adoption of the Charter. A closer analysis of the documents cited by the Court itself would reveal that they are concerned with territorial integrity in a horizontal context. That is arguably true for the so-called safeguard clause of the Friendly Relations Declaration[8,] as it is for Art. 46(1)[9] of the

7 Kosovo-Opinion, supra note 2, 30, Para. 80.

8 GA Res. 2625 (XXV), 24 October 1970.

9 Article 46 (1) reads: Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the

Declaration on Rights of Indigenous Peoples.[10] Be that as it may, the Court could not have expressed itself more clearly: For the Court, territorial integrity is a rule the meaning of which is precisely determined.

III. Security Council Resolution 1244 is an Interim Arrangement Only

A similar approach underlies the interpretation and application of the controlling Security Council resolution 1244(1999). The Court proceeds to the question whether S/RES 1244(1999) prohibits the declaration of independence in relation to Kosovo. The Court denies this question. The Court initially advances an interpretative theory for Security Council resolutions.[11] This Court acknowledges the relevance of Arts. 31-32 Vienna Convention on the Law of Treaties, but it emphasizes that the resolutions of the Security Council are collective acts of the organ of an international organization. This interpretative theory remains somewhat unfinished business and it is not clear which parts of the Court's subsequent reasoning bear it out. It seems, however, to support a rather narrow reading of Security Council 1244, as a sort of stop gap measure: The resolution does not apply in the case at hand, so says the Court, for it only addresses itself to the Provisional Institutions of Self-Government of Kosovo, which, however, did not issue the declaration. As to S/Res 1244, the Court finds it to be essentially an interim arrangement, establishing provisional territorial administration including the PISG and an internationalized framework for negotiations that stops well short of determining the final status of Kosovo.[12] S/Res 1244(1999) is a rule the meaning of which is precisely determined. In this reading, S/Res 1244 cannot adapt to changing realities and cannot be seen as a measure that can steer a process rather than an arrangement frozen in time. That leaves the Court with secondly stating whether the declaration of independence is an act of the PSIG and as such is covered by S/Res 1244 or not. According to the Court, the declaration of independence is an act not of the PISG but of members of the PISG acting in a different capacity.[13] Here much rides on the facts, namely the precise

territorial integrity or political unity of sovereign and independent States (emphasis added).

10 GA Res. 61/295, 13 September 2007.

11 Kosovo-Opinion, supra note 2, 34, para. 94.

12 *Id.*, 36, para. 99.

13 *Id.*, 36, para 102 reads: "The Court needs to determine whether the declaration of independence of 17 February 2008 was an act of the "Assembly of Kosovo", one of

timing of the declaration of independence and the circumstances surrounding it. It is worthwhile quoting the relevant para. 105 of the Opinion:

> "105. *The declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. ...Proceeding from there, the authors of the declaration of independence emphasize their determination to "resolve" the status of Kosovo and to give the people of Kosovo "clarity about their future" (thirteenth preambular paragraph).* This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo "as an independent and sovereign state" (para. 1) (emphasis added).

From this, the Court then concludes that this is not an act *ultra vires* of the Provisional Institutions of Self-Government (PISG)[14] but rather that the declaration of independence was taken by self-constituting representatives of the Kosovo people rather than the PSIG.[15]

The problem with this is that there now is actually much less legal certainty than meets the eye. It remains doubtful whether the declaration of independence is actually an act by the *pouvoir constituant* of the Kosovo people rather than the *pouvoir constitué* of the PISG.[16] While the elections to the PISG conferred would have conferred authority from the Kosovo people on the administration of the self-governance regime under Res. 1244 only, it would not have conferred the authority for setting up a new constitutional regime. Most glaringly, it remains unclear whether the framework of S/Res 1244 would have taken a position on a hypothetical declaration of independence at an earlier point in time. Further crucial issues

the Provisional Institutions of Self-Government, established under Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity."

14 *Id.*, 39, para. 108.

15 *Id.*, 39, para 109 reads: "The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration."

16 As for instance Germany argued in its Written Comments, July 2009, available at http://www.icj-cij.org/docket/files/141/15690.pdf 7. In that vein, all further action by the PISG such as the adoption of a constitution would also reflect the authority of the *pouvoir constituant* acting through the existing institutions.

remain unresolved, namely whether the Security Council under Chapter VII could actually set parameters for the final status negotiations, whether the resolution remains in force even after self-constituting acts of the sovereign. However, the Opinion does not give answers to all of these points. It would seem fair to say that little or no guidance on declarations of independence in a secessionist context can be taken from the rule-centered line of reasoning of the Court.

IV. There is no Right to a Declaration of Independence in a Non-Colonial Context

A right (for whichever bearer) to independent statehood would encompass the right to issue a declaration of independence as a necessary preliminary step. Such a right would be an explicit permissive rule that would logically exclude any prohibitive rule applying to the same set of facts. The Court approaches this issue twice. At the very outset of the opinion, the Court deals with self-determination in its colonial dimension. The Court clarifies this by stating that the right to self-determination of peoples under colonial domination does indeed extend to the right to create an independent state, and so the Court implies, making a declaration of independence is a step in the process of creating that state. That right may not be opposed by other states including the colonial power. But self-determination has not matured into a right to statehood outside of this context. At the end of its Opinion, the Court then revisits the issue, tackling the question of self-determination as a right for a group to secede from an existing sovereign. In reply, the Court quite simply points to the inconclusiveness of States' views as expressed in their Written Statements. There is no *opinio iuris*.[17] Quite what the status of a declaration of independence in a non-colonial context is the Court does not say. The Court does not need to dig any deeper here since anything below a fully fledged

[17] It is an interesting question what legal value accrues to the positions taken by States in Written Statements and Comments made in the proceedings of the Kosovo-Opinion. A full discussion is beyond the scope of this paper, but surely these are first of all part of court proceedings, and the position may be taken that they collectively have value only to the extent that the Court makes reference to them in the text of the decision or opinion. However, it may also be argued that it surely would seem contradictory for each state that has gone on record through a Written Statement to express a legal opinion not in line with the Statement on other occasions, unless justified by reference to the Court pronouncement on the issue.

right would not logically exclude a prohibition of a declaration of independence, which is what the Court is interested in.

C. A Critique of the Court's Rule-Centered Approach and its Alternative: Principles in International Law

Throughout its Opinion, the Court adopts rules-based approach. That is true even with respect to territorial integrity and self-determination both of which would naturally lend themselves to a different principle-based approach. With respect to territorial integrity, the Court essentially foregoes resort to the spirit of territorial integrity. It does so by interpreting territorial integrity as rule fixed in its conditions and consequences as accepted at a certain point in time. Similarly, self-determination is seen as a rule or rather a reservoir of rules. There is one in for a declaration of independence in a colonial context and one for a declaration of independence in a non-colonial context. Security Council resolutions are also subjected to a narrow reading seeking to distil them into rules fixed in time and meaning.

Several possible justifications for such a rule-based approach can be thought of. The consensual legitimacy of international law could be such a justification as could be the self-perception of an international court as a dispenser of justice not as an activist developer of international law. Both of these justifications would coalesce around legal certainty. An assessment of the Opinion against the yardstick of legal certainty leaves the following result: the state of affairs for declaration of independence in a colonial context remains unsettlingly uncertain in spite of the apparent clarity and rigor of the Court's reasoning. It remains unclear what the coverage of the Court's findings really is beyond the precise historical circumstances of the case. Does the Opinion extend to declaration of independence in the precise historical circumstances only as determined by the Court, i.e. by a group of persons issuing the declaration of independence at the unsuccessful completion of a lengthy internationalized negotiation process? Would it have covered an earlier declaration of independence as well, or can the law be considered to frown on such a premature DI? These questions cannot easily be answered from the Opinion, if at all. Ultimately, this uncertain state of affairs is the result of the exclusively rule-centered approach of the Court. Measured against the yardstick of legal certainty, not so much seems to speak in its favor.

The rule-centered approach to international law is not without alternatives. More coherence of the law, more predictive power and ultimately greater legal certainty can be expected from a principle-based

approach. Rules and principles are the two sides of a basic distinction in legal theory, and the characteristics of one category of norms are the reverse of the other category's characteristics. Principles are inter-subjective values, but more than that a legal principle is directive in nature. A norm having the structure of a principle allows for a reasoned or discursive understanding of the spirit of the norm, which may change over time, and it also allows for varied consequences to be provided. The consequences of rules are limited to the dichotomy of lawful or not lawful. Rules allow for a binary logic only. Principles are not limited to this binary logic as to the potential consequences. Rather the understanding of the function and spirit of the principle and the range of consequences correlate. It is a fair statement that there is now considerable agreement in legal theory about the distinction between principles and rules.[18] There is less clarity about the proper way of concretizing principles, of progressively developing the spirit of a principle, which, of course, the possibility of which is, of course, very much the point of having principles in the first place. Several approaches can be envisaged. One would be empirical. A second conceptual approach may be seen as normative in nature. Again, there are two ways through which normative concretization of a given general principle can conceivably be achieved, one extrinsic and one intrinsic. Extrinsic normative concretization of a given principle may be achieved through balancing with conflicting extrinsic principles under proper principles of conflict and coordination. Intrinsic normative concretization may be achieved through adducing additional principles that do not conflict with but rather complement the principle in question. Intrinsic may be understood as here are referring to issues that arise in and of itself at medium levels of abstraction.

D. Conceptualizing Self-Determination as a Principle in a Non-Colonial Context After Kosovo?

Part 3 of this paper will apply this theoretical framework to the positive law of self-determination in a non-colonial context, bearing in mind the parameters set by the Court in *Kosovo*. This will be undertaken in four steps: there is a principle of self-determination in positive international law

[18] For an excellent recent discussion of the principle-rule distinction including intrinsic and extrinsic elements as well as further relevant references see S. Macdonald, 'A suicidal woman, roaming pigs and a noisy trampolinist: refining the ASBO'S definition of "anti-social behaviour"',69 *Modern Law Review* (2006) 2, 183-213.

(I). A shared understanding of its meaning in a non-colonial context can be achieved intrinsically (II). This understanding requires proceduralization and internationalization (III). A declaration of independence within these parameters is then best understood to be an allegation of competences (*Kompetenzbehauptungen*), whose relative weight depends on the precise historical circumstances in which they are made (IV).

I. Self-Determination as a Principle of Positive International Law

1. The UN-Charter

Self-determination is a principle of positive international law. The UN Charter enshrines the foundational principles of modern international law. One of these principles is the self-determination of peoples.[19] There is a core shared understanding of the principle of self-determination that has been established through state practice and the decisions of the Court, and that is the right to self-determination for colonial peoples. The right to self-determination of peoples under alien domination has legally undergirded and politically driven the creation of a large number of new states in Africa and Asia.[20] Indeed even the emphatic statement of the International Court of Justice that there is a "right" to self-determination not a mere objective principle may be seen to refer to the colonial context. Beyond that core, in a non-colonial context, the meaning and indeed function of self-determination have remained subject to controversy, mainly as to the position of socially and culturally discreet groups within a state. This is because self-determination of colonial peoples does not endanger the territorial integrity of any of the existing equal sovereigns, while self-determination resulting in the secession of a people from the territorial sovereign obviously does. As a minimum, it can be said that a consensus view distinguishes internal and external self-determination, primarily as a doctrinal distinction, but there

[19] In the context of the Charter, this principle has both an inherent and a functional significance. Inherent insofar as it is a collective human right, functional insofar as its full realisation will be conducive to the maintenance of international peace and security, the overriding objective of the Charter, by removing causes for conflict between peoples and nations.

[20] Kosovo-Opinion, supra note 2, 30, para. 79: self determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien domination.

remain doubts as to what external self-determination potentially means and whether it may even comprise so-called remedial secession in response to sustained systematic suppression of a minority. In some respects, therefore, the operationalization of the right to self-determination is asymmetrical. Well developed in the colonial context, much less well developed in other contexts. Alas, practically important is mostly the latter today.

2. The Principle of Self-Determination in the Non-Colonial Context: The Kosovo Opinion and its Take on Lotus

SD as a principle might in its spirit also extend to declarations of independence in a non-colonial context. The precise consequences would then have to be determined. But how much room is there for a principle of self-determination in a non-colonial context after the Kosovo-Opinion? The Court states that there is no right to remedial secession flowing from self-determination for lack of consistent *opinio iuris*. That leaves the reader baffled. Is there no substantive law on the issue, a *non liquet* of sorts? The Court, of course, does not say that either, it rather says that for procedural reasons it will look for prohibitive or permissive rules only. Whether there is any other substantive law will not retain the Court here. But the Court has in the past recognized that the procedural mandate for prohibitive rules does not exhaust the cosmos of law applicable in a given case. Quite the reverse, prohibitive rules receive their meaning in the context of such law and in particular principles only. This is the essence of the *Lotus* case. The reminiscences of the well known *Lotus* case in which the Permanent Court of Justice formulated its view of the structure of international law have already been highlighted.[21] In *Lotus*, of course, the PCIJ was also proceeding from a procedural perspective, the *compromis* between France and Turkey, which asked the PCIJ to identify prohibitive rules restricting the extraterritorial exercise of Turkish jurisdiction. But the *Lotus*-Court went beyond the *compromis*, expressly stating that it was in line with the substantive structure of international law. The *Lotus*-Court's restatement of substantive international law in its completeness contextualized the

[21] Declaration of Judge Simma, available at http://www.icj-cij.org/docket/files/141/15993.pdf (last visited 28.11.2010), 1, para. 2.

prohibitive rules on state conduct. It is worth quoting the original passage from the decision:[22]

> "The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons is confronted in the first place by a question of principle which […] has proved to be a fundamental one. [...] the Turkish Government takes the view that Article 15 [of the Turkish law] allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law. The latter view seems to be in conformity with the special agreement itself. [...] According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings. *This way of stating the question is also dictated by the very nature and existing conditions of international law*. *International law governs relations between independent States*. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent entities with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

The quote reveals that *Lotus* did not state that the Turkish exercise of extraterritorial criminal jurisdiction fell into a vacuum under international law. Rather it is covered by state sovereignty as a residual principle of international law of a general nature which, however, will cede to more specific rules. Far from saying that there was no international law other than the prohibiting rules, the PCIJ actually stated that the foundational i*nternational law principle* of state sovereignty – or in Charter terms: equal sovereignty – would permit state action of any type, including extraterritorial jurisdiction, unless another rule of international law prohibited it. Under *Lotus*, a sovereign state is allowed to act as it wishes as long as it is not prohibited from doing so by a rule of international law. State

[22] *Lotus Case (France v Turkey)*, Judgment of 7 September 1927, PCIJ Series A, No. 10, 18 (1927). (emphasis added).

sovereignty under international law thus permits all action by a state unless prohibited by a consensual rule (or expressly allowed by such a rule). This encompassing principle forms the bedrock of the claim of international law to forming a coherent legal order[23] rather than a mere collection of norms. As a legal order, international law will declare the legality or otherwise of any given course of action of states, but it will not countenance legally indifferent states of affairs[24]

In *Lotus*, far from letting procedure stand on its own, the PCJI self-consciously reflected its procedural approach on the level of substantive law where the prohibitive rules were then perceived as constituting exceptions to a comprehensive permissive principle of international law, i.e. state sovereignty. The Kosovo-Court emulates the *Lotus*-Court only in respect of the procedural level but it does not explicitly reflect the procedure on the substantive level of international law. The Court's silence in this respect does not foreclose space for a substantive principle of self-determination to cover Declarations of Independence in a non-colonial context and to provide for their consequences. Indeed, a direct transposition of the *Lotus* principle to the case at hand is not possible since state sovereignty cannot provide the underlying principle justifying the Declaration of Independence in respect of Kosovo for the simple reason that Kosovo is not (yet) a sovereign state. But self-determination of peoples can take the place of state sovereignty. As pointed out above, the UN Charter recognizes self-determination as one of the principles upon which friendly relations between States shall be based. The Charter thus recognizes its foundational quality. This quality lies in the *aspirational* claim to political self-organization and self-government of a people that self-determination underpins. This claim encompasses all the steps that need to be taken en route to the establishment of statehood. Once statehood is reached, the people`s claim to self-determination is subsumed by its claim to territorial sovereignty, at which point *Lotus* becomes applicable.

23 Cf. A. Halpin & V. Roeben, 'Conclusions', in: A. Halpin & V. Roeben, supra note 4, 273-278.

24 Cf. V Bruns, 'Völkerrecht als Rechtsordnung', 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1929), 1, 6.

II. Changing the Shared Understanding of Self-Determination

There may have been a shared understanding if not shared support for function and spirit of self-determination at the time of drafting and entry into force of the UN Charter. Self-determination was meant to bring colonialism to an end and to help the former colonies become sovereign states. As such the principle was applied, and through application and experience it hardened into a right of self-determination. But its underlying power of conviction also resided in the fact that there was a shared understanding if not necessary shared political support that this is what the Charter intended. Beyond this shared core, there is no fixed understanding. The question arises, then, how to achieve a shared understanding of self-determination in a non-colonial context. For self-determination to say something about declaration of independence in a non-colonial context presupposes a change in the received shared understanding of self-determination. Such change can be brought about by inclusive normative principles (3). On the other hand, the *Kosovo*-Opinion forecloses empirically changing the understanding of self-determination (1), and it also forecloses extrinsic concretization of the self-determination (2).

1. Empirical Change

The Kosovo-Opinion provided an opportunity for the Court, the principal judicial organ of the UN, empirically to advance and change the proper understanding of self-determination. The Court preferred, however, to adopt a restrictive rules-centered approach that positively restated the shared understanding that self-determination was a right in a colonial context.

2. Extrinsic Normative Change

The Court also makes it impossible to achieve any extrinsic normative concretization of the principle of self-determination. Such normative concretization would require the balancing of self-determination with another extrinsic principle. It is true that a clear candidate for an extrinsic principle to be balanced extrinsically with self-determination would be territorial integrity. Some of the written statements of States to the Court have anticipated this question, suggesting a legal framework for the exercise of the right to self-determination. A fine example of this approach is the Written Statement of Finland. Finland set forth the two principles of

territorial integrity and self-determination, and sought to achieve to balance them in the instance of the case, achieving *praktische Konkordanz*.[25] The doctrinal foundations of this elegant approach have, it has to be said, been knocked away by the Court's view that territorial integrity does not have a vertical application or protection against interference as a matter of positive international law. According to the *Kosovo*-Opinion, as has been seen above, territorial integrity applies horizontally only but not vertically and can therefore not be balanced with self-determination. The Court opinion may be seen as rejecting the relevance of extrinsic principles – such as territorial integrity – and this is a pronouncement that needs to be taken seriously. Thus, the *Kosovo*-Court spoke firmly on territorial integrity asserting its constitutional court functions. Under the firm pronouncement of the Court, territorial integrity does not bind non-state actors. This restrictive "horizontal" interpretation of territorial integrity chimes with the interpretation that the ICJ has given it in the context of the right to self-defense against an armed attack that a territorial sovereign enjoys under Art. 51 UN Charter. In both *Oil platforms*[26] and in *Congo/Uganda*[27], the Court has reconfirmed that self-defense can only be exercised against an armed attack by another state, but not by other actors. The possibility of that interpretation, of course, had been implied by the Security Council in its resolution 1244 stating that the right to self-defense of the US was engaged by the Al/Qaida attacks of September 11th 2001.[28] It would seem that in this line of cases the Court is reaffirming its authority as the principal judicial organ of the UN making it the ultimate interpreter of the quasi-constitutional layer of public international law. Such authority of the Court would prevail over pronouncements of both the political organs of the UN and of its other judicial organs such as the International Criminal Court for the Former Yugoslavia. As a consequence, territorial integrity remains the law governing the relations between territorial sovereigns. There is no space left

25 Written Statement of Finland, 16 April, p. 2-3, available at http://www.icj-cij.org/docket/files/141/15630.pdf (last visited 10 December 2010). The Written Statement of Germany follows a similar line of reasoning, Written Statement of Germany, 17 April 2009, 32-36, available at http://www.icj-cij.org/docket/files/141/15624.pdf (last visited 10 December 2010)

26 Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003, 161, 186, para. 51

27 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, 168, 223, para. 147.

28 SC Res. 1368, 12 September 2001.

for either the Security Council or the GA developing it in a different direction.

3. Intrinsic Normative Change

This leaves normative change through intrinsic principles. This is the theoretical approach outlined above that focuses on additional intrinsic principles to advance the understanding of the most abstract or general principles. The general principle that we are concerned with here is of course self-determination. Such a quest first should be directed to identifying such principles as would intrinsically advance our understanding of self-determination. Additional principles of medium abstraction that could be advanced would be the proceduralization of substantive law and territorial administration. Such a principle of proceduralising contentious substantive law positions can be induced from a number of reference areas.

UN practice supports the conceptualization of (external) self-determination in its non-colonial context as process. In the first instance, UN Security Council secondary law is procedural sing the exercise of self-determination.[29] The *Kosovo*-Court acknowledges the manifold Security Council action regarding Kosovo and Serbia, and it expressly recognizes the resulting territorial administration of Kosovo as a legal concept. This may be seen as recognition of the continuing involvement of the UN in the process of achieving a negotiated and internationally supervised independence on the basis of self-determination. But the Court did not foreclose progressive development of self-determination in the non-colonial context by the UN's political organs through secondary law-making. Rather it implicitly endorsed the developments achieved by the political organs of the UN not just in Kosovo but also in other secessionist instances. It may even be lawful for the UN (the Security Council) to go beyond the template of S/Res 1244(1999) and to impose obligations not on the internationalized institutions of self-government of a people but on the people itself. Thus, the Court finds that the Security Council has proceeded to setting forth the inviolability of Cyprus and parameters of the final status of the disputed territory. By pointing to relevant Security Council Resolution/Res 1251 (1999)[30], the Court arguably states that the potential authority of the Security Council exists to set parameters for the possible outcomes of internationalized negotiations in a secessionist situation. Such a parameter

[29] In Lotus terms, the subsequent placing of limitations on unfettered self-determination.

[30] Kosovo-Opinion, supra note 2, 40, para. 114.

can certainly be the preservation of the integrity of an existing territorial sovereign if the Security Council so wishes.[31] Seen in this light, the Kosovo-Opinion creates space at the level of primary law for the Security Council and the General Assembly progressively to develop self-determination in a non-colonial context through secondary law-making. At this point in time, the law has been evolving to the point that a case of systematic repression is a tipping point for the internal and the external dimension of self-determination but that there is an expectation on the people concerned that it will have to seek an internationalized negotiated solution with the territorial sovereign. The international community, acting through the UN Security Council, has the right to establish a territorial administration provisionally barring the territorial sovereign from exercising its powers while internationalized negotiations between the sovereign and the would-be secessionists are being conducted. In the practice of international law, it is increasingly becoming accepted that the response to instances of suppression involves the organized international community. Much as the original decolonization did. This involvement has taken various shapes and sizes, ranging from supervised elections to fully fledged territorial administration. In line with the way that international law is developing generally, there will be further cascading or incremental concretization of what the international community can do, on the one hand, and of what is expected of the people seeking secession, on the other. This development is achieved not through a balancing of the right to self-determination with conflicting principles of the same normative hierarchical value but through the development of secondary law by the UN – both through the Security Council and the General Assembly - within the sphere of application of the right to self-determination. It is also clear that this limitation on the exercise of the right to external self-determination is of a general nature, not confined to the specific instance of Kosovo.

4. Declarations of Independence in a Non-Colonial Context

Understanding self-determination as aspirational self-government can be the basis for all acts falling under the thus determined remit. And a

[31] "The Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded", SC Res. 1251, 29 June 1999, para 11. See also most recently resolution SC Res. 1930, 15 June 2010 on the situation in Cyprus focusing on the ongoing negotiations between the parties.

declaration of independence certainly fits this remit. The legal effects of such a declaration of independence must then be carefully determined. There is, the Court has pointed it out, not a right to make a declaration of independence as step on the way to nationhood that other states would have to respect. The fact that there is no right to self-determination through secession does not mean, of course, that Declarations of Independence in these contexts cannot be conceptualized legally. The Court was simply not concerned with any conceptualization below the level of a full blown legal right - a rule - that would positively permit the declaration. The declaration of independence in the case at hand is best conceptualized as an allegation of competence (*Kompetenzbehauptung*). A competence is alleged, but the consequence (only) is that the allegation may be challenged by states, including the territorial state.[32] Declarations of independence are not outside the law. There would be, of course, the possibility that international law does not extend to declarations of independence, that they belong to the political rather than the legal functional system. Indeed, while potentially unlimited in its reach, any given legal order may restrict its substantive reach. But the Court did not say that such declarations were outside of the reach of international law.[33] Rather the Court clearly says that the law – in the instance self-determination – can extend to declarations of independence and that is has done so in the colonial context. Declarations of independence are not per se out of reach of international law, they may be encompassed by self-determination. It is to be determined what position self-determination takes in respect of each historical declaration.

At the conceptual level, it is very much possible to argue that external self-determination is increasingly being operationalized through proceduralization and internationalization. It is arguably the case that S/Res 1244, even under the narrow interpretation of the Court, would not have tolerated a declaration of independence at an earlier stage when negotiations for a peaceful settlement were still under way. At an earlier juncture, the authors could not have viably claimed to speak as the *pouvoir constituant*. S/Res 1244 would arguably have forbidden it. It may be concluded that

[32] But the declaration of independence in the case at hand has had an effect on the UN and the territorial administration it has set up. In fact, the UN Secretary General started to reconfigure the functions of UNMIK as reaction to the Declaration, see e.g. Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2008/692 of 24 November 2008, para.50.

[33] But see UK Written Statement, 17 April 2009, 125, available at http://www.icj-cij.org/docket/files/141/15638.pdf (last visited 12 December 2010).

general international law frowns upon premature declarations of independence. The concrete declaration of independence at issue here escaped this frowning because it was made at a point in time when negotiations had been undertaken but had exhausted themselves. The inconclusiveness of the Opinion in respect of the law that actually governs the situation in Kosovo after the declaration of independence has been discussed at Security Council. At the meeting of the Security Council on 3 August 2010, Member States agreed that the Opinion had not changed parameters significantly.[34] The Security Council meeting did not issue a resolution or any statement. As an organ, the Council remains silent, and this may be interpreted as acquiescence in the evolving framework for negotiations including the administrative restructuring of the role of UNMIK by the UN Secretary General.[35] By contrast, the GA has taken a position[36], for which it is competent under Arts. 10 and 11 UN Charter[37].The resolution endorses the continued regionalized negotiations:[38]

[34] Security Council 6367th meeting, 3 August 2010, UN Doc S/PV 63.67. UK and US have welcomed the opportunity to continue negotiations. Russia continues to consider the declaration of independence illegal, and so does Serbia which also continues to oppose it. In the Security Council meeting of 3 August 2010, The UNSG, who also heads UNMIK has emphasised that after the Opinion, outstanding issues may be solved through negotiation, that the status of S/RES 1244 remains unaffected, and that he is engaged in active negotiations with EULEX, Report of the Secretary General S/2010/401.

[35] In spite of Russian and Serbian protests, UN Secretary-General Ban Ki-moon proceeded with the reconfiguration plan. On 15 July 2008, he stated: "In the light of the fact that the Security Council is unable to provide guidance, I have instructed my Special Representative to move forward with the reconfiguration of UNMIK... in order to adapt UNMIK to a changed reality". According to the Secretary-General, the "United Nations has maintained a position of strict neutrality on the question of Kosovo's status", Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/458, 2. On 26 November 2008, the UN Security Council gave the green light to the deployment of the EULEX mission in Kosovo, Statement by the President of the Security Council, 26 November 2008, S/PRST/2008/44. The EU mission is to assume police, justice and customs duties from the UN, while operating under the UN resolution 1244 that first placed Kosovo under UN administration in 1999.

[36] GA Res. 64/298, 13 October 2010.

[37] The Kosovo-Opinion, supra note 2, 16, para 40, confirms this, reading as follows: “While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10

"/2 Welcomes the readiness of the European Union to facilitate a process of dialogue between the parties; the process of dialogue in itself would be a factor for peace, security and stability in the region, and that dialogue would be to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people."

This is an endorsement by the GA of the dialogue between Serbia and Kosovo on the way to full secession and full membership of the EU and of the continuing international oversight of the process. In other words, the GA, in the absence of another positive statement by the Security Council, has provided an indication by the organized international community about the possible final status solution. It is by implication full statehood of Kosovo as only sovereign states can be members of the EU. The international oversight of the process is a joint international and regional one. The international element continues to be provided by UNMIK, the regional by EULEX.[39]

and 11 of the Charter, to which the Court has already referred, confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the Court has made clear in its Advisory Opinion on Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory, , paragraph 26, 'Article 24 refers to a primary, but not necessarily exclusive, competence'. The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence. The limit which the Charter places upon the General Assembly to protect the role of the Security Council is contained in Article 12 and restricts the power of the General Assembly to make recommendations following a discussion, not its power to engage in such a discussion."

38 The UN GA did not fail to notice that its resolution 63/3 of 8 October 2008 had requested the International Court of Justice to render an Advisory Opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?", but that it received the Advisory Opinion of the International Court of Justice of 22 July 2010 on the Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo.

39 As of 15 December 2010, 72 out of 192 (37%) United Nations member states have formally recognised the Republic of Kosovo as an independent state,for an overview see http://www.kosovothanksyou.com/ (last visited 10 December 2010). Notably, 22 out of 27 (81%) member states of the European Union and 24 out of 28 (86%)

E. Conclusions

This most anticipated Opinion of the Court undoubtedly disposes of the issue at hand. The opinion does, however, only shed light on a small fraction of the full normative picture relating to the matter of declarations of independence in a non-colonial context. The real value of the opinion may lie not so much in what it says but in what it does not say but implies.[40] It is, to use a metaphor, the dark side of the moon that should attract our attention. There are indeed two aspects to the Court's Opinion. The Court explicitly says that no rules of international law prohibit the declaration of independence in this non-colonial context. What it says not explicitly but impliedly is, however, probably more interesting. What it implies is that not rules but rather principles govern such secessionist situations: There is room for basing on self-determination such acts forming part and parcel of secession, but the consequence is not a right that would have to be respected by the other subjects of international law but rather a mere allegation of competence. As such, the declaration of independence will initially remain contestable by the territorial sovereign, but will increasingly be less so as negotiations progress and ultimately conclude.

This principle-centered approach may indeed be seen as inspired by the conception of international law first evidenced in the well-known Lotus case of 1927. A re-reading of the Lotus case confirms that the PCIJ in the case does not at all limit itself to determining negative, prohibitive rules. Rather it advances the idea of a system of international law centered on principles. State sovereignty as in *Lotus* may be seen as one – at the time probably the only principle of positive law – that could underlie the claim of international law to be a coherent normative system: a legal order. In modern international law, sovereignty is complemented by self-determination.

There then becomes visible a division of competence between the ICJ and the political organs of the UN for the progressive development of the foundational principles of international law. The Court of Justice assumes responsibility at the constitutional level setting the fundamental parameters

member states of NATO have recognised Kosovo. Russia and Serbia refuse recognition and China has expressed scepticism.

[40] Niklas Luhmann has not failed to point out that the law (as other societal functional systems) operates by putting distinctions into an existing unity. The focus on one side of the distinction does not mean that the other ceases to exist, rather the unmarked space it is always present. And the law can revisit this other side and start drawing new distinctions from there.

of the foundational principles, to the exclusion of the Security Council. But practice namely of the Security Council but also the General Assembly can then flesh out these fundamentals. The Court is leaving open the field of the law of self-determination in a non-colonial context to be progressively developed by other actors, namely the UN Security Council, the UN General Assembly, and the UN Secretary General. These bodies' law-making capacity is recognized and left unfettered, fleshing out the principle through the development of institutions of medium-level abstraction as well as permissive and prohibitive rule-making that matures over time. Such law will be secondary in nature in the sense that it results from the activity of the organs established by the Charter as primary law. The legal status of such secondary law will vary depending on the powers of each organ under the Charter. But that sustained practice of the Security Council will generate concept of a general nature on which it may draw when regulating specific instances of a conflictual self-determination. The Security Council enjoys broad discretion in framing the parameters for solving each case, including the permanent status of a territory.

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Recent Developments in Legal Assistance in Criminal Matters

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Abstract

The field of legal assistance in criminal matters is deeply influenced by, and intertwined with, international law. However, legal assistance in criminal matters, which accordingly has been traditionally ruled by conventional tools of mutual legal assistance, is beginning to change: Heretofore, legal assistance in criminal matters has been rendered in compliance with basic principles which reflect the international law parity of the interacting States while being open to modifications by way of bilateral or multilateral treaties between individual States. Now, far-reaching changes seem to be well underway: The European Union is gaining ground as a global player, aiming to implement an "Area of Freedom, Security and Justice". In order to reach this ambitious goal, a most important trend in criminal policy from a European perspective is to extend the principle of mutual recognition, which originally stems from the common market, to the area of criminal law. Taking an international perspective it is a remarkable evolution to see the European Union as an (arguably) idiosyncratic entity to commit its individual members to the fulfillment of obligations towards other non-Member States which the Member States themselves have not chosen. While both new approaches may be deemed more easily applicable beyond the realms of criminal law matters, namely in a commercial context, they indeed appear to be big steps in the sensitive area of criminal law which has traditionally been the sole responsibility of the sovereign State itself. Therefore the ongoing developments are bound to have international law repercussions. The following essay deals with these new developments in the field of legal assistance in criminal matters from a combined international and European perspective. We will be focusing specifically on the principle of mutual recognition since its implementation provides a litmus test for the state of procedural rights in the area of legal assistance in criminal law as well as its application within a reference-system previously governed by international law ultimately will modify international law. After describing foundational principles of legal assistance in criminal matters the ground will be prepared for further considerations by having a look at exemplary present application difficulties of mutual recognition, delve into the perspective of a rather radical simplification of transnational evidence gathering by application of the principle of mutual recognition. To give a complete picture we will examine the Intercontinental dynamics of legal assistance which has been put into effect under the rule of the European Union.

A. Introduction and Foundational Principles

Legal assistance law which traditionally encompasses extradition, assistance in the execution of foreign judgments and other assistance in criminal matters can be seen as a *measure* of the integration of international law in interstate relationships: According to general international law a sovereign State is not obligated to lend legal assistance. Neither is it reconcilable with its own sovereignty to impose on it the tolerance of sovereign acts of foreign States, e. g. the arrest of fugitives.[1] In principle States without further ado do not have self-interest in law enforcement with regard to violations of foreign penal laws. Hence, there is no acknowledged rule of international customary law, according to which States are required to extradite; instead of that, the granting of extradition is a right of the sovereign State.[2] Keeping this background in mind, classical legal assistance law in criminal matters is characterized by several material key principles, which relate to one foundational thought, namely the assumption that sovereign States are on par with each other. Those key principles are as follows: The principle of reciprocity, which states that the requested State is only prepared to comply with the request if it can (reasonably) expect that the requesting State complies with a request in analogous situations.[3] The ramifications of the principle of sovereignty on legal assistance manifest themselves probably most clearly in the principle of reciprocity. There seems to be a consensus that the principle of reciprocity emerges from the sphere of international politics.[4] Given the interstate equality, it would be a violation of the requested States' sovereign dignity if it were to assist another State unilaterally. The principle of double criminality is a rule that assistance in criminal matters depends on double criminality in terms of the act in question being punishable and prosecutable in both States involved.[5] Thus, the principle of double criminality allows States to deny assistance regarding acts which they have not criminalized, or at least not to the degree of severity as the requesting State. The principle of double criminality in its

1 Cf. e.g A. Verdross & B. Simma, *Universelles Völkerrecht*, 3rd ed.(1984), § 1020.

2 W. Wagner, 'Building an Internal Security Community', 40 *Journal of Peace Research* (2003) 6, 695, 702-703.

3 H. Van der Wilt, 'The principle of reciprocity' in: R. Blekxtoon & W. van Ballegooij (eds), *Handbook on the European Arrest Warrant* (2005), 71.

4 *Id.*, 71.

5 S. Alegre & M. Leaf, *European Arrest Warrant* (2003), 34; T. Hackner *et al.*, *Internationale Rechtshilfe in Strafsachen* (2003), para. 25.

effect primarily enables the requested State to uphold its decisions regarding the criminalization (only) of certain acts.[6] Those domestic crime-policy-decisions would be infringed upon if a State was obliged to extradite somebody whose acts are in accordance with the State's own national law to another State. As a consequence, the double criminality principle enables the individual to regulate his or her conduct (only) in accordance with the country of residence. The principle of specialty can be considered the third key principle. It states that judicial cooperation will only be granted regarding specific offences which have been clearly defined in the request for legal assistance. The person in question must not be prosecuted for any offence that was not included in the original request. Since the application of the principle of specialty requires a prognosis regarding the prospective acts of the requesting State, the requested State will demand a binding confirmation of the requesting State by verbal note that it will adhere to the principle of specialty in order to obtain a base for a prognosis.[7] The idea behind the specialty-principle is to prevent States from requesting a person for an (extraditable) offence and then, once the person has been transferred, prosecuting another offence for which extradition could not have been granted (for example because of the double criminality rule). Insofar, the principle of specialty safeguards the interests of the requested State and concurrently gives certainty to the person whose extradition is requested as to the charges which will effectively be held against him.[8]

After all, even a superficial look at the ideas behind legal-assistance-laws' key principles make it apparent that the conditions which derive from reciprocity, specialty and the double-criminality-rule are not focused exclusively and not even primarily on the protection of the interests of the accused. On the contrary, the focus lies first and foremost on the interests of the assisting State, mainly the safeguarding of its own sovereignty. Thus the requested State characteristically *in principle* has an open-ended discretion as to how and if it will carry out the request.[9] Accordingly, the extradition-

6 In this sense the principle of double criminality derives from the principle of reciprocity. The protective effect in regards to the rights of the accused is just an indirect result of the application of the dual-criminality principle and has entered into focus later on, cf. W. Schomburg *et al.*, *Internationale Rechtshilfe in Strafsachen*,, 4th. ed .(2006), § 3, para. 2.

7 Cf. Schomburg *et al.*, *supra* note 6, § 11, para. 9.

8 Cf. Alegre & Leaf, *supra* note 5, 47.

9 Cf. the example given by J. R. Spencer, 'The Green Paper on obtaining evidence from one Member State to another and securing its admissibility', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 9, 602.

procedure is split into a first phase wherein a court (e.g. the Higher Regional Court in Germany) proves the admissibility according to mere-judicial standards. But after that, the *granting* of extradition is proven by the executive; that means in principle the Ministry of Justice (cf. s. 74 German Law on International Judicial Assistance in Criminal Matters, IRG); which in its core-content remains open to foreign-policy-considerations.[10] Keeping this background in mind the basis of "classical legal assistance" is as *Spencer* had put it recently "a polite request: 'State B, please would you take this step for us? – if you can and when you can'".[11]

But despite all that, it may be underlined that aforementioned basic structures and foundational principles of legal assistance in criminal matters of course are open to modifications: Material principles as well as procedural aspects of legal assistance can be modified by bi- or multilateral treaties. Over the years a complex web of legal-assistance-treaties has developed.[12] The Council of Europe and later the European Union, especially, have been driving forces in the facilitation of treaties modifying the (traditionally international law inspired) appearance of legal assistance. Art. 4 of the EU Mutual Legal Assistance Convention of 2000 provides an example,[13] insofar as it changes the aforementioned open-ended discretion of the requested State to its mirror image: Now *in principle* the requested State *is obliged* to follow the specifications of the requesting State and it has to do so as soon as possible provided that the request is in line with the foundational principles of the requested States legislation.[14] Sure enough the matrix of bi- and multilateral agreements on legal assistance is enormously complex. Of course, its complexity ultimately only reflects the *individuality*, the still considerably differing crime-policy-stances of the Member States of the Council of Europe respectively (even) of the EU, which – from a "classical" international-law-perspective – appears to be no surprise given the State's sovereign dignity. In the end, this observation leads back to the

10 Cf. K. Ambos, *Internationales Strafrecht*, 2nd ed. (2006), § 10, para. 73. Although executive powers in fact are delegated to the Prosecution at the Higher Regional Courts (A. Sinn & L. Wörner, 'The European Arrest Warrant and its Implementation in Germany', 2 *Zeitschrift für Internationale Strafrechtsdogmatik* [2007] 5, 204, 210).

11 Spencer, *supra* note 9, 602.

12 Cf. (exemplarily) below at B.I.1.

13 Spencer, *supra* note 9, 602.

14 This provision is known as the *ordre public* caveat in international law and can be considered a fundamental principle by which collisions between differing legal systems can be solved.

observation that legal assistance in criminal matters in its nucleus remains rooted in international law.

However, at least in the EU more fundamental changes (compared with the piecemeal-approach of modifying treaties) seem to be underway: Even more profound than the partial addition to, or replacement of, "classical legal assistance law"[15] by way of international agreements, are the results of implementing the *principle of mutual recognition* in the field of legal assistance in the EU. Simplified, this principle, which has its origins in the Common Market, states that any decision of a Member State regarding criminal law which has come to pass in a rightful way has to be accepted as such in any other Member State, even if the decision in question is not in accordance with criminal law in the accepting State.[16] While both "traditional" mutual assistance and mutual recognition based legal assistance in criminal matters are about the same thing, namely bundling resources in criminal matters, there is a notable difference: with mutual recognition it is not as much a polite request but rather an order which is given to the assisting State. The assisting State is *in principle* obliged to carry out the order, possibly even in the manner in which the ordering State wants it done. In practice, however, the contrast occasionally may not be as evident since mutual-recognition as the case may be – depending on the content and scope of the grounds to refuse the execution of a mutual-recognition-instrument – may converge towards traditional mutual assistance.[17] Remarkably, mutual recognition instruments, e.g. the Framework Decision on the European Arrest Warrant, do not abandon any traditional prerequisites for – or hindrances to – mutual-assistance but let them resurface (at least partially) in the guise of (more or less far-reaching) grounds for refusal.[18] But despite this, due to the far reaching potentials of the *consistent* application of mutual recognition, the explicit

15 Cf. H. Satzger, *Internationales und Europäisches Strafrecht*, 4th ed.(2010), § 2, para. 5 ("*klassisches Rechtshilferecht*").

16 On mutual recognition cf. *inter alia Communication from the Commission to the Council and the European Parliament*, 26 July 2000, COM (2000) 495 final; V. Mitsilegas, *EU Criminal Law* (2009), 116, S. Peers, 'Mutual Recognition and Criminal Law in the European Union', 41 *Common Market Law Review* (2004) 5, 35; M. Böse, 'Das Prinzip der gegenseitigen Anerkennung in der transnationalen Strafrechtspflege der EU' in C. Momsen *et al.* (eds), *Fragmentarisches Strafrecht* (2003), 233.

17 K. Ambos, 'Transnationale Beweiserlangung', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 9, 557, 561.

18 Ambos, *supra* note 17, 560.

acknowledgement of the principle of mutual recognition by European primary-law constitutes a fundamental paradigm shift to keep in mind.[19] Since the Lisbon Treaty came into force in December 2009 this principle has been incorporated in Art. 82.1 Treaty on the Functioning of the European Union (TFEU)[20]. As it is well known the principle of mutual recognition has been widely criticized, since it cannot be transferred to criminal law without argument. To put it mildly, despite its acknowledgement by the TFEU, the precise functionality, legitimacy and the scope of the principle of mutual recognition (of judicial decisions) ultimately still appears unsettled. However, according to the will of the Council it still should act as the leading principle for judicial cooperation.[21] Notwithstanding remaining basic concerns about the applicability of mutual recognition to the realms of criminal law its relative success – highlighted most spectacularly by the implementation of the Framework Decision on the European Arrest Warrant (hereafter Arrest Warrant) – appears to be connected to the idiosyncratic international-law-character of the EU, i.e. the advanced development of its integration status which is significantly higher if compared to traditional structures of international law. With regard to the advancement of the EU which is acquiring a role that – by international law standards –, traditionally is associated with States it may be added that in recent times the EU has been party to several international agreements which influence its Member States by altering and modifying those international agreements on legal assistance in criminal matters which have been agreed upon beforehand with third parties. Remarkably, the Union acts with binding effect on its Member States in a field which traditionally is closely associated with inter*state* parity. This tendency can be seen very clearly in the recent agreements on mutual legal assistance between the EU and the United States of America (USA).[22] These agreements served to modify the already existing bilateral treaties between EU-Member States as e.g. Germany and the USA in the area of extradition and altered, for

19 Cf. Spencer, *supra* note 9, 602 and Ambos, *supra* note 17, 557.

20 *Treaty on the Functioning of the European Union*, 9 May 2008, OJ 2008, C115/47 [TFEU].

21 This is evidenced by the Council's *The Stockholm Programme – An open and secure Europe serving the citizen*, 2 December 2009, Council Document 17024/09, which shall be discussed in more detail in B. I.

22 *Agreement on Extradition between the European Union and the United States of America*, 25 June 2003, OJ 2003 L181/27 and *Agreement on Mutual Legal Assistance between the European Union and the United States of America*, 19 July 2003, OJ 2003 L181/34.

example, the bilateral treaty on mutual legal assistance between Germany and the USA by way of negotiation of a supplementary treaty even before the original treaty entered into force. This became a necessity, since the agreement between the EU and the USA in the area of other assistance[23] was on its way.[24]

The developments which have been alluded to are part of a complicated matrix. From these surrounding international regulations which have become increasingly complex, new and sometimes unforeseen problems arise. In order to adequately discuss those problems, we will begin with a short outline of the development of the international framework of legal assistance law, especially in context of the EU (see B. I.). Following this general outline, we will take a look at those new and complex problems which may arise *de lege lata et ferenda* on a national (see B. II.), European (see B. III.) and intercontinental (see B. IV.) level. The following text aims to shed light on these subjects.

B. Recent Developments

Legal assistance in criminal matters (also: judicial cooperation) as already mentioned above includes three areas: *extradition*, *assistance in the execution of foreign judgments* and *other assistance*. While legal assistance in accordance with the traditional mutual-assistance-approach will be rendered between States or – on the basis of the principle of mutual recognition of "judgments and [other] judicial decisions" (cf. Art. 82.1 TFEU) – between those (judicial) authorities which are issuing "decisions", the rendering of legal assistance (its framework-conditions) can be *arranged or provided for* on another level between several different players including the EU, the individual Member States of the EU and non-Member States. Judicial cooperation can therefore be facilitated amongst Member States of the EU (e.g. Germany and the Netherlands for instance by way of implementation of the Framework decision on the European Arrest Warrant), amongst the EU and non-Member States by way of treaty between the EU and said States with binding results for Member States (as

[23] I.e. mutual legal assistance, which does not fall in the areas of extradition or assistance in the execution of foreign judgements.

[24] This short outline of the influence of EU legislation in the area of already existing bilateral treaties shall suffice for now in order to not confuse the reader. We will delve deeper into this subject specifically regarding the already mentioned agreements in part B. IV.

is the case with the legal-assistance-relations between EU-member Germany and the USA) and between individually acting Member States of the EU and non-Member States (e. g. Germany and India)[25]. Due to the EU's desire to become a major global player and its explicitly stated intent to create an "Area of Freedom, Security and Justice" it has developed into a major force to account for the implementation of new procedures, treaties and laws regarding legal assistance in criminal matters. These developments appear to parallel the EU's progress from modest international law roots towards a sui-generis entity which might turn out to be influential e.g. with regard to the Mercosur-Union. Keeping this background in mind, we will first discuss the general outline of the international framework of legal assistance law, while focusing on new efforts on judicial cooperation originating in the EU. Our approach is based on the assumption that the complexities of international law can be more fully understood by keeping European developments firmly in sight.

I. Development of the Framework of Legal Assistance Law in the EU: from Schengen to the Stockholm Programme

As already mentioned, the fundamental difference between traditional legal assistance and "the European way" lies in the principle of mutual recognition applied within the Area of Freedom, Security and Justice (AFSJ). Legal assistance in an international context in the past was rendered in the form of mutual assistance based on aforementioned principles whereas in recent times in the EU the principle of mutual recognition provides the foundation for instruments of legal assistance, most notably the European Arrest Warrant. Before we delve deeper into the most recent developments regarding this subject however, a closer look in brief at the *development* of legal assistance in the EU, focusing on the Schengen Agreement, may round off the interim picture.

[25] Cf. Vertrag zwischen der Bundesrepublik Deutschland und der Republik Indien über die Auslieferung vom 27.06.2001 (*Agreement on Extradition between Germany and India*, 27 June 2001), BGBl. II 2003, 1634; BGBl. II 2004, 787.

1. The Schengen Agreement as Predecessor to Mutual Recognition

The system of mutual assistance instruments – as indicated – can be considered rather complex consisting mainly of the Council of Europe Convention on Mutual Assistance in Criminal Matters (1959), which is supplemented by its additional protocol from 1978 and the Convention on mutual assistance between the Member States of the EU from the 29 May 2000 with its additional protocol from 2001. Also the Benelux Treaty of 1962[26] and the Schengen Implementing Convention of 1990[27], which in accordance with its Art.48 serves to amend to the Council of Europe's Convention on Mutual Assistance in Criminal Matters (1959) with regard to assistance in criminal matters, deserve to be mentioned. Furthermore several bilateral treaties exist as well as the Nordic agreements.[28] The Schengen-*acquis* has meanwhile been integrated into the EU-framework by way of the Amsterdam treaty, which was signed on 2 October 1997 and has taken effect on 1 May 1999. Since then the acceptance of the Schengen regulations is a necessary prerequisite for all new member candidates in the EU. Regarding the Schengen Implementing Convention, it has to be mentioned that this agreement represented a significant step forward in the development of judicial cooperation from a perspective of efficiency. The grounds to refuse execution of a mutual assistance request were reduced.[29] Regarding search and seizure orders, only the requirements of double criminality and the *ordre public* were upheld as grounds for refusal according to Art. 51.[30] By way of converse argument this means that the presence of double incrimination is not required for all other (less invasive) investigation measures. From today's perspective, these developments spearheaded the trend towards mutual recognition which is now prevalent in the European Union and at the same time make it apparent that *in practice* the boundaries between mutual assistance and mutual recognition might be

26 *Benelux treaty concerning extradition and mutual assistance in criminal Matters*, 27 June 1962, 616 U.N.T.S., 8893.

27 OJ 2000 L239/1.

28 Cf. e.g. A. Lach, 'Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda', 4 *eucrim* (2009) 3, 107.

29 L. Bachmaier Winter, 'European Investigation Order for Obtaining Evidence in the Criminal Proceedings', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 9, 580.

30 T. Hackner, 'Internationale Rechtshilfe in der Praxis von Schengen' in S. Breitenmoser *et al.* (eds), *Schengen in der Praxis* (2009), 277, 285.

blurry depending on the concrete formulation of the instrument in question.[31]

The practical importance of the legal-assistance-related articles of the Schengen Implementing Convention may have been diminished since the Convention on mutual assistance between the Member States of the EU has taken precedence according to its Art. 2.[32] However the relevance of the Schengen Implementing Convention still remains, which can in part be attributed to Art. 95 et seqq. Those articles regulate the search for persons, be it as witnesses (Art. 98) or in order to extradite them (Art. 95)[33]. Also Art.54 of the Schengen Implementing Convention is highly relevant,[34] since it serves as the foundation for an European *ne bis in idem*, which has also found its way to the rulings of the European Court of Justice (ECJ).[35] Two principles which have not been touched upon by the Schengen Implementing Convention are the already mentioned principle of double criminality (at least regarding the very sensitive aspect of search and seizure orders) and the principle of non-extradition of citizens of the requested State. This is interesting to note, since those principles have been hardly fought over in the discussion on the European Arrest Warrant.[36]

The most recent developments regarding the Schengen-*acquis*, *however*, are the joining of Switzerland which – as a non-EU-State – has acceded to Schengen according to the agreement from 26 October 2004[37]

31 Cf. *supra* note 17 et seqq.

32 Hackner, *supra* note 30, 285.

33 *Id.*, 295.

34 O. Lagodny, 'Die Grundlagen der internationalen Rechtshilfe im Rahmen von Schengen', in S. Breitenmoser *et al.* (eds), Schengen in der Praxis (2009) 259, 266. With regard to the interrelation with Art. 50 of the EU's Charta of Basic Rights cf. Satzger, *supra* note 15, § 10, para. 68.

35 Hackner, *supra* note 30, 297.

36 Lagodny, *supra* note 30, 269.

37 *Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Conferation's association with the implementation, application and development of the Schengen acquis*, 26 October 2004, OJ 2004 L370/78, L368/26; 2008 L53/1. This has lead to very close ties between Switzerland and the rest of the Schengen-states, since Switzerland has to follow along closely with new developments in the Schengen-area if it wants to be part of the *acquis*. Its only alternatives are acceptance and implementation of new legislation or the termination of the cooperation as a whole if it does not want to go along with new developments (Hackner, *supra* note 30, 283). While Switzerland can take part in the developmental stages of new legislation on an informal level, final acceptance of said legislation is the prerogative of the EU's structures and Member States (Cf. *id.*, 283): Regarding new developments, Switzerland has to notify the EU during a period of 30 days after

and the invention of the principle of availability which states that information which is relevant for criminal prosecution and available in any given State of the EU has to be made *also* available to any other Member State.[38] It has been incorporated into the Schengen-acquis indirectly by way of the Prüm Convention[39] which aims to simplify the exchange of information relevant to criminal prosecution such as DNA-profiles and fingerprints.[40] The mechanism introduced by the principle of availability has been criticized due to (its inherent potential for) the transfer of competence from judicial authorities to police authorities so that information which has been gained by following strict judicial control procedures eventually might be turned over to police authorities without further assessment by a judge.[41] In this regard there are obvious similarities to criticism towards the (mutual-recognition-based) European Investigation Order. Since this instrument will be discussed thoroughly further on in the text, we will refrain from delving deeper into the subject at this time. However, this clearly shows that the Schengen-*acquis* might be considered the testing ground for new concepts regarding legal assistance in criminal matters in the EU.

2. The Stockholm Programme and its Corresponding Action Plan

While the Schengen Agreement marks the very first beginning of the journey towards mutual recognition, the Stockholm Programme and its corresponding Action Plan can be considered the state-of-the-art agenda for

being informed by the Council of the acceptance of new Schengen-legislation, if it wants to implement this legislation. Afterwards, an adequate period will be granted in order to implement the Schengen-legislation. Until then, the Schengen-legislation has to be applied temporarily. If Switzerland does not act during those periods or if it notifies the EU of its non-acceptance, the Schengen-association will be terminated. Also, Switzerland is not bound to the ECJ's interpretation of EU-law, even if it is part of the Schengen-*acquis* (*Id.*, 283).

38 Cf. *The Hague Programme*, 3 March 2005, OJ 2005 C53/7.

39 *Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration*, 27. May 2005, Council Document 10900/05 [Prüm Convention]. While the Prüm Convention was originally a multilateral treaty which had been signed only by some EU-Member States, it was intended from the beginning to incorporate the agreement into the Schengen-*acquis*, cf. Hackner, *supra* note 30, 299.

40 Hackner, *supra* note 30, 299.

41 *Id.*, 300.

the development of legal assistance in criminal matters on the basis of mutual recognition. According to the Council of the European Union's Stockholm Programme[42] the priorities regarding the improvement of legal assistance in criminal matters will lie in furthering mutual trust between the Member States in order to enable them to act in accordance with the principle of mutual recognition.

Remarkably, the protection of the rights of suspected and accused persons is seen as an essential pre-condition for the facilitation of further trust.[43] Consequentially, the rapid accession of the EU to the European Convention is regarded as one of the key steps[44] to further mutual trust. At the same time, regardless of tangible successes (or failures) with respect to the improvement of mutual trust, the creation of a mighty single mutual-recognition-based-instrument to supplement the complex system of mutual-assistance on evidence-gathering in cases with cross-border-dimensions is concretely envisioned.[45] This new system shall encompass as many types of evidence gathering as possible by replacing the existing instruments which are of a fragmentary nature. A detailed roadmap for the implementation of these tools can be found in the Commission's action plan for the realization of the Stockholm Programme.[46] The main waypoints in the area of criminal law are seen in preventing criminals to avoid arrest by exploiting judicial differences between Member States, the implementation of a complete system to obtain evidence and the creation of a European public prosecution department which will be founded on Eurojust. Focusing strictly on legal assistance in criminal matters the next steps shall be:

- A proposition on laws regarding a complete system for obtaining all kinds of evidence in criminal matters. This system shall be based on the principle of mutual recognition. The proposition itself shall be put forth by the Commission in 2011.
- A proposition on laws to create a common standard for securing the admissibility of evidence in criminal matters which also shall be put forth by the Commission in 2011.

42 *Stockholm Programme*, *supra* note 21.
43 *Id.*, 17.
44 *Id.*, 11-12.
45 *Id.*, 22.
46 *Action Plan Implementing the Stockholm Programme*, 20 April 2010, COM(2010) 171.

- Furthermore in 2011 a proposition on laws regarding the mutual recognition of fines, including fines for reckless conduct in traffic shall be put submitted by the Commission.
- A handbook on the execution of the treaties on legal assistance and extradition between the EU and the USA is envisaged for as early as 2010.

Those main waypoints will yet have to be reached but unsurprising in the face of the boldness of the action plan animated discussion has already been spawned regarding these plans, especially concerning the procurance of evidence and the admissibility of said evidence. Before we will explore this subject further however, a look at recent developments in those areas of judicial cooperation which have been examined before appears appropriate in order to remind us of the status quo and its problems.

II. Present Application Difficulties of Mutual Recognition

The European Arrest Warrant has proven to be a kind of acid test of mutual recognition. It, therefore, has been widely discussed[47] so that a short recapitulation will suffice before addressing specific recent German case law as an example for the transposition of the Framework Decision highlighting the challenges posed by the Arrest Warrant. The Arrest Warrant has been incorporated in part eight of the German IRG (*Gesetz über die internationale Rechtshilfe in Strafsachen* – Law on International Assistance in Criminal Matters) which is where most of the rules concerning judicial cooperation in criminal matters can be found. Less than one year later though, the Second Senate of the Federal Constitutional Court in the Darkanzali-Case declared the first European Arrest Warrant Act unconstitutional and void due to a violation of the *Right not to be extradited*;[48] also its accordance with the *Right of Recourse to Court*[49] was questionable.[50]

47 Cf. *inter alia* Alegre & Leaf, *supra* note 5; K. M. Böhm, 'Das neue Europäische Haftbefehlsgesetz', 59 *Neue Juristische Wochenschrift* (2006) 36, 2592; B. Schünemann, 'Die Entscheidung des Bundesverfassungsgerichts zum europäischen Haftbefehl', 25 *Strafverteidiger* (2005) 12, 681.

48 The Right not to be extradited can be found in the German constitution (*Grundgesetz*) in Art. 16 (2). It reads: "No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed." available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (last visited 21 December 2010).

Even though the implementation of the Arrest Warrant intended to simplify judicial cooperation regarding the extradition and procedure of criminal trials, its effects can be exactly opposite as the following recent examples from German case law will show: both cases have been decided by the Higher Regional Court in Oldenburg[51] and discuss pre-trial confinement in order to prevent flight from German jurisdiction. In both cases the accused persons were Dutchmen who had their respective fixed abode in the Netherlands and were prosecuted for trafficking marijuana in large quantities. For persons without a fixed abode who can expect long-term imprisonment there is a knee-jerk reaction in German criminal jurisdiction to assume that they will flee without awaiting trial, so in most of these cases pre-trial confinement can be considered as given. However the issue of flight is comparatively smaller when a fixed abode is present. This line of thought is also valid in those cases where the accused have their residency in a Member State of the EU[52], because in principle they can be brought to trial via arrest and extradition thanks to the Arrest Warrant. Accordingly, it had to be expected that the accused in the cases discussed here would be granted bail and not be taken into custody. This, however, is not what transpired. The First Senate of the Higher Regional Court decided in both cases that there was a higher risk for the accused Dutchmen to flee their respective trials when compared to German citizens. The Court denied bail in both cases, arguing that the possibility of issuing an Arrest Warrant was irrelevant in these cases. This was based on the fact that it would be possible for the Netherlands to allow extradition for their citizens only on the condition that they would be brought back to the Netherlands to serve their sentence if they were convicted to prison (based on Art. 5 No. 3 FD 2002/584/JI, the Framework Decision on the European Arrest Warrant which has been incorporated in Art. 6 of the Dutch law on extradition, the Overleveringswet)[53]. Also another condition for extradition of the accused

49 The Right of Recourse to Court is found in the German constitution in Art. 19 (4) 1: "Should any person's rights be violated by public authority, he may have recourse to Court."

50 Cf. BVerfG, 18 July 2005, 2 BvR 2236/04, 58 *Neue Juristische Wochenschrift* (2005) 32, 2289.

51 OLG Oldenburg, 4 November 2009, 1 Ws 599/09 and OLG Oldenburg, 8 February 2010, 1 Ws 67/10. Both of these decisions are available in 30 *Strafverteidiger* (2010) 5, 254 with a comment by S. Kirsch.

52 OLG Naumburg, 10 October 1996, 1 Ws 101/96. This decision is available in 17 *Strafverteidiger* (1997) 3, 138. LG Offenburg, 15. December 2003, 3 Qs 114/03 is available in 24 *Strafverteidiger* (2004) 6, 326.

53 *Staatsblad* (2004), 195, quoted after S. Kirsch *supra* note 51, 257.

Dutchmen would have to be met by German authorities in order to proceed, namely to accept the transformation of the German prison sentence to a sentence which is deemed acceptable under Dutch law.[54] It stands to reason that the Dutch sentence after transformation would not be as severe as the German sentence because the German stance on ownership, use and selling of marijuana is significantly stricter than the Dutch model. Since the accused can expect to serve a significantly reduced prison sentence in case of his extradition by the Netherlands due to the Dutch model, it would be in his best interests to flee to the Netherlands without awaiting trial in Germany. Firstly, it has to be noted that the Higher Regional Court's course of action arguably constitutes discrimination against a citizen of a Member State because of his citizenship, which is strictly forbidden according to Art. 18 TFEU.[55]

Secondly, and more relevant regarding the future direction of policy in the area of criminal law in the EU, are the following thoughts: the decisions of the Higher Regional Court lead one to believe that their main motivation does not lie in securing the realization of the criminal trial but rather in enforcing Germany's legal policy regarding "soft-drug" use. However this motivation is rejected by the Higher Regional Court in its second decision from 8 February 2010 where the Senate explicitly states:

> "The question which is discussed here is not about the enforcement of standards according to German criminal law but rather about securing the realization of the criminal trial."[56]

Yet, the impression remains that the Court acts against the legislators' intention to accept the Dutch practice with all its consequences. This intention which has been manifested in the signing and ratification of the European Convention on the Transfer of Sentenced Persons[57] includes necessarily the acceptance of results which may not always correspond with German legal policy in the field of criminal law. It appears to be inconsistent behavior on the part of Germany to act against its former statements, especially considering that these same models which have been

54 Based on Art. 11 of the *European Convention on the Transfer of Sentenced Persons*, 21 March 1983, ETS 112.

55 Cf. S. Kirsch *supra* note 51, 257.

56 OLG Oldenburg, 8 February 2010, 1 Ws 67/10, 30 *Strafverteidiger* (2010) 5, 255, 256. Translation by the authors.

57 Cf. *supra* note 54.

criticized by the Court have been incorporated in the German IRG as well.[58] The mentioned Higher-Regional-Court-decisions serve as a perfect example of why the (in)famously evoked "high degree of trust and solidarity"[59] within the EU is at least questionable and justify the Belgian scholar Klip's ironic remarks on the ubiquitous use of this slogan.[60]

> "It must be noted that there is a large gap between what the member states say and arrange officially and the actual performance. I suffice here with the example of the mutual confidence that all states have in each other. This confidence is so great that it must be ordained at regular intervals that there shall be mutual confidence. Despite this in mutual recognition all manner of old grounds for refusal are steadfastly adhered to."

It appears obvious that a most effective means to create trust would be the harmonization of differing Member States' laws and for the sake of completeness it may be noted that the Commission's action plan for the realization of the Stockholm Programme explicitly acknowledges that there is still a lot of work to do in the area of harmonizing European criminal law as illustrated in the following quote:

> "The administration of justice must not be impeded by unjustifiable differences between the member states' judicial systems: criminals should not be able to avoid prosecution and prison by crossing borders

58 Cf. S. Kirsch *supra* note 51, 258. As in the Netherlands, the extradition of German citizens is only admissible if the condition is met that they would be brought back to Germany to serve their sentence if they were convicted as according to their wish, cf. s. 80.1 IRG. Also, the transformation of a foreign sentence to a sentence according to German standards has been realized in s. 54 IRG.

59 Cf. the exemplarily vague reference to mutual trust in the ECJ's decision on the European Arrest Warrant: Case 303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad*, [2007], para. 57: "With regard, first, to the choice of the 32 categories of offences listed in Article 2(2) of the Framework Decision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality."

60 A. Klip, 'European Integration and Harmonisation and Criminal Law' in D. M. Curtin *et al.* (eds), *European Integration and Law* (2006), 137.

> and exploiting differences between national legal systems. A solid common European procedural base is needed."[61]

The effects of the remaining diversity of Member States' criminal law (and crime-policy-approaches) are perfectly illustrated in the case which has been presented here, as it would have been sensible to look for alternatives to provisional detention.[62] First steps to solve the problem – once more on the basis of mutual recognition – have been taken with the FD 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.[63]

The problems of different treatment between residents and non-residents as they have surfaced in the cases which we have just discussed have also been foreseen by the Council of the European Union. This is evidenced in No. 5 of the reasons for adoption of FD 2009/829/JHA which states:

> "As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not. In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident."[64]

In order to reach these goals the Framework Decision allows for several types of supervision measures which are specified in Art. 8 FD 2009/829/JI. Art.8.1 specifies those supervision measures which have to be monitored by each Member State as a minimum standard, e.g. an obligation for the supervised person to notify the authorities of any change of residence or an obligation not to enter certain places. Art. 8.2 names several other

61 *Action Plan Implementing the Stockholm Programme*, *supra* note 46, 5.

62 Cf. S. Kirsch *supra* note 14, 257, who points out that there is no reason which definitely prohibits the possibility of a Dutchmen appearing at his criminal trial in Germany.

63 Council Framework Decision 2009/829/JHA, 23 October 2009, OJ 2009 L294/20.

64 OJ 2009 L294/20.

supervision measures which can be monitored by the Member States if they so choose, as soon as they transpose the Framework Decision to national law, most notably the obligation to deposit bail. According to Art. 13 FD 2009/829/JI those supervision measures, if incompatible to the law of the executing State, may be adapted to the types of supervision measures which most closely resemble the supervision measure of the executing State in a comparable case while also corresponding to the originally intended supervision measure. For several offences which are listed in Art. 14 of the Framework Decision, the principle of double criminality is not deemed necessary, however Member States may for constitutional reasons "opt-out" of some or all of the offences listed. Art. 15 lists different reasons which might give grounds for the non-recognition of decisions on supervision measures, e. g. the *ne bis in idem* principle or the lack of criminal responsibility under the law of the executing State due to age.

III. Simplifying Legal Assistance by the Introduction of Mutual-Recognition-Based Tools?

Instead of a substantial step-by-step approximation of relevant Member State's laws the Union relies heavily on the fast-track of mutual recognition which recently has been expanded to the field of evidence-gathering by the Framework Decision on the European Evidence Warrant (hereafter Evidence Warrant).[65] However, the scope of the Evidence Warrant is rather limited as it only applies to pre-existing evidence, meaning "objects, documents and data" already in existence *in themselves* and *insofar* at hand (in the requested State).[66] Accordingly an Evidence Warrant allows for "measures, including search or seizure" provided[67] that the Warrant regards to an offence listed under Art. 14.2 FD – a mechanism similar to the Arrest Warrant. Pursuant to Art. 4.2 FD an Evidence Warrant should not be issued with regard to (the request of) interviews, bodily examinations, obtaining of real time information (as in case of intercepting communications) or communication data. Furthermore excluded is the request for an "analysis of existing objects, documents or data", which makes it apparent that the Evidence Warrant only aims at evidence-gathering that concerns objects/data which (at least in itself) are already at

65 Council Framework Decision 2008/978/JHA, 18 December 2008, OJ 2008 L350/72.

66 Cf. consideration 7, Art. 1 para. 1 Council Framework Decision 2008/978/JHA *supra* note 65.

67 Cf. Art. 11 para. 3 Council Framework Decision 2008/978/JHA *supra* note 65.

hand. The Evidence Warrant's concept therefore restricts the requesting State's authority to a somewhat accessory role with regard to investigations in the requested State. Hence the Evidence Warrant will arguably be no breakthrough improvement. As practitioners in order to obtain evidence from abroad in *most* cases anyway have to rely on the traditional instruments of *mutual legal assistance* (esp. the 1959 and 2000 Conventions on mutual assistance in criminal matters) they might decide to request *all* evidence through the traditional channel.[68] Nevertheless because of doubts concerning the applicability of the principle of mutual recognition to the gathering of evidence the approval-process was a lengthy one that took five years.[69] From the perspective of European-Union-crime-policy it may be emphasized that the Evidence Warrant from the beginning was perceived only as a "step towards a single mutual recognition instrument that would in due course replace all existing mutual recognition regime".[70]

1. Basic Doubts Concerning the Applicability of the Principle of Mutual Recognition to the Area of Evidence-Gathering

As has already been emphasized, European Law acknowledges the principle of mutual recognition as the foundation of legal cooperation in the European Union (Art. 82 TFEU). Nevertheless although mutual recognition *might* work reasonably well in certain areas of legal assistance, it will not necessarily work as well in others.[71] That those concerns are not ill-founded shows a comparison between the field of obtaining evidence and the area of extradition: Within the European Union traditional extradition law structures have been replaced by the EAW. The EAW was subject to constitutional concerns in several Member States and its implementation laws differ considerably. Nevertheless an Arrest Warrant in a way appears to be a "static" product of a certain national procedure;[72] its content and significance is quite obvious: an authority decides that a certain individual shall be put under arrest to ensure he will stand trial. In contrast, the significance of a certain act of evidence-collecting cannot be separated from

68 Bachmaier Winter, *supra* note 29, 583.
69 *Id.*, 581.
70 *Commission Proposal for the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, 14 November 2003, COM (2003) 688 final, 11.
71 Spencer, *supra* note 9, 603.
72 Cf. Ambos, *supra* note 17, 559.

the (possibilities of the) future use of the evidence within the trial-proceedings. If – because of those characteristics of evidence-gathering – evidence-warrants *could* not be compared to common-market products the applicability of mutual recognition to transnational evidence gathering becomes questionable: Why should an evidence-warrant issued in Member State X be recognized in Member State Y? The ready answer would be: Because there is an overwhelming trust between States X and Y! But this explanation only raises further questions since the *subject* of trust (which perfectly well might exist) seems to be the (quality of) Member State proceedings i.e. Member State proceedings *as a whole*. Mentioned problems are of course amplified by the diversity of Member State rules on collecting evidence[73] and admissibility; an instrument aimed at simplifying legal assistance with regard to the field of evidence gathering has to take into account that the facilitated obtaining of evidence would be completely senseless if the evidence turned out to be inadmissible (because of the circumstances of the taking of evidence). It may be emphasized that aforementioned concerns are not restricted to the ongoing academic discussion but have been most recently adopted by German Parliament.[74]

2. Further Steps ahead: Initiatives of the Commission and a Member State group

However, the Framework Decision on the Evidence Warrant eventually has been adopted in December 2008 and is to be implemented by the Member States until 19 January 2011. But, until now the Evidence Warrant is only in force in Denmark[75]; none have ever been issued, therefore there are no practical experiences concerning the application of mutual recognition in the field of evidence-gathering further steps could draw from.[76]

73 Spencer, *supra* note 9, 603.

74 German Parliament Decision of 7 October 2010, available at http://www.strafverteidiger-bayern.de/media/pdf/2010-10-07_Beschluss-BT_Europ-ischeErmittlungsanordnung.pdf (last visited 18 December 2010); cf. also BT-Drs. 17/3234, 4.

75 Cf. Commission opinion 'Cross-border crime' of 24 August 2010 IP/10/1067 available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1067&format=HTML&aged=0&language=DE&guiLanguage=en (last visited 18 December 2010).

76 Cf. BT-Drs. 17/660, 3.

a) The Green Paper

Notwithstanding in November 2009 the commission adopted the "Green Paper on obtaining evidence in criminal matters …"[77]. The basic idea behind that initiative is to replace the complex system of mutual legal assistance (concerning evidence-gathering) by a single tool based on the principle of mutual recognition. Instruments based on the principle of mutual assistance "may be regarded as slow and inefficient".

> "[T]he most effective solution to the above mentioned difficulties would seem to lie in the replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition and covering all types of evidence".[78]

The Green Paper appears rather sketchy what might be explained by the sensitiveness of the matter.[79] Member States' responses are differing; Germany especially has taken up a critical stance concerning the commission's initiative.[80] The German reply of February 2010 stresses that "obtaining evidence should be considered in the overall context of national law" thus adopting a core-concern regarding the application of mutual recognition to the area of evidence-gathering. The official statement underlines this point by exemplifying: "For instance, far-reaching investigatory powers may be counter-balanced by extensive rights to refuse testimony." Given the (still) "considerable differences" between Member States' "minimum standards for defendants in criminal proceedings" mutual-recognition instruments for obtaining up to-date evidence lack a

77 *Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility*, 11 November 2009, COM(2009), 624 final.

78 *Id.*, 4-5.

79 Critical S. Allegrezza, 'Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 9, 569, 570: "skeletal text, partly confused, which treats roughly subtle issues that would deserve much greater attention and evaluation".

80 Cf. Replies of the Federal Republic of Germany to the questions under points 5.1 and 5.2 of the Green Paper of 26 February 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/national_governments/germany_en.pdf (last visited 17 December 2010).

sufficient basis since "minimum standards would […] be indispensable with a view to extending the principle of mutual recognition to broad areas of obtaining evidence". Remarkably this stance seems to question the precedence of mutual recognition over harmonization (at least where evidence-gathering is concerned): Since Art. 82.2 TFEU only provides for the adoption of minimum rules while explicitly taking into account the differences between Member States' legal systems and traditions the development might have reached a deadlock: on the one hand extending the principle of mutual recognition to the field of evidence gathering requires a sufficient degree of harmonization of Member States' rules of procedure – on the other hand Art 82.2 TFEU unequivocally acknowledges the differences which are effectively hindering mutual recognition.[81] But, of course, whether there is a deadlock depends on the degree of harmonization one deems necessary as sufficient basis for mutual recognition. The German position seems to be the most rigid in the EU.[82] Other Member States, for example Austria, France or the Netherlands are basically in favor of extending the principle of mutual recognition to the area of evidence gathering and moreover one has to bear in mind that an evidence gathering instrument based on the principle of mutual recognition could be adopted under the terms of the ordinary legislative procedure; strangely the emergency brake-procedure would only be available with regard to harmonizing measures which could effectively create the basis for mutual recognition.[83]

b) Draft Directive on the European Investigation Order in Criminal Matters (Investigation Order)

However, the discussion on the Green Paper might already be rather out of date since in April 2010 several Member States brought forward their own proposal for a directive regarding the European Investigation Order in criminal matters (Investigation Order hereafter)[84]. The initiative proposes an

81 In Art. 82.2 it says: "Such rules shall take into account the differences between the legal traditions and systems of the Member States."

82 This might be explained by the difficult implementation-history of the EAW and the skeptical Lisbon-Decision of the Federal Constitutional Court.

83 Cf. Art. 82.1, 2 and 3 TFEU; 16.3 TEU.

84 Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters of 29 April 2010, Council Document 9145/10, Interinstitutional File 2010/0817 (COD).

instrument that (differing from the Evidence Warrant) would cover *any kind* of investigative measures (except the organizing of joint investigation teams and certain interceptions of communication; Art. 3 draft directive). The obvious main advantage of the Investigation Order coheres with the commission's concern expressed in the Green Paper that is to simplify the existing complicated system of legal assistance. But to what extent the adoption of the Investigation Order will turn out as an improvement of the difficult area of legal assistance of course depends on details of the directive (and its implementation laws). The Initiative seems (at least implicitly) to acknowledge fundamental difficulties: According to s. 6 of the preamble of the Investigation Order on the one hand "a new approach is needed, based on the principle of mutual recognition"; on the other hand "the flexibility of the traditional system of mutual legal assistance" is to be taken into account.[85]

It is not easy to tell what will happen in the near future. The German stance, especially, regarding the instruments mentioned before is very skeptical. However, it appears advantageous to concentrate on the Investigation Order. In its basic structure (as an evidence-gathering-instrument founded on the principle of mutual recognition) the Investigation Order parallels the Evidence Warrant; the inherent problems of applying mutual recognition to the field of evidence gathering become all the more apparent with regard to the Investigation order due to its wider scope. Indeed, the application range of the proposed instrument in terms of investigation-measures and procedures covered by an Investigation Order conceivable would be wide. Pursuant to Art. 3 of the draft, an Investigation Order would cover any kind of investigative measures (except the organizing of joint investigation teams and certain interceptions of communication; Art. 3 draft directive). Furthermore, pursuant to Art.4.b, the draft directive would cover any investigations with regard to any administrative offences. But e.g. German judges have expressed concerns that the implementation of the draft directive without limitations with respect to its applicability to mere administrative offences (in German: *Ordnungswidrigkeiten*) might bring forth surplus load.[86] Art. 2 of the draft directive deals with the practical important and sensitive aspect of the

85 *Id.*, 2.

86 Cf. *Stellungnahme des Deutschen Richterbundes zur belgischen Initiative für eine Richtlinie des Europäischen Parlaments und des Rates über die Europäische Ermittlungsanordnung in Strafsachen*, Ratsdok. 9145/10, no. 29/10 (2010) available at http://www.drb.de/cms/index.php?id=658 (last visited 18 December 2010).

competent authorities Member States can respectively are to designate for issuing and executing Investigation Orders. Where the execution authority is concerned the Member States have only a limited implementation margin insofar as the designated authority has to have the competence "to *undertake* the investigative measure mentioned in the Investigation Order in a similar national case".[87] In other words: police-authorities would be designated as executing authorities. Art.2.a) draft directive pertains to the *authorities competent to issue an Investigation Order*. It is identical to Art. 2.c) FD and hence raises identical questions. According to Art. 2.a)i draft directive, judges, courts and investigating magistrates can be designated as competent "issuing authorities"; in addition to that "public prosecutor[s] competent in the case concerned" are explicitly included. Art. 2.a)ii draft directive furthermore provides a sweeping clause that seems open to discussion: it allows for the designation of

> "any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence in the case concerned to order the gathering of evidence in accordance with national law".

The explanatory memorandum argues that the term "judicial authority" is not meant in *strictu sensu*[88], according to its interpretation even police authorities can be designated by Member States as issuing authorities provided that the authority in question "has the power to order the investigative measure concerned at national level".

Once more the problem of the diversity of Member States' criminal procedure rules on the preliminary proceedings appears: since police authorities in part have far reaching investigative powers (of their own) a single instrument aimed at *simplifying* transnational gathering can hardly exclude police bodies as competent issuing authorities. On the contrary, to be efficient an Investigation Order should include any authorities competent in the field of criminal prosecution.[89] But an approach of such broadness raises doubts. First of all, the TFEU differentiates between judicial and police cooperation. Hence it seems dubious whether a directive that covers the issuing of Investigation Orders by police authorities that – depending on

87 *Explanatory Memorandum*, 3 June 2010, Council Document 9288/10 ADD 1, Interinstitutional File 2010/0817 (COD), 5.

88 *Id.*, 4.

89 Cf. *Stellungnahme des Deutschen Richterbundes, supra* note 86.

the situation on the requested side[90] – as the case may be are executed by police authorities would find a sufficient basis in Art. 82.1 TFEU. Accordingly the commission in answer to the initiative has pointed out that it ought to be *clarified* that no regulation is planned that could be interpreted as covering police-cooperation.[91] In addition to similar doubts concerning the coverage of Art.82.1 TFEU, the inclusion of any public authorities beyond Member State courts and (investigation) judges obviously would put a particular burden on the (material) foundation of the proposed Investigation Order. Even under domestic circumstances e.g. German criminal procedure law bestows varying degrees of competence on judicial authorities on the one hand and other public authorities on the other hand like prosecutors and police bodies; there are certain investigative measures which only can be authorized by a judge. Others like searches can only be authorized by the prosecution or its investigating-officers in case of imminent danger. Any such differentiations reflect the assumption that judicial decisions are of superior quality compared to decisions by other public authorities. Hence it might be acceptable that the Investigation Order (as outlined above) effectively would force the executing party into blindly trusting in the soundness of the substantive grounds for the request provided that the request was issued by a judge/a court. That the same could be said with regard to police issued Investigation Orders seems doubtful given the fact that even in domestic cases governed exclusively by national law several restrictions are imposed on the police (and to a lesser degree on prosecutors) which do not apply for judicial decisions. Of course one might argue that because of the similar working methods and the common mission of crime fighting that a high degree of mutual trust exists especially between police officers of different Member State forces. But it seems open to discussion whether mutual trust between law enforcement personnel can provide a sufficient basis for mutual recognition.[92] For instance, the German Parliament has recently pointed out that mutual trust between Member States (authorities) does not provide for a sufficient basis with respect to mutual recognition in the area of criminal law; since mutual recognition in this field amounts to transnational restrictions which affect the citizen the *citizen's trust* in the European Union is required to allow for mutual recognition.[93]

90 Cf. Council Document of 4 October 2010, 13049/1/10.
91 Commission Comment of 24 August 2010, C(2010) 5789 final, 3.
92 Convincing Bachmaier Winter, *supra* note 29, 586.
93 Cf. *supra* note 74.

Art. 5 draft proposal deals with "content and form of" an Investigation Order. With regard to the substantial reason for its decision to issue an Investigation Order the issuing authority is (only) to supply a "summary of facts"[94] and will *certify the accuracy of the Investigation Order's content* (Art. 5 No. 1 draft proposal which parallels Art. 6 FD). On closer inspection, however, it seems dubious whether Art. 82.1 TFEU (the principle of mutual recognition) could provide a sufficient basis for the outlined procedure. Reference objects of the principle of mutual recognition acknowledged in Art.82 TFEU are "judgments and judicial *decisions*". With respect to this the FD on the Arrest Warrant questionnaire requests issuing authorities to indicate the "Decision on which the warrant is based"[95] thus (at least formally) differentiating between a judicial decision (as a subject of recognition) and the warrant as the instrument/medium by which the recognition procedure is to be facilitated. The Investigation Order questionnaire in contrast does not refer to a "decision" which could be regarded as the subject matter of a mutual recognition process. Hence, if for instance a public prosecutor would fill in an investigation order and certify its content it seems open to question whether *that* act qualifies as a "judicial *decision*" whether the Investigation Order *in itself* can be a "decision" in terms of Art.82.1 TFEU. Remarkably the issuing of an Investigation Order *does not even seem to require a declaration* that the requested investigation-measure could be authorized domestically by the issuing authority. But, given that the principle of mutual recognition implies the existence of a judgment or a judicial decision that *in its content* could be "recognized" a judicial decision seems to *be bound to have* a content that exceeds that of a mere request. *If* an Investigation Order (an Evidence Warrant) would require a judicial decision on the (domestic) admissibility of the desired measure, it (arguably) would carry a statement, a declaration which in its content (in principle) appears to be open to recognition to application abroad. But if – in contrast – (lacking any such declaration) the communicative content of an Investigation Order due to the lack of any such declarations at a closer look boils down to a mere request addressed to a foreign authority to do this or

94 *Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters*, 29 April 2010, Council Document 9145/10, Interinstitutional File 2010/0817 (COD), Annex A lit F.

95 Council Framework Decision 2002/584/JHA, 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/14, Annex, lit. b ("Decision on which the warrant is based: […] Arrest warrant or judicial decision having the same effect […] Enforceable judgement").

that arguably there would be no subject to recognition[96]. A mere request could only be denied or complied with, ultimately mutual assistance-style.

Furthermore, it might turn out to be problematic that an Investigation Order (as well as an Evidence Warrant) would provide the executing authority only with a "summary of the facts" regarding the substantive reasons for the request. Of course, one might bring forward that there simply is no need for further information since the executing authority is to act on the basis of trust in the substance of the order. However, (in domestic cases) e.g. the German Federal Constitutional Court stresses that authorities competent to order e.g. searches are to evaluate the reasons for the requested measure thoroughly. Hence, (domestically) an investigating judge cannot simply adopt the position of the prosecution office or the police. On the contrary, he is obliged to decide on his own responsibility e.g. on the lawfulness of a search.[97] Of course, the problem is intrinsically tied to the mutual recognition foundation of the Investigation Order. Inevitably mutual recognition tends to equalize differentiations with regard to (domestic) competences.[98] Keeping this in mind it is difficult to imagine how the (in this example German) legislator (beside his unwillingness to implement mutual recognition based evidence gathering instruments) *could* implement the Investigation Order's or the Evidence Warrant's mechanism in a manner consistent with the role of the investigating judge as outlined above.

Art. 8 of the draft directive – on the basis of the principle of mutual recognition – *obliges* the execution authority to recognize and execute Investigation Orders "without any former formality" unless grounds for non-execution respectively for non-recognition are invoked. However, depending on the content and application range of the grounds to refuse the execution of a request a mutual recognition instrument (as the proposed Investigation Order) converges toward traditional mutual assistance instruments.[99] As mentioned previously mutual legal assistance is rendered on the provision of the non-existence of "traditional" hindrances; mutual recognition instruments do not effectively abandon any such hindrances but

96 Cf. *Stellungnahme des Deutschen Richterbundes*, *supra* note 86.

97 Most recently BVerfG, 31 August 2010, 2 BvR 223/10, para. 24.

98 Cf. H. Ahlbrecht, 'Der Rahmenbeschluss-Entwurf der Europäischen Beweisanordnung', 26 *Neue Zeitschrift für Strafrecht* (2006) 2, 70, 72 with regard to the EEW.

99 Ambos, *supra* note 17, 561.

lets them resurface in the guise of (more or less far-reaching) grounds for refusal.[100]

With regard to this, the proposed Investigation Order provides for "grounds for non-recognition or non-execution" which appear to be limited (Art. 10 Investigation Order). Firstly, the requested State can refuse execution in case of hindering immunities or privileges (in terms of Art. 10.1 a) draft directive). Requested authorities furthermore could invoke national-security-reasons for not executing an Investigation Order (Art. 10.1 b) draft directive). Art. 10.1 d) draft directive deals with Investigation Orders that are not being issued within criminal proceedings. Thus the requested authority may refuse the execution provided that the Investigation Order derives from foreign proceedings regarding (only) administrative offences and the requested investigative measure would not be authorized in a similar national case.[101] As already mentioned there are some doubts about the broadness of the application range of the proposed instruments in terms of the types of procedures covered. Since in cases of only administrative proceedings regarding administrative offences (compared to criminal proceedings) the proportionality of many investigative measures *per se* appears dubious, one may wonder whether a restriction of Art. 4 b)/c) draft proposal by way of a *de minimis* rule would be more appropriate.[102] By comparison with the draft proposal the FD offers more grounds for non-recognition, including *inter alia* the infringement of *ne bis in idem*, the lacking of double criminality (provided the Evidence Warrant refers to a search or seizure with regard to an offence not listed in Art. 14.2 FD)[103] and the *manifest incorrectness* of the request (Art. 13.1 h FD).

However, Art. 10.1 c) draft directive deserves a closer look since it might turn out a kind of back-door allowing requested authorities to avoid execution in several cases. In conjunction with Art.9, the mentioned ground for non-execution addresses the problem that the exact type of the requested measure is not regulated in the requested Member State or could not be authorized in a domestic case. Conceivably, those situations would not be uncommon given the diversity of Member States' procedural law. However, that the requested measure is not regulated in the requested State does not pose automatic grounds for refusal.[104] In such cases pursuant to Art. 9 the

100 Ambos, *supra* note 17, 560.
101 Bachmaier Winter, *supra* note 29, 583.
102 Cf. *Stellungnahme des Deutschen Richterbundes*, *supra* note 86.
103 Cf. Art. 13.1 b Council Framework Decision 2002/584/JHA, *supra* note 95.
104 Bachmaier Winter, *supra* note 29, 583.

requested authority is to take recourse to an investigative measure other than that provided for in the Investigation Order. Recognition or execution of the Investigation Order may only be refused if there is no other investigative measure available which will make it possible to achieve a similar result (Art. 10.1 c Investigation Order). The same procedure applies, if the measure indicated in the Investigation Order exists, yet is limited to a category of offences which do not include the offence stated in the request (Art. 9.1 b, 10.1 c Investigation Order). Arts 9 and 10 Investigation Order thus appear to provide Member States with an implementation margin that remarkably covers the traditional dual criminality requirement. If, provided there is no other investigative measure available which will make it possible to achieve a similar result–, a request can be refused pursuant to Art. 10.1 b) Investigation Order because the measure in question *is only regulated with regard to more serious crimes*, it all the more should be possible to reject a request that refers to a measure that could under no circumstances be applied within domestic proceedings because *the stated offence does not exist*.[105]

On the other hand one might argue that there is no need for an extensive use of the implementation margins since – unlike extradition/surrendering – not all kinds of investigative measures do intensively infringe fundamental rights of the persons concerned.[106] Member States therefore might resort to a compromise solution which seems to be in accordance with the implementation margin offered by Art. 9 and 10 Investigation Order: The dual criminality standard could be disregarded with respect to measures of only limited intrusiveness. In the case of investigation measures that restrict fundamental rights (in an intensive way) like searches or confiscation measures a dual criminality standard appears necessary: at least in these cases mutual recognition lacks a sufficient basis since the issuing and executing a State's rules regarding the requested investigation-measure (obviously) are completely disharmonic if a measure that restricts fundamental rights is lawful in the issuing State but not provided for (and therefore disproportional) in the requested State.[107] A related situation occurs when the requested measure is provided for in the stated offence but its execution would not be necessary or proportional due to the circumstances of the case. Under such circumstances the proposed Investigation Order appears not to allow for a refusal of the request.

105 Bachmaier Winter, *supra* note 29, 585.
106 Ambos, *supra* note 17, 560.
107 Convincing Bachmaier Winter, *supra* note 29, 585.

Furthermore, the requested authority will not even have the necessary information for a proper examination of the proportionality of the measure in question since the intended standard form does only contain an obligation for the requesting authority to procure merely a "[s]ummary of facts and description of circumstances in which the offence(s) underlying the Investigation Order has (have) been committed".[108] The executing authority is bound to trust the assessment of the requesting authority.[109] Certainly one might point out that this kind of trust is what mutual recognition is about. But on the other hand both case groups appear similar: in the first case group (covered by Art. 9 and 10 Investigation Order) the national legislator deems the investigation of a certain type of conduct disproportional and therefore does not provide authorities with (certain) investigation-measures; in the second case group (which is arguably not covered by Art. 9 and 10 Investigation Order) a certain technique is generally provided for, but given the circumstances of the case might by flagrantly un-proportional. Regardless the pivotal importance of the principle of proportionality especially in search cases[110] according to the Investigation Order proposal the executing authority will not (and could not) examine the proportionality of the requested measure. The person concerned on his part can challenge "the substantive reasons for issuing the Investigation Order […] only in an action brought before a court of the issuing state" (Art. 13 Investigation Order).[111]

As already suggested, before *any* instrument on transnational evidence-*gathering* – irrespective of its foundation (mutual legal assistance or mutual recognition) – has to deal with the problem of the *admissibility* of the obtained evidence.[112] Any transnational gathering of evidence on the simplifying basis of mutual recognition would obviously be pointless if obtained evidence would turn out to be inadmissible in the requesting State. Art. 8.2 draft directive tackles this problem on the basis of the *forum-regit-actum*-principle: As a rule "[t]he executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority […] provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State". Remarkably with regard to the crucial question of ensuring the admissibility of evidence

108 Cf. Annex A of the proposition.
109 Bachmaier Winter, *supra* note 29, 586.
110 Cf. L. Meyer-Goßner, *Strafprozessordnung*, 53rd ed. (2010), s. 102, para. 15a.
111 Cf. *supra* note 118.
112 Cf. *supra* note 73.

obtained abroad the proposal adopts a model well-known from mutual legal assistance instruments. Art. 8.2 Investigation Order appears to be modeled closely on Art. 4.1 of the EU-Convention on Mutual Assistance in Criminal Matters of May 2000. Once more the obstacles become apparent that hamper the application of the mutual recognition principle to the little harmonic environment of evidence law. These limitations would affect the practicability of the proposed instrument since the executing authority – regardless the shift from mutual assistance to mutual recognition - still is compelled to apply foreign procedural rules. Art. 8.2. Investigation Order at least allows for the requesting authority to "expressly indicate" the relevant regulations but this provision as well does not constitute an alteration from the EU Convention on Mutual Assistance.[113]

This remarkable continuity obviously stems from a lack of harmonization of procedural law in the EU-Member States: the best way to make sure that evidence gathered abroad will be domestically admissible would be the harmonization of the relevant procedural regimes. But it needs not emphasizing that, this goal is not realistic.[114] Certainly an alternative to the *forum-regit-actum* approach (and rather radical) solution could be reached by way of combining the *locus-regit-actum* rule with the principle of mutual recognition. Evidence would be obtained according to the relevant laws of the executing State; the courts of the requesting authority's State would admit the obtained evidence provided only that it had been gathered in accordance with the relevant regulations of the executing State.[115]

One might bring forward in favor of this approach that notwithstanding the differences of Member State's procedural laws within the EU all Member States at least are bound by the ECHR.[116] But, the initiative arguably rightly refrains from mentioned radical approach since a *locus-regit-actum* rule concerning the gathering of evidence in combination with the facilitation of unlimited admissibility on the basis of mutual recognition could only amount to a *de facto* total harmonization of Member

113 Convincing Ambos, *supra* note 17, 561.

114 Bachmaier Winter, *supra* note 29, 587.

115 Cf. *id.*, 587 with reference to the accordant legislation of the Spanish Supreme Court. Noteworthy German Courts do not (principally) exclude any evidence that have been obtained abroad in ways inconsistent with domestic procedure law. Instead a "*Beweiswürdigungslösung*' is preferred. This means that the circumstances of the evidence-gathering will be taken into account (*only*) with regard to the weighing of evidence. Cf. B. Roger, 'Europäisierung des Strafverfahrens', 157 *Goltdammer's Archiv für Strafrecht* (2010) 1, 28.

116 Cf. Ambos, *supra* note 17, 562.

States admissibility rules which would not (even) be covered by Art. 82.2 TFEU.[117] Mutual recognition therefore effectively would level Member States differing admissibility regimes thus infringing the principle of subsidiarity (Art. 5.3 TEU) as well as the limitations established by Art. 82.2 TFEU as "differences between the legal traditions and systems of the Member States" would not be taken into account but ignored.

Further, different problems are likely to arise if requests were directed at States that domestically make generous use of the principle of opportunity by States that tend to adhere to the principle of legality. From a Spanish perspective *Bachmaier Winter* exemplifies insofar with regard to the Spanish and Dutch laws on minor drug offences: it often occurs that Spanish investigation judges (up till now on the basis of mutual assistance) request Dutch authorities to gather evidence related to drug offences which would not be prosecuted in the Netherlands. In modern practice the State applying the opportunity principle will refuse the execution of the request.[118] Tendencies to extend the principle of opportunity are driven not least by economic considerations; hence a State that applies the principle of opportunity to certain offences (considered domestically as less serious) will not allocate the resources to the investigation of those offences which would be required in case of the consistent application of the legality-principle. Such *domestic* crime/politics decisions (of the requested State) would be undermined if its authorities were *obliged* to investigate any (minor) crimes (which domestically would be dealt with on the basis of the principle of opportunity) provided by a foreign request by way of an Investigation Order.

Art. 13 draft directive (as well as Art. 18.2 FD) allows for legal remedies, yet the "substantive reasons for issuing the Investigation Order can be challenged [by interested parties] only in an action brought before a court of the issuing State". While this burden put to the suspect is merely a consequence of the application of the principal of mutual recognition it nevertheless emphasizes that it should be the mutual trust of the citizens (and not that of brother authorities) providing a sufficient basis for mutual recognition of investigating measures. Furthermore, one has to consider that in cases where interested parties may have good reason to contest the substantive reasons for a certain measure (e.g. for the search of a building) given by an authority of member State X as well as the way of its execution

117 Cf. *Stellungnahme des Deutschen Richterbundes*, *supra* note 86.
118 Bachmaier Winter, *supra* note 29, 585.

by an authority of member State Y the Investigation Order (and Evidence Warrant) would create a division of remedies. The interested party (who might be a citizen of a third State) would have to challenge the given reasons for the measure before a court of State X and the circumstances of its execution before a court of the State Y. Only time will tell if the European Court for Human Rights will assess the legal remedies which the FD and the draft proposal allow for as "effective" ones in terms of Art. 13 European Convention on Human Rights. Similar doubts arise with regard to Art. 6 ECHR since the draft proposal as well as previous EU instruments are aimed unilaterally at further strengthening the efficiency of criminal prosecutions. Undeniably *any* attempt at the strengthening of the prosecution tends to endanger the balance between prosecution and defense. Needless to say the *defense* is not provided with complementary tools regarding evidence-gathering in trans-national cases. Conceivably Strasbourg will have to decide whether the Human Rights guarantee of the equality of arms is infringed.

Of course one might argue in favor of the initiatives that the idea of the draft directive as well as of the FD is (merely) the simplification and therefore improvement of legal assistance with regard to criminal matters within the EU. Yet, arguably this would amount to an artificial restriction of one's perspective. Indeed there is widespread criticism (which by far is not restricted to academic circles) that the EU crime policy overemphasizes the efficiency of prosecutions. For instance the FD on certain procedural rights has still not been approved[119] and the German Parliament has argued out that further extensions of the principle of mutual recognition without implementing the Council's "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings"[120] could only undermine the mutual trust which has been established so far and thus turn out to be simply counterproductive.[121]

IV. Intercontinental European Union Acts

In regards to an intercontinental perspective on legal assistance related developments affecting the framework of international law it may be noted

119 Bachmaier Winter, *supra* note 29, 587.

120 Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights for Suspected or Accused Persons in Criminal Proceedings, OJ 2009 C295/01.

121 Cf. above *supra* note 74.

that recent intercontinental instruments of course are not based on the principle of mutual recognition but on the international agreements regarding mutual legal assistance. Nevertheless, they appear as signs of shifting international law paradigms.

1. Mutual Legal Assistance between the EU and the USA

The most far-reaching developments have taken place in the area of legal assistance between the EU and its member States and the USA. Just like individual member States, the EU itself has acquired an ability to enter international treaties due to its status as an international legal personality, *cf*. Art 47 TEU. While the EU is not considered a State (thus lacking an entitlement to examine its own jurisdiction), it has at least the status of an international organization.[122] Accordingly the entering of international treaties is valid as long as the EU acts in accordance with those areas in which it has been given competence.[123] The hitherto existing jurisprudence, which acknowledged the existence of so-called implicit competences to enact treaties,[124] has been recorded in Arts 3.2 and 216.1 TEU.[125] Therefore the EU now has been given competence in those cases in which a treaty is necessary to realize goals which have been mentioned in the EU's primary legislation. This goes also for those cases in which the treaty in question has been envisioned for the future in binding EU legislation or in cases in which existing legislation could be hindered or altered if the treaty in question would not be entered.[126] Art. 218 TEU specifies the procedure which has to be followed in these cases. Since the institutions of the EU are bound to act in accordance with international treaties due to Art. 216.2 TEU, those international treaties which have been entered take precedence to the EU's secondary legislation. Also it has to be noted that directly applicable clauses can deliver direct legal effects to EU citizens.[127] However the EU's primary legislation takes precedence to international treaties. This follows from Art. 218.11 TFEU which enables the ECJ to decide in an opinion if prospective international treaties are reconcilable with the EU's primary legislation.[128]

122 Cf. W. Frenz, Handbuch Europarecht (2010), Volume 5, Chapter 1 § 2, para. 42.
123 Cf. *Id.*, Chapter 1 § 2, para. 39.
124 Cf. ECJ Case 22/70, *Commission v Council*, Slg. 1971, 263.
125 Critical R. Streinz *et al.*, Der Vertrag von Lissabon zur Reform der EU, 3rd ed. (2010), 133 as the TFEU exceeds the existing jurisprudence.
126 Frenz, *supra* note 122, Chapter 6 § 2, para. 602.
127 Cf. *id.*, Chapter 6 § 2, para. 598.
128 Cf. *id.*, Chapter 1 § 2, para. 45.

This also leads to the conclusion that EU primary legislation is the measure in those cases in which the Union acts based on intercontinental law.[129] These developments consist of the signing of two agreements, namely on the area of extradition[130] and the area of other assistance.[131] In Germany, those agreements have been implemented by the signing of three treaties.[132]

The agreements between the EU and the USA came to pass in reaction to the terrorist attacks of 9/11. Like most Member States, Germany has declared that certain constitutional requirements have to be guaranteed in order to bind Germany to the agreement.[133] The object of the agreements is to simplify the practices in extradition and mutual legal assistance in criminal matters by establishing singular rules in order to better fight terrorism and organized crime.[134] The agreement on extradition consists of 22 articles and regulates only parts of the area of extradition by adding to bilateral treaties already in existence. But, as it consists of rules which stray from rules in already existing bilateral treaties, the agreement between the EU and the USA on extradition remarkably takes precedence over rules agreed on by (traditional) way of bilateral agreement.[135] The mutual-legal-assistance-agreement encompasses 18 articles and aims to simplify several

129 Cf. *id.*, Chapter 1 § 2, para. 46.

130 *Agreement on Extradition between the European Union and the United States of America*, 25 June 2003, OJ 2003 L 181/27.

131 *Agreement on Mutual Legal Assistance between the European Union and the United States of America*, 25 June 2003, OJ 2003 L 181/34.

132 *Treaty between the Federal Republic of Germany and the United States of America on Mutual Legal Assistance in Criminal Matters*, 14 October 2003, BGBl. II 2007, 1620; *Second Supplementary Treaty to the Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition*, signed on 18 April 2006, BGBl. II 2007, 1634; *Supplementary Treaty to the Treaty between the Federal Republic of Germany and the United States of America on Mutual Legal Assistance in Criminal Matters*, 18 April 2006, BGBl. II 2007, 1637. The treaty on mutual legal assistance and its supplemental treaty entered into force on 18 October 2009. The agreements between the EU and the USA as well as the Second Supplementary Treaty have entered into force on 1 February 2010, cf. D. Brodowski, 'Strafrechtsrelevante Entwicklungen in der Europäischen Union', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 5, 376, 385.

133 According to Art. 24.5 TEU in the consolidated version after the Treaty of Nice which reads: "No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally."

134 BT-Drs. 16/4377, 74.

135 BT-Drs. 16/4377, 70.

areas of mutual legal assistance, e.g. in the areas of identification of bank information, video conferencing regarding testimony and joint investigative teams. Just like the agreement on extradition, it also aims at adding to already existing regulations and takes precedence in case of normative collisions.[136]

a) Extradition

The area of extradition between Germany and the USA is governed by the bilateral Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition from 20 June 1978 which has entered into force on 29 August 1980.[137] This treaty has been adapted by the Supplementary Treaty to the Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition which has been signed on 21 October 1986 and has entered into force on 11 March 1993.[138] The Second Supplementary Treaty dating from 18 April 2006 serves to harmonize the bilateral extradition treaty with the regulations of the EU-USA agreement on extradition. The changes which have been made by the Second Supplementary Treaty are strictly oriented on the regulations laid down in the EU-USA agreement on extradition which do not leave much room for differing bilateral rules between the different Member States and the USA. Therefore we now have two instruments of international law which are both to be followed. However regulations of the EU-USA agreement have been incorporated into the bilateral treaty by way of the Second Supplementary Treaty in order to prevent fuzziness in everyday application of these instruments.[139]

Of special interest are Arts 1 and 5 of the Second Supplementary Treaty. Art. 1 deals with cases in which the person to be extradited is threatened by the possibility of capital punishment in the USA. Art. 1 of the Second Supplementary Treaty changes Art. 12 of the original Treaty on extradition insofar as Germany may grant extradition on the condition that the death penalty will not be imposed or that it will not be carried out. If the USA does not accept these conditions, the request for extradition may be denied. In this regard, the wording of Art. 1 of the Second Supplementary

136 BT-Drs. 16/4377, 74.
137 BGBl. II 1980, 646, 1300.
138 BGBl. II 1988, 1086; BGBl. II 1993, 846.
139 BT-Drs. 16/4377, 62.

Treaty is nearly identical to Art. 13 of the EU-USA agreement.[140] Art. 5 concerns the collision of requests for extradition by several States. Art. 5 clarifies that the request for surrender pursuant to the Arrest Warrant is treated as a competing request for extradition and does not deserve special treatment.[141]

b) Other Assistance

The bilateral treaty on mutual legal assistance between Germany and the USA dating from 14 October 2003 only has been signed after considerable negotiation. Since the agreement between the EU and the USA was on its way, the Supplementary Treaty on Mutual Legal Assistance between Germany and the USA has been negotiated even before the original treaty entered into force. The Supplementary Treaty aims at incorporating the changes made by the EU-USA agreement in the bilateral treaty between Germany and the USA, thereby giving way to a consolidated version of the original bilateral treaty. By this treaty, dating from 18 April 2006, the regulations contained in the Arts 4 to 12 of the agreement between the EU and the USA, which have not been included in the original treaty, will become part of the treaty on mutual legal assistance between Germany and the USA. According to Art. 3.2 a) of the EU-US agreement, every Member State has to acknowledge in a written instrument between itself and the USA the application of its bilateral mutual legal assistance treaty in force with the United States of America. By the signing of the supplemental treaty, this demand has been met.[142]

The treaty starts out with regulations on foundational matters, namely the obligation of both parties involved to lend mutual assistance[143] (Art. 1), the establishing of Central Authorities to make and receive requests[144] (Art.2) and the establishment of the right to refuse requests due to the *ordre public* principle (Art. 3). Arts 4 to 13 deal with the different shapes of legal assistance, while Arts 14 to 16 deal mainly with confidentiality issues and

140 BT-Drs. 16/4377, 62.

141 Cf. BT-Drs. 16/4377, 63.

142 BT-Drs. 16/4377, 74.

143 Art. 1 also defines what is included as assistance and defines competent authorities which can request legal assistance.

144 For the United States, Central Authority is in principle the Attorney General or a person which has been assigned by him with this task. For Germany, Central Authority is in principle the Federal Ministry of Justice. In case of urgency requests may be communicated between other authorities.

the protection of sensitive data. Arts 17 to 26 describe technicalities in the way in which legal assistance will be granted, e.g. contents and form of requests and expenses.[145]

As in the area of extradition, there is a possibility to deal with differing views on capital punishment. While this area is explicitly dealt with in Art. 1 of the Second Supplementary Treaty on extradition, in the area of other assistance this problem can be solved by utilizing the *ordre public* rule in Art. 3 thereby denying legal assistance. Another possibility would be to grant legal assistance according to Art. 15.1 on the condition that the death penalty will not be imposed or that it will not be carried out.[146]

2. Mutual Legal Assistance between the EU and Japan

Another noteworthy development is the signing of the Agreement between the European Union and Japan on Mutual Legal Assistance in Criminal Matters.[147]

The agreement consists of 31 articles. Arts 1 to 3 regulate foundational matters like the object and purpose of the agreement as well as the scope of mutual legal assistance. According to Art. 1.2 the agreement does not apply to extradition, transfer of proceedings in criminal matters and enforcement of sentences except in case of freezing or seizure and confiscation of proceeds or instrumentalities which is dealt with in Art. 25. Arts 4 to 6 deal with establishing central authorities and the communication between them as well as establishing the authorities competent to originate requests. Arts 7 to 10 describe technicalities in the way in which legal assistance will be granted, e.g. concerning contents and form of requests, the language to be used and the execution of requests in general. Art. 11 deals with the grounds for refusal of a request while Art. 13 puts limitations on the use of testimony, statements, items or information. Arts 14 to 22 deal mainly with different shapes of legal assistance while Arts 23 and 24 regulate safe conduct for those who have to appear before the competent authorities in the requesting State and the temporary transfer of persons in custody. The remaining articles regulate matters like relation to other instruments, territorial application and entry into force and application of the

145 BT-Drs. 16/4377, 52.

146 Cf. BT-Drs. 16/4377, 54.

147 *Agreement between the European Union and Japan on Mutual Legal Assistance in Criminal Matters*, 30 November 2009, OJ 2010 L 39/20.

agreement. The Agreement which is based on Art. 82.1 TFEU has not entered into force yet, since it depends on the assent of the European Parliament according to Art. 218.6 a) TFEU. As soon as the agreement enters into force, it will become directly enforceable law in the EU and the Member States according to Art. 216.2 TFEU, since it does not require ratification in the Member States. From a German viewpoint this would mean that the Agreement would take precedence in comparison to the IRG. If this meets constitutional demands after the Lisbon-ruling by the Federal Constitutional Court may be doubted.[148]

V. Conclusion

After all, the most vivid playground in legal assistance in criminal matters appears to be the furthering of mutual recognition most recently evidenced by the ongoing discussion surrounding the proposal of a European Investigation Order. However even in the utilization of established instruments there are still challenges to be met; as the examples from German case law regarding the Arrest Warrant suggest, mutual trust does not seem to be a dependable reality yet. Notwithstanding, the Council's Stockholm Programme and its corresponding action plan amongst other things aim to further mutual trust, remarkably, by way of creating new tools of legal assistance with focus on the gathering of evidence in criminal cases. However this might be compared to putting the cart in front of the horse, since it seems to be that trust constitutes a prerequisite for mutual recognition (not the other way round). Keeping this dynamic in mind, it appears to be of special interest not the least from an international law perspective that the capacity (and legitimacy) of the principle of mutual recognition – despite its relative success at least in terms of the growing numbers of instruments based on it – still do not seem to be clear. On the contrary any input from a principle-led perspective on the possible potential of "trust" (which arguably does not go without saying!) for the furthering of inter-State respectively inter-authority relations and the (ever increasing) integration status of the European Union appears to be of mutual interest – from the international law perspective as well as the practical view on the diverse problems of galloping Europeanization. Recent developments and problems of legal assistance in criminal matters cannot be explained nor fully understood from a traditional international law perspective. This

[148] Brodowski, *supra* note 132, 386.

proves the assumption that international law doctrine can only benefit from taking into close account and evaluating the repercussions from the furthering of the principle of mutual recognition in the realms of criminal law.

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The Millennium Development Goals and Human Rights at 2010 – An Account of the Millennium Summit Outcome

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Abstract

In September 2010, the heads of State and government of over 140 countries gathered at the United Nations Millennium Summit in New York, to review progress made towards the Millennium Development Goals (MDGs). Adopted in 2000, the 8 concrete and time-bound MDGs that have become the shared development agenda of the international community are reminiscent of economic and social rights, but contain no explicit reference to human rights. With five years to go to the MDGs target date of 2015, the Millennium Summit adopted the Outcome Document "Keeping the Promise", that serves here as a test case to assess the current state of the debate over human rights and development. Although human rights rhetoric has increasingly entered into the development discourse, its influence on development practice remains limited, and human rights come second on an agenda increasingly dominated by the aid effectiveness concept and its vocabulary.

A. Introduction

The Millennium Development Goals (MDGs) represent a global action plan to combat poverty and, in the words of UN Secretary-General Ban Ki-moon, "the most important collective promise ever made to the world's most vulnerable people".[1] With five years to go to the MDGs target date of 2015, world leaders gathered from 20 to 22 September at the United Nations Millennium Summit in New York, taking stock of progress towards the MDGs since they were agreed in 2000. At the high-level plenary meeting of the General Assembly, the heads of State and government of almost 140 countries adopted a 32-pages long Outcome Document with the title "Keeping the promise: United to Achieve the Millennium Development Goals", reinvigorating their commitment to reach the concrete and time-bound targets of the MDGs.[2]

1 UN Secretary-General Ban Ki-moon's speech to the European Forum on The International Financial Crisis and the Millennium Development Goals, in Alpbach, 4 September, UN Doc SG/SM/13087 DEV/2808, 7 September 2010.

2 Keeping the Promise: United to Achieve the Millennium Development Goals, GA Res. A/65/L.1, 17, September 2010, adopted by consensus on 22 September 2010.

Although the uneven track record and the huge gaps remaining in achieving the MDGs call for deeds rather than words to keep the promise, the focus of this article lies on the Outcome Document. Inspired by Philip Alston's suggestion in 2005, the Outcome Document is used as a "lens through which to assess the current state of the ongoing debate over human rights and development". In comparison to the Millennium Declaration of 2000, the basis of the MDGs, and the World Summit Outcome of 2005, a record of the first stock taking, the document yields an interesting picture of the shifting trends in international development policy over the last decade.[3] Since 2000, human rights rhetoric has increasingly entered into the development discourse as a whole and the MDGs in particular. The influence of human rights on development practice, however, remains limited. Human rights come second on an agenda increasingly dominated by the aid effectiveness concept and its vocabulary.[4]

B. The Millennium Development Goals – A Development and Human Rights Agenda?

I. Source and Substance of a Collective Promise

The Millennium Development Goals are based on the Millennium Declaration adopted by heads of State and government at a high-level plenary meeting of the General Assembly in September 2000 in New York.[5] The Millennium Declaration, building upon a decade of major United Nations conferences and summits, contains a wide range of commitments of Member States to promote peace, human rights, democracy, and

3 United Nations Millennium Declaration, GA Res. 55/2, 18 September 2000; 2005 World Summit Outcome, GA Res. 60/1, 24 October 2005.

4 Philip Alston in 2005, referring to the MDG initiative as a whole; P. Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals', 27 *Human Rights Quarterly* (2005) 3, 755, 757.

5 For an account of the antecedents of the MDGs' adoption, see D. Hulme, 'The Making of the Millennium Development Goals: Human Development Meets Results-based Management in an Imperfect World', *Brooks World Poverty Institute (BWPI) Working Paper* 16, December 2007, 3-12, available at http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-1607.pdf (last visited 21November 2010).

environmental sustainability.[6] Most importantly, Member States pledge to form a new global partnership for development, setting out time-bound and quantifiable goals and targets for combating poverty in its many dimensions.

On the basis of Chapter III, "Development" of the Millennium Declaration, the UN Secretariat, in consultations with the International Monetary Fund (IMF), the World Bank and the Organization for Economic Co-operation and Development (OECD), subsequently elaborated 8 concise goals, 18 targets and 48 indicators.[7] In brief, these 8 Millennium Development Goals endeavor to (1) half poverty and hunger; (2) achieve universal primary education; (3) promote gender equality; (4) reduce child mortality; (5) improve maternal health; (6) combat HIV/AIDS, malaria, and other diseases; and (7) establish a global partnership of industrialized and developing countries in order to facilitate the implementation of MDGs No. 1 to 7.

The MDGs managed to place development firmly on the agenda of the international community, and at the same time emerged as the international community's shared development agenda. By setting out a comprehensive vision for development, they initiated a decade of development activism that brought unprecedented attention to the fight against poverty as a responsibility of both developing and developed countries. By setting out concrete, quantifiable goals, they have become a common framework and yardstick for such diverse actors as UN agencies, the World Bank, philanthropic foundations, and grass-roots NGOs. In the words of the Overseas Development Institute, a London-based development think tank, the MDGs represent "the most determined effort in history to galvanize international action around a common set of development targets. Their success or failure will have immense consequences, not only for the world's poor, but also for the credibility of collective action by the international community"[8].

Raising such high expectations, with their universal pretensions and with their ambitious targets, the MDGs are bound to attract criticism from

6 G. Pleuger, 'United Nations Millennium Declaration', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008), paras 1-5 (last visited 21 November 2010).

7 See Road Map Towards the Implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc A/56/326, 6 September 2001, Annex.

8 'Achieving the MDGs: The Fundamentals', *Overseas Development Institute (ODI) Briefing Paper* 43, September 2008, available at http://www.odi.org.uk/resources /download/1933.pdf (last visited 21 November 2010).

many sides. They have been accused at times of being unrealistic or under-ambitious, and of drawing attention, time, and resources away from other initiatives.[9] From an economic perspective, they have been criticized for setting global targets for such diverse countries as India and Mauretania, suggesting a one-size-fits-all prioritization and paying undue regard to the different starting points, capacities, and needs of individual countries.[10] As Todd Moss from the Center for Global Development, a Washington-based research institution, captures pointedly, the MDGs are highly successful in fundraising, but otherwise inappropriate as national goals and wrong to claim collective accountability, because "when everyone is responsible then no one is"[11].

The question of accountability leads over to the question of legal status. Do the MDGs create obligations under international law? The MDGs build upon the Millennium Declaration that was adopted in the form of a General Assembly resolution. As such, it has only a recommendatory, not a legally binding character.[12] This remains valid despite the solemn adoption of the Declaration by consensus.

9 For an overview of the major criticisms brought against the MDGs, see, for example: 'Beyond the Millennium Development Goals', *OECD Insights* (24 September 2010), available at http://oecdinsights.org/2010/09/24/beyond-the-millennium-development-goals/ (last visited 21 November 2010).

10 Most prominently, D. Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (2006).

11 T. Moss, 'Are the MDGs Useful for Africa?', *The Huffington Post* (5 August 2010), available at http://www.huffingtonpost.com/todd-moss/are-the-mdgs-useful-for-a_b_672429.html (last visited 21 November 2010); also: T. Moss, 'What Next for the Millennium Development Goals?', 1 *Global Policy* (May 2010) 2, 218-220; according to Amnesty International, the central problem with the Goals that do not advocate a rights-based approach is indeed a lack of accountability, enhanced by the failure to take into account the human rights obligations of States and to include human rights benchmarks in MDG progress monitoring, available at http://www.amnestyusa.org /demand-dignity/fight-poverty-with-human-rights/millennium-developmentgoals/page .do?id=1041190 (last visited 21 November 2010).

12 Under Art. 25 UN Charter, only the Security Council can take decisions which are binding on all Member States. In general, resolutions of the General Assembly are not binding on UN Member States but serve as recommendations, I. Brownlie, *Principles of Public International Law* (2003), 14 and A. Boyle & C. Chinkin, *The Making of International Law* (2006), 116, acknowledging, however, that General Assembly Resolutions can play an important role in the development of international law.

Some authors argue, however, that the Goals have since developed into customary international law, becoming binding on all states.[13] Such argumentation is usually built around two strands. First, states have repeated and gradually concretized their commitment to the MDGs on many occasions, often key international summits, including the UN Conference on Financing for Development in Monterrey and the World Summit on Sustainable Development in Johannesburg in 2002; the World Summit in New York and the Group of Eight Summit in Gleneagles (UK) in 2005; and most recently, the Millennium Summit 2010 in New York.[14] The Goals have also entered the strategies and policy documents of many bilateral and multilateral donors, for example the German Federal Ministry for Economic Cooperation and Development (BMZ)[15] or the European Union.[16] Second, there is a clear overlap between many of the MDGs and (particularly economic and social) human rights and human rights principles. Thus, the MDGs must be placed within the context of obligations to promote human rights previously entered into by Member States and reaffirmed in the Millennium Declaration and on subsequent occasions.[17]

13 G. Nankani *et al*., 'Human Rights and Poverty Reduction Strategies', in P. Alston & M. Robinson (eds), *Human Rights and Development. Towards Mutual Reinforcement* (2005), 496-497; cautiously also Alston, *supra* note 5, 774.

14 GA Draft Outcome of the International Conference on Financing for Development: Monterrey Consensus, UN Doc A/AC.257/L.13, 30 January 2002; The Johannesburg Declaration on Sustainable Development, adopted at the 17th plenary meeting of the World Summit on Sustainable Development, UN Doc A/CONF.199/L.6/Rev.2, 4 September 2002.

15 For example, Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, BMZ Konzept 172: *Förderung von Good Governance in der deutschen Entwicklungspolitik*, Bonn (2009); Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, BMZ Konzept 155: *Entwicklungspolitischer Aktionsplan für Menschenrechte 2008 – 2010*, Bonn (2008).

16 Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus' of 24 February 2006, 46/01 OJ 2006 C 46; see also: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: 'A twelve-point EU action plan in support of the Millennium Development Goals', Brussels, 21 April 2010, COM(2010)159 final.

17 M. Robinson, 'What Rights Can Add to Good Development Practice', in Alston & Robinson, *supra* note 14, 41; Alston, *supra* note 4, 774: "the MDGs have been affirmed, reiterated,, and restated in ways and forms and with greater frequency and

Clearly, to the extent that they overlap, the respective MDGs have a normative dimension by repeating or concretizing existing obligations, rather than producing new ones. This, however, only applies to the areas of overlap and narrow core of the rights. The concrete targets and timelines attached to the MDGs in a Secretary General Report (and it is those that set them apart from previous initiatives) create only political and moral, but no legal commitments. The continuous reiterations of the MDGs must be interpreted in line with this trajectory and do not qualify as *opinio iuris*.

II. Human Rights, Development and the MDGs

Unlike the Millennium Declaration which reaffirms the commitment to human rights and democracy, the MDGs themselves do not refer to human rights explicitly, are not expressed in a rights-language, and do not advocate a rights-based approach to development.[18] In particular, while some economic and social rights can still be read into the MDGs, civil and political rights fall clearly off the radar.

Accordingly, the most dominant reaction of the human rights community to the MDGs has been criticism, which comes across as more or less constructive and engaging depending on whether the emphasis is on the communalities or differences of the human rights and MDGs agendas.[19]

Some human rights advocates reject the very concept of the MDGs for prescribing a selection of confined, quantifiable targets from the top-down while omitting or even undermining existing human rights obligations.[20]

insistence than economic and social rights have ever been"; on the relationship between MDGs and Human Rights, see below, Part B.II.

18 Amnesty International, 'Combating Exclusion: Why Human Rights are Essential for the MDGs', 7 *SUR – International Journal of Human Rights* (2010) 12, 55, 55: "The MDGs – while covering areas where States have clear obligations under international human rights law such as food, education and health - are largely silent on human rights."

19 See, for example, M. Robinson, *supra* note 18, 40-41; Alston, *supra* note 4, 764-765; G. Schmidt-Traub, 'The Millennium Development Goals and Human rights-based Approaches: Moving Towards a Shared Approach', 13 *The International Journal of Human Rights* (February 2009) 1, 72, 77; Amnesty International, *supra* note 19, 57-62.

20 Alston, *supra* note 5, 762-764; for example, M.E. Salomon states "at best the MDGs might be understood as a feeble complement to the international economic regime, at worst as a vehicle for advancing the will and preferences of influential states and their industries." M.E. Salomon, 'Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism', 51 *German Yearbook of International Law* (2008), 39, 47-48.

These "essentialist critiques" of the MDGs are implicit in Thomas Pogge's question: Why aim at halving poverty if this means leaving at least half of today's poor in a state of deprivation?[21]

The more common reaction on parts of human rights activists is to laud the MDG initiative for bringing about an unprecedented focusing of efforts to promote human development and the human dignity of those living in abject poverty - an objective shared with the human rights agenda - while criticizing parts of the MDGs concept or approach. For example, it is argued that a human rights perspective entails a more holistic understanding of poverty and its structural causes than suggested by the MDGs.[22] An approach to development that is grounded in the indivisibility and interdependence of human rights requires empowering the individual (rights-holder); respecting the principles of non-discrimination, participation, and accountability; and all the while remaining within the normative framework of international human rights law.[23]

Although the liaison between human rights and development was not stipulated in the concept and phrasing of the Goals, the debate between the development and human rights communities has taken on over the last decade. The debate has moved forward on a conceptual level, through the work of the High Level Task Force on the Right to Development,[24] and on a

21 T. Pogge, The First UN Millennium Development Goal: A Cause for Celebration?, Evening Address at the University of Oslo Global Justice Symposium (2003), available at http://www.etikk.no/globaljustice/ (last visited 21 November 2010).

22 On the distinct approaches to poverty contained in the human rights movement and the MDGs, see P. Nelson, 'Human Rights, the Millennium Development Goals, and the Future of Development Cooperation', 35 *World Development* (2007) 12, 2041-2055.

23 There are differing conceptions of a rights-based approach to development. The elements reflected here are based on M. Darrow & A. Tomas, 'Power, Capture, and Conflict. A Call for Human Rights Accountability in Development Cooperation', 27 *Human Rights Quarterly* (2005) 2, 471, 482-492; for the UN, the central reference is "The Human Rights-based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies". Report of the Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform (Stamford, USA, 5-7 May 2003); for an overview of donor approaches, see L.-H. Piron & T. O'Neil, 'Integrating Human Rights into Development. A Synthesis of Donor Approaches and Experiences', *ODI Report* (2005) prepared for the OECD DAC Network on Governance (GOVNET).

24 The High Level Task Force establishes a link between development and human rights with view to the MDG implementation process. UN Commission on Human Rights, Report of the High-Level Task Force on the Implementation of the Right to Development (Geneva, 13–17 December 2004), UN Doc E/CN4./2005/WG.18.2. In

more operational level, through the adoption by an increasing number of bilateral and multilateral donors of a more or less vigorous human rights-based approach to development.[25] In 2003, the Human Development Report recognizes that each of the MDGs "can be directly linked to economic, social and cultural rights", that national development strategies must respect human rights, and that without sound governance, including in terms of human rights, no country will succeed in its development efforts.[26] The 2005 World Summit Outcome refers repeatedly to the role of human rights and, unlike the Millennium Declaration, establishes a direct link between human rights and development cooperation.[27]

However, despite the rhetoric of human rights and development having entered into the overall development agenda, it holds true that "the acknowledgment of the importance of human rights has yet to have a systematic impact upon practice on the ground"[28]. Rights-based approaches to development often remain too abstract, conceptual, and unsuitable overall to inform the day-to-day decisions that development practitioners need to make; evaluations substantiating the value-additions of a human-rights based approach to development for beneficiaries are still largely pending.[29] Within the UN system, the bodies dealing with development and human rights "are not only separate from each other but they also lack any real mechanisms enabling them to coordinate their respective activities"[30]. And

the HLTF, UN human rights experts pursue a critical dialogue with representatives of the World Bank, IMF, WTO and other organizations with a view to working out common analyses and recommendations for a human rights based approach to development in the framework of the global compact." Pleuger, *supra* note 7, 18.

25 See the references in *supra* note 24.

26 United Nations Development Programme, *Human Development Report 2003. Millennium Development Goals: A Compact among Nations to End Poverty* (2003), 28, 15 and 16 respectively.

27 World Summit Outcome, *supra* note 4, paras 9, 12, 62, 68 and particularly 24 *lit.* b: "To reaffirm that good governance is essential for sustainable development; […] respect for human rights, including the right to development, […] are also essential". The term "human rights" appeared only once in the Monterrey Consensus, the final text adopted at the 2002 International Conference on Financing for Development, but 6 times in the Johannesburg Plan of Implementation, adopted by the 2002 World Summit on Sustainable Development, *supra* note 15.

28 Alston, *supra* note 5, 826.

29 See, for example, Schmidt-Traub, *supra* note 20, 71; Alston, *supra* note 5, 802 and 807.

30 E. Dominguez Redondo, 'The Millennium Development Goals and the Human Rights Based Approach: Reflecting on Structural Chasms with the United Nations System', 13 *The International Journal of Human Rights* (February 2009) 1, 29, 31.

while the current MDG accountability framework, consisting of voluntary monitoring and reporting at the national level, and UN reports on regional and global progress, is considered insufficient, the existing human rights monitoring and accountability mechanisms have not been used widely to provide redress.[31]

These gaps are to blame on both the human rights and development community. Few human rights organizations have articulated effective strategies in the defense and promotion of economic and social rights,[32] and a persistent skepticism towards the MDGs stands in the way of a more practical engagement with the initiative.[33] Ten years after the adoption of the MDGs and despite surging human rights rhetoric in development, the human rights regime still, for the most part, has to "content itself with playing a limited role in directing the course of the development agenda"[34].

C. The 2010 Millennium Summit Outcome – "Keeping the Promise"

I. Stock Taking at the Millennium Summit

The Millennium Summit 2010 was mandated by the General Assembly to review progress and gaps, take account of lessons learned and best practices, and elaborate concrete strategies for action to achieve the

31 Amnesty International, *supra* note 19, 60; C. Doyle, 'Millennium Development Goals and Human Rights: In Common Cause or Uneasy Partners?', 13 *The International Journal of Human Rights* (February 2009) 1, 5, 6; M. S. Carmona: 'The Obligations of 'International Assistance and Cooperation under the International Covenant on Economic, Social and Cultural Rights. A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8', 13 *The International Journal of Human Rights* (February 2009) 1, 86, 87.

32 F. Azzam, 'Reflections on Human Rights Approaches to Implementing the MDGs', 2 *SUR – International Journal on Human Rights* (2005) 2, 22, 24.

33 On the need to harness the complementarity of human rights and the MDGs, see, for example, Alston, *supra* note 5, 827; S. Carmona, *supra* note 32 , 35; Doyle, *supra* note 32, 6.

34 Doyle, *supra* note 32, 6. It is exemplary that the human rights discourse at the World Bank has been abating, after a brief upsurge under the Presidency of James D. Wolfensohn. See, G. Sarfaty, 'Why Culture Matters in International Institutions. The Marginality of Human Rights at the World Bank', 103 *American Journal of International Law* (2009) 4, 647-683.

MDGs until 2015.[35] Based on this mandate and following the launch of the UN Secretary-General's report "Keeping the Promise" in March 2010,[36] diplomats negotiated a draft outcome document in the run-up to the Summit in September.[37] The months leading to the Summit also saw the publication of the Millennium Development Goals Report 2010, which contains the latest data on progress on all goals globally and regionally, and the MDG Gap Task Force Report 2010 on implementation gaps in the commitments made under MDG 8.[38]

The picture that emerged from these reports is mixed: while progress has been made on some goals and in some regions, it remains too slow and uneven. The number of poor has fallen from 1.8 billion in 1990 to 1.4 billion in 2005, but this is largely due to the economic growth of China and Eastern Asia; in the backdrop of the global economic crisis, the number of people in extreme poverty is projected to increase by 64 million by the end of 2010, according to a World Bank study.[39] Major strides have been made on getting children into school, though they are not sufficient to reach MDG 2 by 2015; in some regions, gender parity in educational enrolment remains elusive, and progress on gender equality is overall sluggish.[40] Advances have been made on some health-related Goals, such as reducing child mortality and increasing the coverage of antiretroviral therapy and malaria

35 GA Resolution on the Organization of the High-level Plenary Meeting of the sixty-fifth session of the General Assembly, GA Res. 64/184, 5 February 2010, para. 3.

36 Keeping the Promise: A Forward-looking Review to Promote an Agreed Action Agenda to Achieve the Millennium Development Goals by 2015, Report of the Secretary-General, UN Doc A/64/665, 12 February 2010.

37 During the negotiations, it is reported that developing countries did not act as a uniform group with homogenous interests, nor were the newly industrializing or emerging donors interested in taking the lead – instead, the debate was dominated by those countries that used the platform to criticize existing power relations in the international system, see S. Weinlich, 'Warum ein Konsens in den Millenniumszielen so schwierig ist', *Zeit Online* (20 September 2010), available at http://www.zeit.de/politik/ausland/2010-09/UN-Entwicklungsziele-Konsens?page=1 (last visited 21 November 2010).

38 United Nations, The Millennium Development Goals Report 2010 (2010); and focusing on MDG 8, see UN MDG Gap Task Force Report 2010, The Global Partnership for Development at a Critical Juncture (2010). The UN Gap Task Force brings together more than 20 UN agencies, the IMF, World Bank, WTO and OECD.

39 MDG Report 2010, *supra* note 39, 15; The International Bank for Reconstruction and Development / The World Bank, *Global Economic Prospects. Crisis, Finance, and Growth* (2010) Foreword, available at http://siteresources.worldbank.org/INTGEP2010/Resources/GEP2010-Full-Report.pdf.

40 MDG Report 2010, *supra* note 39, 16, 20-21.

control, yet maternal mortality rates remain far off the reduction rates foreseen in MDG 5.[41] The world is on track to meet the drinking water target - of halving the proportion of population without access to safe drinking water, whereas sanitation facilities are lacking for half of the population of developing countries.[42] Finally, while Official Development Assistance (ODA) flows are still on the rise, only five donor countries have reached the UN target of 0.7% of gross national income for aid.[43] At the current pace, many of the MDG targets are likely to be missed in most regions – and it is expected that the international community will not be able to keep the promise it made in 2000.[44]

Against this background, the Millennium Summit faced three key challenges: it had to rally state support around the MDG initiative at a time when the global financial crisis and the global food crisis had diminished resources for the fight against poverty, while increasing the number and needs of the poor. Second, it had to sell the MDGs as a formula to success, even as the very uneven track record and the major gaps remaining gave little reason for optimism in the prior to the Summit. Third, it had to generate consensus between the industrialized and the developing world, in two trenches that have characterized international development politics since the earliest day.

Nevertheless, heads of State and government reached agreement on the Outcome Document "Keeping the Promise – United to Achieve the Millennium Development Goals", a title that connotes its main message: that the MDGs can still be reached until 2015, but only through a partnership effort. The document then proceeds in four parts: starting with the reiteration of common values and commitments, it reviews successes and remaining gaps and importantly, takes note of lessons learned and best

41 *Id.*, 26 (child mortality), 30 (maternal health), 40 (HIV/AIDS, malaria).

42 *Id.*, 58-61.

43 *Id.*, 66-67; Official Development Assistance (ODA) is a definition introduced by the OECD in 1969, and is today a generally recognized category to determine which financial flows to developing countries constitute official development aid. For more information, see the OECD webpage, available at http://www.oecd.org/dac/stats/ (last visited 21 November 2010).

44 MDG Report 2010, *supra* note 39, 4-5; This is no reason to go as far as K. Anderson, however, calling the MDGs "development zombies" that do not warrant a global review: K. Anderson, 'Millennium Development Goals', *Opinio Juris* (20 September 2010), available at http://opiniojuris.org/2010/09/20/millennium-development-goals/ (last visited 21 November 2010).

practices.[45] This is followed by an "agenda for action" that is rather an aggregation of vague political and economic concepts, repetitive reiterations, and few concrete suggestions for each of the 8 MDGs.[46] The document concludes with mandating the General Assembly to continue review, and the Secretary General to report annually on progress made in the implementation of the MDGs.[47]

II. Key Themes in the Outcome Document

The Outcome Document reflects and responds to the three challenges described above – an ill-tempered donor-community at times of crises, a bleak-looking track record in implementing the MDGs, and a well-known dichotomy of industrialized and developing countries. The text recognizes the impact of the "multiple and interrelated crises", including the global economic and financial crisis and the food crisis, to acknowledge new restraints and new vulnerabilities.[48] It oscillates diplomatically between the recognition of what has been reached, and the concern over what is still missing: between "progress […] despite setbacks", "challenges and opportunities".[49] And it responds to the dichotomy by making "partnership" the centerpiece of the document, with the word appearing no less than 19 times in the text.[50]

A "global partnership for development" primarily demands mutual efforts and mutual responsibilities of both partners, and is thus a viable concept to overcome the blame game between developing and developed countries.[51] The Outcome Document strikes a noticeable balance between national and international responsibilities for achieving the MDGs, a

45 On lessons learned and best practices, see Keeping the Promise, *supra* note 3, para. 23.

46 *Id.*, paras 36-79.

47 *Id.*, paras 79-81.

48 The word "crisis"/"crises" appears 8 times in the text, *id.*, paras 5, 6, 22, 33, 70 *lit.* n and 78 *lit.* q.

49 *Id.*, e.g. paras 5, 6, 19, 20 and 22.

50 *Id.*, paras 5, 7, 9, 21, 24, 30, 38, 44, 50, 56, 70 *lit.* l, 76 *lit.* d, 77 *lit.* i, 78 *lit.* a, d, s (not including "public-private partnerships"). It appears once in the Millennium Declaration, *supra* note 4, para 20 and ten times in the Chapter on Development in the World Summit Outcome 2005, *supra* note 4.

51 Critical is M.E. Salomon: "While rhetorically MDG 8 concerns developing 'a global partnership', the weight of the responsibility for giving effect to the partnership is understood to rest with developed countries and it is those countries that report against it.", Salomon, *supra* note 21, 56.

balance alternating between "indispensable" national ownership and global partnership,[52] "primary responsibility" and "shared responsibility",[53] calls for more transparent and accountable national *and* international governance.[54] In this sense, the formula for achieving the MDGs implicit in the document suggests an optimistic interplay of "intensified collective action" and "enhanced global partnership", together with nationally owned development strategies and more aid effectiveness.[55]

Aid effectiveness, the new buzzword of the development community, is another major theme in the Outcome Document. Since the OECD Development Assistance Committee (DAC) endorsed the Paris Declaration on Aid Effectiveness in 2004, the principles of ownership, alignment, harmonization, managing for results, and mutual accountability have become the central reform agenda agreed by donor and recipient states to improve the effectiveness and quality of aid.[56] The Paris principles are thus not originally a vocabulary of the United Nations system, but have since started entering the development discourse even within the United Nations.[57] Compared to the 2005 World Summit Outcome, where the then

52 See Keeping the Promise, *supra* note 3, para. 10.

53 *Id.*, paras 10, 36.

54 *Id.*, paras 10, 23 *lit.* n, 52, 70 *lit.* o.

55 *Id.*, para. 9: "We are convinced that the Millennium Development Goals can be achieved […] with renewed commitment, effective implementation and intensified collective action by all Member States and other relevant stakeholders at both the domestic and international levels, using national development strategies and appropriate policies and approaches that have proved to be effective, with strengthened institutions at all levels, increased mobilization of resources for development, increased effectiveness of development cooperation and an enhanced global partnership for development." See also para. 23, which enumerates lessons learned and successful policies, where national ownership on the one hand and more transparent and accountable international development corporation on the other hand feature prominently.

56 OECD DAC, Paris Declaration on Aid Effectiveness (2 March 2005) and Accra Agenda for Action, adopted by the 3rd High Level Forum on Aid Effectiveness in Accra (September 2008) available at http://www.oecd.org/dataoecd/58/16/41202012.pdf (last visited 22.November 2010).

57 See, for example, United Nations Development Programme, *Joint Evaluation of the UNDG Contribution to the Paris Declaration on Aid Effectiveness* (2008), available online http://www.undp.org/evaluation/thematic/pd.html (last visited 24 November 2010); World Summit Outcome 2005, *supra* note 4, para. 23 *lit.* c; or Economic and Social Council, Press Release (29 June 2010), ECOSOC/6432: Coherence, aid effectiveness among key topics as Economic and Social Council launches second Development cooperation forum, available at http://www.un.org/News/

new aid effectiveness vocabulary hardly appeared, in the 2010 Outcome, national ownership, results-based management, donor harmonization and alignment with national priorities are repeatedly evoked and infused into the strategies to achieve the MDGs.[58] They are greeted by major donor countries, which accentuated the same principles in their speeches at the Summit.[59]

If aid effectiveness is a new theme, good governance and the rule of law, two concepts that have played a dominant role in the development discourse over the last two decades, feature less prominently. Compared to the Millennium Declaration and the 2005 World Summit, where the MDGs are embedded in a document that makes a strong call for participatory and rule-based (development) policy-making, reference to good governance and the rule of law is less explicit in the 2010 Outcome.[60] This is not to say, however, that the concepts have been abandoned – rather, they resound in more precise policy suggestions and best practices that advance the "full participation of all segments of society", the fight against corruption, or transparent and accountable governance.[61]

Press/docs/2010/ecosoc6432.doc.htm (last visited 22. November 2010). Further, most UN agencies have adopted a results-based management approach which they follow more or less rigorously, for example UNDP, UNHCR, UNICEF, UNESCO, FAO and WFP.

58 Keeping the Promise, *supra* note 3, on the concepts of aid effectiveness (paras 9, 64, and health-related in para; 73 *lit.* d, j and k); ownership (paras 10, 23 *lit.* a, 36, 58, 64); results-based management (paras 59, 64, 78 *lit.* f); harmonization (paras 64, 73 *lit.* m); alignment (paras 64, 73 *lit.* b, m); and accountability (paras 23 *lit.* o, 59, 72 *lit.* g, 73 *lit.* a, 78 *lit.* c, f). Note, however, what comes across as a disclaimer in para. 64: "We also bear in mind that there is no one-size-fits-all formula that will guarantee effective assistance and that the specific situation of each country needs to be fully considered."

59 For example, Barack Obama presented the new U.S. Global Development Policy, resting on enhanced ownership (or: national leadership), mutual accountability, and performance-based lending, Remarks by the President at the Millennium Development Goals Summit in New York, New York (22 September 2010), available at http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york (last visited 21 November 2010); also: Speech of the Federal Chancellor Angela Merkel at the United Nations General Assembly (21 September 2010), available at http://www.bundeskanzlerin.de/nn_683608/Content/DE/Rede/2010/09/2010-09-21-bk-un-millenium-rede.html (last visited 21 November 2010).

60 The words "good governance" (paras 11, 77 *lit.* d), "rule of law" (paras 3, 11) and "democratic" (paras 3, 78 *lit.* f) appear twice each in Keeping the Promise, *supra* note 3.

61 *Id.*, para. 23 *lit.* l, para. 36; para. 18: "we acknowledge the role of national parliaments in furthering the achievement of the Millennium Development Goals by 2015."

Partnership, aid effectiveness, good governance – now what is the role of human rights in the Outcome Document of the 2010 Millennium Summit? In the text, the conceptual link between individual MDGs and economic and social rights is made as clear as never before.[62] Beyond the general assertion of "respect for all human rights, including the right to development" in the first part,[63] the document's agenda for action contains a reaffirmation of the right to food under MDG 1,[64] a commitment to achieve MDG 2 through realizing the right to education,[65] several affirmations of women's and children's rights,[66] and a pledge to take steps to realize the right to health.[67]

Yet many of the demands voiced by the human rights community prior to the Summit were not taken up.[68] There is no explicit endorsement of a rights-based approach to development, although the recognition "that the respect for and promotion and protection of human rights is an integral part of effective work towards achieving the Millennium Development Goals" comes fairly close.[69] While the need for (mutual) accountability is stressed throughout the document, accountability remains a vague concept and is not associated with human rights accountability and the mechanisms to safeguard it.[70]

In sum, it seems that the trend observed above continues, that human rights are given credit in development rhetoric and gain recognition as a

62 The link was also made in the Millennium Development Goals Report 2010, where Secretary-General Ban-Ki Moon recognizes that the "Goals represent human needs and basic rights that every individual around the world should be able to enjoy", Foreword, 3; S. Zaidi, 'Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary?', 7 *SUR International Journal on Human Rights* (2010) 12, 123, 124.

63 Keeping the Promise, *supra* note 3, para. 3. Further: paras 12, 13, 23 *lit.* j.

64 *Id.*, para. 70 *lit.* u.

65 *Id.*, para. 71 *lit.*. a.

66 *Id.*, paras 72 *lit.* a, g, k, 73 *lit.* i.

67 *Id.*, para. 75 *lit.* a.

68 See, for example, Amnesty International, *supra* note 12; International Alert, 'Replacing the MDGs with a Better Framework', Submission to the International Development Committee Inquiry: The 2010 Millennium Development Goals Review Summit: Looking ahead to after the MDG deadline of 2015, (7 October 2010).

69 Keeping the Promise, *supra* note 3, para. 53.

70 Other terms, too, such as participation and non-discrimination, could be made less "open-ended, contingent, and too often subjective" if "rooted in identified standards", Alston, *supra* note 5, 760.

moral framework for development efforts, while their impact on the operational development agenda remains limited.

D. Human Rights, Development and the MDGs – Revisited

Certainly, the world today is a different one than it was in 2000, when heads of State and government first committed to the time-bound targets of the MDGs. The last decade has brought new challenges (economic and food crises, climate change) and has seen the rise of new actors (emerging donors), new interests (security-development nexus), and new concepts (aid effectiveness) in development cooperation.

Against this background, it is remarkable that States reaffirmed their common resolve and responsibility to achieve the MDGs in the Outcome Document, and that human rights rhetoric has taken such a strong hold therein. Meanwhile, it is a separate question whether the lofty promises and human rights language in the Outcome Document must be deemed significant or irrelevant in the light of the many gaps in the implementation of the Goals; the answer is likely to depend on how the contribution of the MDG initiative to the cause of development cooperation in general is estimated.[71]

In conclusion and turning from material goals to procedures, it seems that development policy even within the United Nations system is currently following the Paris-path towards aid effectiveness. Although the concepts of effectiveness, results-orientation and the consequential strategy of performance-based allocation cause suspicion on parts of the human rights community, it cannot be neglected that there are substantial common grounds between the two.[72] If the ownership principle is understood not to

[71] The only substantial commitment consisted in the launch of a Global Strategy for Women's and Children's Health, a global effort to accelerate progress on MDGs 4 and 5, bolstered by over $40 billion in resources; for more information see http://www.un.org/sg/globalstrategy.shtml (last visited 21 November 2010).

[72] See the paper authored by GOVNET (the OECD's Governance and Development Section), 'Human Rights and Aid Effectiveness' (2007); more action-oriented: 'Human Rights and Aid Effectiveness: Key Actions to Improve Inter-Linkages' (2008); further OECD publications on the topic available at http://www.oecd.org/document/29/0,3343,en_2649_34565_43490845_1_1_1_1,00.html (last visited 21 November 2010);and also M. Foresti *et al.,* 'Aid Effectiveness and Human Rights: Strengthening the Implementation of the Paris Declaration', Overseas

stop at the nation State level, for example, but to include an individual dimension, it has an undeniable link to the right to development and participatory rights. Similarly, accountability is stressed in both the human rights and aid effectiveness agenda.

Given that "[p]overty eradication" is rarely presented "through the lenses […] of international regulation", human rights have already made huge strides in establishing themselves as a normative framework for development activities.[73] To be more influential on development practice, maybe the human rights community could engage in a more constructive dialogue with the aid effectiveness agenda, so that reservation on both sides does not again stand in the way of harnessing complementarities for a common cause.

Development Institute, October 2006, available at http://www.odi.org.uk/resources/download/1538.pdf (last visited 21 November 2010).

73 C. Chinkin, 'The United Nations Decade for the Elimination of Poverty: What Role for International Law?', 54 *Current Legal Problems* (2001), 553, 554.