

Special Issue

Resources of Conflict - Conflicts over Resources

Keynote Speech
Marie-Claire Cordonier Segger

Resources Before, During and After Conflicts

The Redistribution of Resources in Internationalized Intra-State Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions
Cindy Daase

The Falkland Islands and the UK v. Argentina Oil Dispute: Which Legal Regime?
Alice Ruzza

Conflicts over Protection of Marine Living Resources: The 'Volga Case' Revisited
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Regulation Information Flows, Regulation Conflict: An Analysis of United States Conflict Minerals Legislation
Christiana Ochoa & Patrick J. Keenan

Actors of Armed Conflicts and International Law

Incentives and Survival in Violent Conflicts
Moshik Lavie & Christophe Muller

Enhancing Compliance with International Law by Armed Non-State Actors
Annyssa Bellal & Stuart Casey-Maslen

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Armed Forces as Carrying both the Stick and the Carrot? Humanitarian Aid in U.S. Counterinsurgency Operations in Afghanistan and Iraq
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Resources and Conflict Prevention: Access, Sharing and Regulation

Settling Trade Disputes over Natural Resources: Limitations of International Trade Law to Tackle Export Restrictions
Stormy-Annika Mildner & Gitta Lauster

Resource Conflicts over Arable Land in Food Insecure States: Creating an United Nations Ombudsman Institution to Review Foreign Agricultural Land Leases
Anastasia Telesetsky

Overcoming State-Centrism in International Water Law: 'Regional Common Concern' as the Normative Foundation of Water Security
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Between the Scylla of Water Security and Charybdis of Benefit Sharing: The Nile Basin Cooperative Framework Agreement - Failed or Just Teetering on the Brink?
Dereje Zeleke Mekonnen

Knowledge as a Resource: Access, Assessment and Legal Consequences

Information Warfare and Civilian Populations: How the Law of War Addresses a Fear of the Unknown
Lucian Emery Dervan

Limits of the Impact of the International Criminal Tribunal for the former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina
Eszter Kirs

The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?
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Adjudicating Conflicts over Resources: The ICJ's Treatment of Technical Evidence in the Pulp Mills Case
Juan Guillermo Sandoval Coustasse & Emily Sweeney-Samuelson

From Riches to Rags - The Paradox of Plenty and its Linkage to Violent Conflict
Pelin Ekmen

GoJIL

Goettingen Journal of
International Law

Goettingen Journal of International Law (GoJIL)
c/o Göttingen Institute for International and European Law
Platz der Göttingen Sieben 5
37073 Göttingen
Germany
info@gojil.eu
www.gojil.eu
ISSN 1868-1581

The Goettingen Journal of International Law is published Open Access and semi-annually by Göttingen Law School students.

Submissions: The GoJIL encourages submissions addressing general international law and employing methodologies from neighbouring disciplines such as international relations, history, or economics. The Journal also welcomes contributions emanating from specialized branches of international law such as international criminal law, international humanitarian law, and international economic law, in particular if they address issues which are of general relevance.

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Editorial

“Conflicts over resources have been responsible for disputes and even wars both among, and within, many countries. They cause suffering for millions today, and continue to hold back important progress for many, many more. This conference doesn’t just accept these terrible facts. It actively considers how the law can help to break the vicious cycle, bringing resolution and sustainable development to those who most need it.”¹

Six months have passed since the international conference on *Resources of Conflict – Conflicts over Resources* took place and this GoJIL issue is published in a time of turmoil and disturbance around the globe. During the upcoming months, the full dimension and impacts of the revolutionary events in the North African and Arab countries on international law and of the nuclear accident in the power plant of Fukushima Dai-ichi will become apparent. It is already clear that these events force the international community to find a response. The fact that numerous contemporary conflicts, international as well as intrastate in nature are linked to aspects of resources has been highlighted by an abundant number academic works. Given the example of the “resource curse” obstructing the peaceful development of countries, resource-related conflicts pose a chance for comprehensive academic work with potential impact for peoples. As Professor Cordonier Segger elaborates in her opening speech to the conference, one must not forget about the people. She emphasized that international law is not just an academic exercise but an instrument “to break the vicious cycle, bringing resolution and sustainable development to those who most need it”². As such, International Law has substantial implications on aspects of every-day life.

¹ M.-C. Cordonier Segger, ‘Keynote Speech’, 3 *Goettingen Journal of International Law* (2011) 1, 11, 12.

² Cordonier Segger, *supra* note 1, 12.

This issue of the GoJIL contains all the sixteen papers that were selected for the conference, a table paper, as well as Marie-Claire Cordonier Segger's (Centre for International Sustainable Development Law, Canada) keynote speech that opened the conference and shows the scope of the contributions, beginning with the questions how existing rules protect resources and how do the parties of a conflict deal with resources.

The first panel *Resources before during and after Conflict* analyzed the role that resources play before, during and after conflicts. It dealt with the applicability of existing rules as well as the responsibility for parties of conflicts. *Cindy Daase's* (Freie Universität Berlin, Germany) article deals with the regulation of resources in internationalized peace agreements and concludes that the Security Council plays a major role in the implementation of the treaties as well as in the redistribution of resources after a conflict. However, the question remains if the existing legal tools, especially Chapter VII of the Charter of the United Nations provides a just and appropriate tool for settling resource conflicts. *Alice Ruzza* (Trento University, Italy) pays attention to the dispute between Argentina and the United Kingdom over the natural resources of the Falkland Islands. Ruzza stresses that the United Kingdom's unilateral exploitation remains a legally problematic issue. *Saiful Karim* (Macquarie University, Australia) sets out to show that the international legal system has developed modest legal tools to handle disputes over marine living resources. Based on the Volga Case Karim argues that the UNCLOS dispute settlement provides a potential to help protect marine living resources. *Christiana Ochoa's* (Indiana University, USA) and *Patrick Keenan's* (University of Illinois, USA) contribution examines the connections between conflict and commercial activities in the Eastern parts of the DRC and point out existing problems connected with regulation in this field.

The second panel, *Actors of Armed Conflict and International Law*, dealt with the role of actors in armed conflicts. The Economist *Moshik Lavie* (Bar-Ilan University, Israel) and *Christophe Mueller* (Aix-Marseille II, France) present an analytic view on actors' willingness to participate in a conflict. According to Lavie and Mueller the differentiation between the motivational backgrounds of soldiers are vital to policy making in the field of building missions. *Annyssa Bellal's* and *Stuart Casey-Maslen's* (both Geneva Academy of International Humanitarian Law and Human Rights, Switzerland) paper identifies ways to improve armed non-state actors' respect for international law, especially incentives for compliance such as taking into account their interests in the law making process. *Alexander Kees* (District Court Stuttgart, Germany) raises the issue of private military

companies. Although the international norms only contain workable principles, for Kees the real challenge is the implementation regulation of private military actors at the domestic level. In her article, *Alice Gadler* (University of Trento, Italy) observes that today more and more States use humanitarian assistance to influence the population and thus to deprive insurgents of support.

The impact of resources on the prevention of conflicts was the topic of the third panel, *Access, Sharing, Regulation*. The main aspects of the panel were the question of mechanisms to regulate resources. The submission of *Stormy-Annika Mildner* and *Gitta Lauster* (German Institute for Foreign Studies and Security Studies (SWP), Germany) examines the increasing trend by governments, to intervene in primary commodities markets for reasons of supply security. Accordingly, they analyze the existing regulatory framework concerning export restrictions under WTO law and examine the role of preferential trade agreements and of free trade agreements. The second article, submitted by *Anastasia Telesetsky* (University of Idaho, USA) deals with foreign direct investments in arable land in African and Southeast Asian countries. She argues that this practice contributes to the creation of conditions of environmental degradation, thus exacerbating present conflicts in many target countries of investment. This article is followed by *Bjørn-Oliver Magsig's* (UNESCO Centre for Water Law, Policy and Science, UK) contribution. He points out the complexity of the peaceful management of the world's freshwater resources. He maps out possible routes for a comprehensive reassessment in this area, stressing the need to rethink certain fundamental tenets of international law and introduced the notion of regional common concern as normative foundation of water security. The fourth contribution to this panel, dealing with water-related conflicts between the riparian states of the Nile Basin, was made by *Dereje Zeleke Mekonnen* (Assistant Professor at the Institute of Federalism and Legal Studies (IFLS) of the Ethiopian Civil Service College, Ethiopia). His article sheds light on the efforts of riparian states to work out a legal framework for the Nile basin in the past and critically assesses the current state of cooperation in this field.

The last panel *Knowledge as a Resource: Access, Assessment and Legal Consequences*, dealing with access, use and legal consequences of the information society, commenced with a presentation by *Lucian E. Dervan* (Southern Illinois University, USA) addressing the subject of cyber warfare. Dervan analyzes whether the Geneva Conventions apply to cyber wars. He stresses that, at first sight, cyber war may result in less unnecessary suffering. However, taking into consideration the consequences on the long

run such as riots due to inaccessibility of information from the internet or the unknown severe collateral damages might change this first impression. *Eszter Kirs* (University of Miskolc, Hungary) shows the process of changes in the relationship between the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the national judicial system of Bosnia and Herzegovina. She highlights that fragmentation is present within the judiciary that defines the limits of the impact of the ICTY and concluded that the domestic courts in Bosnia and Herzegovina are prepared to prosecute war crimes. The Abyei Arbitration from the Permanent Court of Arbitration (PCA) was the subject of a presentation by *Freya Baetens* (Leiden University, The Netherlands) and *Rumiana Yotova* (University of Cambridge, UK) who analyze this unique case. The parties, only one being a state (Government of Sudan v. SPLM), chose the PCA to solve their dispute on national resources and decided to make the whole procedure transparent and public. The authors evaluated whether the Abyei Arbitration is a leading example for other disputes dealing with natural resources, taking into consideration procedural matters as well.

The fourth contribution of this panel was handed in by *Juan-Guillermo Sandoval Coustasse* and *Emily Sweeney-Samuelson* who analyze the Pulp Mills Case of the International Court of Justice (ICJ). They elaborate on the problem of fact-findings and the role of experts before the ICJ. The authors focused their presentation on Judge Yusuf's assertion that the Court needs to develop a clear strategy in these types of cases and on Judges Al-Khasawneh and Simma's statement that the Court has to position itself to consider complex scientific evidence.

The issue will be completed by the table paper by *Pelin Ekmen*. In *From Riches to Rags – the Paradox of Plenty and its Linkage to Violent Conflict* the author broaches the issue of the resource curse mentioned above. With regard to possible solutions to this problem, she focuses on the commerce with coltan in the Democratic Republic of Congo.

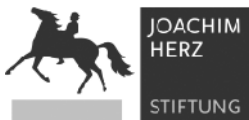
Six months have passed since the conference. However, the issues raised during the conference remain worth debating. The international responses to the conference show the widespread attention and admiration for the project's outcome: Over 90 participants attended the enriching debates. This issue assembles scholarly work from all over the world to foster discussion on the serious topic of the connections between resources and conflicts. GoJIL is now proud and honored to publish the results of the conference that took place in Göttingen on 7-9 October 2010.

The Editors

Acknowledgments

Without the incredible support and help of the following people, we would not have been able to accomplish this ambitious project. We would like to thank:

- All members of the GoJIL Advisory Board and Scientific Advisory Board
- Robin Geiß
- External Reviewers: Ebrahim Afsah, Tobias Lechtenfeld
- The University and Law Faculty of Göttingen
- The Göttingen Institute for Public International Law and European Law
- The Joachim Herz Stiftung
- The Göttinger Verein zu Förderung des Internationalen Rechts e.V.
- The Göttinger Universitätsverlag
- Universitätsbund Göttingen e.V.
- The Niedersächsisches Ministerium für Wissenschaft und Kultur
- The KMU Netzwerk der Göttinger Graduiertenschule Gesellschaftswissenschaften (GGG)



Keynote Speech

Resources of Conflict – Conflicts over Resources

Marie-Claire Cordonier Segger*

* Prof. Marie-Claire Cordonier Segger, MEM (Yale), BCL & LL.B (McGill) is Director of the Centre for International Sustainable Development Law (CISDL) in Montreal, Canada. This text was held as the keynote speech during the conference “Resources of Conflict – Conflicts over Resources” (7-9 October 2010) in Göttingen, Germany.

Opening

I am honored, esteemed colleagues and scholars, to assist you in opening this conference. We are gathered here to consider a crucial and timely problem, the linkages between two impossible challenges facing over a billion people in our world today. Conflicts over resources have been responsible for disputes and even wars both among, and within, many countries. They cause suffering for millions today, and continue to hold back important progress for many, many more. This conference doesn't just accept these terrible facts. It actively considers how the law can help to break the vicious cycle, bringing resolution and sustainable development to those who most need it. I congratulate the organizers, and also all of you as speakers and participants, for your foresight and your intellectual courage.

As has been mentioned, I am the Director of the Centre for International Sustainable Development Law (CISDL). My Centre, a fellowship of over 120 lawyers and legal scholars from 54 countries, leads legal research and capacity building, convenes expert and scholarly dialogues, and publishes legal analysis and scholarship in the area of sustainable development law and policy.

I also direct a new Program on Environment and Sustainable Development Law for the International Development Law Organization (IDLO), an international, inter-governmental institution that partners with the UN in providing rule of law training and technical assistance in the world's most vulnerable and post-conflict countries.

As an author and lawyer, a treaty negotiator and scholar, I have spent the last twenty years, on the invitation of the UN and its member countries, working to help nations in Africa, Latin America and Asia to develop new laws and institutions to steward, manage and equitably share vital natural resources. In some countries, we have seen success. In others, the peace that has been constructed is fragile, even desperate, but we have hope. And in others still, we are failing – much, much more is still needed.

My messages for you today are simple, and based on three important lessons that all the 'barefoot lawyers' and scholars in my Centre, and among IDLO and our local partners, continue to learn and re-learn every day, in our work on the ground.

First – we face incredible challenges today. Key resources – water, lands, even our very climate, are being degraded and lost at terrible rates in many parts of the world. There is no alternative to action. We **MUST** stop conflicts over resources, and prevent the use of resources to fuel conflicts.

This is a vital precondition to any kind of development, especially sustainable development.

Second – We are not powerless, nor are we starting from zero. There is a real role for law. And as legal scholars and practitioners, we have both a solemn responsibility, and also many tools to help us achieve this seemingly impossible task. We have treaty regimes and regulations, we have customary principles and rules, we have dispute settlement and joint resource management mechanisms. We need to activate existing laws, and where necessary, create new ones. We need to strengthen, through respect and use, *these fragile paths and bridges of binding words that are the law*.

Third – we must pay careful, careful attention to process. There is so much to be gained, or lost. Participatory assessment, transparency, consultation and engagement of all actors, willingness to listen respectfully, to learn from those most affected, to consider new solutions that combine law with policy and practice, these are crucial. Many conflicts are either resolved, or exacerbated, by how people are treated. The solution isn't just in what we do, but how we do it... and whether it works.

In essence, I bear a warning, a reminder and a challenge.

First, the warning... On natural resources & conflicts today

The links between natural resources and conflicts have been established in theory, and on the ground, for some time now. And a great deal has been done.

But more effort is needed. Overall, global and regional resources problems are getting worse, not better. And despite intense global media attention, and many efforts for prevention, many societies bear the burdens of conflicts. There are 35 million survivors of conflict across the globe. The lives of millions more, the large, large majority of whom are innocent and vulnerable civilians, continue to be affected by conflict every day. Currently, there are well over 20 domestic and international conflicts raging, especially in Sudan¹ and Somalia,² while others hover on a knife-edge of war, or peace.

¹ In the Sudan, militias and government forces have been engaged in fighting with rebel groups in Darfur that are angered at what they see as the oppression of black Sudanese in favor of Arab Sudanese. There have been attempts to draw connections between the

Conflicts do not spring from nowhere. They often occur when people have no choices left, when basic freedoms from need, and from fear, are denied. As noted by Professor Amartya Sen in his Nobel-winning book, *Development as Freedom*, we must have opportunities. But as Professor Paul Collier has observed, in his book, *The Bottom Billion*, natural resources form a crucial part of the conflict equation. And current trends, in this respect, are far from encouraging.

I will give three examples – water, land, and air (our climate).

With regards to water, which is a basic human need, and also a human right, scarcity is becoming worse. According to the United Nations Development Programme (UNDP), over 1 billion people worldwide lack access to water, with over 2.4 billion people worldwide lacking access to simple forms of sanitation. It is perhaps not surprising, given these staggering numbers, that over 5000 children die every day from water-related illnesses. International scientific panels have predicted that water availability may decrease by 10-30% over some dry regions of the world by 2050. In Africa alone, it is estimated that up to 600 million people will experience water stress and will be at risk for hunger by 2050. Most countries in the Middle East and northern Africa are already considered water scarce, and by 2025 large parts of China, India, and other countries are predicted to face deficiencies as well. Water shortages, lack of access to water, and inequitable distribution of water can both cause and enhance conflict at the local, national, and international level, such as in Kenya and Ethiopia in 2006.

With regards to lands, both farms and forests, which are vital for food security, we are similarly heading for trouble. According to the Center for International Forestry Research (CIFOR), deforestation takes nearly 12 million hectares of tropical land every year, destroying the livelihoods – and

conflict and the lack of plentiful water access in the region, however this has yet to be verified beyond reproach. Natural resources play into the victimization of those in Darfur in that those venturing out of refugee camps to seek natural resources such as timber or wood have been targeted for rape and/or killing by all sides involved.

² In Somalia, conflict has raged for years, displacing the internationally recognized government and resulting in a fragmentation of the state into smaller areas of allegiance to a particular group. As a result, food security – among many other forms of security – is in constant peril, and recent drought has only exacerbated the inability of many Somalis to access sufficient natural resources, in the form of food stuffs, to survive.

causing subsequent food shortages – for those who depend upon forests for survival. Threatened forests are home to an estimated 50 million indigenous people, and provide for informal economies related to hunting, gathering and fuel wood. Commercial logging, often illegally, competes for access to the resource with those that live in forests, sometimes resulting in violence. And according to the Food and Agriculture Organization of the United Nations (FAO), the global land area without major soil fertility constraints is only about 31.8 million square kilometers, and total potential arable land is only about 41.4 million square kilometers total. As one of the panels in this conference will discuss tomorrow, in some countries, the leasing of massive tracts of agricultural land might well exclude important populations from access to resources, sowing the seeds of future conflicts, and making present conflicts more severe. When loss of arable land, degradation of soils, and desertification and drought occurs, people cannot grow staple food crops famine can cause, or contribute to internal conflicts, as we have seen in the Darfur region of Sudan. As another of our panels will discuss, the global picture for fisheries, another important resource for food security, is similarly grim, and may be leading to conflicts.

With regards to our climate, as the Intergovernmental Panel on Climate Change (IPCC) has observed, even a 2% rise in temperatures may cause natural disasters, extreme climate variability leading to droughts and flashfloods, to sea level rise and coastal erosion, to broader vectors for infectious diseases such as malaria and cholera, and inexorably, to conflicts. As noted by the Pew Foundation, coastal and low-lying areas all over the world are expected to be exposed to increasingly high risks such as sea-level rise and coastal erosion. The IPCC estimates that with a temperature rise of just 2°C, millions more people will experience coastal flooding each year. Densely-populated and low-lying deltas, as well as small islands, are especially vulnerable to these risks. A recent analysis found that 300 million people inhabit 40 deltas around the world, and by 2050, one million people in just three major deltas (the Ganges-Brahmaputra delta in Bangladesh, the Mekong delta in Vietnam and the Nile delta in Egypt) will be directly impacted by land loss and coastal erosion.

Climate change is expected to create issues of housing, security, and exposure to disease worldwide, particularly among vulnerable populations. The World Health Organization (WHO) has found that disasters such as floods can increase the transmission of both water-borne and vector-borne diseases like typhoid fever, leptospirosis, hepatitis A, malaria, yellow fever, and West Nile Fever. Additionally, as noted by the Pew Foundation,

mosquitoes carrying malaria and dengue fever have been found increasingly at higher altitudes and latitudes, jeopardizing communities that have had little experience with tropical disease and that lack adaptive capabilities. Large-scale health emergencies or disease epidemics can quickly escalate to regional or global security threats. They cause deep suffering for those afflicted, and also have the potential to create internally displaced persons or refugees or, in the case of medical calamities, communities that are decimated by disease, leaving those who survive barely able to care for themselves or their families.

According to Pew, in 1995, there were 25 million environmental refugees, a number almost equivalent to conventional refugees at the same time. Under unmitigated climate change, this number has the potential to increase rapidly; some estimate there could be as many as 50 million environmental refugees by 2010.

Is the exploitation of natural resources, the degradation and scarcity of which can certainly lead to conflict, also a way to secure development and prevent conflict?

Not necessarily. Not automatically. And certainly not without law. As Professor Paul Collier has observed, natural resources *alone* cannot secure economic stability or prosperity for a country. Indeed, the discovery and exploitation of mineral, fossil fuel or other resources can destabilize, even destroy, a country's economy and peace. Extractive industries have an important relationship with conflicts. In some instances, extraction is used to fund and fuel conflicts, with combatant groups using natural resources such as precious metals and stones to finance the purchase of weapons and other supplies of warfare. For instance, "blood" diamonds were used to finance conflicts in Sierra Leone³ and Liberia.⁴ If mining and extraction of

³ The conflict in Sierra Leone began in 1991 and ended in 1999. The rebel group which challenged the government, the Revolutionary United Front, was heavily supported by the Liberian government, particularly Charles Taylor. One of the contributing factors to the civil war was control over diamond mines located in Sierra Leone, and the accumulation of wealth from these natural resources in the hands of a very small elite group. Ultimately, the fighting in Sierra Leone was of the utmost brutality, resulting in an international court for the prosecution of those involved.

⁴ In Liberia, conflict began in the late 1980s and, with the exception of a brief interlude, lasted until 2003. Political disruption and unrest was the primary cause of the conflict, which was notoriously funded by the use of conflict diamonds, particularly by then-president Charles Taylor. As with Sierra Leone, the violence and depravity displayed in this conflict was horrific, and has resulted in Charles Taylor being brought before the International Criminal Court.

natural resources is done in a way that damages the environment and peoples, it destroys livelihoods, and can exacerbate conditions for conflicts.

Further, as took place in Nigeria, oil and natural gas extraction may even create or fuel conflicts. Indeed, conflicts over oil, and the territories in which oil is located, are not limited to the developing world, as evidenced by the ongoing dispute between the Nordic countries, Russia, Canada and the United States regarding rights to Arctic natural resources and exploration. This dispute, largely a diplomatic issue at present, will become more pressing as the effects of climate change become increasingly apparent and felt around the world.

But perhaps *sustainable* development of natural resources, backed by the strengthening of laws and institutions, of governance systems, and supported by equitable and open engagement in international society, can be part of a solution.

This brings me to my second point – the reminder.

Domestic and international law have a role to play. We are not flying blind, here. We have much to learn from existing experiences, including some successes, and also the failures.

The continued – and indeed growing – connection between natural resources and conflicts is well established. Domestic and international law may offer methods of generating knowledge of, and solutions to the perils of the relationship between natural resources and conflicts. Indeed, the CISDL is dedicated to supporting and sharing cutting edge legal research on exactly these important priorities. And my IDLO colleagues act on it, with and for developing countries, including through 46 alumni associations in Africa, Asia and the Americas. The legal aspects of the connections between natural resources must be investigated, acknowledged and incorporated into legal policies and systems. Your own careful analysis, inspired critiques and new proposals are a crucial part of this endeavor.

International treaty regimes and instruments such as the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol, the United Nations Convention to Combat Desertification (UNCCD), the United Nations Convention on Biological Diversity (UNCBD) and its Protocols, the International Tribunal for the Law of the Sea (ITLOS) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) have made real contributions to combating conflicts over natural resources. Each of these instruments

advances global standards, dialogue and cooperation for more sustainable development of important resources, including renewable energy, forests and land, biodiverse species, fisheries, and seeds. In so doing, the treaties may be helping to combat threats to, and stresses on, crucial natural resources. Without them, we might have many, many more conflicts based on access and survival. Such instruments, together with bi-lateral and other management regimes, are essential weapons for those working to prevent conflicts over natural resources.

The Kimberly Process – and associated legal documents – has made an important contribution to ending the use of natural resources to fund conflicts. This is important on its own, and is also important because the actions of the diamond industry and interested States (in part to limit potential damage to their reputations) have served as a model to other extractive and natural-resource based industries. While the bulk of these industries have chosen to self-regulate through internal rules, this is still an important step. Regulation (even voluntary) begets standard-setting and potential for oversight, which beget public and private criticism, which begets better behavior, which begets (eventually) internalization – corporate and governmental.

In the fight to sever the connection between natural resources and conflict principles of sustainable development law are vital. The New Delhi Declaration of the International Law Association (ILA), drafted based on a decade of study of existing treaties and laws by international experts, offers key ideas.

Perhaps the most relevant of these principles is the sustainable use of natural resources, as this principle, when applied correctly, ensures the perpetuation of natural resources in the immediate term and for future generations, alleviating a reduction in access to these resources which can be a motivating source for conflict.

The principle of equity is also crucial. Equitable access to, and sharing of the benefits of, important natural resources, have the potential to decrease the likelihood of conflict over resources in the short term. This may be discussed with regards water, for instance, in your panels tomorrow. It is also very true for genetic resources and biodiversity, as we may shortly witness in Conference of the Parties (COP 10) of the UNCBD in Nagoya, Japan. Sustainable management and equitable benefit sharing creates incentives to reduce fighting over natural resources and these principles can help communities share equally in the many benefits offered by natural resources.

A further relevant principle of sustainable development law involves committing to good governance. This was recognized in the 2002 ILA New Delhi Declaration which emphasized that States must (a) adopt democratic and transparent decision-making procedures and financial accountability; (b) take effective measures to combat official or other corruption; (c) to respect the principle of due process in their procedures and to observe the rule of law. Many international organizations and states, in particular the World Bank, adopt 'good governance' to encompass all procedures and processes for sustainable development. Good governance in this sense is closely related to the principles of transparency, participation, impact assessment and access to justice.

Conflicts over natural resources present a different form of result than traditional warfare – there is no winner, especially when these resources have been exploited or plundered during the conflict. Thus, when we think of methods to resolve such disputes, we must look beyond standard options and embrace both formal dispute settlement mechanisms and informal dispute settlement mechanisms. Consultations between the parties are essential as soon as a threat or potential threat has been found to exist. This is particularly important so that the parties can understand the role of natural resources in the threat of conflict. If consultations are not effective, negotiations are another vital tool, and represent an opening for the international community to openly assist in the resolution of the dispute. The use of international tribunals is another option, be the tribunal the International Court of Justice or even the WTO Dispute Settlement Mechanism if the conflict presents appropriate subject matter. What is important to remember is that there is a profound place for formal and alternative dispute settlement mechanisms within conflicts over natural resources, and that these mechanisms offer a beneficial path for the parties involved and the global community as a whole.

Law, and lawyers, occupy a unique place in the prevention of conflicts over natural resources. At the most obvious level, lawyers promulgate the laws and policies which can be used to protect natural resources and to prevent conflict by building more responsive governmental systems. Yet, this tells only half the story. As recent research on Legal Empowerment of the Poor has highlighted, lawyers need to ensure that the law is understood by all, and that justice can be accessed by all. Further, it is not enough to simply transfer knowledge or research; lawyers can become voices for the poor in the creation and enforcement of the law, and can ensure that the poor and marginalized – who, in many instances, depend directly on natural resources – are able to assert their own voices, views and needs within legal

systems. Thus, legal research needs to focus on all levels of society and deliver on the inclusion of all aspects of society within the law. This is essential not only because it is fair, or it is just. It is also essential because, in being fair and just, it is the best way to prevent conflicts over natural resources.

We need only to look at the interventions planned for this conference to see the importance of conflicts over resources and the many ways in which these conflicts can be manifested.

As the expert speakers in this conference will discuss on Panel, resources are important before, during and after conflicts.

Further, as will be illuminated in Panel 2, State and non-State actors can play important roles in using resources to fuel or resolve conflicts.

In the discussions surrounding access to resources, the sharing of resources, and their regulation, we see how further research into these issues can be used to analyze instances where law was unable to be used as a tool to stop a potential conflict from occurring. We further are able to study effective uses of law in the conflict over resources; in the contrasts we learn valuable case study lessons with regards to lands, fisheries, water and metals as they link to trade law. These experiences provide, in my view lessons for law and policy as a whole.

Finally, you will be able to carefully consider experiences with a range of legal dispute resolution or post-conflict reaction techniques, critiquing but also creating analysis for alternatives.

This brings me to my third point – the challenge.

It matters what we do. But it also matters *how* we do it, and whether it works.

There is now a whole host of procedural innovations that can help us to advance sustainable development. The first example I would like to highlight is impact assessment. Since the first environmental impact assessment was legislated in NEPA 1970, this tool has seen multiple incarnations and the most modern version also takes social impacts, for example on health, into account. EIA has arguably been recognized as a customary norm in projects with an international dimension, such as in the ICJ in *Uruguay River Case*. Lawyers have a crucial role to play in impact assessment in that they can ensure that due process is actually observed and can point to deficiencies in the procedure (a right often not granted for the outcome of the project plan itself). There are a couple of examples where a

proper impact assessment could have avoided greater conflict (also over natural resources). If we leave an example like oil drilling in Alaska aside (the US having been forced to re-do the assessment several times, also because the impact on native people was not properly considered), the case of French nuclear tests in the Pacific comes to mind. There is an argument to say that a proper impact assessment could have avoided an international conflict which also played out before the ICJ.

A second very important procedural element involves transparency and participation. Engagement of those most affected, of all interests, is essential to create ownership over a decision as important as natural resource exploitation. Transparency is now required for most projects that receive international financing, either through the World Bank or through regional development banks. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also contains a treaty obligation for all contracting parties to share public environmental information. Lawyers working to ensure sustainability of a process need access to information and ideally participation in the decision-making process. Information has been crucial to avoid natural resources conflicts occurring and spiraling out of control. The EITI process creates better information as to where oil exploitation funds that are paid by oil companies go in the host government.

Access to justice is also crucial. Even if the justice system in question is not perfect, it greatly enhances the possibility that an independent or semi-independent institution evaluates the situation.

And finally, we need to take on the challenge of securing better implementation. Much more research and debate is needed to mobilize legal knowledge on the way we apply international obligations, and comply with domestic laws. Compliance can also help to avoid international conflict. There is a growing body of literature concerning the rule of law and better law-making. It is easy to tell a conference of lawyers that the rule of law is able to prevent conflict over natural resources, it is more challenging to prove it on the ground with people whose livelihoods are threatened by more than corrupt government officials and judges. The basic commitment to the rule of law which is now often required to receive enhanced development assistance, for example under the New Partnership for Africa's Development (NEPAD) or the EU GSP Plus system, can help communities

to insist on their rights. And peer review makes more of a difference than we know.

Conclusion

I have warned of the scale of the problem and highlighted existing legal tools. You, the future generation of courageous legal scholars, are well-placed to embrace the challenges posed by these connections and opportunities. In meeting these challenges, I have one other word of advice – where we are going, we all need each other. In your debates and future research, build networks, create coalition of legal scholars from the developed and developing worlds, and engage in partnerships. Keep your promises, to each other and to the communities where research is done. Return results to those most affected, and be ready to help test your ideas and solutions in legal practice. Engage, inform or even join the “barefoot lawyers,” who work not only in the realm of scholarship but also in the very important – if often overlooked – trenches of legal practice among the communities that are suffering the most. Let's forge a generation of lawyers that is well-versed in the theoretical and practical needs and realities of law as it relates to conflicts over resources.

While the realities of conflicts over resources – particularly the human rights and environmental realities – might at time seem insurmountable, we can and must work together, activating a collective dedication. The threats posed by conflicts over resources, particularly those related to climate change, are massive. So too is our ability to overcome them.

The Redistribution of Resources in Internationalized Intra-State Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions

Cindy Daase*

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Abstract

The (illegal) exploitation and (bad) management of high value resources like timber, diamonds, gold, minerals and oil constitute key-factors for the inflammation, continuation and termination of numerous intra-state conflicts. Since the 1990s these conflicts have been increasingly settled by the conclusion of comprehensive peace agreements between the conflicted state and belligerent non-state parties. At the example of the Lomé, Accra and Ouagadougou Agreement, which were negotiated to terminate the conflicts in Sierra Leone, Liberia and Côte d'Ivoire, the paper describes and analyzes whether and how these agreements addressed the redistribution of conflict-resources during the peace process. In the course of this documentation, the paper finds a strong involvement of the UN Security Council when it comes to the redistribution of resources and the implementation of all three agreements that goes beyond addressing an immediate threat to peace and security. Focusing on this involvement of the Security Council to exert a strong pull towards the compliance of the parties with these agreements, the paper will discuss the legal nature of the example peace agreements and of the specific obligations concerning the redistribution of resources. The paper finds that, under certain circumstances, internationalized comprehensive peace agreements, with a strong endorsement and involvement of the Security Council, can create effective legal obligations for the parties with respect to the redistribution and treatment of resources during the transition from conflict to peace.

“The war...started because some people felt they would never have access to resources. They still don't.”¹

A. Introduction

The access, development as well as management of resources and distribution of resource revenues constitute key factors in the initiation, continuation and termination of numerous current intra-state conflicts.² The

¹ International Crisis Group interview with an unnamed diplomat after the conclusion of the Accra Agreement, Freetown, 18 August 2004, cited in International Crisis Group, ‘Liberia and Sierra Leone: Rebuilding Failed States’, Crisis Group Africa Report Number 87 (8 December 2004) available at <http://www.crisisgroup.org/~media/Files/africa/west-africa/liberia/Liberia%20and%20Sierra%20Leone%20Rebuilding%20Failed%20States.ashx> (last visited 28 April 2011), 29; ‘Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia and the Political Parties’, Accra/Ghana, 18 August 2003, UN Doc S/2003/850, 29 August 2003 [Accra Agreement].

² P. N. Okowa, ‘The Legal Framework for the Protection of Natural Resources in Situations of Armed Conflict’, in W. J. M. van Genugten *et al.* (eds), *Criminal Jurisdiction 100 years after The Hague Peace Conference, 2007 Hague Joint Conference on Contemporary Issues of International Law* (2009), 243-260 [Okowa, The Legal Framework for the Protection of Natural Resources]; P. N. Okowa, ‘Natural Resources in Situations of Armed Conflict: Is there a Coherent Framework for Protection?’, 9 *International Community Law Review* (2007) 3, 237-262 [Okowa, Natural Resources in Situations of Armed Conflict]; N. Schrijver, *Sovereignty over Natural Resources, Balancing Rights and Duties* (1997), 255-395 [Schrijver, Sovereignty over Natural Resources]; N. Schrijver, ‘The Plundering of Natural Resources and the Destruction of Environment in Times of Armed Conflict’, in W. J. M. van Genugten *et al.* (eds), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference, 2007 Hague Joint Conference on Contemporary Issues of International Law* (2009), 242-285 [Schrijver, The Plundering of Natural Resources]; S. L. Woodward, ‘Economic Priorities for Successful Peace Implementation’, in S. J. Stedman *et al.* (eds), *Ending Civil Wars, The Implementation of Peace Agreements* (2002), 183-214. *Definitions:* The paper understands resources as material (natural) resources such as oil, gas, diamonds, minerals, forests (timber) and water as well as immaterial (intangible) resources like access to resource-distributing state- and governance-institutions or the establishment of power and wealth-sharing mechanisms. The United Nations Environment Programme (UNEP) recently specified: “*Natural resources* are actual or potential sources of wealth that occur in a natural state, such as timber, water, fertile land, wildlife, minerals, metals, stones, and hydrocarbons.”, see UNEP, ‘From Conflict to Peacebuilding, The Role of Natural Resources and the Environment’ (February 2009) available at http://hqweb.unep.org/pdf/pcdmb_policy_01.pdf (last visited 28 April 2011), 7; *Resources of conflict* are

inability of a state to share national wealth and resource revenues equitably among its citizens provides a platform to those challenging the legitimacy of the governing authority and can lead to a violent intra-state conflict. Recent research suggests that, over the last sixty years, at least forty percent of all intra-state conflicts have had a link to natural resources. This is no attempt to create a mono-casual explanation. But civil wars, such as those in Liberia, Sierra Leone and Côte d'Ivoire as well as those in Angola or the Democratic Republic of Congo, have been fuelled and prolonged by the (illegal) exploitation of high-value resources, like timber, diamonds, gold, minerals and oil. Other conflicts, including those in Darfur and the Middle East, have involved the struggle for the control of scarce resources, such as fertile land and water.³ Since the 1990s, violent intra-state conflicts⁴ have increasingly been settled by peace agreements between the conflicted state and belligerent non-state parties.⁵ The negotiation and implementation process of such agreements is often characterized by a strong involvement of the

inter alia natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from, or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law, see Global Witness, 'The Sinews of War. Global Witness Publishing' (1 November 2006) available at <http://www.globalwitness.org/library/sinews-war> (last visited 2 May 2011), 7.

³ UNEP, *id.*, Executive Summary.

⁴ *Comment:* The paper will take a broad approach to outline the initial situation in which peace agreements and the redistribution of natural and intangible resources are negotiated. This approach is not limited to the definition of a non-international armed conflict by Protocol II of the Geneva Convention. *Conflict*, in the context of this paper is referred to as a dispute or incompatibility caused by the actual or perceived opposition of needs, values and interests. *Intra-state conflict* refers to civil wars or other struggles that involve the use of force between the state power and a non-state entity mainly within the territory of one state. *Intra-state conflict* is understood as a violent conflict between the state and the non-state entity, which can have various forms of organization and motivation, in this case the access to and the exploitation of resources, see UNEP, *id.*, 7; describing the dimension of intra-state conflict: R. Khan, 'United Nations Peace-keeping in Internal Conflicts', in J. A. Frowein *et al.* (eds), 4 *Max Planck Yearbook of United Nations Law* (2000), 543-581.

⁵ C. Bell, 'Peace Agreements: Their Nature and Legal Status', 100 *The American Journal of International Law* (2006) 2, 373-412 [Bell, Peace Agreements]; C. Bell, *On the Law of Peace, Peace Agreements and the Lex Pacificatoria* (2008), 5-7 [Bell, Lex Pacificatoria]; C. Daase, 'Friedensabkommen zwischen staatlichen und nicht-staatlichen Parteien, Chimären zwischen Recht und Politik', in J. Bäumler *et al.* (eds), *Akteure in Krieg und Frieden* (2009), 141-166; R. Licklider, 'The Consequences of Negotiated Settlements in Civil Wars, 1945-1993', 89 *The American Political Science Review* (1995) 3, 681-690; H. Hegre, 'The Duration and Termination of Civil War', 41 *Journal of Peace Research* (2004) 3, 243-252; Woodward, *supra* note 2, 184.

United Nations (UN), which can take various formats and can have an internationalizing effect on the overall peace process.⁶ This paper expects that the most comprehensive agreements, subsequently referred to as *internationalized comprehensive peace agreements* (ICPA), will seek to address the roots of the conflicts, *inter alia* the distribution of resources and resource revenues, to exert a sustainable pull towards compliance on the parties of the agreement and to create a stable peace process by establishing incentives for the parties to settle disputes within the framework of the institutions and regulations outlined in the agreement.⁷

As legal literature has not adequately addressed this topic to date,⁸ this paper will seek to do so with reference to three specific ICAs, namely for

⁶ See examples, among many other: Accra Agreement, *supra* note 1; ‘Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone’, Lomé/Togo, 7 July 1999, available at http://www.usip.org/files/file/resources/collections/peace_agreements/sierra_leone_07071999.pdf (last visited 28 April 2011) [Lomé Agreement]; ‘Agreement between the Government of the Republic of Angola and the União Nacional para la Independencia Total de Angola (UNITA)’, Lusaka/Zambia, 15 November 1994, UN Doc S/1994/1441, 22 December 1994 [Lusaka Protocol]; ‘Arusha Peace and Reconciliation Agreement for Burundi’, Arusha/Tanzania, 28 August 2000, available at <http://www.hdcentre.org/files/Arusha%20peace%20agreement.pdf> (last visited 28 April 2011); ‘Government of the Republic of Côte d’Ivoire and the Force Nouvelle (FN), Ouagadougou Political Agreement’, Ouagadougou/Burkina Faso, 4 March 2007, UN Doc S/2007/144, 13 March 2007 [Ouagadougou Agreement]; see more at <http://peacemaker.unlb.org/index1.php> (last visited 28 April 2011).

⁷ The author follows the definition of the UN Peacemaker database, which states: “Comprehensive Agreements address the substance of the underlying issues of a dispute. Their conclusion is often marked by a handshake, signifying that a historic moment has ended a long-standing conflict. Comprehensive Agreements seek common ground between the interests and needs of the parties to the conflict; they resolve the substantive issues in dispute and provide the necessary arrangements for implementing the agreement.”, available at <http://peacemaker.unlb.org/index1.php> (last visited 8 March 2011). Furthermore, there is no legal definition for *peace agreement* or *peace accord*. The reader will find numerous definitions as for instance of the Centre for Humanitarian Dialogue, L. Vinjamuri & A. P. Boesenecker, ‘Accountability and Peace Agreements, Mapping Trends from 1980 to 2006’ (1 September 2007) available at <http://reliefweb.int/node/22983> (last visited 28 April 2011), 6. This article follows C. Bell’s broad working definition, which states that: “Peace agreements are documents produced after discussion with some or all of the conflict’s protagonists, that address militarily violent conflict with a view to ending it.”, Bell, ‘Lex Pacificatoria’, *supra* note 5, 55.

⁸ See Bell, ‘Peace Agreements’, *supra* note 5, 374-376; Bell, ‘Lex Pacificatoria’, *supra* note 5, 27-161; Daase, *supra* note 5, 143-147.

Sierra Leone, Liberia and Côte d'Ivoire. The first analytical part of the paper will set the scene, dealing with the role of resources in intra-state conflicts and peace processes from a more general perspective (Part B). The paper will then address the question of whether and how the selected ICPAs address the redistribution of conflict resources (Part C). In each case, the agreement is coupled with Security Council (SC) Resolutions that were adopted in the course of the peace processes.

The examples have been chosen for a similar case comparison. Sierra Leone, Liberia and Côte d'Ivoire are members of the UN, the African Union (AU), the Economic Community of West African States (ECOWAS), the Mano River Union and the Kimberley Process Certification Scheme.⁹ In all three countries the UN has been involved since the repeated outbreak of intra-state violence. All conflicts constitute a threat to peace for the entire sub-region and together they are considered to have created one common conflict region, heavily troubled by resource-fuelled conflicts.¹⁰ Each conflict has become the object of one or more peace agreements between the (government of the) state and the non-state parties outlining power-sharing arrangements and the transition from conflict to peace based on an internationalized negotiation process. In sum, the three peace agreements were generated in a common regional, as well as similar political and legal, framework. Hence, it could be expected that all three agreements treat the

⁹ SC Res. 1231, 11 March 1998; SC Res. 1346, 30 March 2001; SC Res. 1400, 28 March 2002; SC Res. 1436, 24 September 2002; SC Res. 1446, 4 December 2002; SC Res. 1470, 28 March 2003; SC Res. 1521, 22 December 2003. About the Kimberley Process Certification Scheme, see: http://www.kimberleyprocess.com/documents/basic_core_documents_en.html (last visited 28 April 2011).

¹⁰ Lomé Agreement, *supra* note 6, preamble; SC Res. 1231, 11 March 1998; SC Res. 1270, 22 October 1999; SC Res. 1334, 22 December 2000; SC Res. 1346, 30 March 2001; SC Res. 1346, 30 March 2001; SC Res. 1385, 19 December 2001; SC Res. 1400, 28 March 2002; SC Res. 1436, 24 September 2002; SC Res. 1446, 4 December 2002; SC Res. 1470, 28 March 2003; SC Res. 1688, 16 June 2006; SC Res. 1514, 13 November 2003; SC Res. 1795, 15 January 2008; SC Res. 1885, 15 September 2009; SC Res. 1509, 19 September 2003; SC Res. 1521, 22 December 2003; SC Res. 1579, 21 December 2004; SC Res. 1607, 21 June 2005; SC Res. 1626, 19 September 2005. *Comment*: The Truth and Reconciliation Commission for Sierra Leone found that: “[...] countries in the Mano River Union permitted their territories to be used as conduits for the smuggling of diamonds extracted from Sierra Leone. The political elites of these countries benefited enormously from the diamond resources smuggled out of Sierra Leone.”, The Truth and Reconciliation Commission Report, ‘Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission, Vol. 2’ (5 October 2004) available at <http://www.sierra-leone.org/Other-Conflict/TRC Volume2. pdf> (last visited 28 April 2011), 107, para. 554.

distribution of resources and recourse revenues as key factors for the outbreak and continuation of the conflict in a similar way. With a focus on the strong involvement of the SC to exert a strong pull towards the compliance of the parties with the agreement, the paper will discuss the legal nature of the example peace agreements and of the specific obligations they create concerning the redistribution of resources of conflict (Part D). It will be shown that, under certain circumstances, ICPAs, with a strong endorsement and involvement of the SC, can create effective legal obligations for the parties with respect to the redistribution and treatment of resources.

B. The Context: Resources of Conflict in Intra-State Conflicts

To understand the role of the access to and the exploitation of resources during a peace process, the general connection between intra-state conflicts and resources needs to be briefly introduced.¹¹ Statistics indicate that, in developing countries,¹² natural resources are often a major source of national income and thus a major object of conflict and instability, if governed badly and shared unfairly.¹³ It is not only the formal and *de facto*

¹¹ Khan, *supra* note 4, 596.

¹² OECD, Definition: "In the context of the Paris Club, countries eligible to receive concessional terms. The Paris Club decides eligibility on a case-by-case basis, but only countries eligible to receive highly concessional IDA credits from the World Bank Group are included. The World Bank classifies as low-income those countries with GNP per capita income of \$755 or less in 2000.", available at <http://stats.oecd.org/glossary/detail.asp?ID=5970> (last visited 28 April 2011); *comment*: Statistics about the role of natural resources in intra-state conflicts see I. Bannon & P. Collier, 'Natural Resources and Violent Conflict, Options and Actions' (2003) available at [www-wds.worldbank.org/servlet/WDSContentServer/WDSPath=IB/2004/05/24/000012009_20040524154222/Rendered/PDF/282450Natural0resources0violent0conflict.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer?WDSPath=IB/2004/05/24/000012009_20040524154222/Rendered/PDF/282450Natural0resources0violent0conflict.pdf) (last visited 28 April 2011).

¹³ "The common trait in these [...] situations is the inability of weak states to resolve resource-based tensions peacefully and equitably. Indeed, conflict over natural resources and the environment is largely the reflection of a failure of governance, or a lack of capacity. As demands for resources continue to grow, this conclusion highlights the need for more effective investment in environmental and natural resource governance. [...] Countries whose economies depend heavily on natural resources face a greater risk of conflict. Rebel groups fund their activities and wage war with illicit exploitation and trade, while corrupt elites drain off the revenues of

ownership of natural resources which is at stake, but also the access to state institutions, which manage and develop natural resources and distribute resource revenues. Therefore, severe tension may arise concerning the access to and control of these state institutions, which often struggle to handle the competing demands and influences of various actors. In many cases, the institutions of state governance fail to resolve these tensions equitably, hastening the rate at which those institutions are undermined and raising the readiness of these actors to use violence to obtain their goals.¹⁴ The Truth and Reconciliation Commission for Sierra Leone dealt intensively with the connection between intra-state conflicts, regional conflicts, natural resources and governance of natural resources. It describes how diamonds were used by most of the armed factions to finance and support their war efforts. The Commissions concluded, however, that the exploitation of diamonds was not the cause of the conflict in Sierra Leone; rather it was an element that fuelled the conflict.¹⁵

On the global level the SC President stated in a Presidential Statement that the Council recognizes the role which natural resources can play in armed conflict and post-conflict situations. And moreover, that, in specific

natural resources.”, see UNEP, *supra* note 2, 11; M. L. Ross, ‘What do we know about natural resources and civil war?’, 41 *Journal of Peace Research* (2004) 3, 337-356.

¹⁴ “Weak governance institutions and expressions of authority, accountability and transparency are frequently eroded by conflict. When tensions intensify and the rule of law breaks down, the resulting institutional vacuum can lead to a culture of impunity and corruption as public officials begin to ignore governance norms and structures, focusing instead on their personal gain. This collapse of governance structures contributes directly to widespread institutional failures in all sectors, allowing opportunistic entrepreneurs to establish uncontrolled systems of resource exploitation. Conflict also tends to confuse property rights [...]”, see UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, ‘A more secure world: Our shared responsibility’, Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change, UN Doc A/59/565, 2 December 2004, see *inter alia* paras 22, 38, 39, 91; The report also states that: “A new challenge for the United Nations is to provide support to weak States – especially, but not limited to, those recovering from war – in the management of their natural resources to avoid future conflicts.”, see UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, *id.*, para. 91; C. Clapham, *Africa and the International System, The Politics of State Survival* (1996), 15-24; Okowa, ‘The Legal Framework for the Protection of Natural Resources’, *supra* note 2, 243-245; Okowa, ‘Natural Resources in Situations of Armed Conflict’, *supra* note 2, 237-240.

¹⁵ The Truth and Reconciliation Commission Report, ‘Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission, Vol. 1’ (5 October 2004) available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume1.pdf> (last visited 28 April 2011), 12-13, paras 17, 37-45.

armed conflicts, the exploitation, trafficking, and illicit trade of natural resources contributed to the outbreak, escalation or continuation of armed conflicts.¹⁶ As a matter of conflict prevention in Africa, the SC has affirmed “[...] its determination to take action against illegal exploitation and trafficking of natural resources and high-value commodities in areas where it contributes to the outbreak, escalation or continuation of armed conflict”.¹⁷ The SC has followed on this promise and has taken measures to prevent the illegal exploitation of natural resources, especially of diamonds and timber, from fuelling the continuation of armed conflicts through various resolutions. Furthermore, the SC President called for a more coordinated approach by the UN in armed conflicts and post-conflict peace processes with regional organizations and governments concerned. He emphasized in particular the need for the international community to enable governments in post-conflict situations to better manage their resources *inter alia* by encouraging a transparent and lawful management of natural resources through clarifying the responsibility of management of natural resources and through establishing sanctions committees as well as panels of experts to oversee the implementation of those measures.¹⁸ Also, the importance of taking the resource dimension of conflicts into account when drafting the mandate of UN and regional peacekeeping operations was pointed out, especially by making provisions for assisting governments and organizations and in preventing the illegal exploitation of natural resources by the parties to the conflict.¹⁹ Furthermore, the President’s statement also emphasized the value of the contribution of other UN organizations and the need for a more coordinated approach for co-operation with regional organizations and governments concerned, in addition to commodity monitoring and certification schemes, such as the *Kimberley Process* and the *Extractive Industries Transparency Initiative (EITI)*.²⁰

This short overview illustrates to what extent international peace and security may be adversely affected by the failure of states to manage natural resources and proceeds of their sale in a legitimate manner. Indeed, preliminary findings from an analysis of intra-state conflicts indicate that

¹⁶ Statement by the President of the Security Council, UN Doc S/PRST/2007/22, 25 June 2007.

¹⁷ SC Res. 1625, 14 September 2005.

¹⁸ Statement by the President of the Security Council, *supra* note 16.

¹⁹ *Id.*

²⁰ *Id.*

conflicts over, and fuelled by, natural resources are twice as likely to relapse into conflict in the first five years following an initial peace agreement was reached and can have spill-over effects on the whole region.²¹ This underpins the relevance of the question of whether and how negotiated settlements between conflicting parties that are reached under international auspices deal with the ownership, allocation and treatment of resources and resource revenues in an obligatory manner.

C. Resources in Internationalized Comprehensive Peace Agreements and Security Council Resolutions

Do the agreements chosen by way of example actually address the distribution of resources? If they do, then how do they address the issue? The following section will focus on the Lomé, Accra and the Ouagadougou Agreements concluded in Sierra Leone, Liberia and Côte d'Ivoire from a comparative perspective. In each case, the agreement chosen constitutes the most recent ICPA between the state and the non-state parties to the armed and resource-fuelled conflict. Part C will be complemented by a documentation of SC Resolutions referring to the peace agreements and their parties, as well as to the management of resources.

I. Internationalized Comprehensive Peace Agreements Concluded in Sierra Leone, Liberia and Côte d'Ivoire

The creation of a sustainable intra-state peace process in Sierra Leone, Liberia and Côte d'Ivoire seems to be mutually influenced by the experience of the other countries in the region, in particular when it comes to the regulation of the distribution and exploitation of natural resources and wealth-sharing mechanisms.²² For all these reasons, one would expect that

²¹ *Id.*

²² As an earlier example: 'Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone', Abidjan/Côte d'Ivoire, 30 November 1996, UN Doc S/1996/1034, 11 December 1996 [Abidjan Agreement]. *Comment:* The Abidjan Agreement was a ceasefire and comprehensive peace agreement, which was violated by the non-state parties. The agreement inter alia provided for the transformation of RUF into a political party and a plan for the socio-economic development and reconstruction of Sierra Leone. It was signed by the President of Sierra Leone, by the leader of RUF, by the President of the Republic of Côte d'Ivoire, by the Special Envoy of the United Nations, by the Representative of

all three peace agreements comprehensively address the ownership, allocation and treatment of those resources which gave rise to and/or fuelled the conflict to guarantee a sustainable transition from conflict to peace in a similar manner.

1. Sierra Leone - The Lomé Peace Agreement

The Lomé Agreement, concluded between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF) on 25 May 1999,²³ reaffirms the cessation of hostilities as laid out in the Abidjan Agreement²⁴ and provides for power-sharing arrangements between the elected government and the RUF. It also includes provisions on Disarmament, Demobilization, Rehabilitation and Reintegration (DDRR) and the transformation of the RUF into a political party. The President of the Republic of Sierra Leone and the leadership of RUF signed the Lomé Agreement as main parties to the agreement. The conclusion of the agreement was witnessed by the Government of Togo, as the Chairmanship of ECOWAS, by the Representative of the Secretary General of the UN, by a representative of the Organization of African Unity (OAU), by a Representative of the Commonwealth Organization and by the United States' Presidential Special Envoy for the Promotion of Democracy in Africa, Reverend Jesse Jackson.

The Lomé Agreement was drafted in a conspicuously legal-looking format, including a preamble and an operative part. The articles were drafted in a detailed manner using a strong obligatory language. The Lomé Agreement referred to the Abidjan Agreement and the ECOWAS Peace Plan²⁵ and also recalled earlier initiatives for a negotiated settlement of the conflict.²⁶ The Lomé Agreement furthermore delegated dispute settlement and interpretation functions to third parties, *inter alia* by the request for international peacekeeping troops and by the delegation of the technical implementation of certain resource-sharing arrangements via sales

the Organization of African Unity and by the Representative of the Commonwealth Organization.

²³ Lomé Agreement, *supra* note 6.

²⁴ Abidjan Agreement, *supra* note 22.

²⁵ 'ECOWAS Six-Month Peace Plan for Sierra Leone' (23 October 1997-22 April 1998) available at <http://www.sierra-leone.org/conakryaccord.html> (last visited 28 April 2011). *Comment:* The Peace Plan was a road map for the peace process but it did not create legal obligations for the parties to the conflict.

²⁶ Lomé Agreement, *supra* note 6, preamble.

agreements to international companies.²⁷ The agreement specified: “For the export or local resale of gold and diamonds by the Government, the CMRRD [Commission for the Management of Strategic Resources, National Reconstruction and Development] shall authorize a buying and selling agreement with one or more reputable international and specialized mineral companies. All exports of Sierra Leonean gold and diamonds shall be transacted by the Government, under these agreements.”²⁸

Additionally, in its preamble, the agreement addressed the socio-economic well-being of the country and its people as one key factor for the creation of a sustainable peace.²⁹ Until the first general elections, the transitional government was charged with the management of scarce public resources, as prescribed by the Constitution, to “[...] the benefit of the development of the people of Sierra Leone [...]”.³⁰ The agreement provided, in a detailed manner, for the inclusion of RUF into these structures as one aspect of its transformation into a political party in the framework of the agreed power-sharing arrangements. Arts III and V entitled RUF to join a government of national unity through cabinet appointments as, for instance, the Chairmanship of the Board of the CMRRD.³¹ With these measures, RUF

²⁷ Lomé Agreement, *supra* note 6, Art. VII.

²⁸ Lomé Agreement, *supra* note 6, Art. VII, para. 5.

²⁹ “Guided by the Declaration in the Final Communiqué of the Meeting in Lomé of the Ministers of Foreign Affairs of ECOWAS of 25 May 1999, in which they stressed the importance of democracy as a factor of regional peace and security, and as essential to the socio-economic development of ECOWAS Member States; and in which they pledged their commitment to the consolidation of democracy and respect of human rights while reaffirming the need for all Member States to consolidate their democratic base, observe the principles of good governance and good economic management in order to ensure the emergence and development of a democratic culture which takes into account the interests of the peoples of West Africa [...]”, Lomé Agreement, *supra* note 6, preamble.

³⁰ Lomé Agreement, *supra* note 6, Part Two, Governance.

³¹ The Government and the RUF express the need to find a transitional mechanism “[...] to incorporate the RUF into governance within the spirit and letter of the Constitution [...]”, Lomé Agreement, *supra* note 6, preamble; incorporated into domestic law by The Commission for the Management of Strategic Resources, ‘National Reconstruction and development Act, 1999 [No. 5 of 1999]’ (1999) available at <http://www.sierra-leone.org/Laws/1999-5.pdf> (last visited 28 April 2011); see also ‘The Revolutionary United Front of Sierra Leone (Participation in Political and Democratic Process) Act, 1999 [No. 4 of 1999]’ (1999) available at <http://www.sierra-leone.org/Laws/1999-4.pdf> (last visited 28 April 2011); an evaluation of the failed integration of RUF as a political party offers The Truth and Reconciliation

received direct access to institutions, which were supposed to be responsible for the management and development of resources as well as for deciding over the usage of resources revenues.

Art. VII regulated the functions and structure of the CMRRD.³² Referring to the country's severe economic and security situation, the parties agreed that the "[...] Government shall exercise full control over the exploitation of gold, diamonds and other resources, for the benefit of the people of Sierra Leone"³³. The CMRRD was established and charged with the responsibility to secure and monitor the legitimate exploitation of Sierra Leone's gold and diamonds and other resources that were determined by the parties of the agreement to be of strategic importance for the national security and welfare of Sierra Leone as well as to cater for post-war rehabilitation and reconstruction of the war-shattered country.³⁴ The CMRRD was responsible for the authorization and licensing of artisanal production of diamonds and gold "[...] in accordance with prevailing domestic laws and regulations"³⁵ and the Government was to forbid all exploitation, sale, export, or other transaction of gold and diamonds except those sanctioned by the CMRRD.³⁶ It was furthermore determined that all

Commission Report, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission, Vol. 3A' (5 October 2004) available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume3A.pdf> (last visited 28 April 2011), 331-333, paras 1039-1050.

³² "The Commission shall be governed by a Board whose Chairmanship shall be offered to the Leader of the RUF, Corporal Foday Sankoh. The Board shall also comprise: two representatives of the Government appointed by the President, two representatives of the political party to be formed by the RUF, three representatives of the civil society and two representatives of other political parties appointed by Parliament [...]", Lomé Agreement, *supra* note 6, Art. VII, para. 12.

³³ Lomé Agreement, *supra* note 6, Art. VII, para. 1.

³⁴ Lomé Agreement, *supra* note 6, Art. VII, para.1; see also "The management of other natural resources shall be reviewed by the CMRRD to determine if their regulation is a matter of national security and welfare, and recommend appropriate policy to the Government.", Lomé Agreement, *supra* note 6, Art. VII, para. 8; and "The functions of the Ministry of Mines shall continued to be carried out by the current authorized ministry. However, in respect of strategic mineral resources, the CMRRD shall be an autonomous body in carrying out its duties concerning the regulation of Sierra Leones strategic natural resources.", Lomé Agreement, *supra* note 6, Art. VII, para. 9.

³⁵ Lomé Agreement, *supra* note 6, Art. VII, paras 2-3.

³⁶ Lomé Agreement, *supra* note 6, Art. VII, para. 2; and further: "[...] All previous concessions shall be null and void [...]", Lomé Agreement, *supra* note 6, Art. VII, para. 2; for an overview of Sierra Leonean domestic law and the incorporation of the

gold and diamonds extracted or otherwise derived from any Sierra Leonean territory were to be sold to the transitional government.³⁷ The CMRRD's task was also to ensure that all necessary measures against unauthorized exploitation were taken.³⁸

The agreement furthermore regulated that the revenues from gold and diamond transactions were to be treated as public assets. They were to be transferred into a special treasury account, to be spent "[...] exclusively on the benefit for the development of the people of Sierra Leone [...]"³⁹. It was additionally determined that the Government of Sierra Leone had to seek, if necessary, the assistance and cooperation of other governments to detect violations of Art. VII and to facilitate their prosecution.⁴⁰ Disputes about Art. VIII, and other provisions of the Lomé Agreement, were to be referred to a Council of Elders and Religious Leaders.⁴¹ The Lomé Agreement also guaranteed transparency and determined the full access of the public to the records of all correspondence, negotiations, business transactions and any other matters related to the exploitation and management of resources.⁴²

It also provided for the incorporation of Art. VII into domestic legislation.⁴³ The Government of Sierra Leone committed itself "[...] to propose and support an amendment to the Constitution to make the exploitation of gold and diamonds the legitimate domain of the people of Sierra Leone [...]"⁴⁴. The Lomé Agreement determined that the Government of Sierra Leone, through the National Commission for Resettlement,

Lomé Agreement into domestic law, see <http://www.sierra-leone.org/laws.html> (last visited 28 April 2011).

³⁷ Lomé Agreement, *supra* note 6, Art. VII, para. 3.

³⁸ Lomé Agreement, *supra* note 6, Art. VII, para. 4.

³⁹ As for instance for public education, public health, infrastructural development, compensation for incapacitated war victims as well as post-war rehabilitation and reconstruction. Especially rural areas were supposed to benefit, see Lomé Agreement, *supra* note 6, Art. VII, para. 6.

⁴⁰ Lomé Agreement, *supra* note 6, Art. VII, para. 7.

⁴¹ Lomé Agreement, *supra* note 6, Art. VIII.

⁴² Lomé Agreement, *supra* note 6, Art. VII, para. 10; and furthermore "The Commission shall issue monthly reports, including the details of all the transactions related to gold and diamonds, and other licenses or concessions of natural resources, and its own administrative costs.", Lomé Agreement, *supra* note 6, Art. VII, para. 11.

⁴³ Lomé Agreement, *supra* note 6, Art. VII, para. 13; see also 'The Lome Peace Agreement (Ratification) Act, 1999 [No. 3 of 1999]' (1999) available at <http://www.sierra-leone.org/Laws/1999-3.pdf> (last visited 28 April 2011).

⁴⁴ Lomé Agreement, *supra* note 6, Art. VII, para. 14.

Rehabilitation and Reconstruction (CRRR) and with the support of the international community, should provide appropriate financial and technical resources for post-war rehabilitation, reconstruction and development.⁴⁵ In its final part, the parties to the Lomé Agreement also regulated its registration, similar to an international agreement.⁴⁶

In sum, the Lomé Agreement comprised the comprehensive redistribution of natural and intangible resources in a treaty-like manner. It used strong regulative and obligatory language, which was, in some parts, modeled after the constitution. In other parts, the agreement authorized its amendment, and, in its final parts, it covered entirely new terrain in a constitutional manner.

2. Liberia – The Accra Agreement

Following the signing of the Accra Peace Agreement between the government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL) and political parties in 2003,⁴⁷ the National Transitional Government of Liberia (NTGL) took office in October 2003 until the first general post-conflict elections were to be held in 2005-2006.⁴⁸ The Accra Agreement also called explicitly for the suspension of the existing Liberian constitution.⁴⁹

⁴⁵ Lomé Agreement, *supra* note 6, Article XXVIII.

⁴⁶ The question whether this act of ratification could be a decisive indicator for an international status of the Lomé Agreement was answered in the negative by the Special Court for Sierra Leone (SCSL), *Decision on Challenge to Jurisdiction, Lomé Accord Amnesty*, SCSL-2004-15-AR 72 (E), 13 March 2004 [Kallon Case]; the decision was strongly criticized *inter alia* by A. Cassese, 'The Special Court and International Law, The Decision Concerning the Lomé Agreement Amnesty', *2 Journal of International Criminal Justice* (2004) 4, 1130; following Cassese: Daase, *supra* note 5, 147-154.

⁴⁷ In accordance with Art. I, Political Parties "[...] means Political Parties registered under the laws of the Republic of Liberia.", Accra Agreement, *supra* note 1, Art. I.

⁴⁸ *Comment*: The first post-conflict presidential elections took place in a relatively secure environment in October and November 2005. Mrs. Ellen Johnson-Sirleaf, who won the run-off election on 8 November, was inaugurated as President of Liberia on 16 January 2006.

⁴⁹ "[...] In order to give effect to paragraph 8(i) of the Ceasefire Agreement of 17th June 2003 signed by the GOL, the LURD and the MODEL, for the formation of a Transitional Government, the Parties agree on the need for an extra-Constitutional arrangement that will facilitate its formation and take into account the establishment and proper functioning of the entire transitional arrangement. / b. Accordingly, the

The NTGL was established by the agreement to replace the existing government of Liberia.⁵⁰ The Accra Agreement furthermore envisaged that, immediately after the installation of the NTGL, all ministers, heads of autonomous agencies, and heads of public corporations and state-owned enterprises were to resign from office.⁵¹ The NTGL consisted of three branches, namely the National Transitional Legislative Assembly (NTLA), the Executive, and the Judiciary.⁵² In all three branches, the non-state parties to the agreement or their former members or leaders were to participate after their complete disarmament as political parties.⁵³ The agreement included additional provisions on a ceasefire,⁵⁴ the deployment of an international stabilization force, an ECOWAS and UN Mission,⁵⁵ post-conflict military

provisions of the present Constitution of the Republic of Liberia, the Statutes and all other Liberian laws, which relate to the establishment, composition and powers of the Executive, the Legislative and Judicial branches of the Government, are hereby suspended. /c. For the avoidance of doubt, relevant provisions of the Constitution, statutes and other laws of Liberia which are inconsistent with the provisions of this Agreement are also hereby suspended. / d. All other provisions of the 1986 Constitution of the Republic of Liberia shall remain in force. / e. All suspended provisions of the Constitution, Statutes and other laws of Liberia, affected as a result of this Agreement, shall be deemed to be restored with the inauguration of the elected Government by January 2006. All legal obligations of the transitional government shall be inherited by the elected government [...]", Accra Agreement, *supra* note 1, Art. XXXV; Other provisions referring to the constitution of the Republic of Liberia can be found in the preamble: "Determined to concert our efforts to promote democracy in the sub-region on the basis of political pluralism and respect for fundamental human rights as embodied in the Universal Declaration on Human Rights, the African Charter on Human and People's Rights and other widely recognised international instruments on human rights, / including those contained in the Constitution of the Republic of Liberia [...]", Accra Agreement, *supra* note 1, preamble.

⁵⁰ Accra Agreement, *supra* note 1, Art. XXII.

⁵¹ Accra Agreement, *supra* note 1, Art. XXII, paras 1-3.

⁵² Accra Agreement, *supra* note 1, Art. XXIII.

⁵³ Outlining the power-sharing arrangements in a detailed manner: Accra Agreement, *supra* note 1, Art. XXII, paras 5-6; Art. XXIV, paras 3 (b)- 4; Art. XXVI, para. 4, Annex 4.

⁵⁴ Accra Agreement, *supra* note 1, Arts II-III.

⁵⁵ "The GOL, the LYRD, the MODEL and the Political Parties agree on the need for the development of an Internationalized Stabilization Force (ISF) in Liberia. Accordingly, the Parties hereby request the United Nations in collaboration with ECOWASS, the AU and the ICGL to facilitate, constitute and deploy a United Nations Chapter VII force in the Republic of Liberia to support the transitional government and to assist in the implementation of this agreement." Accra Agreement, *supra* note 1, Art. IV.

and security reform measures⁵⁶ and the establishment of an Independent National Commission on Human Rights (INCHR).⁵⁷ The Accra Agreement has been signed amongst others by the Liberian Government, LURD, MODEL, the Special Representative of the UN, as well as representatives of the AU, ECOWAS, the European Union, and the Ghanaian Co-Chairs for the International Contact Group on Liberia.

Despite its comprehensiveness, the Accra Agreement did not address natural resources directly but set out strong allocation mechanisms and furthermore addressed explicitly the role of economic development and good governance during the peace processes.⁵⁸ The agreement emphasized in particular the importance of the social and economic situation by referring *inter alia* to the stability of the Mano River Union region.⁵⁹ The Accra Agreement was, as the Lomé Agreement for Sierra Leone, drafted in a treaty-like manner and used strong regulative and obligatory language.⁶⁰

Art. XVI provided for the establishment of a Governance Reform Commission (GRC), which was supposed to function as a vehicle for the promotion of the principles of good governance in Liberia.⁶¹ The outlined mandate of the Commission was to review the existing Program for the

⁵⁶ Accra Agreement, *supra* note 1, Arts V-VIII.

⁵⁷ Accra Agreement, *supra* note 1, Arts XII-XIII.

⁵⁸ Accra Agreement, *supra* note 1, preamble, Art. XVI, Art. XVII, Art. XXXVI, Art. XXIX, Art. XXXIII, Art. XXXV.

⁵⁹ “Concerned about the socio-economic well-being of the people of Liberia; / Determined to foster mutual trust and confidence amongst ourselves and establish mechanisms which will facilitate genuine healing and reconciliation amongst Liberians; / Also determined to establish sustainable peace and security, and pledging forthwith to settle all past, present and future differences by peaceful and legal means and to refrain from the threat of, or use of force; / Recognising that the Liberian crisis also has external dimensions that call for good neighbourliness in order to have durable peace and stability in the Mano River Union States and in the sub-region [...]”, Accra Agreement, *supra* note 1, preamble.

⁶⁰ “The Parties to this Peace Agreement undertake that no effort shall be spared to effect the scrupulous respect for and implementation of the provisions contained in this Peace Agreement, to ensure the successful establishment and consolidation of lasting peace in Liberia. / 2. The Parties shall ensure that the terms of the present Peace Agreement and written orders requiring compliance are immediately communicated to all of their forces and supporters. / 3. The terms of the Agreement shall concurrently be communicated to the civilian population by radio, television, print, electronic and other media. [...]”, Accra Agreement, *supra* note 1, Art. XXXII.

⁶¹ Accra Agreement, *supra* note 1, Art. XVI.

Promotion of Good Governance, especially the development of the public sector management reforms. It was established to monitor and ensure transparency and accountability in all government institutions and activities and to ensure a national and regional balance in appointments, in addition to enabling an attractive environment for direct private sector investment.⁶²

Furthermore, the agreement entailed the establishment of a Contract and Monopolies Commission (CMC) to oversee the activities of a contractual nature undertaken by the NTGL.⁶³ Its mandate was to control whether all public financial and budgetary commitments entered into by the NTGL were transparent, non-monopolistic and in accordance with the laws of Liberia and internationally accepted norms of commercial practice to avoid corruption and to guarantee the transparent and accountable management and treatment of state-resources for the post-conflict reconstruction.⁶⁴

The parties to the agreement also called upon the UN, the ECOWAS, the AU, the International Monetary Fund (IMF), the World Bank, the African Development Bank and other international institutions to assign international experts for the purpose of providing technical support and assistance to the NTGL.⁶⁵ The parties also called on ECOWAS, in collaboration with the UN, AU, the European Union (EU) and the International Contact Group for Liberia (ICGL) to set up a monitoring mechanism in the form of an Implementation Monitoring Committee (IMC) to ensure the effective and faithful implementation of the agreement.⁶⁶ Disputes within the NTGL, arising out of the application or interpretation of the provisions of the agreement, were to be settled through a process of mediation, which was to be organized by ECOWAS in collaboration with the UN, the AU and the ICGL.⁶⁷

⁶² Accra Agreement, *supra* note 1, Art. XVI.

⁶³ Accra Agreement, *supra* note 1, Art. XVII.

⁶⁴ The reports of the CMC were to be published, see Accra Agreement, *supra* note 1, Art. XVII, paras a-b.

⁶⁵ Accra Agreement, *supra* note 1, Art. XXVI, para. 7.

⁶⁶ The Parties also agreed on the need for ECOWAS, in collaboration with the UN, the AU and the International Community, to organize periodic donor conferences for resource mobilization for post-conflict rehabilitation and reconstruction in Liberia, see Accra Agreement, *supra* note 1, Art. XXIX, para. 2 and para. 4.

⁶⁷ Accra Agreement, *supra* note 1, Art. XXXVI.

In sum, the Accra Agreement, while not directly and explicitly addressing the management of resources, constituted a comprehensive and highly regulative power-sharing regime governing the access to state institutions as well as the management of state contracts and the treatment of state funds. The agreement also delegated far-reaching functions and authorities to international and regional organizations and suspended and/or amended the constitution.

3. Côte d'Ivoire- The Ouagadougou Agreement

The Ouagadougou Agreement was signed on 4 March 2007.⁶⁸ With this agreement, the parties decided to move forward in the electoral process to create a stable government. They also pledged to proceed with the disarmament process and they agreed that the state authority should be restored in the entire territory through the redeployment of public administrative structures. The agreement was signed by the President of the Republic of Côte d'Ivoire, by the head of the Forces Nouvelles of the Republic of Côte d'Ivoire (FN)⁶⁹ and by the President of Burkina Faso, as the Chairman of ECOWAS and facilitator of the negotiation and implementation process.

Also, this agreement was drafted in a treaty-like form using strong regulative and obligatory language and delegating certain powers to the UN and regional organizations. In the preamble of the agreement, the parties reaffirm – after identifying the problems encountered in the implementation of the Linas-Marcoussis,⁷⁰ Accra⁷¹ and Pretoria Agreements⁷² – their

⁶⁸ Ouagadougou Agreement, *supra* note 6.

⁶⁹ This group retains control of the country's diamond mines and, more importantly, a share of the cocoa trade which, as Global Witness investigations have demonstrated, has provided it with around US\$30 million per year, see M. Davis, 'Why should mediators consider the economic dimensions of conflicts?' (23 July 2009) available at <http://www.hdcentre.org/publications/why-should-mediators-consider-economic-dimensions-conflicts> (last visited 28 April 2011), 8-9.

⁷⁰ 'Linas-Marcoussis Agreement', Linas-Marcoussis/France, 23 January 2003, UN Doc S/2003/99, 27 January 2003, Art. VI (land-tenure regime).

⁷¹ 'Accord Accra II sur la crise en Côte d'Ivoire', Accra/Ghana, 7 March 2003 (implementation agreement) available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/EVIU-63HH5E?OpenDocument> (last visited 8 March 2011); 'Accord Accra III sur la crise en Côte d'Ivoire', Accra/Ghana, 29 – 30 July 2004, UN Doc S/2004/629, 9 August 2004 (implementation agreement).

⁷² 'Pretoria Agreement on the Peace Process in Côte d'Ivoire', Pretoria/South Africa, 6 April 2005, UN Doc S/2005/270, 25 April 2005 (implementation agreement);

commitment to respect the sovereignty, independence, territorial integrity and unity of Côte d'Ivoire, their respect for the constitution, their commitment to the above mentioned agreements and their commitment to all relevant SC Resolutions, in particular SC Res. 1633 and SC Res. 1721.⁷³ The agreement focused on the restoration of state authority and the redeployment of the administration and all public services throughout the national territory. The parties agreed to request the AU, through the intermediary of ECOWAS, to petition the SC for the immediate lifting of the personal sanctions in force against the actors involved in the Ivorian crisis.⁷⁴ In the given context, it is most astonishing that the Ouagadougou Agreement remained absolutely silent on the redistribution of natural and intangible resources, as well as on wealth-sharing mechanisms for the socio-economic reconstruction of the country.⁷⁵

'Declaration on the Implementation of the Pretoria Agreement on the Peace Process in the Côte d'Ivoire', Pretoria/South Africa, 28-29 June 2005 (implementation agreement) available at <http://www.dfa.gov.za/docs/2005/ivor0701.htm> (last visited 28 April 2011).

⁷³ Ouagadougou Agreement, *supra* note 6, preamble; see also SC Res. 1633, 3 June 2005; SC Res. 1721, 1 November 2006; *Comment*: SC Res. 1721 contains unusual strong language to *endorse* a very detailed power-sharing structure for the post-conflict situation adopted by the African Union Peace and the Security Council. The intent of the SC and the legal implications of the usage of the word *endorse* seems ambiguous. As *endorse* could mean *supports* (an indicators for a non-binding nature) but also *approves* or gives *permission* which could imply a binding value; see: Security Council Report, Special Research Report, Security Council Action Under Chapter VII: Myths and Realities, 2008 No. 1 (23 June 2008) available at: http://www.securitycouncilreport.org/site/c.g1KWLeMTIsG/b.4202671/k.3A9D/Special_Research_ReportbrSecurity_Council_Action_Under_Chapter_VII_Myths_and_Realitiesbr23_June_2008.htm (last visited 28 April 2011).

⁷⁴ Ouagadougou Agreement, *supra* note 6, Art. IV, para. 4.

⁷⁵ In their report submitted pursuant to SC Res. 1584 a panel of Experts for the intra-state conflict in Côte d'Ivoire assessed the role of natural resources, such as cotton, diamonds, and cocoa in fuelling the conflict and the effectiveness of the arms embargo. The panel was especially concerned that the illicit trade of diamonds provides an important income to the rebel group FN. The report called on the UN peacekeeping mission in Côte d'Ivoire and the Kimberley Process Secretariat to evaluate the volume of illicit diamond exports, see Report of the Groups of Experts submitted pursuant to paragraph 7 of Security Council resolution 1584 (2005) concerning Côte d'Ivoire, UN Doc S/2005/699, 7 November 2005.

II. Security Council Resolutions Referring to Comprehensive Peace Agreements and the Redistribution of Resources in the Example Peace Processes

What role does the UN, especially the SC, play in this context? As far as the example ICPAs are concerned, there is a strong connection between the drafting and the implementation process of these agreements and SC Resolutions referring to them, their parties and the role of the allocation and treatment of resources during the peace processes. Additionally, in some cases, as will be shown, the SC paid more attention to the redistribution of conflict-resources than the ICPA under consideration, and went beyond addressing the agreements and particular situations constituting a threat to peace and security by outlining structures and mechanisms concerning the governance of natural resources for the overall process of transition.

The following section will give a short country-by-country overview of the numerous SC Resolutions, especially those adopted under Chapter VII, which refer to the selected peace agreements between state and non-state parties. The SC Resolutions, *inter alia*, endorse the comprehensive peace agreements or demand their effective implementation, by directly calling upon the non-state parties to put the agreement into practice and/or directly sanctioning those parties in case of violation or non-implementation of the agreement. The SC Resolutions also connect the implementation and non-implementation of the peace agreements with lifting or imposing economic sanctions as, for instance, import/export bans on diamonds. Hence, the SC establishes a connection between the exploitation and management of resources and the creation of a sustainable peace process and economic development by the parties to a peace agreement.

1. Sierra Leone

With SC Res. 1181, the SC established the Office of a Special Representative for Sierra Leone to mediate in the ongoing conflict.⁷⁶ Regarding the negotiations of the Lomé Agreement, the SC stated in SC Res. 1245 its support for the peace talks between the Government of Sierra

⁷⁶ SC Res. 1181, 13 July 1998. *Comment*: A comprehensive overview and reflection of the involvement of external actors, amongst them the UN, offer The Truth and Reconciliation Commission Report, *supra* note 10, 13-14, paras 46-49.

Leone and the representatives of the non-state parties, calling upon “[...] all concerned to remain committed to the process of negotiation and to demonstrate flexibility in their approach to the process [...]” and underlined its strong support for the Special Representative of the Secretary General and the commitment of the international community to support a sustainable peace settlement.⁷⁷ Later the SC welcomed the signing of the Lomé Agreement and the first steps taken by RUF, the Economic Community of West African States Monitoring Group (ECOMOG), ECOWAS and the UN Mission (UNOMSIL) towards its implementation.⁷⁸ The SC called upon all parties to fulfill their commitments under the concluded agreement and especially called upon the RUF, the Civil Defense Forces, the former Sierra Leone Armed Forces/Armed Forces Revolutionary Council (AFRC) and other armed groups in Sierra Leone to give up their arms in accordance with the provisions of the agreement.⁷⁹ The mandate of UNOMISL was extended to the support of the implementation process of the Lomé Agreement.⁸⁰ Acting under Chapter VII, the SC recalled that the Government and the RUF had agreed in the peace agreement to provide guarantees for UNOMISL-personnel.⁸¹ As the agreement was repeatedly violated and as violence, mostly financed by the illegal exploitation of resources, was flaring up again, the SC passed Resolution 1306 and established a comprehensive and far-reaching regime to address the illegal exploitation and trade of diamonds, while also emphasizing the necessity to re-establish the state’s authority and sovereignty over the country’s natural resources.⁸²

The SC decided that all states should take the necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory, with the exception of diamonds certified by an effective certification scheme. This scheme was to be established by the Government of Sierra Leone with the assistance of international organizations and co-operation frameworks like the Kimberley Process. The

⁷⁷ SC Res. 1245, 11 June 1999, paras 1-3.

⁷⁸ SC Res. 1270, 22 October 1999, para. 1; see also SC Res. 1289, 7 February 2000.

⁷⁹ SC Res. 1270, 22 October 1999, paras 2-4. And also “Welcomes the return to Freetown of the leaders of the RUF and AFRC, and calls upon them to engage fully and responsibly in the implementation of the Peace Agreement and to direct the participation of all rebel groups in the disarmament and demobilization process without delay [...]”, SC Res. 1270, 22 October 1999, para. 5; see also SC Res. 1289, 7 February 2000.

⁸⁰ SC Res. 1270, 22 October 1999, para. 8.

⁸¹ SC Res. 1289, 7 February 2000, para. 15.

⁸² SC Res. 1306, 5 July 2000.

Government was requested to inform the Sanctions Committee established by Resolution 1132 about the regulatory details of such a certificate of origin regime. The Sanctions Committee was also asked to make periodic reports to the SC on information submitted to it regarding alleged violations of the measures and persons or entities reported to be engaged in such violations, as well as concerning the extent of the Government's authority over the diamond-producing areas to enable the SC to decide whether to lift or extend its sanctions for a further period, to modify them or to adopt further measures.⁸³ Taking into account the regional context, the Sanctions Committee was asked to cooperate with the committee established pursuant to Resolution 985 for Liberia.⁸⁴

In 2000, SC Resolution 1313 identified a widespread violation of the Lomé Agreement by the RUF and, as a result thereof, the failure of the consent-based and cooperative approach to establish a sustainable peace process.⁸⁵ In that context, the SC further strengthened UNOMISL's mandate, recalling the earlier Resolutions concerning the peace process.⁸⁶ After the violation of the Lomé Agreement, the Government of Sierra Leone and RUF signed a ceasefire agreement in Abuja.⁸⁷ The SC took note of the ceasefire and expressed its concerns about the failure of the RUF to fully meet its obligations under the agreement, and called upon the RUF to give a more convincing demonstration of its commitment to the ceasefire and the peace process.⁸⁸ The SC became more insistent in Resolution 1346 when it expressed its concern about the fragile state of security in Sierra Leone and its neighboring countries, in particular about the continued fighting in the border regions of Sierra Leone, Guinea and Liberia.⁸⁹ It recognized the

⁸³ SC Res. 1306, 5 July 2000; SC Res. 1132, 8 October 1997.

⁸⁴ SC Res. 1306, 5 July 2000; SC Res. 985, 13 April 1995; SC Res. 846, 13 April 1995.

⁸⁵ SC Res. 1313, 4 August 2000, paras 2-3; *Comment*: The SC openly blames RUF for the violation of the agreement, but in fact the situation, which led to the violation and breach of the agreement, was much more complex, as documented by: The Truth and Reconciliation Commission Report, *supra* note 10; the Commission was established by a domestic legal act, based on Art. XXVI of the Lomé Agreements, see 'The Truth and Reconciliation Act, 2000 [No. 4 of 2000]' (2000) available at <http://www.sierra-leone.org/laws.html> (last visited 28 April 2011).

⁸⁶ SC Res. 1313, 4 August 2000, paras 2-3.

⁸⁷ 'Ceasefire Agreement between the Government of Sierra Leone and RUF', Abuja/Nigeria, 10 November 2000, available at <http://www.sierra-leone.org/ceasefire1100.html> (last visited 28 April 2011) [Abuja Agreement].

⁸⁸ SC Res. 1334, 22 December 2000; see also SC Res. 1346, 30 March 2001, para. 7.

⁸⁹ SC Res. 1346, 30 March 2001.

importance of the progressive extension of state authority throughout Sierra Leone *inter alia* by guaranteeing the legitimate exploitation of the natural resources of Sierra Leone for the benefit of its people and by avoiding the continuous fuelling of the conflict by the illegal exploitation of resources. Additionally, the SC considered further strengthening the military component of UNAMSIL to fulfill the overall objective of assisting the Government of Sierra Leone in re-establishing its authority throughout the country, including the diamond-producing areas.⁹⁰ The SC explicitly addressed the RUF and encouraged the group to fulfill its commitments under the Abuja Agreement and to transform into a political party. The SC called upon all parties to intensify their efforts towards the full and peaceful implementation of the Abuja Agreement and the resumption of the peace process, taking into account the basis of the Abuja Agreement and relevant SC Resolutions. It urged the governments and regional leaders to continue their full cooperation with the ECOWAS and the UN to promote these efforts, in particular, to use their influence upon the leaders of the RUF to obtain their cooperation towards the fulfillment of the Abuja Agreement and related SC Resolutions and to effectively implement the peace agreement.⁹¹

This line of engagement was followed in later Resolutions, which referred to the fragile security situation, the implementation of the Abuja Agreement or the continuation of the dialogue between RUF and the Government of Sierra Leone. In summary, the SC Resolutions laid out specific mechanisms to manage and develop the exploitation of natural resources during the entire peace process.⁹²

2. Liberia

To facilitate the implementation of the Accra Agreement, the contracting parties invited an international stabilization force under a Chapter VII mandate to support the peace process in its initial phase.⁹³ With

⁹⁰ SC Res. 1346, 30 March 2001.

⁹¹ SC Res. 1346, 30 March 2001, para. 10; *Comment*: Like SC Res. 1313, SC Res. 1346 does not explicitly take recourse to Chapter VII UN-Charter, but refers to all previous SC-Resolutions which clearly determined a threat to peace and took measures under Chapter VII. This allows to read SC Res. 1313 and SC Res. 1346 in line with the previous Resolutions and measures.

⁹² SC Res. 1385, 19 December 2001; SC Res. 1400, 28 March 2002; SC Res. 1446, 4 December 2002.

⁹³ Accra Peace Agreement, *supra* note 1, Art. III, Art. IV.

Resolution 1509, the SC established the UN Mission in Liberia (UNMIL).⁹⁴ It reaffirmed its support for the Accra Agreement “[...] reached by Liberia’s Government, rebel groups, political parties, and civil society leaders [...]” and stated that the main responsibility for implementing their obligations under the agreement was with the parties.⁹⁵ The Resolution addressed LURD and MODEL directly and urged them to work closely together with the established UN Mission (UNMIL) and to follow the Disarmament and Demobilization programme.⁹⁶ With Resolution 1521, the SC, acting under Chapter VII, continued to endorse the Accra Agreement and addressed the non-state parties LURD and MODEL as parties to the peace agreement as well as addressees of an arms embargo.⁹⁷ At the same time, the SC identified the illegal exploitation of natural resources, such as diamonds and timber, and the illicit trade with such resources as major reasons for the continuation of conflicts in West Africa, and particularly in Liberia.⁹⁸ The SC connected its Chapter VII measures and sanctions directly to the fulfillment of obligations deriving from the peace agreement.⁹⁹ Acting under Chapter VII it urged all parties to the Accra Agreement “[...] to fully implement their commitments and fulfill their responsibilities in the National Transitional Government of Liberia, and not to hinder the restoration of the Government’s authority throughout the country, particularly over natural resources”¹⁰⁰.

The SC continuously emphasized the importance of the control of the diamond and timber exploitation by the NTGL and encouraged Liberia to join the *Kimberley Process* to establish transparent accounting and auditing mechanisms, so that resources revenues were used for the benefit of the

⁹⁴ SC Res. 1509, September 19, 2003.

⁹⁵ SC Res. 1509, September 19, 2003, paras 3-4.

⁹⁶ SC Res. 1509, September 19, 2003, para. 17.

⁹⁷ SC Res. 1521, 22 December 2003, Part B, para. 2 (a)-(c).

⁹⁸ SC Res. 1521, 22 December 2003.

⁹⁹ “Expresses its readiness to terminate the measures imposed by paragraphs 2 (a) and (b) and 4 (a) above when the Council determines that the ceasefire in Liberia is being fully respected and maintained, disarmament, demobilization, reintegration, repatriation and restructuring of the security sector have been completed, the provisions of the Comprehensive Peace Agreement are being fully implemented, and significant progress has been made in establishing and maintaining stability in Liberia and the subregion [...]”, SC Res. 1521, 22 December 2003, Part B, para. 5.

¹⁰⁰ SC Res. 1521, 22 December 2003, para. 14.

Liberian people.¹⁰¹ The SC reaffirmed its findings and measures repeatedly.¹⁰² In Resolution 1607, it expressed its concern about the continuous illegal exploitation of resources and a lack of transparency in granting mining rights and the limited progress in establishing a transparent financial management. The SC emphasized “[...] the need for the international community to help the National Transitional Government increase its capacity to establish its authority throughout Liberia, particularly to establish its control over the diamond- and timber-producing areas and Liberia’s borders”¹⁰³. The SC endorsed the establishment of an Economic Governance Action Plan for Liberia “[...] to ensure prompt implementation of the Comprehensive Peace Agreement and to expedite the lifting of measures imposed by Resolution 1521 (2003) [...]”¹⁰⁴. Acting under Chapter VII, the SC invited the NTGL to consider the possibility of commissioning independent external advice on the management of Liberia’s diamond and timber resources, in order to increase investor confidence and attract additional donor support and decided to re-establish a panel of experts.¹⁰⁵

At that time, the Panel of Experts consisted of a timber expert, Arthur Blundell (Canada); an Interpol expert with investigative and arms experience, Damien Callamand (France); a diamond expert, Caspar Fithen (United Kingdom); an expert on humanitarian and socio-economic aspects, Tommy Garnett (Sierra Leone); and an expert on financial matters, Rajiva Sinha (India). Furthermore, a consultant assisted the Panel with expertise in

¹⁰¹ SC Res. 1521, 22 December 2003, paras 7-13.

¹⁰² “Recalling that the measures imposed under Resolution 1521 (2003) were designed to prevent such illegal exploitation from fuelling a resumption of the conflict in Liberia, as well as to support the implementation of the Comprehensive Peace Agreement and the extension of the authority of the National Transitional Government throughout Liberia,” see SC Res. 1607, 21 June 2005 and SC Res. 1579, 21 December 2004.

¹⁰³ SC Res. 1607, 21 June 2005.

¹⁰⁴ SC Res. 1607, 21 June 2005.

¹⁰⁵ SC Res. 1607, 21 June 2005.

The Panel of experts acts under the Security Council Committee established pursuant to Resolution 1521, which was established to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in paragraph 21 of the same Resolution, SC Res. 1521, 22 December 2003; about the problems of international investment during the transformation period, see J. Ford & K. Tienhaara, ‘Too Little, Too Late? International Oversight of Contract Negotiation in Post-Conflict Liberia’, *17 International Peacekeeping* (2010) 3, 361-376.

money-laundering, Tom Brown (United States).¹⁰⁶ The Panel's tasks were, based on SC Resolution 1579 (2004), to assess the compliance with sanctions imposed on arms,¹⁰⁷ diamonds,¹⁰⁸ timber¹⁰⁹, as well as the travel bans for those people who were deemed a threat to the peace in the region and to be sources of financing, such as from natural resources, for the illicit trade of arms. Furthermore, the Panel was asked to review the steps taken by the NTGL to establish an effective certificate of origin regime for trade in diamonds with a view to joining the Kimberley Process on the domestic legal level as well as to establish effective control over timber-producing areas and to ensure that Government revenues were not used to fuel the conflict but were harnessed for legitimate purposes. The Panel of Experts also supported the work of the Sanctions Committee by making recommendations.¹¹⁰ Later it also reviewed the implementation of Liberia's Governance Management Assistance Programme (GEMAP). GEMAP was established to ensure the prompt implementation of the Accra Agreement and to expedite the lifting of sanctions imposed by Resolution 1521¹¹¹ and subsequently Liberia's progress in establishing transparent exploitation and financial mechanisms.¹¹² GEMAP was, like the Accra Agreement, negotiated under the auspices of ECOWAS. The GEMAP Agreement was concluded between Liberia and the ICGL.¹¹³ The agreement established the

¹⁰⁶ Report of the Panel of Experts submitted pursuant to paragraph 8 (e) of Security Council Resolution 1579 (2004) concerning Liberia, S/2005/360.

¹⁰⁷ While Resolution 1903 terminated the arms embargo with regard to the Government of Liberia, the Security Council decided in para. 6 of this Resolution that all States shall notify in advance to the Committee any shipment of arms and related materiel to the Government of Liberia, or any provision of assistance, advice or training related to military activities for the Government of Liberia, SC Res. 1093, 17 December 2009.

¹⁰⁸ The Liberia sanctions regime on the import of rough diamonds from Liberia, terminated with SC Res. 1753, 27 April 2007.

¹⁰⁹ Previously, the SC sanctions regime also included prohibitions on the import of all round logs and timber products from Liberia. The SC decided to let the timber sanctions expire with the adoption of Resolution 1689 in light of Liberia's commitment to transparent management of the country's forestry resources, SC Res. 1689, 20 June 2006.

¹¹⁰ Report of the Panel of Experts submitted pursuant to paragraph 8 (e) of Security Council Resolution 1579 (2004) concerning Liberia, S/2005/360, 13 June 2005.

¹¹¹ SC Res. 1626, 19 September 2005.

¹¹² SC Res. 1689, 20 June 2006; SC Res. 1731, 29 September 2006.

¹¹³ 'Governance and Economic Management Assistance Program', Monrovia/Liberia, 9 September 2005, available at <http://siteresources.worldbank.org/LIBERIAEXTN/Resources/GEMAP.pdf> (last visited 28 April 2011) [GEMAP Agreement]; The ICGL was composed of representatives of the UN, ECOWAS, the AU, the World Bank

comprehensive co-operation framework designed to improve financial and fiscal administration, transparency and accountability. The international partners and the Liberian governmental institutions sought to ensure that the government and its institutions would manage the funds effectively and transparently and would spend the collected budget on rebuilding the country's infrastructure.¹¹⁴ The main tool of GEMAP was the appointment of international experts who were positioned directly in the financial offices of several key governmental institutions.¹¹⁵ These international experts were supposed to work within their respective institutions and to implement, in co-operation with the Liberian leadership, the economic standards set out in the GEMAP Agreement.¹¹⁶ To achieve these standards, the international experts were equipped with a co-signature authority that actually gave them a veto power.¹¹⁷ As far as transparency in granting concessions, contracts, and licenses for the exploitation of natural resources were concerned, Liberia complied with the GEMAP Agreement, and joined the Extractive Industries Transparency Initiative (EITI)¹¹⁸ and the Kimberley Process.¹¹⁹ The establishment of GEMAP itself was endorsed by SC Resolution 1626.¹²⁰ The SC also requested the UN Secretary General to include information on the progress of the implementation of GEMAP in his regular

(WB), the United States of America (USA), Ghana, Nigeria, the United Kingdom (UK), Germany, Spain and Sweden. The GEMAP Agreement was finally signed by the Minister of Planning and Economic Affairs of the NTGL, the Minister of Justice and the Chairman of the NTGL and by two Co-Chairmen of the ICGL, GEMAP Agreement, *id.*, 1.

¹¹⁴ See GEMAP Agreement, *supra* note 113.

¹¹⁵ GEMAP Agreement, *supra* note 113, 2.

¹¹⁶ GEMAP Agreement, *supra* note 113, 1-6.

¹¹⁷ GEMAP Agreement, *supra* note 113, 1-6.

¹¹⁸ More information about the *Extractive Industries Transparency Initiative* (EITI) see <http://eiti.org/> (last visited 28 April 2011).

¹¹⁹ More information about the *Kimberly Process* see <http://www.kimberleyprocess.com/> (last visited 28 April 2011); GEMAP Agreement, *supra* note 113, 3 *et seq.* The UN Security Council had also demanded that Liberia joins the Kimberley Process and the Extractive Industries Transparency Initiative, see *inter alia*, SC Res. 1607, 21 June 2005.

¹²⁰ "Welcoming the signing by the National Transitional Government of Liberia (NTGL) and the International Contact Group of Liberia of the Governance and Economic Management Assistance Program (GEMAP) which is designed to ensure prompt implementation of the Comprehensive Peace Agreement and to expedite the lifting of measures imposed by resolution 1521 (2003) [...]", SC Res. 1626, 19 September 2005, preamble.

reports on UNMIL¹²¹ and later expressed its satisfaction with Liberia's progress in establishing transparent exploitation and financial mechanisms. As a result of this satisfactory view, the SC lifted its economic sanctions on Liberia step-by-step.¹²²

3. Côte d'Ivoire

After the conclusion of the Ouagadougou Agreement, the SC endorsed the agreement and began to concern itself with the latter's implementation.¹²³ While the agreement did not refer directly to natural resources, the SC connected the peace process and the implementation of the peace agreements directly with the legal exploitation of natural resources and the exercise of control by the state authorities, as established by the agreement.¹²⁴ Continuously referring to these measures, the SC later enhanced the mandate of the UNOCI.¹²⁵ Resolution 1765 invited all signatories of the Ouagadougou Agreement to take the necessary steps to fulfill in this regard their commitments in accordance with the Agreement.¹²⁶ With Resolutions 1795 and 1826, the SC, acting under Chapter VII, endorsed supplementary agreements concluded to support the implementation of the Ouagadougou Agreement and pointed out the need for all signatory parties to redouble their efforts to implement the

¹²¹ The SC furthermore states that it "Looks forward to the implementation of GEMAP by the NTGL and succeeding governments of Liberia in collaboration with their international partners, and requests the Secretary General to include information on the progress of this implementation in his regular reports [...]", see SC Res. 1626, 19 September 2005, para. 4 (operative part).

¹²² SC Res. 1689, 20 June 2006; and also indirectly SC Res. 1731, 29 September 2006.

¹²³ SC Res. 1765, 16 July 2007; SC Res. 1782, 29 October 2007; SC Res. 1795, 15 January 2008; SC Res. 1826, 29 July 2008; SC Res. 1842, 29 October 2008; SC Res. 1865, 27 January 2009; SC Res. 1880, 30 July 2009; SC Res. 1893, 29 October 2009.

¹²⁴ SC Res. 1572, 15 November 2004; SC Res. 1643, 15 December 2005.

¹²⁵ SC Res. 1739, 10 January 2007. The Security Council "[...] requests UNOCI, within its existing resources, to support the full implementation of the Ouagadougou political Agreement, including by supporting the integrated command centre, the restoration of State administration throughout the country, the identification and voter registration processes, the electoral process, persons affected by the conflict, efforts to create a positive political environment, protection and promotion of human rights, and the economic recovery process of Côte d'Ivoire;" see SC Res. 1765, 17 July 2007.

¹²⁶ SC Res. 1765, 17 July 2007, paras 4 and 10; repeated by SC Res. 1826, 29 July 2008, para. 16.

agreements and to strengthen UNOCI's role in the implementation process.¹²⁷

In Resolution 1865, the SC put its Chapter VII measures under the headline "Supporting the Ouagadougou political process".¹²⁸ In 2009, the SC also renewed its arms and financial embargos as well as travel bans imposed by Resolution 1572, as well as measures preventing the import by any state of all rough diamonds from Côte d'Ivoire as imposed by Resolution 1643 until 31 October 2010.¹²⁹ In 2010, in the light of the presidential elections, the SC decided to renew with Resolution 1946 its arms, financial and travel sanctions as imposed by Resolution 1572¹³⁰ and the measures preventing the import of all rough diamonds from Côte d'Ivoire as imposed by Resolution 1643¹³¹. The SC also utilized the Kimberley Process to communicate through the Sanctions Committee supporting information, reviewed by the Group of Experts when possible, concerning the production and illicit export of diamonds from Côte d'Ivoire.¹³² The political and economic stability, including the overall peace process, remain fragile.

III. Substance and Form of the Redistribution of Resources by Internationalized Comprehensive Peace Agreements and Security Council Resolutions

It is remarkable that the ownership,¹³³ allocation¹³⁴ and treatment¹³⁵ of resources, including the access to and the structure of institutions which

¹²⁷ SC Res. 1795, 15 January 2008, paras 1-5; SC Res. 1826, 29 July 2008, paras 3, 5 and 8. *Comment*: Resolution 1826 addressed the Defence and Security Force of Côte d'Ivoire and the FN to implement the election plan and *invited* again all parties to the agreements to fulfill their commitments, see also SC Res. 1842, 29 October 2008.

¹²⁸ SC Res. 1865, 27 January 2009, para. 9.

¹²⁹ SC Res. 1839, 29 October 2009, para. 1; SC Res. 1842, 29 October 2008; SC Res. 1865, 27 January 2009.

¹³⁰ SC Res. 1572, 15 November 2004.

¹³¹ SC Res. 1643, 15 December 2005.

¹³² SC Res. 1946, 15 October 2010.

¹³³ *Ownership* is understood as the regime governing the property ownership of natural resources, which means the rights to usage and benefits of resources. There are more abstract, idealistic or cultural-focused concepts of ownership but in this context ownership covers different notions from private ownership, communal/local and state ownership as well as customary ownership, see N. Haysom & S. Kane, 'Negotiating natural resources for peace: Ownership, control and wealth-sharing', Humanitarian Dialogue Briefing Paper (October 2009) available at <http://www.hdcentre.org/files/Ne>

regulate and distribute resources and the benefits derived thereof, have been barely addressed in ICPAs.¹³⁶

However, since the end of the 1990s, some peace agreements have tended to deal with natural resources and forms of power- and wealth-sharing mechanisms in a more comprehensive and detailed manner.¹³⁷ All three agreements under consideration in this study were drafted in a very precise manner. They all contained detailed regulations, they used strong obligatory language, and they also invariably provided for the delegation of interpretation, monitoring and dispute-settlement functions.¹³⁸ Delegation in

gotiating%20natural%20resources%20for%20peace.pdf (last visited 28 April 2011), 6-8.

¹³⁴ The ownership of natural resources is interconnected with the *allocation* of power or the access to state institutions to manage and develop natural resources. Allocation encompasses the establishment of central or de-centralized bodies, which enact or supervise the redistribution of resources. The allocation of legislative and executive power in a peace process could answer the questions of who has the authority to pass laws regulating natural resources, who administers the laws and which monitoring and dispute settlement mechanisms are envisaged, see N. Haysom & S. Kane, *id.*, 12-13.

¹³⁵ The *treatment* of natural-resource revenues – this means the fair generation, collection and sharing of natural resource-revenues – is considered to be a determining factor of the viability of a peace agreement and its outline of the future structure of the post-conflict society and state, N. Haysom & S. Kane, *id.*, 6; Table concerning the treatment of natural resource-revenue sharing in selected countries as well as technical aspects like revenue-collection mechanisms and formula-based revenue-sharing, see N. Haysom & S. Kane, *id.*, 22-24.

¹³⁶ *Comment*: Agreements such as the Lusaka Protocol, *supra* note 6, which sought to end the Angolan civil war, and Cambodia's 1991 Paris Peace Accords, see 'Final Act of the Paris Conference on Cambodia', Paris/France, 23 October 1991, UN Doc A/46/608 and S/23/177, 30 October 1991 [Cambodia Agreement] failed to dislodge fully the main insurgent groups from the resource-rich areas they controlled. When these accords broke down, UNITA was quick to harness diamonds to its war effort once more, and the Khmer Rouge began tapping the reserves of timber, rubies and sapphires under its control, see also Davis, *supra* note 69, 8.

¹³⁷ UNEP, *supra* note 2.

¹³⁸ The author makes use of the categories developed in the context of the *Concept of Legalization*. The Concept of Legalization categorizes legal (looking) institutional arrangements alongside the criteria precision, obligation and delegation into a continuum form *high to low legalization*. One leading assumption of the concept is that *highly legalized* arrangements/institutions will bind states through law. The actors' behavior is subject to scrutiny under the general rules, procedures, and discourse of international law and, often, domestic law. The Concept of Legalization is a variation of a neo-institutional regime-theory in International Relations. Legalization is a form of institutionalization, characterized by three dimensions: the degree to which rules are obligatory, the precision of those rules and the delegation of some functions. *Institutions* are enduring sets of rules, norms and decision-making

all cases meant a strong involvement of the UN during the negotiation and implementation process and led to an internationalization of the drafting and implementation process of the concluded peace agreement.

On the substantive level, there are important differences, though. The most recent agreement, the Ouagadougou Agreement, did not even cover the redistribution of resources or wealth-sharing mechanisms at all, although the resource question was as much of relevance to the conflict as in the cases of Sierra Leone and Liberia. The Lomé and Accra Agreements dealt with the ownership of natural resources rather briefly by determining the sovereignty of the state concerning the exploitation of natural resources and/or the formal ownership of the people. In both cases, the emphasis was placed on the allocation of resources, in particular through access to state institutions managing and developing natural resources. While the Lomé Agreement entailed the strongest redistribution mechanism, the Accra Agreement addressed the allocation of resources and treatment of resource revenues at least indirectly through a strong focus on good governance, socio-economic development and wealth-sharing mechanisms. In both agreements, the allocation and treatment of resource revenues were connected with (socio) economic development and wealth-sharing mechanisms and with criteria, like participation, transparency, accountability and responsibility or good governance as an umbrella standard to create the conditions for a sustainable peace process.¹³⁹

processes that shape the expectations, interests, and behavior of actors and which can vary in many dimensions. *Precision* in its strongest form means that the rules are definite and ambiguously defining the conduct they require, authorize, or proscribe. *Obligation* means that states are legally bound by rules and procedures of international or domestic law. And a strong form of *delegation* grants authority to third parties for the implementation of rules and interpretation, application, dispute settlement, and (possible) future law making. See: J. Goldstein *et al.*, 'Preface', 54 *International Organization* (2000) 3, 1-13; J. Goldstein *et al.*, 'Introduction: Legalization and World Politics', 54 *International Organization* (2000) 3, 385-399; K. W. Abbott *et al.*, 'The Concept of Legalization', 54 *International Organization* (2000) 3, 401-419; K. W. Abbott *et al.*, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 3, 421-456; the application of the Concept of Legalization by Bell, 'Lex Pacificatoria', *supra* note 5; Bell, 'Peace Agreements', *supra* note 5, and the critique and application by Daase, *supra* note 5; *Comment*: The reader will find A strong example of delegation in Freya Baetens' and Rumiana Yotova's contribution about the Abyei Arbitration, see F. Baetens & R. Yotova, 'The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?', 3 *Goettingen Journal of International Law* (2011) 1, 417.

¹³⁹ Lomé Agreement, *supra* note 6; Accra Agreement, *supra* note 1.

In sum, there is a clear tension between the search for *clarity* and the actual *ambiguity* of the provisions addressing the redistribution of resources in ICPAs. This particular ambiguity reflects the inherent tension between the need for a political compromise between the parties, which also leaves some flexibility, and creating clear and binding obligations for the parties during the peace process.

Power- and wealth-sharing arrangements in ICPAs, which are *de facto* negotiated to accommodate the conflicting parties' interests, are of a highly delicate nature, especially when it comes to the distribution of resources. Even though, in theory, it might seem desirable that ICPAs address the redistribution of resources as comprehensively as possible by referring to international standards and adapting them to the local situation, it is questionable whether the legal-political ambiguity of those arrangements is avoidable at all if the mediators and the negotiating parties to the conflict want to avoid zero-sum ownership, allocation and treatment debates during the negotiation and implementation process. Even against the background of a strong involvement and monitoring by third parties, a certain level of ambiguity and wider scope of interpretation seems to be required in order to reach a consensus and later compliance by the former conflict parties with the arrangements outlined in an agreement.¹⁴⁰ These processes also have to be considered against the background of traditionally established local and regional forms of leadership and patrimonial wealth-sharing mechanisms, which significantly influence the agenda-setting of the negotiating parties, the implementation of a peace agreement and a successful transitional peace process.¹⁴¹ In the end, some power- and resource-sharing arrangement will appear as if, so to speak, the foxes were put in charge of the henhouse.¹⁴²

¹⁴⁰ For further reading concerning the negotiation, drafting and implementation dilemma of agreements in general and peace agreements in particular see: C. Lipson, 'Why are some international agreements informal?', 45 *International Organization* (1991) 4, 495-538; J. Arnault, 'Good Agreement? Bad Agreement? An Implementation Perspective' (n.d.) available at <http://www.stanford.edu/class/psych165/Arnault.doc> (last visited 28 April 2011).

¹⁴¹ G. Anders, 'Denial and Recognition of Difference: Representation of African Culture in International War Crimes Trials', in W. Gephart (ed.), *Recht als Kultur. Eröffnungssymposium* (forthcoming 2011); as examples for the structure of RUF, see The Truth and Reconciliation Commission Report, *supra* note 10, 47, paras 170-172.

¹⁴² Examples for strong criticism on power-sharing and wealth-sharing mechanisms: M. Goldmann, 'Sierra Leone: African Solutions to African Problems?', in A. v. Bogdandy *et al.* (eds), 9 *Max Planck Yearbook of United Nations Law* (2005),

The dilemma boils down to the question: Who else could be put in charge of the henhouse than the foxes? And how can the foxes be effectively controlled?

Furthermore, all three peace agreements under consideration differ concerning their substance, but the drafting and implementation of the peace agreements and the peace processes were accompanied and pushed forward by a developing common practice of SC Resolutions that address resources, peace agreements and non-state entities in the course of the peace process and that create far-reaching regulations concerning the redistribution of resources and resource treatment on the international, regional and domestic level.

D. The Legal Nature of the Example Peace Agreements and the Specific Obligations as Concerns the Redistribution of Resources of Conflict

After all, do these agreements and provisions create any kind of (legal) obligations for their parties? This section will address (1) the legal nature of the ICPA between state and non-state parties, (2) the nature of the obligations which are created by provisions which redistribute resources in the framework of the ICPA and (3) the implications of the relevant SC Resolutions.

I. The *Lack of Fit* of Peace Agreements between State and Non-State Parties

In the post-colonial context, peace agreements or self-determination agreements have had the function of *transitional constitutions*, proclaiming sovereignty of the state and its people and their sovereignty over resources.¹⁴³ Thus, in this particular context, the permanent sovereignty over resources could be understood as a form of self-determination and as an

475-476, 479, 480; Khan, *supra* note 4, 574-575, 577, M. Kaldor, *New and Old Wars, Organized Violence in a Global Era*, 2nd ed. (2007), 64, 122-130; J. I. Levitt, 'Illegal Peace: An Inquiry into the Legality of Power-Sharing with Warlords and Rebels in Africa', 27 *Michigan Journal of International Law* (2005) 2, 495-577.

¹⁴³ See Bell, 'Lex Pacificatoria', *supra* note 5, 97-104.

expression of the homogeneity of the new state and its people.¹⁴⁴ In recent decades, the permanent sovereignty of the state over its natural resources has acquired the status of a rule of customary international law,¹⁴⁵ which, as some authors claim, not only entails rights of the state but also obligations

¹⁴⁴ Many treaties, legal instruments and other international documents refer to the permanent sovereignty of states over natural resources. Some of them entail disclaimer clauses such as: “Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources.”, *Vienna Convention on Succession of States*, 23 August 1978, Art. 13, U.N.T.S. 1946, 3. Others include limiting conditions to the exercise of this sovereign right: “[...] states have, in accordance with the Charter of the United Nations and the principles of international law, a sovereign right to exploit their own resources pursuant to their environmental and developmental policies [...]”, see ‘The African Convention on the Conservation of Nature and Natural Resources’ (11 July 2003) (revised version) available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/nature%20and%20natural%20resource.pdf> (last visited 7 September 2010), preamble; for the global level: *International Covenant on Civil and Political Rights*, 16 December 1966, Art.1, 999 U.N.T.S. 171; as a non-binding instruments referring to the concept: GA Res. 1515 (XV), 15 December 1960, para. 5, Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), 12 December 1974, Art. 2; Rio Declaration on Environment and Development, UN Doc A/CONF.151/26, 14 June 1992, Principle 2. The African Banjul Charta states that: “All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. / 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. / 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. [...] 5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”, *African (Banjul) Charter on Human and Peoples’ Rights*, 27 June 1981, Art. 21, OAU Doc CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Also referring to the permanent sovereignty over natural resources: GA Res. 1803 (XVII), 14 December 1962; Declaration on the Right to Development, GA Res. 41/128, 4 December 1986, preambular paragraph; similar: *International Covenant of Economic, Social and Cultural Rights*, 16 December 1966, Art. 1, para. 2, Art. 11, para. 2 (a), 993 U.N.T.S. 3.

¹⁴⁵ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Jurisdiction of the Court, Judgement, ICJ Reports 2005, 168, 252, para. 244; Okowa, ‘The Legal Framework for the Protection of Natural Resources’, *supra* note 2, 252-255; Okowa, ‘Natural Resources in Situations of Armed Conflict’, *supra* note 2, 251-260.

vis-à-vis its own people.¹⁴⁶ However, the principle works badly in the given context of resource-driven and fuelled intra-state conflicts in which the legitimacy of the state, or of the government as the embodiment of the state, is questioned and actors other than the state have *de facto* power over the exploitation and distribution of resources. Additionally, in the given cases, the non-state actors do not even seek self-determination as representatives of a people or as a secessionist movement seeking to acquire effective statehood.¹⁴⁷ Furthermore, international documents may refer to the permanent sovereignty of people over natural resources, but in fact they address the state that is supposed to be the mediator of the right. They do not cover regulations concerning the redistribution of resources and benefits in the case of intra-state conflicts between the government of a state and intra-state armed groups challenging the government and how to reach a sustainable peace process and power-sharing arrangement.¹⁴⁸

After all, the ICPAs under consideration addressed intra-state conflicts that required the state, as well as international organizations, to accept the diversity and heterogeneity of relevant actors and participants in the legal framework laid out in peace agreements. These arrangements were supposed to create a sustainable peace process and to trigger compliance with the peace process by the parties to the former violent conflict. They were drafted with a strong involvement of the AU, ECOWAS and the UN to resolve political and economic claims of competing internal groups in an internationalized political and legal setting. The agreements affected the legal and even constitutional order of the state, but at the same time they

¹⁴⁶ For example: Okowa, 'The Legal Framework for the Protection of Natural Resources', *supra* note 2, 245-48, 256-260; Okowa, 'Natural Resources in Situations of Armed Conflict', *supra* note 2, 240-247; 260-262; N. Schrijver, 'Natural Resource Management and Sustainable Development', in T.G. Weiss *et al.* (eds), *The Oxford Handbook on the United Nations* (2007), 592-610; N. Schrijver, 'Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources', in I. Boerefijn & J. Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essay in Honour of Cees Flinterman* (2008), 85-98.

¹⁴⁷ Okowa, 'Natural Resources in Situations of Armed Conflict', *supra* note 2, 240.

¹⁴⁸ *Comment*: In the chosen cases the concluded agreements as well as SC-Resolutions referring to the agreements and to resources, guaranteed the sovereignty of the state and/or the people over their resources but they did not refer explicitly to these international instruments when regulating the allocation of resources and treatment of resource-revenues.

were concluded in a grey zone both between conflict and peace and between domestic and international law.¹⁴⁹

One could claim that those agreements, even if they refer to international law and international standards, and although they are created through internationalized mediation processes, are of a purely domestic nature. They are concluded between state and non-state parties and could be comparable to coalition agreements between political parties seeking to jointly govern a country or agreements between the government and a private entity within the same state.¹⁵⁰ In both examples, the purely domestic nature of the agreement is unquestionable and the agreement is usually concluded within a stable state. But, as opposed to ICPAs, they are neither aiming to end an armed intra-state conflict nor are the parties questioning the constitutional basis of the state, its social contract, as little as they are seeking to redesign the fundamental structures of the state or even to change and/or temporarily replace the constitution.

Although, at the same time, they are apparently not purely domestic agreements, ICPAs can also not be treated as international treaties as this would clearly run counter to Arts 2, 3 of the Vienna Convention on the Law of Treaties.¹⁵¹ After all, ICPAs seem to be encapsulated in the grey zone

¹⁴⁹ *Comment:* The dilemma is particular salient in post-conflict environments where there is a deficit of trust in the ability and capability of the state party to guarantee the development and fair revenue-sharing in the framework of a purely domestic agreement, see Haysom & Kane, *supra* note 133; and more general about the particularities of the (legal) nature of peace agreements between state and non-state parties: Bell, 'Lex Pacificatoria', *supra* note 5; Bell, 'Peace Agreements', *supra* note 5; Daase, *supra* note 5; comment: for further reading on new perspectives on the division between national and international law: J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between Nation and International Law* (2007).

¹⁵⁰ *Comment:* Although it could be argued whether these agreements could be adjudicated in case of disputes amongst the parties. Additionally, an illustrative example of an agreement between the government and a non-state party without the approval of the parliament is the currently discussed agreement between the German Government and the Atom-Lobby; see 'Eckpunktevereinbarung mit den Energieversorgungsunternehmen' (6 September 2010) available at http://www.bundesregierung.de/Content/DE/___Anlagen/2010/2010-09-09-foerderfondsvertrag,property=publicationFile.pdf (last visited 28 April 2011).

¹⁵¹ And even taken the loophole of Art. 3 VCLT, a non-state party cannot conclude an international treaty unless it has at least a partial legal subjectivity and also a treaty-making capacity – a complicated construction as the state party as well as the UN and other organizations will usually avoid to explicitly accept a general international legal status and general treaty-making capacity of non-state parties to peace agreements;

between conflict and peace, as well as between national and international law.

Still, it has to be pointed out that in the present examples, the conflict parties appear to meet and sign the agreement as *equals*, which resembles more the situation with respect to a peace agreement between two state parties. Considering also the intensive involvement of the UN during the drafting and implementation process, and the endorsement of the agreements by SC Resolutions referring to key issues, one wonders how this affects the nature of the agreements and obligations concerning the redistribution of natural and intangible resources in the overall peace process, especially in the context of the Lomé and Accra Agreements.

II. The *de facto* Internationalization of the Redistribution of Resources in Internationalized Peace Processes

To include non-state parties in internationalized mediation and negotiation processes creates – in an ideal setting – the possibility to transform belligerent groups into political parties within a stabilizing context and to end an intra-state conflict.¹⁵²

Nevertheless, the conferral of respectability on rebel groups through their inclusion in agreements with the state is a dilemma during the negotiation and implementation of peace agreements.¹⁵³ In this context, non-state entities could even develop an interest to further escalate intra-state conflicts to be invited to the negotiation table as a stakeholder and to use the international mediation-framework to gain a degree of recognition at the international level as well as direct access to resources.¹⁵⁴ But one should

Vienna Convention on the Law of Treaties, 23 May 1969, Arts 2-3, U.N.T.S. 1155, 331; also the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 21 March 1986, Arts 2-3, UN Doc A/CONF.129/15 offers no other perspective; see also Bell, 'Lex Pacificatoria', *supra* note 5, 128-129; Bell, 'Peace Agreements', *supra* note 5, 379-384; Daase, *supra* note 5, 159-160.

¹⁵² D. Petrusek, 'Armed groups and peace processes – Pondering and planning engagement' (21 November 2005) available at <http://www.hdcentre.org/files/Armedgroupsandpeaceprocessponderingandplanningengagement.pdf> (last visited 28 April 2011), 4.

¹⁵³ Petrusek, *id.*, 6.

¹⁵⁴ One tactic to enter into this framework is to provoke government forces to use strong-arm and repressive measures precisely to attract international attention, and thereby set the scene for international mediation; see ICG Report Liberia, *supra* note 1; Petrusek, *id.*, 6.

also not forget that, more often than not, the state and the government themselves are *de facto* of a dubious democratic legitimacy in such situations despite their *de iure* status.¹⁵⁵ In these situations, ones terrorist or illegal force is another's liberation movement, and ones democratic government is another's oppressor.¹⁵⁶ The UN has to address and to operate within this political and legal dilemma and is apparently taking on the challenge as, for instance, the World Summit in 2005 agreed to strengthen the Secretary General's *capacity* to mediate disputes and to strengthen his ability to offer *good offices*.¹⁵⁷ Additionally, in most cases, a Special Envoy or Special Representatives were sent out to broker an agreement between the conflicting parties.¹⁵⁸

By addressing the non-state parties to an agreement directly and by holding them responsible for their non-compliance with the terms of the peace agreement, and by fostering the implementation of sanctions, the SC seems to acknowledge an internationalized status of the ICPA under consideration and of the non-state parties to the agreements for the purpose of the implementation of the agreement and the advancement of the ongoing peace process.¹⁵⁹

It is widely discussed that the UN Charter, and especially Chapter VII, initially was intended to cover inter-state relations and the prevention of

¹⁵⁵ Clapham, *supra* note 14, 15-27; Okowa, 'Natural Resources in Situations of Armed Conflict', *supra* note 2, 240-242.

¹⁵⁶ C. Bell, *Peace Agreements and Human Rights* (2000), 16 [Bell, *Peace Agreements and Human Rights*].

¹⁵⁷ United Nations, 2005 World Summit Outcome, UN Doc A/RES/60/1, 25 October 2005; T. Whitfield, 'Good offices and "groups of friends"', in S. Chesterman (ed.), *Secretary or General, The UN Secretary-General in World Politics* (2007), 86-101.

¹⁵⁸ T. Myint-U, 'The UN as Conflict Mediator: First Amongst Equals or the Last Resort?' (26 June 2006) available at <http://www.hdcentre.org/files/TheUNasConflictMediator.pdf> (last visited 28 April 2011), 90.

¹⁵⁹ P. H. Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts', in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (1998), 333. *Comment*: In this context it would lead to far to reflect or try to present the development of the treatment of non-state entities as parties to a conflict especially by the Security Council; the focus here will be explicitly limited to the treatment of non-state entities as a party to the examples peace agreements between a state and a non-state party regulating the redistribution of resources or addressing a resource-focused conflict which was addressed as such by the Security Council.

inter-state wars.¹⁶⁰ Consequently, intra-state conflicts as well as key-issues underlying these conflicts, as for instance the exploitation of resources of a country, would be generally considered to remain within the *domaine réservé* of that state and thus outside the scope of application of the Charter.¹⁶¹

As seen above, in the context of the intra-state conflicts in Sierra Leone, Liberia and Côte d'Ivoire, the SC expressed on numerous occasions that the conflict in question constituted a threat to (regional) peace. In doing so, the SC *inter alia* pointed to the connection between the exploitation and management of resources and the peace process. It also referred repeatedly to the peace agreements concluded, and previously described, and insisted on their implementation by all parties. In the latter context, the SC directly addressed the non-state parties' responsibility to follow their commitment and to fulfill their obligations. The non-state parties were also the addressees of sanctions like arms embargos, travel bans and bank account freezes and were indirectly affected by embargos or export restrictions on diamonds or timber in case of non-implementation or violation of a peace agreement or of a relapse into a violent conflict.¹⁶² The SC Resolutions furthermore laid out detailed mechanisms for the legal exploitation of resources by the government and/or transitional institutions established for the transitional period by the peace agreement, having been endorsed by the *Kimberley Process* or a regional cooperation framework.¹⁶³

Therefore, there is no doubt that the SC is able to deal with the effects of intra-state conflicts by determining a threat to peace based on Art. 39 of the UN Charter and by taking measures based on Chapter VII. But addressing a situation constituting a threat to peace and security is different from addressing and dealing directly with non-state entities, which are

¹⁶⁰ Similar: Kooijmans, *id.*, 333; Additional indicators are the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN Doc GA/RES/2625 (XXV), 24 October 1970, and Resolution on the Definition of Aggression, UN Doc GA/RES/3324 (XXIX), 14 December 1974.

¹⁶¹ See Kooijmans, *supra* note 159, 333. *Remark:* Nowadays examples for Chapter VII measures in intra-state conflict situations without additional criteria, see A. Frowein & N. Krisch, Article 39, in B. Simma *et al.* (eds), *The Charter of the United Nations, A Commentary, Volume 1*, 2nd ed. (2002), 720-721, paras 6-8, 723-724, para. 18; see also E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 133-177.

¹⁶² See Part C.

¹⁶³ See Part C.

parties to ICPAs, in situations that involve the substantial issues underlying those disputes as well as with the exploitation of resources and with institution building during the entire peace process. The measures taken by the SC in the context of the implementation of all three ICPAs went beyond traditional sanction mechanisms to hinder the illegal exploitation of resources to fuel an intra-state conflict.¹⁶⁴

The imposition of sanctions, influencing the intra-state mechanisms dealing with resources and resource revenues are based on the repeated finding that one of the parties – mostly the non-state entity – did not implement the agreement or had violated their obligations under the agreement, and that this non-implementation or violation and/or the overall situation constituted a threat to peace and security.¹⁶⁵ *De facto*, the SC enforced the implementation of peace agreements, holding equally responsible the state and non-state parties for their implementation. In that sense, it did not only address and influence the immediate situation constituting a threat to peace and security.¹⁶⁶ The measures the SC took to endorse and secure the effective implementation of these peace agreements outlined structures for the political and economic transformation of the post-conflict states beyond this period. Additionally, the three examples have shown that the SC Resolutions addressed conflict resources in an even more

¹⁶⁴ Kooijmans, *supra* note 159, 333-334, 339; See Part C.

¹⁶⁵ *Comment*: The limitation of the paper does not allow a general discussion of the spectrum of questions which could be raised in this context as: What makes a SC-Resolution binding and who can be bound by a SC-Resolution? And directly connected to that: How can SC-Resolutions be interpreted? And also whether the SC can exercise quasi-judicial functions? The line of argumentation in this paper follows concerning the first two questions the findings of the Security Council Report, Special Research Report, Security Council Action Under Chapter VII, *supra* note 73, 28-29 and M. C. Wood, 'The UN Security Council and International Law', Hersch Lauterpacht Memorial Lectures, Held at the Lauterpacht Centre for International Law, University of Cambridge (7-9 November 2006) available at http://www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php (last visited 28 April 2011), concerning the last two questions the paper refers to *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, 53, para. 114; recently confirmed and referred to in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, General List No. 141, 1, 34, para. 94; M.C. Wood, 'The Interpretation of Security Council Resolutions', in A. v. Bogdandy *et al.* (eds), 9 *The Max Planck Yearbook of United Nation Law* (2005), 73-95; de Wet, *supra* note 161, 133-177, 338-368.

¹⁶⁶ Frowein & Krisch, *supra* note 161, para. 18.

comprehensive manner than the agreements. Hence, the SC acted as a rule proliferator during the implementation of the agreements with a view to push the overall peace process forward. At the same time, it protected or respectively reaffirmed the sovereignty of the state over natural resources by referring to the establishment of authority of the government to control the exploitation of natural resources; a government, which usually was established in the course of the implementation of an ICPA.

Furthermore, from a general perspective on these agreements, especially in the context of the conclusion and implementation of the Lomé and Accra Agreements, one can assume that all parties to the agreement in question must have agreed to not only commit themselves towards their counterparts in the conflict but also towards the UN, in particular the SC, as a mediator and *de facto* guarantor for the implementation of the agreement and the peace process.¹⁶⁷ This provides an argument for recognizing the binding nature of the agreement and by way of a preliminary conclusion, it could be said that the agreements under consideration have created legal obligations governed by international law.¹⁶⁸ This alleged legal nature of obligations created by peace agreements could be a possible trigger for a sustainable peace process. It could have the function of a fixed point in an otherwise very dynamic process.¹⁶⁹ If the obligations created by such an

¹⁶⁷ Kooijmans, *supra* note 159, 338

¹⁶⁸ Kooijmans goes even further and states: “I can see no supportable reason why clearly recognizable entities who have been involved in a dispute which was a matter of [international] concern, cannot enter into binding agreements in which they have obligations not only to the opposite party in the conflict, but also towards the international community as such, if that international community has formally approved such an agreement or even co-signed it. By their very nature such commitments are commitments under international law. It would be completely artificial and it would serve no purpose whatsoever to deny such commitments that character for the simple reason that the entity has no legal personality in the traditional sense.”, see Kooijmans, *supra* note 159, 338.

¹⁶⁹ Bell notes that “[...] literature has paid little attention to the role of the peace agreement as a binding document. Social scientists and conflict resolution analysts have examined what makes peace agreements succeed or fail. [...] They have tried to isolate the different elements of settlements, so as to test empirically and through case studies the extent to which they reduce conflict. This research, in its design and results, treats peace agreements as a group but tends to accord a limited role to the related questions of how an agreement is worded and whether or not it is a legal document. [...] Legal literature, in contrast, has produced detailed appraisals of the terms, structure, and legal nature of specific agreements but little sustained analysis of peace agreements per se. Each position is worth challenging. As regards legal

internationalized peace agreement between state and non-state parties are considered to be governed by international law, and to have created obligations governed by international law, the non-state party to the agreement must possess partial international legal personality.¹⁷⁰

The question is whether this partial legal subjectivity can be equated with concepts which have been applied in the past to non-state entities, such as liberation movements, secessionist movements or *de facto regimes*.¹⁷¹ This is less problematic in the case of entities which control a certain territory *de facto* while not being recognized. Those entities can be regarded as being subject to international legal obligations and rights. But the entities considered here are often not in control of a given territory. Frowein and Krisch point out that those entities can be granted a certain legal personality *inter alia* by the conclusion of internationalized peace agreements and through SC measures.¹⁷² Without pushing this line of argument further, one may say that the non-state entities in question could have acquired a partial and temporary international legal personality that would remain confined to

literature, the scale of the phenomenon of peace agreements; the emerging body of standards dealing with them as a group; and a range of common practices relating to their negotiation, design, content, and implementation - all point to a set of documents with common legal features. As regards social science literature, the sidelining of the legal attributes of peace agreements with respect to compliance or implementation flies in the face of even the most nuanced accounts of why law might matter." Bell, 'Peace Agreements', *supra* note 5, 374-375; see also Bell, 'Lex Pacificatoria', *supra* note 5, 28 *et seq.*; and Fortna assumes that "Peace tends to last longer after formal agreements than after tacit or unilaterally declared cease-fires, all else being equal, but the difference is not significant statistically." She concludes: "Peace is hard to maintain among deadly enemies, but mechanisms implemented in the context of cease-fire agreements can help reduce the risk of another war. Peace is precarious, but it is possible. Agreements are not merely scraps of paper, their content affects whether peace lasts or war resumes.", V. P. Fortna, 'Scraps of Paper? Agreements and the Durability of Peace', in B. A. Simmons & R. H. Steinberg (eds), *International Law and International Relations* (2006), 538, 541.

¹⁷⁰ Daase, *supra* note 5, 163-166; Kooijmans, *supra* note 159, 338.

¹⁷¹ Bell, 'Lex Pacificatoria', *supra* note 5, 127-143; Cassese, *supra* note 46, 1130-1140; A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', 30 *The International and Comparative Law Quarterly* (1981) 2, 416-439, Daase, *supra* note 5, 160-162; J. A. Frowein, *Das de facto-Regime im Völkerrecht, Eine Untersuchung zu Rechtsstellung „nicht anerkannter Staaten“ und ähnlicher Gebilde* (1968); R. Hoffmann & N. Geissler, *Non-State Actors as New Subjects of International Law, Proceedings of an International Symposium on the Kiel Walther-Schücking-Institut of International Law, 25-28 March 1998* (1999); M. Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized de Facto Regimes in International Law: The Case of 'Somaliland'* (2004).

¹⁷² Frowein & Krisch, *supra* note 161, 715-716, paras 43-44.

that peace agreement and the respective peace process.¹⁷³ During the implementation period, the non-state parties have rights and obligations under international law in instances of non-compliance and violation of the agreement, facilitated by internationalized dispute settlement mechanisms and most prominently by SC measures.¹⁷⁴

This paper does not suggest, however, that the non-state entities generally obtain some sort of international legal personality because they are the target of SC enforcement measures.¹⁷⁵ In carrying out its primary responsibility for the maintenance of international peace and security, the SC is free to take measures against any entity which it considers to be an obstructive factor in the restoration of peace. Nevertheless, it has to be emphasized that the SC, in the given context of the implementation of ICPAs and the redistribution of resources, explicitly addresses these entities as responsible for the implementation of a peace agreement and the creation of a sustainable peace process,¹⁷⁶ whereas during ongoing internal armed conflicts the SC usually refrains from addressing the parties by name and appeals to all parties to the conflict or uses similar terms. Once a peace agreement has been concluded, it refers to both parties by name and as direct addressees.

Hence, the framework in which these three agreements were concluded and implemented gave birth to a temporary, limited internationalization of these peace agreements and a partial temporary legal personality of the non-state parties. Therefore, ICPAs and the SC involvement contribute to the creation of international (legal) binding

¹⁷³ See also Kooijmans, *supra* note 159, 339. *Comment:* This approach to the status of non-state parties of an ICPA between state and non-state parties pays tribute to the fact that these agreements usually aim to change the overall structures of the state and to accommodate the conflicting non-state party into these new and agreed structures at the same time. Once the ICPA would have been implemented and/or the transformation period was terminated, the non-state party would have acquired the status of a political party and thereby lost their international legal personality with the progress of the implementation of the peace process.

¹⁷⁴ See also Kooijmans, *supra* note 159, 339; for another strong example see Baetens & Yotova, *supra* note 138.

¹⁷⁵ Kooijmans, *supra* note 159, 339.

¹⁷⁶ Similar for the Lusaka Agreement (*supra* note 6) in Angola: R. Khan, *supra* note 4, 570.

obligations for the parties to the agreement concerning the redistribution of resources to the benefit of the people.

E. Summary and Outlook

On a global level, the United Nations Environment Programme found that less than a quarter of peace negotiations aiming for the resolution of intra-state conflicts over resources in fact addressed the redistribution of natural resources and resource management mechanisms.¹⁷⁷ Given the complexity of the initial situation in intra-state conflicts, it has to be acknowledged that there is neither a political nor legal one-size-fits-all pattern to address these sensitive issues in ICPAs and to create compliance through the creation of legal obligations. This paper has demonstrated how differently the example agreements addressed the redistribution of resources, even though the conflicts were inter-connected. Additionally, the implementation of all three peace agreements was often threatened by a lack of adherence of the parties, especially the non-state parties, and a lack of institutions which could guarantee the effective implementation of the power- and wealth sharing arrangements. This drew the focus of the SC, which continuously addressed their implementation and sanctioned the non-implementation by both the state and non-state parties. The legal exploitation and effective redistribution of resources and resource revenues played a key role in its measures during this process. Nevertheless, the SC addressed the state as well as non-state parties to the agreements as responsible for the implementation of their obligations entered into through the agreements. Taken together, this leads to a temporary internationalization of the obligations created concerning the redistribution of conflict resources during the peace process and the peace agreements themselves. When it comes to the allocation of resources, the measures of the SC, in all three cases, went even beyond the framework outlined in the agreement. The SC took up the function of a negotiator and is about to develop a new and particular practice when it comes to the redistribution of resources as one key to the creation of a sustainable peace process after intra-state conflicts. This would seem to be in line with the 2004 Report of the UN Secretary General's High-Level Panel on Threats, Challenges and

¹⁷⁷ Based on this finding, the UNEP asked the UN Peacebuilding Commission to address natural resources as part of the peacemaking and peacekeeping process as well as to integrate natural resource issues into the peacebuilding strategies and to harness natural resources for economic recovery, see UNEP, *supra* note 2, 5.

Change, which highlighted the fundamental relationship between the environment, security, and social and economic development in the pursuit of global peace in the 21st century. It stated that “[m]ore legal mechanisms are necessary in the area of natural resources [...]” and that a new challenge for the UN was to provide support to weak states, especially to those recovering from war in the management of their natural resources to avoid future conflicts.¹⁷⁸ It concludes, “[t]he United Nations should work with national authorities, international financial institutions, civil society organizations and the private sector to develop norms governing the management of natural resources for countries emerging from or at risk of conflict”¹⁷⁹. The realization and future implications of these statements remain unclear. In the examples of Sierra Leone, Liberia and Côte d’Ivoire, the UN provided its support first and foremost via Chapter VII measures of the SC. A broader strategy and conceptual framework was not evident. The Peacebuilding Commission and the Peacebuilding Fund could become such a framework for further conceptualization; all three countries receive assistance from the Peacebuilding Fund.¹⁸⁰

An open question remains as to whether international principles, like the permanent sovereignty over resources, and mechanisms, like ownership, allocation, and treatment, as well as international standards, like good governance (as an umbrella term for transparency, accountability and participation), are suitable alone to address the roots of resource-intensive intra-state conflicts. During the mediation and implementation process, these internationalized concepts, advocated by the UN, the SC and other international actors, are confronted with the dilemma of creating simultaneously legitimate and effective power-sharing mechanisms between the conflicting parties and their particular concepts of leadership and ownership.

Does the current form of internationalized peace processes, peace agreements and the redistribution of resources reveal the helplessness of the

¹⁷⁸ UN Secretary-General’s High-Level Panel on Threats, ‘Challenges and Change’, *supra* note 14, para. 92; K. Ban, ‘Secretary-General’s message on the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict’ (6 November 2009) available at http://www.un.org/en/events/environmentconflictday/sg_message_2009.shtml (last visited 28 April 2011).

¹⁷⁹ UN Secretary-General’s High-Level Panel on Threats, ‘Challenges and Change’, *supra* note 14, para. 92.

¹⁸⁰ Sierra Leone since 2006; Liberia since 2007; and Côte d’Ivoire since 2008; more information available at <http://www.unpbf.org/index.shtml> (last visited 28 April 2011).

international community, mainly the UN and the SC, to address the roots of these conflicts and to deal with the interests of the conflicting parties, as well as the interests of external actors? In absolute terms, one has to answer with *yes*; in differentiated terms one could say *not necessarily* as the SC utilizes already a very broad margin of its political and legal powers to address these conflicts.

After all, peace agreements between state and non-state parties should reflect not only the result of local horse-trading, while SC Resolutions frame the wider legal and political context for the transformation of resource-intensive conflicts. It may sound like common sense, but when focusing on the influence and high degree of international involvement in the three presented cases, one should not forget that these countries are subjects and not merely objects of international law. These states and their people should still own the peace process and be responsible for it, even if the prevailing state authority is a relatively weak government with a limited capacity to exert its sovereignty. This should find its expression in a peace agreement between the direct parties to the violent conflict and other stakeholders. In the end, the agreement reached between these actors is the best possible agreement that could be reached at that particular point in time. But there is further need to reflect upon the local, regional and global dimensions of resource-centered conflicts to clarify which fact factors can be actually addressed and dealt with by an ICPA and SC Resolutions.¹⁸¹

¹⁸¹ Similar Whitfield, *supra* note 157, 94-95.

The Falkland Islands and the UK v. Argentina Oil Dispute:

Which Legal Regime?

Alice Ruzza *

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Abstract

Following Argentina's withdrawal from the 1995 Joint Declaration concluded with the UK for the common exploration and exploitation of hydrocarbons in the Falklands, the sovereignty dispute over the Islands has recently re-emerged as an economic 'struggle' for access to the North Falklands Basin's oil deposits. The paper analyzes the states' pending sovereignty dispute and their present claims, from the perspective of the exploitation of the Islands' natural resources. The lawfulness of uncoupling the treatment of title to territory and to natural resources, particularly in an area where sovereignty is disputed has been examined in the present paper. By considering the UN practice on the Falklands' case, it is argued that a separate treatment is not per se unlawful, provided that all the parties having a legitimate sovereign claim over the territory are involved. The Joint Declaration is employed as a model to provide evidence in this regard. In addition, the paper discusses the unilateral conduct of the parties as a possible alternative to a cooperative agreement. As the UK is currently acting unilaterally with regard to the access to the oil deposits in the Islands, the implications of its conduct are also reviewed.

A. Introduction

The dispute between Argentina and UK for the sovereignty over the Falkland Islands is not new. It has involved the two States since 1833, when they initially made competing claims of sovereignty over the Islands. Yet, the controversy has recently re-emerged with regard to the access to the oil deposits located in the Falklands/Malvinas' seabed.¹

This contribution aims to analyze the controversy from the point of view of the exploitation of the Falklands/Malvinas' natural resources, which presently constitutes the key interest of both States. The right to have access to the Islands' oil,² indeed, is inherently linked to the pending sovereignty dispute, being the availability of a territory's natural wealth a corollary of the sovereign title to the territory concerned. The Falklands/Malvinas' dispute is an interesting case in which the title to natural resources is

¹ Argentina traditionally refers to the Falkland Islands as "Las Malvinas"; as a consequence the term "Falklands/Malvinas" will be employed in this article.

² Reference is here made to the Principle of Permanent Sovereignty over Natural Resources (PSNR), which will be further discussed below.

uncoupled from the title to territory. Hence, by analyzing the attempts already undertaken by the parties in order to settle their dispute, and by resorting to useful international law tools, this paper will warn about the possible repercussions that the current natural resources' exploitation might have on the prospective relations between Argentina and the UK.

After a brief overview of the parties' historical and modern claims, the lawfulness of separating the treatment of title to territory and to natural resources, together with its implications for the oil deposits in the maritime area around the Falklands/Malvinas, will be analyzed. More precisely, the paper will discuss the options available for regulating the access to the Falklands/Malvinas' natural resources. In this regard, the 1995 Joint Declaration for Hydrocarbons, that Argentina terminated in 2007, will serve as a model to examine the outcomes of a cooperative approach. Moreover, the decision to act unilaterally is also considered as a choice available to the parties: since the UK seems to follow this strategy, the analysis will be conducted in light of the possible effects that this conduct might have on the title to natural resources in the Falklands/Malvinas. In conclusion, the paper argues that violations of the title to natural resources seems more problematic than violations of the plain title to territory, particularly given the exhaustible nature of natural wealth. Hence, the present conduct of the UK seems to aggravate the status of the dispute by irreversibly impairing Argentina's title to natural resources.

B. The Dispute: Historical and Modern "Warfare"

The ongoing dispute over the Falklands/Malvinas' sovereignty began in 1833, when the Islands came under *de facto* British control. Argentina's claim is based on territorial rights inherited from Spain, which exclusively administered the Malvinas from 1774 to 1810.³ It has to be noted that prior to the Lexington incident⁴ involving Argentina and the United States, the

³ L. Freedman, *The Official History of the Falklands Campaign*, Vol. I (2005), 6.

⁴ *Id.*, 7. In 1823 the Argentine Governor Vernet received a concession on East Falkland for fishing and grazing rights. Seeking to establish a settlement on the Islands, Vernet decided to enforce Argentine fishing regulations by seizing three American ships. The USS warship Lexington was in the River Plata at that time: it sailed to the Islands, and after having destroyed all military installations, and put most inhabitants under arrest, the American Captain Duncan declared the Islands free of all government. As a result, relations between United States and Argentina were severed; moreover the United States denied Argentine jurisdiction over the Islands, implicitly recognizing the British sovereignty.

controversy was latent. The UK decision to re-open the contention and 'reassert' its sovereign title (1832-33),⁵ indeed, resulted from the American recognition of the British sovereignty over the Malvinas, as a consequence of the incident.

The UK exercised *de facto* sovereign rights over the Falklands/Malvinas since 1833. However, Argentina continuously protested against this situation, but no satisfactory answer or change in the British attitude was reached.⁶ After the Argentine failure to obtain a review of the situation in the Falklands/Malvinas, a new controversy with the UK started in 1884, when Argentina released a map in which the Islands appeared as a part of its territory.⁷ The UK continuously rejected Argentina's proposal to settle the dispute by peaceful means or before an arbitral tribunal.⁸ Formally, Argentina protested again in 1908; and then, during the two world wars, the controversy over the Islands continued without any change in the attitudes of the parties.⁹ Hence, after ineffective political pressure and fruitless negotiations, Argentina invaded the Falklands on April 2, 1982.

As of this military intervention, the territorial claims of both Argentina and the UK have not changed.¹⁰ Both States assert their sovereign title over the Falklands/Malvinas, and none of them seems willing to compromise or retreat such positions, as will be shown below. This is important particularly given that the General Assembly (GA) has repeatedly invited the States to solve their dispute, and particularly the GA Resolution 31/49 calls the Governments to refrain from unilateral actions that would modify the situation prior to a final settlement of their controversy.¹¹

Hence, given the contested sovereignty, if the States are to exploit the Falklands/Malvinas' resources, there are two viable paths. On the one hand,

⁵ *Id.*, 8.

⁶ R. Dolzer, *The Territorial Status of the Falkland Islands (Malvinas): Past and Present* (1993), 137, 139: Reference is made to the protests of 22 January 1833, 17 June 1833, and also 29 December 1934. Moreover, it is noted that the conduct of a state subsequent to the development of an adverse territorial situation is important for the development of territorial status.

⁷ *Id.*, 140.

⁸ *Id.*, 141.

⁹ *Id.*, 142.

¹⁰ Freedman, *supra* note 3, 11. The claim of the UK is based also on the right to self-determination of the islanders, the illegitimacy of the use of force, and, the right to self-defense under art. 51 of the UN Charter; On the status of the Falkland Islands see, Dolzer, *supra* note 6, 170.

¹¹ GA Res. 31/49, 1 December 1976, para. 4.

they could cooperatively approach the problem, in order to jointly benefit from the wealth of the Islands;¹² on the other hand, each of them may unilaterally intervene, but such conduct might be problematic from the perspective of its compliance with international law.

A cooperative attempt for a joint exploitation of the Islands' natural resources was indeed carried out in 1995, when the States concluded a Joint Declaration for Hydrocarbons.¹³ The document resulted from the effort to set aside the – unresolvable – sovereignty issue, while laying the foundations for a cooperative relationship in the access to oil within a Special Co-operation Area that the Declaration identified. Unfortunately, the Declaration failed with the Argentine withdrawal in 2007.¹⁴ The reasons for the Argentine withdrawal seem related to the lack of exploitable resources in the Area; new oil deposits, conversely, have recently been discovered in the North Falklands Basin where the British corporations are currently performing their activities.¹⁵

How may this unilateral action be interpreted, in light of the contested sovereignty nature of the territory concerned? What consequences does this unilateral behavior cause to the parties' claims – and, eventually, rights –, according to international law?

The following sections will be developed in light of these questions. Firstly, the claims of the two states will be analyzed by considering the international law rules concerning the formation of the title to territory. Then, the Joint Declaration for Hydrocarbons will be studied: the Declaration will serve as a model in view of which considering the present controversy and evaluating its possible implications. Indeed, the Declaration constitutes an attempt to separate the treatment of the title to territory from

¹² As will be clarified, this cooperation is in compliance with international law to the extent that no other party can legitimately claim a sovereign title over the Falklands/Malvinas.

¹³ British and Argentine Governments, 'Joint Declaration, Cooperation Over Offshore Activities in the South West Atlantic' (27 September 1995) available at <http://www.falklands.info/history/95agree.html> (last visited 13 April 2011). On bilateral joint development agreement see D. M. Ong, 'The Progressive Integration of Environmental Protection within Offshore Joint Development Agreements', in M. Fitzmaurice & M. Szuniewicz (ed.), *Exploitation of Natural Resources in the 21st Century* (2003), 113-141.

¹⁴ International Boundaries Research Unit (IBRU), 'Claims and Potential Claims to Maritime Jurisdiction in the South Atlantic and Southern Oceans by Argentina and the UK' (24 June 2010) available at http://www.dur.ac.uk/resources/ibru/south_atlantic_maritime_claims.pdf (last visited 13 April 2011), note 4.

¹⁵ *Id.*

the title to natural resources, and therefore it deserves a closer scrutiny through the international law lenses. Lastly, the prospective effect of the current conduct of the parties on their dispute over sovereignty in the Falklands/Malvinas will be commented upon.

C. The Current Developments and the Status of the Parties' Claims

The dispute between the UK and Argentina involves the maritime areas around the Falklands/Malvinas: the parties have overlapping claims in relation to the Exclusive Economic Zone (EEZ)¹⁶ and to the Continental Shelf, to which Argentina and the Islands are respectively entitled.¹⁷ Gas and oil deposits have recently been discovered in the North Falklands/Malvinas Basin, located within the Islands' Exclusive Economic Zone,¹⁸ and it is over this area that the current tensions are directed.

The recent developments of the dispute followed the arrival in the Falklands/Malvinas of an oil exploration rig, the Ocean Guardian. The rig was hired by the British company Desire Petroleum, with the aim to drill up to ten wells in the North Falklands/Malvinas Basin.¹⁹ The Argentine

¹⁶ “The EEZ can briefly be defined as a maritime zone beyond and adjacent to the territorial sea extending up to 200 nautical miles (‘nm’) from the baseline of a coastal State where the coastal State has sovereign rights over the living and non-living resources of the superjacent waters and its seabed and subsoil – rights of an essentially economic nature – whereas in that zone other States enjoy the freedoms of navigation and overflight (see Art. 56 UN Convention on the Law of the Sea)”, D. Nelson, ‘Exclusive Economic Zone’ (March 2008) available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1156&recno=68&letter=E (last visited 13 April 2011), para. 1.

¹⁷ IBRU, *supra* note 14, note 3.

¹⁸ IBRU, *supra* note 14, note 4.

¹⁹ BBC, ‘Q & A: The Falklands oil row’ (17 February 2010) available at <http://news.bbc.co.uk/2/hi/business/8520038.stm> (last visited 13 April 2011); BBC, ‘Oil drillings off Falkland Islands ‘next week’’ (17 February 2010) available at http://news.bbc.co.uk/2/hi/uk_news/scotland/highlands_and_islands/8519694.stm (last visited 27 April 2011); MercoPress, ‘Falklands’ Desire Petroleum announces Drillings of sixth wells has begun’ (30 March 2011) available at <http://en.mercopress.com/2011/03/30/falklands-desire-petroleum-announces-drilling-of-sixth-well-has-begun> (last visited 27 April 2011); Furthermore, in contrast to the steady economic decline that Argentina is experiencing, in May the British company Rockhopper discovered an oil deposit at about 137 miles off the north coast of the Islands, see T. Webb, ‘UK firm’s Falklands oil find sparks mix of hopes and fears’ (6 May 2010) available at

Government reacted by imposing a shipping ban on all vessels sailing between Argentina and the Falklands/Malvinas (or to them through Argentine waters), in order to make drillings more complicated and expensive for foreign firms.²⁰ Moreover, Argentina accused Britain of having breached a UN resolution forbidding unilateral development in disputed waters,²¹ and protested to the UN Secretary General, who reiterated its availability to perform good offices, provided that both parties agree.²² To counteract the Argentine ban, the UK re-asserted its sovereignty over the Falklands/Malvinas, specifying that the application of law in and around the Islands is a matter for the islanders.²³

The underlying rationale of these claims, and the core of the Falklands/Malvinas dispute, is the title to territory, whose attribution is still pending and contested between the States.

According to Brownlie, the term “sovereignty” denotes the “legal competence which a state enjoys in respect of its territory”²⁴, and it encompasses both the concept and the essence of title; moreover, De Visscher argues that it is the “firm configuration of its territory furnishes the State with the recognized setting for the exercise of its sovereign powers”²⁵. From a different perspective, the title to territorial sovereignty allows a

<http://www.guardian.co.uk/uk/2010/may/06/falklands-oil-discovery-rockhopper> (last visited 13 April 2011).

²⁰ BBC, *supra* note 19.

²¹ The Argentine President is referring to GA Res. 31/49, 1 December 1976, para 4.

²² F. Elliott & H. Strange, ‘Escalating Falklands oil dispute goes to UN’ available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7038582.ece (last visited 13 April 2011).

²³ UK Government, ‘Bryant: ‘No Doubts about Our Sovereignty over Falkland Islands’’ (23 February 2010) available at <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21811579> (last visited 13 April 2011); The UK had reaffirmed its sovereignty over the Falkland Islands during UN GA, Fourth Committee, Remaining 16-Non-Self-Governing Territories on United Nations List are 16 too many’, GA/SPD/422, 5 October 2009, available at <http://www.un.org/News/Press/docs/2009/gaspd422.doc.htm> (last visited 13 April 2011); see also UN GA, Fourth Committee, A/C.4/64/SR.2, paras 30-33, “The Falklands’ Government stated that supplies were coming from Aberdeen, not Argentina, and therefore the shipping ban will have no effect”, The Economist, ‘Oil and troubled waters – Drilling a vein of nationalism’ (18 February 2010) available at <http://www.economist.com/world/americas/displaystory.cfm?storyid=15546482> (last visited 13 April 2011).

²⁴ I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 119.

²⁵ C. De Visscher, *Theory and Reality in Public International Law* (1957), 197.

delimitation of the exercise of the sovereign power, since “no state may lawfully exercise its sovereignty within the territory of another”²⁶.

International law recognizes various modes as creating a title to territory;²⁷ yet, the actual effective control over the territory is the most relevant element.²⁸ A valid and substantiated title implies that the state in which it is vested can vindicate it before a Court and also be enabled to recover a possession of which it has been deprived:²⁹ this means that the title must be able to exist even when divorced from possession.³⁰ Nonetheless, the extent to which sovereignty over a territory is also claimed by other parties influence the formation of a valid title:³¹ a long-continued undisturbed possession - i.e.: acquisitive prescription *strictu sensu*³² - ,

²⁶ R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), 2; *Island of Palmas (The United States v. The Netherlands)*, 2 U.N. Rep. Intl. Arb. Awards 829,, 839 [Island of Palmas Case].

²⁷ Occupation, prescription, cession, accession or accretion, subjugation/conquest, Brownlie, *supra* note 24, 133-158. However, Lauterpacht clarifies that “the acquisition of territory by an existing State and member of the international community must not be confused, first, with the foundation of a new State.”, L. Oppenheim & H. Lauterpacht, *International Law: a Treatise*, Vol. 1: Peace (1995), 544.

²⁸ Jennings, *supra* note 26, 4. The author refers also to Roman Law, which requires both *corpus* and *animus*; *Island of Palmas Case*, *supra* note 26, 829, 867.

²⁹ *Titulus est justa causa possidendi quod nostrum est*.

³⁰ Jennings, *supra* note 26, 5.

³¹ *Legal Status of Eastern Greenland (Denmark v. Norway)*, PCIJ Ser. A/B, No. 53, 1933, 46.

³² Acquisitive prescription *strictu sensu*, as opposed to acquisitive prescription *tout court*, refers to the case in which “the actual exercise of sovereign rights over a period of time is allowed to cure a defect in title”. In general terms, acquisitive prescription is linked to ‘immemorial possession’, that is a so well-established possession “that its origins are both beyond doubts and unknown”, Jennings, *supra* note 26, 21; see also, D. H. N Johnson, ‘Acquisitive Prescription in International Law’, in M. N. Shaw (ed.), *Title to Territory* (2005), 294-295: acquisitive prescription has been defined as “the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states [...] have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate organization or international tribunal or [...] have failed to manifest their opposition in a sufficiently positive manner”; see also P. K. Menon, ‘Title to Territory: Traditional Modes of Acquisition by States’, 72 *Revue de Droit International et de Sciences Diplomatiques et Politiques* (1994), 1.

indeed, is considered to favor the creation of a good title.³³ Kohen argues that the original condition of the territory concerned could also play a role in the formation of a title to territory: it is on this ground, for instance, that he rejects the British claim over the Falklands, supporting instead the Argentine one.³⁴

The case of the Falklands/Malvinas, hence, is evidently a situation where the attribution of the legal title to territory is contested.³⁵ Whilst the Argentine counter-claim rests on the title inherited as a result of the state's declaration of independence from Spain,³⁶ the UK resorts to the islanders' right to self-determination to found its legitimate title. More precisely, Argentina not only claims a right to territorial integrity and the British correlative duty to permit the reunion of the Islands with the Argentine mainland, but it also contests the attribution of the right to self-determination to the islanders.³⁷ According to Argentina, in the Falklands/Malvinas there is no colonized population, but rather a transplanted British community, which does not conform to the subjugated or dominated people criterion as set forth in the GA Resolutions on the point. Argentina defines them as "a British population transplanted with the

³³ Jennings, *supra* note 26, 21 and 25, where the author makes reference to the attitude of third states toward possession in a disputed case; M. G. Kohen, *Possession Contestée et Souveraineté Territoriale* (1997), 192, emphasizing that the term "title" encompasses both a situation based on a juridical entitlement and on "faits de possession".

³⁴ Maintaining that the possession acquired after the qualification of the territory as 'non self-governing', or the changes in the possession after a critical date, could not justify the acquisition of sovereignty, Kohen considers that the Administering Power itself cannot invoke the possession as it followed to the qualification of the territory as a non self-governing entity, see, Kohen, *supra* note 33, 194-195.

³⁵ Kohen, *supra* note 33, 193, where it is argued that the claims that "effective possession" outweighs legal titles and that it could reverse the owner of the title to territory both signal a case of "contested possession".

³⁶ UN GA, Special Committee of 24 on Decolonization, 'Statement by Councilor Janet Robertson, Legislative Council of the Falkland Islands' (12 June 2008) available at <http://www.falklands.gov.fk/site/legco/un-speech-2008-robertson.pdf> (last visited 18 April 2011).

³⁷ Permanent Mission of Argentina to the UN, 'Statement made by Argentina Minister of Foreign Affairs, International Trade and Worship at the United Nations' (18 June 2009) available at <http://www.un.int/argentina/statements/miscelaneous/taiana2009.htm> (last visited 27 April 2011). Webb, *supra* note 19; M. G. Kohen, 'Alternativas Para la Solucion del Conflicto por las Islas Malvinas', 7 *Revista de Estudios Internacionales* (1986) 4, 1145.

intention of setting up a colony”³⁸, and thereby addresses the *mala fides* in the British conduct. In addition, Argentina founds its claim on paragraph 4 of GA Resolution 31/49, which states: “[The General Assembly] calls upon the two parties to refrain from taking decisions that would imply introducing unilateral modifications in the situation while the Islands are going through the negotiation process”³⁹. This position was reiterated at the UN Special Committee on Decolonization, where Argentina described the purported British sovereignty over the Malvinas as a “colonial injustice”⁴⁰.

The UK, conversely, affirms its role as the Falklands/Malvinas’ Administering Power,⁴¹ and points to the islanders’ right to self-determination which shields their will to remain under the British administration.⁴² The Falklands/Malvinas’ islanders, indeed, support the UK position and, by perceiving themselves as a people, they state their right to self-determination in the opening of their Constitution, recalling specifically the UN Charter and Common Art. 1 of the 1966 Covenants.⁴³ In addition, the Falklands/Malvinas’ Constitution expressly qualifies the Islands as a British Overseas Territory, internally self-governed but under British Administration.⁴⁴ As will be noted, the Falklands/Malvinas’ population is

³⁸ UN GA, Special Committee on Decolonization adopts draft Resolution Reiterating Need for Peaceful, Negotiated Settlement of Falkland (Malvinas) Question, UN Doc GA/Col/3140, 15 June 2006.

³⁹ GA Res. 31/49, 1 December 1976, para. 4.

⁴⁰ The Economist, *supra* note 23; Permanent Mission of Argentina to the UN, *supra* note 37.

⁴¹ UK Government, *supra* note 23; UN GA, Most of World’s Population no Longer Lives under Colonial Rule, but United Nations Decolonization Mission Still Unfulfilled, Fourth Committee Told as Debate Begins, UN Doc GA/SPD/371, 8 October 2007; UN GA *supra* note 23.

⁴² UN GA, *supra* note 36; see also, Falkland Islands Government, Department of Mineral Resources, <http://www.falklands-oil.com/> (last visited 18 April 2011); The UK describes its relationship with its Overseas Territories as based on partnership, shared values, and the right of each territory to choose whether to remain linked to the UK or not; as for the *erga omnes* nature of the right to self-determination see *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, 102 [East Timor Case]; See also, *Barcelona Traction, Light and Power, Limited*, Judgment, ICJ Reports 1970, 3 [Barcelona Traction Case].

⁴³ International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407; International Covenant on Economic, Social and Cultural Rights (ICESCR), 19 December 1966, 993 U.N.T.S., 3.

⁴⁴ UN GA, Special Committee of 24 on Decolonization, Statement by Councilor Janet Robertson: as observed by the Legislative Council of the Islands, it is thanks to this mixed status that the political will of the Islands’ people is fully implemented; See

not perceived as ‘people’. In the UN Resolutions the islanders are treated as the object of a conflict between the UK and Argentina, rather than as an autonomous party, entitled to self-determination.⁴⁵ This approach is shared by Argentina which rejects the applicability of the principle of self-determination to the Falklands/Malvinas’ population, and thereby their peoplehood.

The international community seems divided upon the sovereignty dispute between Argentina and the UK. The position of Argentina finds support among the Latin American states, which backed Argentine “legitimate rights [...] in the sovereignty dispute with Great Britain”⁴⁶ during the Rio Group Summit; whilst, interestingly, the United States seem not willing to side in favor of the UK,⁴⁷ whose position finds however an indirect recognition by the members of the European Union through the inclusion of the “Falkland Islands” among the “Association of Overseas Countries and Territories” regime, established in the newly entered into force Treaty of Lisbon.⁴⁸

As known, sovereignty comprises a number of liberties in terms of internal organization and disposal of territory.⁴⁹ Among its corollary, the

also, Falkland Islands Government, Department of Mineral Resources, <http://www.falklands-oil.com/> (last visited 18 April 2011).

⁴⁵ GA Res. 2065 (XX), 16 December 1965; GA Res. 3160 (XXVIII), 14 December 1973; GA Res. 31/49, 1 December 1976; GA Res. 37/9, 4 November 1982; GA Res. 38/12, 16 November 1983; GA Res. 39/6, 1 November 1984; GA Res. 40/21, 27 November 1985; GA Res. 41/40, 25 November 1986; GA Res. 42/19, 17 November 1987; GA Res. 43/25, 17 November 1988.

⁴⁶ Elliott & Strange, *supra* note 22; see also, R. Carroll, ‘Latin American leaders back Argentina over Falklands oil drilling’ (24 February 2010) available at <http://www.guardian.co.uk/uk/2010/feb/23/argentina-uk-falkland-row-oil> (last visited 14 April 2011); see also, UN GA, Fourth Committee, A/C.4/64/SR.2, *supra* note 23: More precisely, Uruguay (paras 11-13) maintains that the sovereignty dispute over the Falklands involves Argentina and UK as the sole parties. It considers that the principle of self-determination cannot be applied in this case, since in the Malvinas there is no colonized population, but rather a transplanted British community. Venezuela (para. 35) as well declares its support for the legitimate sovereign rights of Argentina. Furthermore, Uruguay, Venezuela and Mexico (paras 14-18) urge the Governments of Argentina and the United Kingdom to resume negotiations, to find a peaceful and just solution to their sovereignty dispute.

⁴⁷ G. Whittell & J. Bone, ‘US refuses to endorse British sovereignty in Falklands oil dispute’ (25 February 2010) available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7040245.ece (last visited 14 April 2011).

⁴⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, 2007/C 306/01, Part 4, Art. 198.

⁴⁹ Brownlie, *supra* note 24, 106.

right to exploit the natural resources and wealth, is the most interesting for the study that this contribution aims to develop.⁵⁰ Is it possible, and to what extent, to exploit the natural resources of a territory whose sovereignty is contested?

The case of the Falklands/Malvinas seems to advocate for a positive answer to these questions; yet, this asks for a further analysis under international law. After the failure of a cooperative agreement for the exploitation of hydrocarbons in the lately-discovered, resource-void Special Cooperation Area, the situation in the Falklands/Malvinas ended in a stalemate, interrupted only by English unilateral, recent activity in the resource-rich North Basin. Is this legitimate, provided that the UK only asserts its sovereign title, but is not lawfully vested with it?

Following a brief description of the object of the present tensions, the interplay between sovereignty and the title to natural resources will be commented upon.

D. A Quick Insight on the Matter of the Dispute: the Falkland Islands' Oil

The concrete object of the latest controversy over the Falklands/Malvinas is located in the North Basin, within the Islands' EEZ, in the form of exploitable oil deposits. Among the companies drilling in the area, one can enumerate Desire Petroleum, Rockhopper and BHP Billinton, which are all British firms.

Rockhopper found a deposit of “high quality reservoir interval with very good porosity and permeability”⁵¹. Provided that the reservoir's quality is as estimated, the company declared to be looking “at a discovery of maybe a couple of hundred million barrels”⁵². On the average amount of the reserves, the opinions are contrasting: a conservative estimate suggests a bare minimum viable recovery of 3.5 billion barrels of oil; the estimate of

⁵⁰ Reference here is made to the Principle of Permanent Sovereignty over Natural Resources which will be forthwith commented.

⁵¹ E. Sefton, ‘High quality’ Falklands oil find raises tensions’ (10 May 2010) available at <http://www.thefirstpost.co.uk/63121,news-comment,news-politics,high-quality-falklands-oil-find-raises-tensions-with-argentina-rockhopper> (last visited 14 April 2011).

⁵² *Id.* For comparison, Saudi Arabia is estimated to have reserves totaling 264 billion barrels.

the British Geological Society suggests around 60 billion barrels.⁵³ What is certain, however, is that the payback for the UK in case of success will be significant, particularly in terms of corporations' taxes and royalties.⁵⁴ By next year, British Borders & Southern will be performing exploration activities in the North Falklands/Malvinas; and, Argus Resources as well is planning to drill for oil off the Islands.⁵⁵

The British 'race for oil' seems therefore unconstrained: Argentina, which is facing a severe economic crisis, does not seem to have the power to influence the UK's action, through neither economic pressure nor the resort to force. Indeed, Rockhopper continued its activity and announced on September 7, 2010, to have commenced the flow test to probe commerciality of the Falklands/Malvinas' oil discovery in the "Sea Lion well"⁵⁶. Apparently, "oil activities still remain encouraging"⁵⁷ in the Falklands/Malvinas since the Sea Lion well was successfully tested and, therefore, Rockhopper is furthering its operational program in the area.⁵⁸

⁵³ British Geological Survey, 'The science behind Falklands oil exploration', available at http://www.bgs.ac.uk/research/highlights/falklands_oil_exploration.html (last visited 14 April 2011).

⁵⁴ P. C. Glover, 'A Falklands Gusher: UK Look for an Oil Rich Payback' (16 June 2010) available at <http://www.energytribune.com/articles.cfm/4341/A-Falklands-Gusher-UK-Looks-For-An-Oil-Rich-Payback> (last visited 14 April 2011). Moreover, while Rockhopper's shares 'rocketed by 150%' thanks to its activity in the North Falkland Basin, the quest for oil in the Southern one proved a failure, see, R. Wachmann, 'Falkland Oil and Gas shares plunge after its Toroa Well proves empty' (12 July 2010) available at <http://www.guardian.co.uk/business/2010/jul/12/falkland-oil-production-exploration> (last visited 14 April 2011).

⁵⁵ MercoPress, 'Fifth Company Argos Plans to Drill for Oil' (9 July 2010) <http://en.mercopress.com/2010/07/09/fifth-company-argos-plans-to-drill-for-oil-off-the-falkland-islands-says-ft> (last visited 14 April 2011).

⁵⁶ MercoPress, 'Flow tests begin to probe commerciality of Falklands' oil discovery' (7 September 2010) available at <http://en.mercopress.com/2010/09/07/flow-tests-begin-to-probe-commerciality-of-falklands-oil-discovery> (last visited 14 April 2011): "The top oil sand in the Sea Lion well was encountered at 2,374 meters subsea, and the base of the lowest oil sand ("oil down to") level was encountered at 2,591 meters subsea. The total vertical oil column is 217 meters (712 feet), with total net pay of 53 meters in seven identified pay zones, the thickest of which is approximately 30 meters".

⁵⁷ MercoPress, 'Falkland Islands: Oil activity still remain encouraging' (7 September 2010) available at <http://en.mercopress.com/2010/09/03/falkland-islands-oil-activities-still-remain-encouraging> (last visited 14 April 2011).

⁵⁸ MercoPress, 'Rockhopper Planning Further Drilling in North Falkland Basin' (14 October 2010) available at <http://en.mercopress.com/2010/10/14/rockhopper-planning-further-drilling-in-north-falkland-basin> (last visited 14 April 2011).

More precisely, Rockhopper is currently “fully funded to undertake an extensive exploration and appraisal programme across all of [the Falklands/Malvinas’] acreage during 2011”⁵⁹. Although a “development phase could take up to ten years to plan before hydrocarbons became available on the market”, the discovery encourages “oil companies to invest in the area and drill more wells”⁶⁰.

E. The Interplay between Sovereignty and Exploitation of Natural Resources

It is a well-established practice, accepted as law that the title over natural resources is to follow that over territory:⁶¹ accordingly, the sovereign subject enjoys the exclusive right to dispose of the natural wealth of the area over which it exercises sovereignty.⁶²

⁵⁹ Rockhopper Exploration PLC website, available at <http://www.rockhopperexploration.co.uk/> (last visited 14 April 2011).

⁶⁰ MercoPress, ‘Rockhopper Executives in the Falkland Islands’ (27 January 2011) available at <http://en.mercopress.com/2011/01/27/rockhopper-executives-in-the-falkland-islands> (last visited 14 April 2011).

⁶¹ N. Schrijver, *Sovereignty over natural resources – balancing rights and duties* (1997), 238. See also, Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration and Art. 3 of the Biodiversity Convention.

⁶² Schrijver, *supra* note 61, 7-9 and 68-69. During the drafting process of Resolution 1803, the very existence of the legal concept of “permanent sovereignty over natural wealth and resources” was challenged. Several states, among which Japan and Afghanistan, clearly interpreted the right to dispose of the natural wealth as an attribution of the sovereign state. Moreover, during 1970s and 1980s only peoples whose territories were under foreign domination or occupation were identified as subjects of the right to self-determination. However, in the same time-span a tendency to consider the states as the sole subjects of the PSNR re-emerged, both in the UN GA CERDS of 1974 and in the ILA Seoul Declaration of 1986. Arguably, the state does not seem to have an arbitrary right to exploit natural resources, rather the natural wealth should serve the interest and the well-being of the population, including indigenous peoples, see, Schrijver, *supra* note 61, 232, 241. See also UN Declaration on Permanent Sovereignty, para 1; Art. 1 of the Human Rights Covenants; *Texaco v. Libyan Arab Republic*, 53 *International Law Reports* (1977), 484 [Texaco Award]. The customary nature of the principle of permanent sovereignty over natural resources has been also recognized by the ICJ in *Case Concerning the Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168. In the literature see, K. N. Gess, ‘Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis’, 13 *The International and Comparative Law Quarterly* (1964) 2, 398, 449;

H. W. Baade, 'Permanent Sovereignty Over Natural Wealth and Resources', in R. S. Miller & R. J. Stanger (eds), *Essays on Expropriation* (1967), 3-40; J. Baloro, 'Some International Legal Problems Arising from the Definition and Application of the Concept of 'Permanent Sovereignty over Wealth and Natural Resources' of States', 20 *The Comparative and international Law Journal of South Africa* (1987), 335-352; J. N. Hyde, 'Permanent Sovereignty over Natural Wealth and Resources', 50 *The American Journal of International Law* (1956) 4, 854; L. Barrera-Hernandez, 'Sovereignty over Natural Resources under Examination: the Inter-American System for Human Rights and Natural Resource Allocation', 12 *Annual Survey of International and Comparative Law* (2006) 1, 43; G. S. Akpan, 'Host State Legal and Policy Response to resource Control Claims by Host Communities: Implications for Investment in the Natural Resources Sector', in T. Wälde, E. Bastida & J. Warden Fernández (eds), *International and Comparative Mineral Law and Policy: Trends and Prospects* (2005), 283-310; On peoples' rights see, S. J. Anaya, *Indigenous People in International Law* (2004), 104-106; S. J. Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resources Extraction: the More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources', 22 *Arizona Journal of International and Comparative Law* (2005) 1, 7; E. Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law', 38 *The George Washington International Law Review* (2006) 1, 33; B. Sloan, 'Study of the Implications, under International Law, of the United Nations Resolutions on Permanent Sovereignty over Natural Resources, on the Occupied Palestinian and other Arab Territories and on the Obligations of Israel Concerning Its Conduct in These Territories', Annex to UN Doc A/38/265, E/1983/85, 21 June 1983; Y. Dinstein, 'Collective Human Rights of Peoples and Minorities', 25 *The International and Comparative Law Quarterly* (1976) 1, 102, 186; Minority Rights Group International, 'The Right to Development: Obligations of States and the Right of Minorities and Indigenous People' (10 February 2003) available at <http://www.minorityrights.org/923/briefing-papers/the-right-to-development-obligations-of-states-and-the-rights-of-minorities-and-indigenous-peoples.html> (last visited 18 April 2011); A. Rosas, 'The Right to Development', in A. Eide (ed.), *Economic, Social and Cultural Rights* (2001), 119-130; B. C. Mank, 'The Rights of Indigenous Peoples to a Healthy Environment and Use of Natural Resources under International Human Rights Law', in D. Barnhizer, *Effective Strategies for Protecting Human Rights: Economic Sanctions, Use of National Courts and International 'Fora' and Coercive Power* (2001); E-I. A. Daes, 'Indigenous peoples' permanent sovereignty over natural resources – Preliminary report', UN Doc E/CN.4/Sub.2/2003/20, 21 July 2003, para 16; A. Eide, 'Rights of Indigenous Peoples – Achievement in International Law During the Last Quarter of a Century', 37 *Netherlands Yearbook of International Law* (2006) 1, 155; M. Gestri, *La gestione delle risorse naturali d'interesse generale per la Comunità internazionale* (1996); A. F. M. Maniruzzaman, 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: an Overview', 8 *Journal of Transnational Law and Policy* (1998-1999) 1, 57; ILA, Committee on the Rights of Indigenous Peoples, 'Conference Report The Hague – Interim Report' (2010) available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (last visited 18 April 2011), 51.

The title over natural resources is also known as “Principle of Permanent Sovereignty over Natural Resources” (PSNR), and it developed through various GA Resolutions.⁶³ It evolved in the post-war era as a new principle of international economic law, aiming in particular to secure to developing countries and peoples living under colonial rule the advantages stemming from the exploitation of natural resources within their territories. PSNR functioned as a legal tool for newly independent states against breaches of their economic sovereignty.⁶⁴

⁶³ See, GA Res. 523 (VI), 12 January 1952; GA Res. 626 (VII), 21 December 1952; GA Res. 37 (IX), 14 December 1954; GA Res. 1314 (XIII), 12 December 1958; GA Res. 1514 (XV), 14 December 1960; GA Res. 1515 (XV), 15 December 1960; GA Res. 1720 (XVI), 19 December 1961; GA Res. 1803 (XVII), 14 December 1962; GA Res. 1813 (XVII), 16 December 1962, GA Res. 1831 (XVII), 18 December 1962, GA Res. 2158 (XXI), 25 November 1966; GA Res. 2386 (XXIII), 19 November 1968; GA Res. 2398 (XXIII), 3 December 1968; GA Res. 2581 (XXIV), 15 December 1969; GA Res. 2626 (XXV), 24 October 1970; GA Res. 2692 (XXV), 11 December 1970; GA Res. 2849 (XXVI), 20 December 1971; GA Res. 2994 (XXVII), 15 December 1972; GA Res. 2995 (XXVII), 15 December 1972; GA Res. 2996 (XXVII), 15 December 1972; GA Res. 2997 (XXVII), 15 December 1972; GA Res. 3016 (XXVII), 18 December 1972; GA Res. 3129 (XXVIII), 13 December 1973; GA Res. 3171 (XXVIII), 17 December 1973; GA Res. 3281 (XXIX), 12 December 1974; GA Res. 3362 (S-VII), 16 September 1975; GA Res. 3517 (XXX), 15 December 1975; GA Res. 32/176, 19 December 1977; GA Res. 33/194, 29 January 1979; GA Res. 34/89, 11 December 1979; GA Res. 34/186, 18 December 1979; GA Res. 35/7, 30 October 1980; GA Res. 35/56, 5 December 1980; GA Res. 37/7, 28 October 1982; GA Res. 37/217, 20 December 1982; GA Res. 41/65, 3 December 1986; GA Res. 41/128, 4 December 1986; GA Res. S-18/3, 1 May 1990; GA Res. 45/199, 21 December 1990, etc.; the urgency of natural resource-related issues is confirmed also by Resolutions adopted by the Security Council. More precisely, they deal with Iraq, the Democratic Republic of the Congo and other conflict-zones, in which the flow of natural resources is considered a root-cause of the hostilities, see SC Res. 687, 3 April 1991, para 16; SC Res. 1625, 14 September 2005, para 6; SC Res. 1653, 27 January 2006, paras 16-17; See, also SC Res. 502, 3 April 1982 and SC Res. 505, 26 May 1982.

⁶⁴ Schrijver, *supra* note 61, 4. Doctrinal controversies soon emerged on the principle’s legal nature. Firstly, the development of the PSNR in GA Resolutions exposed it to questions concerning its binding character. Secondly, the matters it covered - such as expropriation of foreign property, compensation, standards of treatment of foreign investors - were delicate and controversial aspects of interstate relations, and this hampered its acceptance. Additionally, the PSNR was associated with important political processes such as the struggles of colonial peoples for political and economic self-determination, and the efforts of developing States to establish a New Economic Order. In addition, the jus cogens character of PSNR is also debated in international law, see, G. M. Danilenko, ‘International Jus Cogens: Issues of Law-Making’, 2 *European Journal of International Law* (1991) 1, 42. A concerted effort aimed at

In the case of the Falklands/Malvinas the problematic aspects stem from the failure to identify an ultimate sovereign power, and hence, the official holder of the title to exploit natural resources. As mentioned, Argentina and the UK have two possible options in order to reach their economic objective and have access to the Islands' natural resources, whilst avoiding the attribution of sovereignty: on the one hand, they could choose, as in fact they did, a cooperative approach; on the other, they could engage in a unilateral conduct. Both the alternatives, however, are conditioned upon the fact that no other actors may advance a legitimate sovereign claim over the Islands.

Apparently, either GA Resolutions and the states' practice show a tendency to consider the UK and Argentina as the sole owners of a valid claim over the Islands.

elevating a particular norm to the rank of jus cogens is provided by the negotiations at the Vienna Conference on Succession of States in Respect of State Property, Archives and Debts. One of the most controversial issues at the Conference was the legal nature of the principle of the permanent sovereignty over natural resources proclaimed in a number of the UN General Assembly resolutions. Art. 15(4) requires agreements between a predecessor state and a newly independent state concerning succession to state property not to "infringe the principle of the permanent sovereignty of every people over its wealth and natural resources". Relying on the ILC commentary, which observed that some of the members of the Commission were of the opinion that the infringement of the principle of permanent sovereignty in an agreement between the predecessor state and the newly independent state would invalidate such an agreement, the developing states claimed that the principle of permanent sovereignty over wealth and natural resources was a principle of jus cogens. However, lacking the support of the Western states, which maintained that these efforts were 'an attempt to give legal force to mere notions to be found in various recommendatory material emanating from the General Assembly', is not possible to ultimately argue in favor of a jus cogens nature of the permanent sovereignty, see, Schrijver, *supra* note 61, 374-377: arguments to support the jus cogens nature of the PSNR are to be found in the frequent identification of permanent sovereignty as "inalienable" or "full", or in the Arts 25 and 47 of the two International Covenants on Human Rights. However, in light of Art. 53 of the VCLT, which establishes the mechanism for the formation of a jus cogens norm, the PSNR is yet to be accorded a jus cogens nature, failing to be supported by many states "principally concerned". Additionally, also its non-derogable character is questionable. See also UN, Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1978 (not yet in force), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf (last visited 14 April 2011); C. A. Meckenstock, *Investment Protection and Human Rights Regulation* (2010), 70.

The UN Resolutions,⁶⁵ indeed, do not consider the Falklands/Malvinas islanders as entitled to self-determination; rather, the “Question of the Falkland Islands” is portrayed as a “special and particular colonial situation, which differs from others in light of the sovereignty dispute”⁶⁶. The Resolutions confirm the dominant approach among the states. The GA Resolution no. 2065 (XX) of 16 December 1965,⁶⁷ whilst calling on the two Governments to peacefully settle a dispute “covered by the process of decolonization of non-autonomous territories”⁶⁸, also invites them to take into consideration the *interest* - not the *will* - of the Falklands/Malvinas’ population. The “selfness” of the islanders seems hence rejected. GA Resolutions no. 3160 (1973) and no. 31/49 (1976) follow and strengthen this line. Particularly, Resolution 31/49 is decisive. Paragraph 4 of the Resolution⁶⁹ requires the *two states* to refrain from taking decisions or actions that would unilaterally modify the Falklands/Malvinas’ condition, before any agreement between them is reached. Apparently, by calling on the “two states” to refrain from the “unilateral modification” of the circumstances, the Resolution links the event of the “modification of the circumstances” to the sole conduct either of Argentina and the UK (two parties), possibly suggesting that no other sovereign and legitimate claim over the Falklands/Malvinas could effectively alter the Islands’ situation.

⁶⁵ GA Res. 2065 (XX), 16 December 1965; GA Res. 3160 (XXVIII), 14 December 1973; GA Res. 31/49, 1 December 1976; GA Res. 37/9, 4 November 1982; GA Res. 38/12, 16 November 1983; GA Res. 39/6, 1 November 1984; GA Res. 40/21, 27 November 1985; GA Res. 41/40, 25 November 1986; GA Res. 42/19, 17 November 1987; GA Res. 43/25, 17 November 1988.

⁶⁶ Special Committee on Decolonization, ‘Special Committee on Decolonization recommends general assembly reiterate call for resumption of negotiations over Falkland Islands (Malvinas)’, GA/COL/312 (24 June 2010) available at <http://www.un.org/News/Press/docs/2010/gacol3212.doc.htm> (last visited 21 April 2011): “after hearing the petitioners on the question of the Falkland Islands as well as a statement by the Foreign Minister of Argentina, the Special Committee on Decolonization recommended that the General Assembly reiterate its call for direct negotiations between Argentina and United Kingdom over that Non-Self-Governing Territory”. The Committee stressed the content of its draft resolution approved by consensus on the issue, see Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc A/AC.109/2010/L.15, 18 June 2010.

⁶⁷ GA Res. 2065(XX), 16 December 1965.

⁶⁸ G. Cataldi, ‘L’Assemblea Generale delle Nazioni Unite e la controversia sulle Falkland/Malvinas’, in N. Ronzitti (ed.), *La questione delle Falkland-Malvinas nel diritto internazionale* (1984), 79.

⁶⁹ GA Res. 31/49, 1 December 1976, para 4.

Argentina, on this basis, has constantly denounced the presence and activity of the British firms in the North Falklands/Malvinas Basin as a unilateral conduct unlawfully impairing the circumstances in the region.

As for the states' practice, the 9th Meeting (June 2010) of the Special Committee on Decolonization, whilst recommending the General Assembly to reiterate the call for resuming negotiations, summarizes the various arguments and positions of the (specially interested) states.⁷⁰ The majority of the Latin American states, together with the Group of 77, support the Argentine argument. In particular, Cuba refers to the territorial integrity of Argentina as well as to the interests of the islanders, which the UK should respect also by reentering into substantial negotiations. Similarly, Uruguay, Mexico, Bolivia and Venezuela express their view in favor of Argentina's legitimate rights over the Falklands/Malvinas, describing the British conduct as preserving an "anachronistic colonial situation"⁷¹. The declarations of those states reveal the general opinion that Argentina and the UK are the sole relevant parties to this controversy. Specifically, the position of the islanders, their peoplehood⁷² and their right to self-determination do not clearly emerge as a possible counterclaim. The only exception in the Meeting is Sierra Leone, whose statement reiterates the country's support for the islanders' basic human right to self-determination, considering that any solution that failed to embrace their aspiration would be inconsistent with Arts 1(2) and 73(b) of the UN Charter.⁷³

On this account, Argentina and the UK are considered as the sole parties which can validly claim the title to the Falklands/Malvinas' territory. This means also that the states are the two sole parties upon which sovereignty - and its corollaries - could be divided, and this involves

⁷⁰ Special Committee on Decolonization, *supra* note 66.

⁷¹ Special Committee on Decolonization, *supra* note 66.

⁷² S. K. N. Blay, 'Self-determination Versus Territorial Integrity in Decolonization', in M. N. Shaw (ed.), *Title to Territory* (2005), 448-449: "Falkland Islands may be described as 'plantations' of the colonial administration because they are predominantly populated by citizens or subjects of the colonial power who settled in the colonial territories. International law is unclear as to whether such residents are entitled to self-determination. [...] It is not clear from the text of art. 73 UN Charter whether the provision sets up a distinction between people and inhabitants. [...] The General Assembly's approach to the claims of self-determination for the territories of Gibraltar and the Falkland Islands suggests that these resident do not constitute a people and are not entitled to exercise the right to self-determination". See also, UN GA, *supra* note 23.

⁷³ UN GA, *supra* note 23.

separating the title to territory from the title to natural resources is not *per se* unlawful in cases of contested sovereignty. More precisely, the exploitation of natural resources located in a territory whose sovereignty is disputed is lawful to the extent that such exploitation is agreed upon by all the parties legitimately advancing a sovereign claim.

It is in this light that the Joint Declaration for Hydrocarbons will be analyzed. Through this document the states suspended their sovereignty dispute - without, however, obliterating it - and designed an instrument for a cooperative relationship in the exploitation of hydrocarbons situated in a Special Co-operation Area (in the South West Atlantic). The Declaration, which was terminated in 2007,⁷⁴ offers a parameter to evaluate the effectiveness of political agreements as means to regulate resources' exploitation in territories where sovereignty is contested.

F. The Alternatives for Regulating the Access to the Falklands/Malvinas' Oil Deposits

I. The Cooperative Agreement: the 1995 Joint Declaration for Hydrocarbons

Under the Joint Declaration for Hydrocarbons⁷⁵, the States committed themselves to jointly explore and exploit hydrocarbons in a Special Co-operation Area, operating under the control of a Joint Commission. The Declaration followed the Joint Statement issued in Madrid in 1989, which established the so-called "Formula for Sovereignty"⁷⁶: the Formula aimed to lead the parties to a progressive normalization of their relationship, and

⁷⁴ The Argentine decision to terminate the Agreement depends upon the fact that the Special Area created through the Declaration were found devoid of exploitable resources. Presently, as mentioned, the resource-rich zone is located in the North Falklands Basin.

⁷⁵ 'Declaration of the British Government with Regard to the Joint Declaration signed by the British and Argentine Foreign Ministers on Cooperation over Offshore Activities in the South West Atlantic' (27 September 1995) available at <http://www.falklands.info/history/95agree.html> (last visited 21 April 2011) [Joint Declaration for Hydrocarbons].

⁷⁶ The 'Madrid Formula' was agreed by Argentina and the UK on 19 October 1989. Accordingly, the countries pursue cooperation while accepting that the position of either side on sovereignty over the Falklands remain reserved. See, K. Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia* (2004), 152.

indeed resulted in cooperative arrangements on both fisheries (1990) and hydrocarbons (1995).⁷⁷

The Declaration is an interesting model for studying the outcomes of a cooperative approach aimed to separating the attribution of the title to the territory from the attribution of the title over natural resources.

Considering its content, one should note that a safeguard clause opens the declaration: accordingly, nothing in the document shall be interpreted as changing, or recognizing, the UK's or Argentina's claims over "sovereignty or territorial and maritime jurisdiction over the Falkland Islands". Similarly, no third party's activity carried out as a result of the agreement should constitute a basis for supporting, affirming, or denying such claims. Art. 2 continues stating that the two Governments "agreed to cooperate and to encourage offshore activities in the South West Atlantic", specifying that "activities" stands for "exploration and exploitation" of hydrocarbons. The document warrants the establishment of a Joint Commission, composed of delegates of both States, in charge of supervising the business activities, submitting recommendations and proposing standards for the protection of the environment, by coordinating the actions in the "Areas for Special Cooperation". These areas shall be controlled by a sub-committee, which will, among other tasks, "encourage commercial activities in each tranche" and "promote the exploration for and the exploitation of hydrocarbons in maritime areas of the South West Atlantic subject to a controversy on sovereignty and jurisdiction". The Declaration concludes by affirming that "the parties will create the conditions for substantial participation in the activities by companies from the two sides", will share information concerning exploratory and exploitative actions, and will refrain from any conduct possibly frustrating the carrying out of hydrocarbon developments. Finally, the declaration is portrayed as "an interdependent whole", for the implementation of which the Governments shall co-operate "throughout the different stages of offshore activities undertaken by commercial operators".

The political nature of the Declaration is self-evident and it constitutes both the strong and the weak point of this document.⁷⁸ Although, in fact, a

⁷⁷ R. R. Churchill, 'Falkland Islands: Maritime Jurisdiction and Co-operative Arrangements with Argentina', 46 *The International and Comparative Law Quarterly* (1997) 2, 463.

⁷⁸ The preponderant political nature of the Document nullifies any binding inference from it. For instance, in the Annexed Declaration of the British Government, it is declared that "appropriate legislation will be introduced in order to take account of the Joint Declaration", thereby conveying the idea of the normative and binding value of

political nature may prove useful from the point of view of the implementation process, a major disadvantage is shown in its transitory character. The Declaration, indeed, created a cooperative regime deemed to remain stable and self-sustaining insofar as the interests and choices of the parties converged.⁷⁹ Whilst from a short-term perspective this solution may prove effective to avoid disputes, from a long-term standpoint it could by no means guarantee peaceful relations, as the current events in the Falklands/Malvinas show. Indeed, the Declaration failed immediately after the finding that no exploitable resources were available in the Special Cooperation Area: this material fact, together with the political essence of the instrument, caused - and allowed for - the withdrawal of Argentina, leading to the termination of the agreement.

Through the Joint Declaration, Argentina and the UK regulated the operational aspects of their cooperative relationship on the exploration and exploitation of the Falklands/Malvinas' hydrocarbons. Furthermore, the Declaration served as a basic text on which also the licenses with third, commercial parties could rely, so that the two states' business activities are not affected by their failure to settle their sovereignty and jurisdiction dispute. Yet, the interplay between the title to territory and the PSNR seems to suggest that the former is the basis for the enjoyment of the latter, and this is entirely consistent with the principle of non-interference and the concept of domestic jurisdiction,⁸⁰ as well as the sovereign equality of states.⁸¹ The Declaration, however, is to be interpreted as dividing the PSNR between the two sole parties upon which sovereignty could reside: as para. 4 of the Resolution 31/49 may suggest, the dispute over the Falklands does

the instrument concerned, capable of prompting an adaptation process in the national legal system. However, reading the opening passage of the Annexed Declaration one could note that the 1995 Agreement is referred to as an "understanding" reached with Argentina on "cooperation over offshore activities". Thus, also the legislative arrangements mentioned in the Annexed Declaration appear as a *motu proprio* initiative of the UK, neither aimed to implement the Declaration, nor emanating from the parties' intention to create legal obligations upon themselves. More precisely, such legislation seems intended to regulate the activities of the two states' corporations and commercial partners in the Falklands. See Joint Declaration for Hydrocarbons, *supra* note 75.); on the UK Constitutional Rules see E. Denza, 'The Relationship between International and National Law', in M. D. Evans (ed.), *International Law*, 2nd ed. (2006), 433-435.

⁷⁹ In fact, by discovering that no exploitable resources were present in the Special Area, the goal set in the Document was exhausted and Argentina terminated it.

⁸⁰ Art. 2(7) of the UN Charter.

⁸¹ Art. 2(1) of the UN Charter.

not seem to involve any other (state) party.⁸² In addition, the Resolution urges the states to avoid any “unilateral modification” of the circumstances in the Islands, indirectly conveying the idea that a modificatory, but bilateral, agreement may respect the GA recommendation, not affecting any other legitimate claim.

Two conclusions can thus be drawn. First, the Joint Declaration provides evidence that the title to territory and to natural resources may *in the practice* be treated separately, and that this is legitimate as long as all the parties possibly entitled to advance a sovereign claim over the territory are involved;⁸³ secondly, the Joint Declaration illustrates the limits of a cooperative model.

⁸² Considering the State Actors, as noted, it does not seem that any other member of the international community could validly advance any sovereign claim over the Falklands. Either considering the national statements at the Decolonization Committee and the traditional approach to the issue in the UN Resolutions, it appears rather uncontroversial that the dispute is involving only Argentine and UK. See, UN GA, *supra* note 23.

⁸³ See, GA Res. 31/49, para. 4; A final instrument according to which the separation of the title to territory and to natural resources in the Falklands/Malvinas may be interpreted is the UN Convention on the Law of the Sea (1982), to which both the UK and Argentina are parties. Two assumptions could be proposed in this regard. Either the UK-Argentina Joint Declaration regulating the access to natural resources is favored by the UNCLOS; or, the Declaration fails to meet its requirements. The answer depends upon how we interpret the aim of the Convention, either as calling for a negotiation effectively capable to resolve the subject-matter of the dispute (sovereign title), or as deeming it sufficient to cope with one of its corollaries (access to natural resources), provided that an agreement is reached. Evidently, it is only in the second case that the Declaration fulfills the UNCLOS call. The Convention establishes that islands are entitled to the same maritime zones as other land territories (Art. 121). Furthermore, it explains that the State of which the island forms part of, has sovereignty over its territorial sea and holds sovereign rights for the purpose of exploring it and exploiting its natural resources; this, in relation both to the EEZ and to the Continental Shelf, both of which extend up to 200nm from the baseline from which the territorial sea is measured (Arts 55-57, 74 and 76-77, 83). The Convention, moreover, requires the parties involved in a dispute to peacefully settle it, to achieve an equitable solution (Arts 74 and 83). Arguably, a joint cooperation agreement may provide the “equitable solution” called for in the Convention. Indeed, the case of the Falklands shows the intention of Argentina and UK to equally share the access to the resources and thereby balance their condition from that perspective. Yet, such agreement allowed them to suspend their conflict but not to settle it. In fact, the dispute involving Argentina versus the UK has been worsening during the last months, giving evidence of the volatility of such agreements and the ensuing unstable interstate relationships that they may create. United Nations Convention on the Law of the Sea, 10 December 1982), 1833 U.N.T.S., 3; In addition, one should note that the

Indeed, the deterioration of the UK-Argentine relationship shows that the Declaration was not an effective tool for governing the concurring, economic interests of two states disputing over sovereignty. The Document established only an “interim regime”, to be overturned at the change of the parties’ interests - and this is exactly what happened when oil deposits were discovered in the North Falklands/Malvinas Basin. Furthermore, the Declarations have a political, thus non-binding character: hence, although it is in the parties’ interest to resume negotiations and reach, eventually, a settlement of the dispute, this voluntary element seems absent and there is no effective international law norm to force its materialization.⁸⁴ Arguing that the states are under an obligation to negotiate is still not plausible, since the formally non-binding nature of the GA Resolutions prevents this conclusion. Too many economic interests are intertwined with the historical claims of the states, for them to peacefully negotiate upon a reallocation of rights and duties.

II. The UK and its Unilateral Activity in the Falklands/ Malvinas: What are the Implications?

As observed, a number of English corporations are unilaterally accessing the natural resources of the Falklands/Malvinas. Obviously the UK is persuaded of the legitimate nature of their activity, which it justifies on the basis of its sovereign claim over the Islands. However, the status of contested sovereignty that characterizes the Falklands/Malvinas does not allow for a simplistic solution.

Indeed, the situation must be analyzed also from the Argentine standpoint. Argentina holds an equally valid sovereign claim over the

UN Special Rapporteur on Shared Natural Resources recently suggested at the 62nd ILC Session not to pursue any further the topic of oil and gas, being the matter bilateral in nature, as relying on the agreement of the parties. The recommendation of the UN Rapporteur that “the Working Group decide that the topic of oil and gas will not be pursued any further”, is noteworthy. According to Murase, this outcome expresses a general trend in the international community, which is either against a universal international rule and in favor of interstate, bilateral, cooperative agreement mechanisms, as for the management of oil and gas reserves (point C). The UNCLOS is interpreted in this light. See, International Law Commission, Shared Natural Resources: Feasibility of Future Work on Oil and Gas, UN Doc. A/CN.4/621, 9 March 2010.

⁸⁴ None of the parties will presumably decide to bring the case before an international Court or Arbitration, as none would run the risk of ultimately losing the possibility to assert its rights over the Islands’ resources.

Islands, and the UK unilateral conduct might permanently affect the substance of Argentine rights. To clarify, one should distinguish between the impact that a violation might have on the “title to territory”, from the impact that a violation might have on the “title to (exhaustible) natural resources”. In terms of damages and reparations, the two situations are substantially different. Having access, and therefore exploit, the oil deposits of the Falklands/Malvinas means that the reservoir of this non-renewable resource is progressively depleted. Such a damage does not allow for any reparation or restitution in the future - i.e.: the *status quo ante* cannot be restored - , and the title to natural resources that might belong to Argentina is therefore irreversibly altered - or, rather, nullified. A violation of the title to territory, on the contrary, may be judicially ascertained and the injured state may be entitled to reparations. After that, the title is restored to the legitimate sovereign, and no irreversible damage occurs.

As a consequence, the unilateral behavior performed by the UK may be considered by far unlawful. As it not only contravenes para. 4 of the GA Resolution 31/49, explicitly calling the parties to refrain from unilateral modification of the situations in the Falklands/Malvinas, pending the contestation over sovereignty;⁸⁵ but also aggravates the sovereignty dispute,⁸⁶ by having a permanent effect on the title to natural resources.

Although being mainly a case of contested sovereignty, it is on its corollary - namely the title to natural resources - that the most significant and immutable effects of the dispute materialize. Arguably, the legitimacy of the Argentine sovereign claim suggests that it is entitled to have the Falklands/Malvinas’ natural resources unaffected - meaning unexploited and non-exhausted - by others. This results from a negative interpretation of the permanent sovereignty over the Falklands/Malvinas’ resources, to which both Argentina and the UK are entitled, insofar as a formal and individual

⁸⁵ This statement needs to be considered in light of the non-binding nature of the GA Resolutions.

⁸⁶ The International Court of Justice whilst considering the request for provisional measures in the *Costa Rica v. Nicaragua* case, indicates at para 86(3) that “Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.” Although the case of the Falklands/Malvinas is not before the Court, this recent statement underlines that, where sovereignty is disputed, the claiming parties should avoid behaviors that might cause irreparable prejudices, so that the *status quo ante* cannot be restored. See, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for Indication of Provisional Measures, 8 March 2011, ICJ Press Release.

sovereign power is identified. Furthermore, to legitimately dispose of the right – i.e.: the right to use the natural wealth and resources of the Falklands/Malvinas - , the UK should be entirely entitled to it; conversely, the contested nature of the sovereign title and, consequently, of its corollary, pinpoints that the right at hand is not incontrovertibly vested in the UK.

This reasoning is significant in prospective terms. Indeed, assuming that the dispute is settled either by conferring the sovereign title to Argentina, or by reaching an agreement between the parties, the Argentine title to natural resources seems irreversibly impaired, depriving thereby the Argentine state of one of the fundamental attributes of sovereignty.

III. A Tentative Option: The Condominium

The Joint Declaration effected a separate treatment of the title to territory and to natural resources; however, it revealed inconclusive and unstable outcomes, which are not encouraging as to the effectiveness of cooperative model to address the regulation of economic interests, within the Falklands/Malvinas contested-sovereignty area. Yet, starting from the assumption that the *Argentina v. UK* dispute could not be settled by exclusively imputing the sovereign status to one party, since the states evidently lack the will thereof, the Joint Declaration regulated the most fundamental corollary of the dispute – the access to natural resources – confirming thereby its limited scope.

In a more politically challenging alternative, the complex set of rights and duties associated to the Falklands/Malvinas' sovereignty could have been divided upon the states, being uncontested that no other third party may legitimately advance a sovereign claim over the Islands.⁸⁷ Such a result may, for instance, be reached through the phenomenon of condominium.

Under a condominium, two or more states equally exercise sovereignty with respect to a territory and its inhabitants.⁸⁸ Generally, it is

⁸⁷ On the concept of “shared sovereignty”, see S. D. Krasner, ‘The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law’, 25 *Michigan Journal of International Law* (2004) 4.

⁸⁸ M. N. Shaw, *International Law*, 6th ed. (2008), 228-229; V. P. Bantz, ‘The International Legal Status of Condominia’, 12 *Florida Journal of International Law* (1998) 2, 77. The author argues that in international law a number of definitions of ‘condominium’ do exist: “According to Lauterpacht, a territory subject to a condominium is clearly under a division of sovereignty, or joint sovereignty, or both. For Arrigo Cavaglieri, there are many examples where delineating a border would have caused so many problems that it was impossible for the interested states to reach

assumed that the co-owners act together, avoiding unilateral (legal) actions⁸⁹ that could affect the whole ownership;⁹⁰ moreover, as specified by the International Court of Justice in the *El Salvador v. Honduras* case, a condominium “being a structured system for the joint exercise of sovereign governmental powers over a territory could be created both by agreement and as a juridical consequence of a succession of states”⁹¹. However, in the *El Salvador v. Honduras* case, the Court’s decision to recognize the joint sovereignty of the three coastal states of Nicaragua, El Salvador, and Honduras over the waters of the Gulf of Fonseca beyond the three-mile territorial sea, was based on “the historic character of the Gulf waters, the consistent claims of the three states involved, and the absence of protest from other states”⁹². In the case of the Falklands/Malvinas, on the contrary, the situation is further complicated by the lack of consistency in the states’ claims over time, as well as by the islanders’ assertion of the British sovereign power over the territory. In fact, whilst the Joint Declaration is a mere political document that does not alter the legal status of the territory, a condominium would imply the establishment of a legal regime and the formal attribution of sovereignty to both the UK and Argentina, an outcome which is likely to be opposed by the population. Yet, the choice for a condominium administration would finalize this dispute and dodge the repercussions of the unilateral conduct of the UK. In addition, the status of

agreement. Under such circumstances, the territory was put *pro indivisio* under the contesting powers’ joint authority. And Lassa Oppenheim believes that a condominium is a “piece of territory consisting of land or water... under the joint tenancy of two or more States, [with] these several States exercising sovereignty conjointly over it, and over the individuals living thereon”. Fauchille argues that one can find cases of joint ownership, condominium or co-imperium, other than international servitudes, where two sovereignties jointly exercised authority over the same territory. For Max Sorensen, “some territories have been subject to a division of authority between two or more states, [and] the most frequent form of this kind of divided authority over the same territory is termed ‘condominium’ or ‘coimperium’”. Finally, for Marcel Sibert, there is a condominium when two or more states together exercise joint sovereignty on the same territory, and such sovereignties mutually limit their activities, at least in principle, on the grounds of the legal equality. In the nineteenth century, A. G. Heffter noted that two states could also exercise divided or undivided sovereignty over a foreign territory (condominium), while Alphonse Rivier noted that a territory or a portion thereof, whether land or water, could belong *pro indivisio* to two or more states” (89-91).

⁸⁹ Shaw, *supra* note 88, 228-229.

⁹⁰ Bantz, *supra* note 88, 77-151.

⁹¹ *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, Judgment, ICJ Reports 1992, 601.

⁹² Shaw, *supra* note 88, 230.

the parties in respect of the Islands would be equalized, reaching a politically as well as legally valuable result.

Nevertheless, this option seems unlikely to be favored by the states. None of them is in fact willing to compromise over its claim for sovereignty, and given the urgency of issues related to demand, supply, and control of limited energy sources, the room for negotiations seems more and more confined.

G. Conclusions

This contribution attempted an analysis of the Falklands/Malvinas' case from the perspective of the exploitation of natural resources. The overarching question on which the focus is shifted, is whether it is possible to uncouple the title to territory from the title to natural resources, which constitutes the key interests of both Argentina and the UK in the Islands. Starting from the *de facto* assumption that the controversy between Argentina and the UK for sovereignty over the Islands cannot be realistically solved by imputing the title to territory to one of the two states, it is argued that two other paths remain available in order to access the oil deposits located in the North Falklands/Malvinas Basin.

The first option is a cooperative agreement: evidently, Argentina and the UK already pursued this solution when concluding the 1995 Joint Declaration for Hydrocarbons. This attempt, however, failed with the withdrawal of Argentina in 2007. Most probably, the reasons for this failing outcome are to be found in both the political - that is, non-binding - nature of the Declaration and in the finding that no exploitable resources were available in the Special Cooperation Area established through the document. Nonetheless, the Joint Declaration is an interesting model, which shows that uncoupling the title to territory from the title to natural resources is not *per se* unlawful. Rather, the document demonstrates that a separate treatment of sovereignty and its corollary complies with international law to the extent that all the parties that hold a legitimate sovereign claim are involved.

The second option to accessing the oil deposits in the Falklands/Malvinas' seabed is the unilateral action of each party. Yet, this corresponds to the current conduct of the UK in the Falklands/Malvinas: English corporations are indeed performing their activity in the North Falklands/Malvinas Basin, whilst further investments are urged. The compatibility of this conduct with international law is doubted. It is argued that the Argentine title to natural resources might be permanently affected by the English (mis)use of an exhaustible natural resource as oil. In

addition, as the sovereignty over the Islands is contested, the UK is yet to be vested with the right to dispose of the natural wealth and resources of the Falklands/Malvinas according to international law.

The case of the Falklands/Malvinas is the story of an endless “struggle” between Argentina and the UK, whose ancient roots makes it unlikely to be settled even in the long run. Furthermore, the present conduct of the UK seems to aggravate the status of the dispute by irreversibly impairing Argentina’s title to natural resources. Although, being an interesting case of a separate treatment of title to territory and to natural resources, the case of the Falklands/Malvinas provides evidence that violations of the latter might be much more problematic than violations of the title to territory, not allowing for the *status quo ante* to be restored.

Conflicts over Protection of Marine Living Resources: The ‘Volga Case’ Revisited

Md. Saiful Karim*

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Abstract

Non-traditional maritime security concerns have become more important than ever in the post-Cold War era. Naval forces of most developed countries are more concerned about these threats than conventional war. One of the main maritime security issues for many countries in the world is illegal, unreported and unregulated (IUU) fishing in the marine area. With these burgeoning issues comes the potential for a large number of disputes involving international law. In early 2002, a long-line fishing vessel under a Russian flag – the Volga, was detained by Australian authorities a few hundred meters outside the Exclusive Economic Zone of Australia’s Heard and McDonald Islands in the Southern Ocean. The vessel was reportedly engaged in illegal fishing. This incident gave birth to litigation in international and Australian courts. Apart from these cases, Russia also announced separate litigation against Australia for violation of Articles 111 and 87 of the United Nations Convention on the Law of the Sea (UNCLOS). Considering the outcome of these cases, this article critically examines the characteristics of litigation as a strategy for pacific settlement of disputes over marine living resources. Using the Volga Case as an example, this article explores some issues related to the judicial settlement of disputes over marine living resources. This article demonstrates that the legal certainty of winning a case may not be the only factor influencing the strategy for settlement of an international dispute.

A. Introduction

The Asia-Pacific region hosts some of the busiest sea routes in the world. More than half of the global annual merchant fleet tonnage traverses the Asia-Pacific waters.¹ The economy of many countries in the region relies heavily on marine living and non-living resources. Maritime security has emerged as one of the main issues in the discourses of bilateral and multilateral relations of the Asia-Pacific countries. The region is now facing a great number of emerging maritime security threats including *inter alia* piracy, terrorist activities; illegal and unauthorized fishing; human trafficking and migrant smuggling using sea routes; environmental pollution; proliferation of weapons of mass destruction using sea routes; health security, and the testing of nuclear weapons in the areas in and around the sea.

¹ J. F. Bradford, ‘The Growing Prospects for Maritime Security Cooperation in Southeast Asia’, 58 *Naval War College Review* (2005) 3, 63, 63.

Australia is also facing numerous maritime security threats.² One of the main maritime security issues for Australia is the illegal, unreported and unregulated (IUU) fishing in its vast marine area.³ Consequently the Australian Government has responded to these issues with a very stringent legal framework.

IUU fishing is one of the main threats to the existence of commercially valuable and vulnerable Patagonian Toothfish in the remote areas of Southern Ocean. Although several regional and international organizations are working to stop the poaching of Patagonian Toothfish in the region, enforcement problems make it difficult to stop this illegal practice.⁴ The high market value is one of the main contributing factors to IUU fishing of Patagonian Toothfish. Remoteness of the fishing ground makes surveillance and enforcement very difficult. Both of these factors provide ideal circumstances for IUU fishing. This situation makes the work of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), established under the framework of the Convention for the Conservation of Antarctic Marine Living Resources,⁵ largely ineffective.⁶ It has been estimated that one third of the total catch in the CCAMLR area in the late 1990s was IUU.⁷ Within the CCAMLR region,

² “The Australian Government recognises the following maritime security threats to Australia's national interests: Illegal exploitation of natural resources; Illegal activity in protected areas; Unauthorised maritime arrivals; Prohibited imports/exports; Maritime Terrorism; Piracy; Compromise to Bio-security [and] Marine pollution.”, Australian Government – Border Protection Command, ‘Maritime Security Threats’ (2007) available at <http://www.bpc.gov.au/site/page5777.asp> (last visited 10 March 2011).

³ “Australia's national interests are threatened by the illegal exploitation of natural resources in its maritime domain. This includes: Unauthorised foreign fishing undertaken by foreign fishing vessels in the Exclusive Economic Zone; Operations by vessels in direct support of foreign fishing vessels such as the transfer of catches at sea; illegal or unsustainable practices by domestic fishermen; The removal or destruction of wildlife for illegal purposes [and] Activities that cause unlawful damage to the ecosystem.”, *id.*

⁴ A. J. Oppenheim, ‘The Plight of the Patagonian Toothfish: Lessons from the Volga Case’, 30 *Brooklyn Journal of International Law* (2004) 1, 293, 295.

⁵ Convention for the Conservation of Antarctic Marine Living Resources, opened for signature 1 August 1980, 1329 U.N.T.S. 47 (entered into force 7 April 1982).

⁶ M. Lack & G. San, ‘Patagonian Toothfish: Are Conservation and Trade Measures Working?’, 19 *The TRAFFIC Bulletin* (2001) 1, 15, 15.

⁷ *Id.*

the water surrounding Australia's Heard and McDonald Island is facing serious threat of IUU fishing.⁸

In early 2002, a long-line fishing vessel under Russian flag – the *Volga* was detained by the Australian authorities a few hundred meters outside the Exclusive Economic Zone (EEZ) of Australia's Heard and McDonald Islands in the Southern Ocean. The vessel was reportedly engaging in IUU fishing. This incident gave rise to several instances of litigation⁹ in international and Australian courts. Moreover, Russia also hinted at separate litigation against Australia for violation of Articles 111 and 87 of UNCLOS.

This article intends to critically examine the different features of litigation as a strategy for settlement of international disputes. It demonstrates that the legal certainty of winning a case may not be the only factor influencing the strategy for settling international disputes. The article submits further that the international legal system, with all its shortcomings, has a modest potential to handle emerging disputes over marine living resources. This article is divided into seven parts. The first part introduces the structure and content of the article. Part 2 of the article gives a brief idea about the jurisdiction of the international and national courts for settlement of disputes over marine living resources. Part 3 describes the facts of the *Volga Case*. Part 4 examines different critical legal issues involved in the settlement of the *Volga Case*. Part 5 explores the issues behind the Russian Federation's decision to not initiate separate proceedings against Australia for violating Articles 111 and 87 of UNCLOS. Part 6 of the article summarizes the lessons learned from the *Volga Case* which may be relevant for understanding the characteristics of settlement of future disputes involving other maritime security issues. The final part concludes the article with some observations.

⁸ D. J. Agnew, 'The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme', 24 *Marine Policy* (2000) 5, 361, 362.

⁹ For this article litigation includes both a case in national and international court or tribunal as well as international arbitration.

B. Disputes Concerning Protection of the EEZ Fisheries: Jurisdiction of International and National Courts

The EEZ is a *sui generis* regime created by UNCLOS, which extends up to 200 nautical miles from the baseline where the coastal State enjoys sovereign rights over natural resources. UNCLOS provides the coastal State with ‘sovereign rights for the purpose of exploring and exploiting, conserving and managing’ living resources in the EEZ.¹⁰ These rights come with a bundle of duties. The coastal State is obliged to take proper conservation and management measures to save marine living resources from over exploitation. In doing so, the coastal State is required to take cooperative action in conjunction with competent international and regional organizations.¹¹

UNCLOS provides a mixed jurisdiction for settlement of disputes arising from conservation of EEZ fisheries. The primary jurisdiction lies with the national judicial system. The coastal State has the prescriptive and enforcement jurisdiction for conservation of living resources.¹² While exercising this jurisdiction, the coastal State has to adhere to two procedural requirements, namely, the prompt release of vessels and crew upon posting of a reasonable bond or other security¹³ and prompt notification to the flag State of arrest, detention, action and penalty of a foreign fishing vessel.¹⁴

However, international dispute resolution mechanisms may intervene in the process in certain circumstances.¹⁵ Before discussing this matter, it is pertinent to give a brief introduction to the various international dispute settlement mechanisms under UNCLOS. UNCLOS encourages the parties to make peaceful settlement using non-binding means like negotiation and conciliation. In cases where parties fail to settle their dispute by these non-binding procedures, the Convention introduces some compulsory procedures entailing binding decisions. Article 287 of the Convention gives

¹⁰ United Nations Convention on Law of the Sea, opened for signature 10 December 1982, 1833 U.N.T.S. 3, Art. 56(1) (entered into force 16 November 1994) [UNCLOS].

¹¹ *Id.*, Art. 61(2).

¹² “The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.”, *id.*, Art. 73(1).

¹³ *Id.*, Art. 73(2).

¹⁴ *Id.*, Art. 73(4).

¹⁵ R. R. Churchill & A. V. Lowe, *The Law of the Sea*, 3rd ed. (1999), 447.

the parties the option to choose any one of the following procedures:¹⁶ the International Tribunal for the Law of the Sea (ITLOS/ the Tribunal),¹⁷ the International Court of Justice (ICJ), an arbitral tribunal constituted in accordance with Annex VII,¹⁸ and a special arbitral tribunal constituted in accordance with Annex VIII.¹⁹

In many cases, the primary jurisdiction for settlement of disputes falls on the national dispute settlement mechanism, especially disputes which involve one State and natural or legal person from another country. The most important feature that is of relevance to the present study is the prompt release application procedure of UNCLOS. According to Article 292, the flag state of a detained ship is entitled to apply to any of the above mentioned forums or, if there is no agreement, to ITLOS for prompt release of vessel upon posting a 'reasonable bond or other financial security'.²⁰ Owing to this provision, UNCLOS provides residual jurisdiction to ITLOS while primary jurisdiction remains with national courts. In the *Volga Case*, the Russian Federation invoked the Article 292 procedure.

C. Facts of the *Volga Case*

On 7 February 2002, the Australian naval officials, while conducting naval patrol against IUU fishing of Patagonian Toothfish in the EEZ of the Heard and McDonald islands in the Southern Ocean, boarded a Russian fishing vessel the *Volga* on the basis of a calculation that the vessel was within the EEZ of Australia's Heard and McDonald Island.²¹ Later a more accurate calculation revealed that at the time of first detection of the vessel by the aircraft the vessel was 0.7 nautical miles inside the Australian EEZ

¹⁶ This binding dispute resolution process is subject to a number of exceptions. UNCLOS, Arts 287, 297, also see J. Collier & V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (2000), 92-93.

¹⁷ UNCLOS, Annex vi.

¹⁸ UNCLOS, Annex vii; also see Collier & Lowe, *supra* note 16, 90-91.

¹⁹ UNCLOS, Annex viii; also see Collier & Lowe, *supra* note 16, 91-92.

²⁰ "Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.", UNCLOS, Art. 292.

²¹ *R v Lijo & Others*, Unreported, District Court of Western Australia in Criminal, Blaxell DCJ, WADC\IND\2004WADC0029.doc, 27 February 2004, paras 16-26.

and at the time of first transmission of message from a military helicopter the vessel was 0.5 nautical miles outside the Australian EEZ. The *Volga* was boarded by Australian navy few hundred meters outside the EEZ.²² That means Australian authority failed to give the vessel any auditory or visual signal while it was within Australia's EEZ.

After being apprehended, the Russian vessel was escorted to the Western Australian port of Fremantle. The master and three other crew members of the vessel were detained. Subsequently a seizure notice was served on the master stating that the *Volga* with all its nets, traps, equipment and catch would be forfeited if a notice of claim was not submitted to the Australian Fisheries Management Authority by the owner or possessor. Subsequently, three crew members of the ship were charged with the offence of illegal fishing using a foreign boat in the Australian Fisheries Zone (AFZ). After filing the case, the Australian authorities sold the catch of the *Volga* worth of nearly A\$2 million and held the money in trust with the Australian Government Solicitor. The owner of the *Volga* then instituted proceedings in the Federal Court of Australia to stop the forfeiture of the vessel. In reply to a request from the owner for the release of the vessel pending the legal action, the Australian Authority set a bond of nearly A\$3.33 million²³ which comprised:

1. Value of the vessel including all equipment, fuel and net. (A\$1.92 million)²⁴
2. Potential fines against the 3 crew members (A\$412,500)²⁵
3. A 'good-behaviour bond' for carrying a fully operational Vessel Monitoring System (VMS) as a guarantee for the non-repetition of IUU fishing in the Australian EEZ and observing CCAMLR Conservation measures, until the conclusion of legal proceedings in Australia. (A\$1 million)²⁶

²² *Id.*, para. 31.

²³ *The Volga Case (Russian Federation v. Australia)*, 2002 available at http://www.itlos.org/case_documents/2002/document_en_215.pdf (last visited 24 March 2011), para.49 [The Volga Case].

²⁴ ITLOS, *The Volga Case, Minutes of Public Sitting*, 50 available at http://www.itlos.org/case_documents/2008/document_en_312.pdf (last visited 24 March 2011).

²⁵ *Id.*

²⁶ *Id.*, 50, 52.

As a condition of prompt release, the Australian Authority required information from the vessel's owner relating to the ultimate beneficial owners of the vessel, the names and nationalities of the directors of the owning company, the managers of the vessel's operation, the insurers of the vessel and the financiers of the vessel.²⁷ On the other hand the owner of the *Volga* stated that the bond set by Australia was unreasonable and that a reasonable bond should be no more than A\$500,000.

Against this backdrop, the Russian Federation commenced proceedings against Australia in ITLOS for prompt release of the *Volga* and its crew pursuant to Article 292 of UNCLOS. In the prompt release proceedings, the Tribunal determined whether the bond set by Australia was unreasonable and hence in violation of Article 73(2) of UNCLOS. This main issue gave rise to two other issues: (1) whether non-financial conditions can be imposed as part of the bond; and (2) whether a good behavior bond is justifiable.²⁸ The Tribunal decided that the additional non-financial conditions and the good behavior bond would defeat the object and purpose of Article 73(2) of UNCLOS.²⁹ But the Tribunal rejected the Russian view that the proceeds from the catch, which was held by Australian authority in trust, had to be included in the bond. Finally, the Tribunal decided that the bond should be A\$1,920,000 which was equal to the value of the vessel including all equipment, fuel and net. This bond was still nearly four times higher than the bond that Russia claimed was reasonable.

The Tribunal's decision on the non-financial conditions attracted serious reservations from the academic community. Many experts are of the view that this decision is not in conformity with the objective of conserving the marine living resources.³⁰ I will discuss this matter further in part 4.1 of this study.

²⁷ *Id.*, 53-55.

²⁸ *Id.*, 75.

²⁹ The *Volga* Case, *supra* note 23, paras 85-89.

³⁰ D. R. Rothwell & T. Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Right and Interest', 53 *International and Comparative Law Quarterly* (2004) 1, 171; C. Brown, 'Reasonableness' in the Law of the Sea: The Prompt Release of the *Volga*', 16 *Leiden Journal of International Law* (2003) 3, 621; A. J. Oppenheim, 'The Plight of Patagonian Toothfish: Lessons from the *Volga* Case', 30 *Brooklyn Journal of International Law* (2004) 1, 293; W. Gullett, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgment of the International Tribunal for the Law of the Sea in the '*Volga*' Case (Russian Federation v Australia)', 31 *Federal Law Review* (2003) 2, 395.

There were several decisions regarding the *Volga* in the Australian domestic courts. In these cases, the Australian courts did not implement UNCLOS in its totality, partly because of the conflict between UNCLOS and Australian domestic law. A very important issue arising in the decisions of the Australian courts is the probable violation of the provisions related to 'hot pursuit' in UNCLOS. This issue has been elaborated in part D.II.

D. The Issues of Effective Dispute Resolution and Compliance with International Law

This part briefly examines how far relevant provisions of UNCLOS are implemented in the decisions of the national and international judicial bodies which adjudicated the *Volga Case*. The characteristics of legally sound settlement of disputes in the international law context may be defined by three aspects, namely: obligation, precision, and delegation.³¹ *Obligation* denotes that states and non-state actors are obliged by a concrete set of international rules or commitments.³² *Precision* denotes that the rules are capable to define the conduct of the parties precisely.³³ *Delegation* denotes that third parties have been granted power to intervene in the implementation and dispute resolution process.³⁴

This conceptual lens is immensely important for the examination of the role of national and international courts in ensuring compliance with international law and effective settlement of international disputes. I will try to evaluate how far the test of *obligation*, *precision* and *delegation* has been met by the international and Australian courts in the *Volga Case*. The main aim of this part is to assess how far the *obligation* established in UNCLOS is *precisely* enforced through the court's (*third party*) intervention. In examining the issue, this part surveys two critical legal issues evolved in the *Volga Case* which I have indicated in the previous part: the issue of 'reasonableness of the bond' and the issue of 'legality of hot pursuit'.

³¹ K. W. Abbott *et al.*, 'The Concept of Legalisation', 54 *International Organisation* (2000) 3, 401, 401.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

I. Reasonableness of the Bond and Ensuring the Protection of Marine Living Resources

One of the main stated objectives of UNCLOS is conservation of the marine environment and living resources.³⁵ In this part I examine how far ITLOS has been successful in implementing this objective of the convention precisely.

In its decision, ITLOS observed that imposing a ‘good-behaviour bond’ for carrying a Vessel Monitoring System (VMS) as a guarantee for the non-repetition of IUU fishing in the EEZ and observing the CCAMLR Conservation measures until the conclusion of legal proceedings in Australia is not reasonable within the framework of Article 73(2).³⁶ The Tribunal declined to consider the issues in light of the whole of the Convention but rather used a narrow approach of textual interpretation when interpreting the term ‘reasonable bond or other security’.

Australia argued in the Tribunal that depletion of Patagonian Toothfish is an international environmental concern.³⁷ Australia also presented the Tribunal with the report of the CCAMLR meeting which noted that illegal fishing had seriously depleted the stock of Patagonian Toothfish.³⁸ It was proved by Australia that the *Volga* was illegally fishing in the Australian EEZ and CCAMLR conservation area without a required license. The vessel has violated not only Australia’s national laws enacted in exercise of the country’s sovereign rights under UNCLOS, but also regional conservation measures adopted under the auspices of the CCAMLR.

Unlike its previous decision in the *Monte Confurco Case*,³⁹ the Tribunal has noted the concerns of the global community about the depletion of Patagonian Toothfish in the CCAMLR region. The Tribunal observed:

³⁵ UNCLOS, *supra* note 10, Preamble para. 4.

³⁶ The *Volga Case*, *supra* note 23, 80.

³⁷ ITLOS – Australia, *Statement in Response of Australia*, available at http://www.itlos.org/case_documents/2002/document_en_210.pdf (last visited 24 March 2011), chapter IX.

³⁸ Commission for the Conservation of Antarctic Marine Living Resources, Report of the Twenty-First Meeting of the Commission, CCAMLR-XXI, 4 November 2002, 38, cited in *id.*

³⁹ ITLOS, *The Monte Confurco Case* (Seychelles v. France) (2000) available at http://www.itlos.org/start2_en.html (last visited 24 March 2011), para.93 [*The Monte Confurco Case*].

“The Tribunal takes note of the submissions of the Respondent. The Tribunal understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem.”⁴⁰

However, the end result remained the same. As mentioned earlier, Australia required the owner of the vessel to provide certain information regarding the beneficial ownership of the vessel. Australia in its oral presentation showed an international gang was engaged in organized crime involving illegal fishing in the CCAMLR area under the veil of flags of convenience.⁴¹ But the Tribunal held that:

“The object and purpose of article 73, paragraph 2, read in conjunction with article 292 of the Convention, is to provide the flag State with a mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms. The inclusion of additional non-financial conditions in such a security would defeat this object and purpose.”⁴²

The main reason behind the Tribunal’s decision was that the term ‘bond or other security’ does not include within its ambit any non-financial condition. The Tribunal even rejected some non-financial conditions which were translated into a financial term. Through a narrow interpretation of the term ‘bond or other security’ the Tribunal rejected the respondent’s proposal for a ‘good behaviour’ bond for observation of the CCAMLR conservation measures and carrying a fully operational VMS system to prevent future violations of Australian law and regional conservation measures. The Tribunal was of the view that:

“a ‘good behaviour bond’ to prevent future violations of the laws of a coastal State cannot be considered as a bond or security within the meaning of article 73, paragraph 2, of the Convention read in conjunction with article 292 of the Convention.”⁴³

⁴⁰ The Volga Case, *supra* note 23, para. 68.

⁴¹ ITLOS, *supra* note 24, 45.

⁴² The Volga Case, *supra* note 23, para. 77.

⁴³ The Volga Case, *supra* note 23, para. 80.

This interpretation is mainly based on Articles 73(2), 292, 220(7) and 226(1)(b) of the Convention which use the expressions ‘bond or other security’, ‘bond or other financial security’ and ‘bonding or other appropriate financial security’.⁴⁴ In determining the reasonableness of the bond, the Tribunal did not consider other articles of the convention which refer to the coastal State’s obligation to protect marine living resources. The non-financial conditions and ‘good behaviour bond’ imposed by Australia were necessary for the conservation of the Patagonian Toothfish. It is an obligation of all coastal States under Article 61(2) to ensure the conservation and management of marine living resources. While taking conservation measures, the coastal State is also required to cooperate with sub-regional, regional and global competent organizations. Australia imposed the ‘good behaviour bond’ in exercise of its duty under UNCLOS and as a member of the CCAMLR. Although the Tribunal did not reject the coastal State’s right to impose such conditions outright, it considered these conditions to be unreasonable under Article 73(2) of the Convention.

It is very difficult to understand how a condition that has been imposed in the discharge of a duty of the coastal state under the Convention can be an unreasonable condition for ‘prompt release’ of vessel. This approach is contrary to the objective of the Convention to conserve marine living resources. A treaty must be interpreted in its entirety. Article 72(3) or Article 292 cannot be interpreted in isolation from the other provisions of the convention. While interpreting these articles, other articles of substantive nature i.e. Article 56(1), 61(2), 117 and the preamble of the Convention cannot be ignored.

According to Article 31(1) of the Vienna Convention on the Law of Treaties, 1969 “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”⁴⁵.

As observed by the Permanent Court of Arbitration in Island of Timor Case “[h]ere again, as always, we must look for the actual and harmonious intention of the Parties at the time when they bound themselves”⁴⁶.

⁴⁴ The Volga Case, *supra* note 23, para. 77.

⁴⁵ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, Art. 31(1) (entered into force 27 January 1980).

⁴⁶ *Affaire de l’île de Timor (Pays-Bas, Portugal)* (1914) 11 RIAA 48. *Boundaries in the Island of Timor (Netherlands v. Portugal) (Unofficial English Translation)*, Permanent Court of Arbitration available at <http://www.pca-cpa.org/upload/files/>

However, the Tribunal considered the ordinary meaning of the phrase ‘bond or other security’. According to the International Court of Justice the rule of ‘natural and ordinary meaning’ “is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it”⁴⁷.

Judge Anderson in his dissenting opinion explained how non-financial conditions can be included even within the ordinary meaning of the word ‘bond’. Article 292 of the Convention was based on a draft submitted by the USA. The term ‘bond’, in Article 292 actually means a ‘bail bond’ not a bond in financial sense. This is not an investment dispute.⁴⁸ The case in the Australian domestic court was a criminal case. Imposing non-financial conditions as part of the bail bond is very common in criminal cases. Even restricted interpretation of the term ‘bond’ may allow the coastal State to impose non-financial conditions as part of a reasonable bond. Obviously the Tribunal has the jurisdiction to examine the reasonableness of non-financial conditions, as with the financial conditions. Nevertheless, outright rejection of non-financial conditions is not in conformity with the objectives and purposes of UNCLOS.

II. Hot Pursuit and Compliance with UNCLOS

According to Article 111(4) of UNCLOS, in the case of violation of the coastal State’s law in the EEZ, hot pursuit must start from the EEZ of the pursuing State and commence after a visual or auditory signal. As described in Part-2 of this paper, the first message from the Australian authority was transmitted while the vessel was on the high sea. The Russian Federation in its prompt release application stated that Australia “was in breach of article 111 of UNCLOS when it boarded the vessel and accordingly apprehended the vessel on the high seas in a manner that was unlawful and contrary to Article 87(1)(a) of UNCLOS”⁴⁹. The Russian Federation requested the Tribunal to take this fact into consideration when

English%20Timor%20Sentence%20edited.pdf (last visited 25 March 2011), vi, para. 3.

⁴⁷ *South West Africa Cases (Ethiopia v South Africa, Libya v South Africa)*, Preliminary Objections, Judgment ICJ Reports 1962, 319, 336.

⁴⁸ D. Anderson, ‘Dissenting Opinion of Judge Anderson’ (2002) available at http://www.itlos.org/case_documents/2002/document_en_219.pdf (last visited 25 March 2011).

⁴⁹ ITLOS – Russian Federation, ‘The Volga - Application for release of vessel and crew of the Russian Federation’ (2002) available at http://www.itlos.org/case_documents/2002/document_en_209.pdf (last visited 25 March 2011), part II, para. 4(b)(vi)(bb).

determining the reasonableness of the bond. However, Australia argued that the Russian Federation “is clearly inviting the Tribunal to pre-judge the merits of any proceedings threatened by the Respondent in relation to the seizure of the *Volga*”⁵⁰. The Tribunal was of the opinion that “matters relating to the circumstances of the seizure of the *Volga* [...] are not relevant to the present proceedings for prompt release under Article 292 of the Convention. The Tribunal therefore cannot take into account the circumstances of the seizure of the *Volga* in assessing the reasonableness of the bond”⁵¹.

The Russian Federation announced that it will initiate a separate proceeding against Australia for violating Article 87(1)(a) and 111 of UNCLOS in the prompt release application. However, Russia did not initiate any such separate proceeding against Australia under the compulsory dispute resolution mechanisms of UNCLOS. Part E of this paper will be dedicated to this issue.

The Australian authority charged three crew members of the vessel with indictable offence under section 100(2) of the *Fisheries Management Act 1991*. The crew members initially submitted an application for a permanent stay of the proceedings in the District Court of Western Australia. The main argument of the petitioners was that the *Volga* was boarded on the high seas, which is illegal under international law and also beyond the powers conferred by the *Fisheries Management Act 1991*. The petitioners contended that as the accused had been unlawfully brought into the jurisdiction it would be an abuse of the Court’s process if the prosecution were allowed to continue the case.⁵²

Section 100 of the said Act makes it an offence for a person to use a foreign boat for commercial fishing without a foreign fishing license within the Australian Fisheries Zone (AFZ). Section 87 of the Act grants power for ‘surveillance and enforcement’ and empowers the authority to pursue persons and boats from a place within the AFZ to place outside the AFZ (high seas). The ‘Hot Pursuit’ provision is not fully consistent with relevant provisions of UNCLOS. Unlike Article 111(4) of UNCLOS, Australian law does not impose any condition that the pursuit cannot be commenced without a visual or auditory signal to stop. Moreover, Australian law also permits pursuit by radar, which obviously may be conducted without a

⁵⁰ ITLOS – Australia, *supra* note 37, para. 57.

⁵¹ The *Volga* Case, *supra* note 23, para. 83.

⁵² R v Lijo & Others, *supra* note 21, para. 2.

visual or auditory signal. Furthermore, under Australian law the officer conducting 'hot pursuit' need not have a prior belief before commencement of pursuit that the vessel violated Australia's law. However, the Australian court held that as 'hot pursuit' was valid under Australian law, the petition for permanent stay of the case was not sustainable. As Blaxell DCJ observed:

“UNCLOS is not part of the municipal Law of Australia [...] and it is self-evident that Parliament did not intend to fully replicate its terms in the Act. There does not appear to be any ambiguity in the relevant provisions of the Act, and it follows that s 87 cannot be construed in a manner which imports any of the requirements of UNCLOS that are not already there. In this regard, the provisions of UNCLOS cannot be used to contradict the unambiguous language of the Act.”⁵³

As mentioned earlier, the owner of the *Volga* initiated a proceeding in the Federal Court of Australia against the forfeiture of the vessel. The petitioner alleged *inter alia* that the boarding and seizure of the vessel was unlawful both under Australian and international law as it was outside the AFZ. But the Court decided that the “offences were committed against the Fisheries Management Act which involved the use and presence of the *Volga* in the AFZ and that by reason of those offences the boat was automatically forfeited to the Commonwealth together with its equipment and catch. The provisions under which that forfeiture was effected are valid. The vessel having become the property of the Commonwealth there was no basis for any relief arising out of the boarding and seizure of it”⁵⁴. The vessel was automatically forfeited when it engaged in illegal fishing in the AFZ, so there was no 'hot pursuit' at all. The court contended that it did not need to take a conclusive decision on whether the 'hot pursuit' was legal in accordance with UNCLOS.⁵⁵

⁵³ R v Lijo & Others, *supra* note 21, para. 37.

⁵⁴ *Olbers Co Ltd v Commonwealth of Australia*, 205 Australian Law Reports (2004), 432, 433.

⁵⁵ *Id.*, 457, 458. See generally: R. Baird, 'Australia's Response to Illegal Foreign Fishing: A Case of winning the Battle but losing the Law?', 23 *International Journal of Marine and Coastal Law* (2008) 1, 95; L. Blakely, 'End of the Viarsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in Its Exclusive Economic Zone', 17 *Pacific Rim Law & Policy Journal* (2008) 3, 677.

E. Why Russia did not sue Australia for Violation of Article 111

As mentioned earlier, the Russian Federation announced separate proceedings for violation of Article 111 and Article 87(1)(a) of the Convention. A ship is entitled to compensation if it “has been stopped or arrested [...] in circumstances which do not justify the exercise of the right of hot pursuit”⁵⁶.

In its prompt release application, the Russian Federation stated that it intended to invite Australia to accept ITLOS’s jurisdiction for a separate proceeding for violation Article 111 of the convention. ITLOS is Australia’s preferred forum pursuant to its declaration under Article 287.⁵⁷ Otherwise, the Russian Federation will refer the dispute to Annex VII arbitration.⁵⁸ However, Russia did not initiate such arbitration. An in-depth discussion of the reasons behind the Russian Federation’s reluctance to take recourse of the UNCLOS dispute settlement mechanism may be important in determining the role of international litigation in settlement of international disputes.

It is rare to use litigation for the settlement of a dispute in international affairs.⁵⁹ What is the motivation of a State behind initiating international litigation is a very important area to focus on. On the other hand it is equally important to know why/when a State makes a decision not to initiate international litigation.⁶⁰ Why Russia did not invoke the compulsory dispute settlement procedure under UNCLOS Part XV is a difficult question to answer. Nevertheless, I will examine two probable factors behind Russian decision including the issue of legal uncertainty and the issue of national reputation.

⁵⁶ UNCLOS, *supra* note 10, Art. 111(8).

⁵⁷ See generally Collier & Lowe, *supra* note 16, 92-93.

⁵⁸ ITLOS – Russian Federation, *supra* note 49, chapter II, para. 25.

⁵⁹ T. D. Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v. United States Dispute* (1989), 47.

⁶⁰ D. D. Fischer, ‘Decisions to Use the International Court of Justice: Four Recent Cases’, 26 *International Studies Quarterly* (1982) 2, 251, 252.

I. Legal Uncertainty

If there is any legal uncertainty, a State may be reluctant to have recourse to international litigation. As observed by one commentator litigation is “at best a zero-sum game and often the outcome is lose-lose”⁶¹. Even in the prompt release application the Russian Federation and the owner of the vessel spent a large amount of money and energy but failed to reduce the bond to an amount which they were prepared to pay.⁶² Ultimately they failed to have the vessel released.⁶³

There were three legal uncertainties regarding the alleged violation of Article 111 of the Convention. First, whether there was any violation of Article 111 at all? Secondly, even if there was a violation, whether the Russian claim would pass the jurisdiction test? This issue arose because of a Russian declaration made under Article 298 of the Convention. Finally, Russia’s standing as a flag State. I will discuss these three issues separately.

1. Legality of Hot Pursuit

Russia alleged that as the first audible signal from the Australian Navy Helicopter was transmitted while the vessel was on the high seas, the ensuing ‘hot pursuit’ was illegal under Article 111(4) of the Convention and hence that Australia violated Russia’s freedom of navigation on the high seas under Article 87(1)(a).⁶⁴

On the other hand, Australia contended that the legality of the ‘hot pursuit’ should be determined in accordance with the whole Article 111, not only on the basis of paragraph 4. It is a requirement for the coastal State to ‘have good reason’ to believe that the vessel had violated its laws. If there is a subjective satisfaction of the ‘pursuing ship/aircraft’ by such practicable means that the vessel is in fact in the EEZ, there is no need for the vessel to actually be within the EEZ. Henry Burmester QC appearing for Australia concluded that “[if] using practicable means, the coastal state considers the vessel to be within the zone, then that is sufficient for a valid pursuit to

⁶¹ A. Serdy, ‘Paradoxical Success of UNCLOS Part XV: A Half-Hearted Reply to Rosemary Rayfuse’, 36 *Victoria University Wellington Law Review* (2005) 4, 713, 715.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ ITLOS – Russian Federation, *supra* note 49, paras 25-31.

commence”⁶⁵. Australian counsel also contended that a pursuit that starts on the high seas just after the vessel escapes from the jurisdiction is legally sound. He came to this conclusion relying on following observation of Hall:

“The reason for the permission [hot pursuit] seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.”⁶⁶

This opinion is based on customary international law which as claimed by Australian counsel is replicated in the 1958 High Seas Convention and 1958 Convention provisions then also replicated in UNCLOS. Liberal interpretation of Article 111(4) of the convention is supported by post UNCLOS writing as well, as observed by Churchill and Lowe:

“Developing technology is making it possible to detect and track offending vessels using radar, sea-bed sensors and transponders, and satellite surveillance. It seems both inevitable and desirable that the conditions for the exercise of the right of hot pursuit be given a flexible interpretation in order to permit the effective exercise of police powers on the high seas.”⁶⁷

However, these calls for liberal interpretation do not necessarily support the Australian position regarding the legality of arresting the vessel on the high seas. If we consider the opinion of Churchill and Lowe, we can come to this conclusion that at best a signal may be given using modern technology while the vessel is within the jurisdiction of the coastal State.

Article 111(1) probably does not allow a legal fiction that a pursuit commenced outside the EEZ was in fact commenced inside the EEZ.⁶⁸ The condition of ‘visual or auditory signal’ in Article 111(4) is a very clear obligation. If it becomes subject to a subjective satisfaction by the coastal State, there is a chance of misuse of the provision. There should be an

⁶⁵ ITLOS, *supra* note 24, 31.

⁶⁶ W. E. Hall, *A Treatise on International Law*, 8th ed. (1924), 309.

⁶⁷ Churchill & Lowe, *supra* note 15, 216.

⁶⁸ The Volga Case, *supra* note 23, para. 64.

objective satisfaction that the vessel is within EZZ. This view is supported by Momtaz:

“Pursuit may only be commenced by a ship or aircraft on government service after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the ship situated in one of the areas of national jurisdiction.

Pursuit must also be commenced immediately following the violation, *before the foreign ship reached the high seas*. The right to hot pursuit is in fact the continuation of a legal act initially entered upon within the limits of the coastal State’s sphere of jurisdiction.”⁶⁹

If the coastal State is allowed to detain a ship on the high seas on the basis of its own subjective satisfaction that the vessel is within EEZ, it may severely undermine the delicate balance established by UNCLOS between the rights of the coastal state and that of the flag state.

2. Jurisdiction

The second legal uncertainty is the question of jurisdiction. Australia stated in its statement in the prompt release proceedings that it would challenge the jurisdiction of Russia, if Russia initiates any substantive proceedings. The Australian argument is mainly based on the Russian deceleration under Article 298(1)(b) of the Convention which gives an option to the States to make exception for any “disputes concerning military activities ... and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3”. There is a link between this Article and paragraph 3(a) of the Article 297 which relates disputes regarding sovereign rights of coastal State with respect to living resources in the EEZ.

Article 298(1) deals with law enforcement activities pertaining to fishing in the EZZ which may not be extended to the high seas.⁷⁰ The Russian application for Annex VII arbitration is not related to the sovereign rights over the living resources in the EEZ or their exercise by Australia, rather it is related to the Russia’s right on the high seas. No country has sovereign rights over the high seas.

⁶⁹ D. Momtaz, ‘The High Seas’, in R.-J. Dupuy & D. Vignes (eds), *A Handbook on the New Law of the Sea, Volume 1* (1991), 383, 411 (emphasis added).

⁷⁰ N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), 313.

The next question is whether Australian hot pursuit for the apprehension and seizure of the vessel can be treated as a military activity. Pursuant to the Russian declaration under Article 298(1), military activities are excluded from compulsory dispute settlement processes. Australia's counsel stated in the oral presentation that Australia retain the right to raise this question in the future if there are any substantive proceedings. According to Natalie Klein:

“It is difficult to assert that the right of hot pursuit and right of visit are not law enforcement activities rather than military activities as both acts involve the enforcement of specific laws. The mere fact that these rights are exercised by military and government vessels does not justify a characterization of ‘military activities’ for the purpose of Article 298.”⁷¹

As mentioned earlier, Australia stated that it would challenge the jurisdiction of Russia, if Russia initiated any substantive proceedings. However, it can be predicted from the above discussion that the jurisdiction would not have been a serious obstacle for Russia had it initiated substantive proceeding for violation of Article 111(4) and Article 87(1)(a).

3. Russia's Standing as Flag State

The last legal uncertainty is Russia's standing as a flag State. Australia proved that Russia did not have actual control on the *Volga*. As observed by Professor James Crawford, appearing as counsel for Australia:

“I have assumed and Australia has assumed, for the purposes of this discussion that Russia is the flag state. For the purposes of your summary jurisdiction in this prompt release case, Australia formally accepts that. But, although we do not question Russia's standing to bring a prompt release application, a special form of application, we reserve the right to argue in any subsequent international proceedings on the merits, that Russia's status as flag state is not opposable to Australia because there is no genuine link between the *Volga* and Russia as required by Article 91(1) of the Convention.”⁷²

⁷¹ *Id.*, 312-313.

⁷² ITLOS, *supra* note 24, 39.

Under international law, an owner has full liberty to choose the flag for his ship, provided he satisfies the registration requirements of the flag state. Consequently, every State has the right to set its own regulation and standards for registration of ships. Nationality of a ship is determined by the flag it flies. UNCLOS imposed a condition of 'genuine link' between the ship and the flag State, without precisely defining the term.⁷³ This seems to be an incomplete provision which has created more problems than it solves. This ambiguous provision has led scholars to interpret the term in their own ways with divergent results. Most scholars have concluded that a mere administrative act such as registration is sufficient to fulfill the condition of 'genuine link'.⁷⁴ Moreover, there is strong support for the opinion that lack of 'genuine link' is not sufficient to refuse nationality of a ship. As observed by ITLOS:

“There is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State. [...] The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States”⁷⁵.

Russian standing as the flag state may not be a problem for Russia in any future substantive proceedings.

Perhaps the main reason behind Russia's decision is not the legal uncertainty, but lies elsewhere. There was no real national interest of Russia in this dispute and the issue may impose a bad impact on the national image of Russia. These issues are discussed in the following parts.

⁷³ UNCLOS, *supra* note 10, Arts 91 and 94.

⁷⁴ A. Khee Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (2006), 47-57.

⁷⁵ *The M/V "SAIGA" (No.2) Case (St. Vincent and Grenadines v Guinea)*, Judgment, 38 ILM (1999) 5, 1323, 1343, para. 82-83; also see decision of the International Court of Justice in the Constitution of the Maritime Safety Committee of *IMCO Case*, ICJ Reports 1960, 150.

II. National Interest and Reputation

An important issue to determine is whether or not Russia had any real national interest behind the *Volga* affairs. As stated by Judge *ad hoc* Shearer in his dissenting opinion in the *Volga Case*:

“It is notable that in recent cases before the Tribunal, including the present case, although the flag State has been represented by a State agent, the main burden of presentation of the case has been borne by private lawyers retained by the vessel’s owners.”⁷⁶

In many prompt release cases the flag State is in fact a ‘flag of convenience’. Where real national interest is involved, the approach of the parties in the proceedings may be totally different. This can be seen by comparing the situation in the *Volga Case* with the *Hoshinmaru Case*.⁷⁷

In the *Hoshinmaru Case*, Japan initiated a ‘prompt release’ proceeding against Russia for release of its vessel *Hoshinmaru*. The Russian authorities detained the vessel in Russia’s EEZ where it was licensed to fish. Although the vessel possessed a fishing license, Russia alleged that one type of fish was substituted for another, in breach of the license. This case differs from *Volga* because the vessel was fishing legally in the Russian EEZ but infringed the conditions of its license.

Unlike the *Volga*, all the crew members of the *Hoshinmaru* including the Master were of Japanese nationality and the vessel was legally and beneficially owned by a Japanese company.⁷⁸ The national interest of Japan was seriously at stake in this case because 19 Japanese crew members of the vessel were imprisoned by the Russian Federation. The interest of Japan in this case was so high that a member of the Japanese legal team was later bestowed with a national honor for “playing an indispensable role in the maintenance of Japan’s *national interests* as an ocean state”⁷⁹.

⁷⁶ I. Shearer, ‘Dissenting Opinion of Judge *ad hoc* Shearer’ (2002) available at http://www.itlos.org/case_documents/2002/document_en_220.pdf (last visited 25 March 2011), para. 19.

⁷⁷ ITLOS, *The Hoshinmaru Case (Japan v. Russian Federation)* (2007) available at http://www.itlos.org/case_documents/2007/document_en_295.pdf (last visited 25 March 2011), paras 27-35.

⁷⁸ *Id.*, para. 27.

⁷⁹ Embassy of Japan in the UK, ‘Japanese Government honours Professor Alan Vaughan Lowe’, (18 December 2008) available at <http://www.uk.emb-japan.go.jp/en/japanUK/decoration/081212lowe.html> (last visited 11 March 2011) (emphasis added).

In this case, as there was serious national interest involved, Japan was represented by a very strong legal team including legal luminaries like Professor Vaughan Lowe. Russia was also represented by a similar legal team including Professor Vladimir Golitsyn, who later became a judge of the Tribunal. As both Japan and Russia had real national interest behind the case both the countries were represented by lawyers retained by the State not private lawyers retained by the shipowner. The situation was totally different in the *Volga* if we compare the oral presentation of Russia with the Australian one. As Australia's national interest was at stake, the country was represented by the senior most government lawyers as well as globally renowned public international law expert Professor James Crawford. On the other hand presentation for Russia was mainly given by private lawyers retain by the shipowner.⁸⁰ The agent of Russia said very little about the prompt release of the *Volga*. Although he gave a brief introduction to the issue in his first presentation, in his second presentation he mainly replied to Australian allegation of Russian inaction as a member of the CCAMLR and as a flag State in conservation of Patagonian Toothfish. His presentation was mainly focused on the Russian future interest not on the *Volga*.

It was quite clearly and convincingly explained in the *Volga Case* that Russia actually had no real control in the *Volga* except providing the flag. The vessel was beneficially own by someone who was not a resident in Russia. The vessel was operated by a Jakarta-based group that was engaged in IUU fishing in the CCAMLR area.⁸¹ This assertion was supported by an affidavit of the Master of the *Volga's* sister ship the *Lena*, which was detained by the Australian authority just before the *Volga*.⁸² Considering the bilateral relations between Australia and Russia, it was very difficult for Russia to start another proceeding against Australia when Russia had no real national interest in the vessel.

In the proceedings for prompt release, counsel for Russia was silent on one issue. They never claimed that the *Volga* was not engaged in IUU fishing in the Australian EEZ. They mainly emphasized the technical issue of the legality of hot pursuit.⁸³ Another interesting point is that no action was taken to challenge the forfeiture of the *Volga's* sister ship the *Lena*. The only difference between the *Volga* and the *Lena* was that the *Volga* was

⁸⁰ Shearer, *supra* note 76.

⁸¹ ITLOS, *supra* note 24, 44-45.

⁸² ITLOS, *supra* note 24, 45.

⁸³ ITLOS, *supra* note 24, 74.

arrested a few hundred meters outside the Australian EEZ. Both vessels were engaged in the same type of activities. As observed by Professor Crawford:

“It seems, with respect, that the shipowner would have nothing to say if there was no doubt about the Article 111 issue, but why should the shipowner be able to rely on Article 111? What virtue is it to the shipowner that it was arrested in one place or another when the substance of the issue against the shipowner is flagrant, repeated, unlawful depredations against an endangered species?”⁸⁴

On the other hand, from the very beginning of the proceedings, Australia presented a substantial amount of evidence in support of its allegation of IUU fishing by the vessel. There was very little moral basis for Russia to initiate proceedings for violation by Australia of Article 111 of the Convention.

Even if the Russian Federation would win the case, its image may be tainted by this case. Russia is not widely regarded as a ‘flag of convenience’ country. But, unfortunately in case of the *Volga*, the Russian relationship with the vessel was no more than a relation of ‘flag of convenience.’ Had Russia initiated new proceedings, Australia would have seriously raised this issue. As a member of the CCAMLR it would have been embarrassing for Russia if unlawful activities of the vessel carrying its flag were revealed and circulated more widely. As mentioned by Professor Crawford “when one commences proceedings, one lays oneself open to criticism”⁸⁵. Even in the *Volga Case* Russia’s performance as a member of the CCAMLR was convincingly questioned by Australia.⁸⁶ Australia’s very comprehensive presentation in the prompt release proceedings warned Russia of the danger of initiating further proceedings on the same issue. Engaging further proceedings on the same issue would have jeopardized Russia’s reputation and image as a member of the CCAMLR and a permanent member of the United Nations Security Council. Perhaps these were the main factors behind Russia’s decision not to sue Australia again on the *Volga* issue.

⁸⁴ ITLOS, *supra* note 24, 76.

⁸⁵ ITLOS, *supra* note 24, 34.

⁸⁶ ITLOS, *supra* note 24.

F. Lessons Learned from the *Volga Case*

There are two remarkable aspects of this case. This case gives us an idea about the role of reputation in framing disputes settlement strategy. Moreover, this case is a good example for examining the effectiveness of the international and national judicial institutions as well as their role in ensuring compliance with international law.

Why the Russian Federation did not initiate a separate case for violation of Article 111 and 87 of UNCLOS against Australia is an important issue to examine for the study of litigation strategy of states in settlement of international disputes. The *Volga Case* showed that whether a country has a strong probability to win a case is not the only factor behind the decision of initiating a case in an international judicial forum. The next question is how this experience may be relevant in other types of maritime security issues? The *Volga* experience may give us some clue as to the reaction of the flag state if a vessel or its crew members are detained for other types of maritime security issues.

For example, we can consider a hypothetical case of suspected terrorism. Under the existing international law it will be very difficult to take action against a foreign vessel on the high seas if a state suspects that the vessel may be used for terrorist activities. A ship which is legally registered in a country may be used for terrorist activities. Only the flag state can take action if there is any suspicion that the vessel may be used for terrorist activities on the high seas. Nevertheless, it is interesting to know that what will be the reaction of the flag state if another country's warship visit and arrest its vessel on the high seas suspecting that the vessel may engage in terrorist activities and in subsequent investigation it reveals that the vessel was in fact preparing for terrorist activities. From a strict legal point of view the arresting state violated the international law. Suspected terrorism is not one of the reasons included in Article 110 of UNCLOS that empowers a warship to visit a foreign ship.⁸⁷ From the experience of the *Volga*, we can assume that it will be very difficult for the flag state to initiate proceedings against the arresting state under the compulsory dispute settlement mechanisms of UNCLOS. Although in the strict legal sense there is every possibility of winning the case, the main influencing factors for the

⁸⁷ See generally: S. Kaye, 'Interdiction and Boarding of Vessels at Sea: New Developments and Old Problems', in R. Herbert-Burns, S. Bateman & P. Lehr (eds), *Lloyd's MIU Handbook of Maritime Security* (2009), 201.

decision of litigation will be political pressure. Like the *Volga Case*, it will be very difficult for the flag State to initiate proceedings against the arresting state if allegations of terrorism against its vessel and crew are proved beyond reasonable doubt. If, in this hypothetical case, the flag state is a flag of convenience, it is more unlikely that the flag state will initiate proceedings against the arresting state under the compulsory disputes settlement procedure of UNCLOS for compensation.

One of the main objectives of resorting to an international institution is attracting the global public opinion to have leverage at the bargaining table.⁸⁸ In a case like the *Volga* or the above mentioned hypothetical case, where serious allegation of illegal fishing or terrorism against a vessel were proved conclusively, international litigation may not be an attractive way for the flag state to gain favorable international public opinion.

G. Concluding Remarks

Although ITLOS may be criticized for not allowing non-financial conditions and the 'good behavior bond', there were some positive developments in the 'prompt release' jurisprudence. Unlike its previous decision in the *Monte Confurco Case*,⁸⁹ the Tribunal did not include the proceeds of catch in the bond. The bond that was set by the Tribunal was far higher than the amount the shipowner was willing to pay. Consequently, the owner failed to obtain the release of the vessel.

On the domestic front, the highest court of Australia confirmed the forfeiture of the vessel⁹⁰ and three crew members also pleaded guilty.⁹¹ However, the problematic aspect of this case is the outright rejection by Australia's domestic courts of the application of UNCLOS as there is a conflict between UNCLOS and domestic law. This is a very important issue which warrants a serious consideration because the sovereign rights in the

⁸⁸ S. Fang, 'The Strategic Use of International Institutions in Dispute Settlement' (2008) available at <http://www.princeton.edu/~pcglobal/conferences/beijing08/papers/Fang.pdf> (last visited 11 March 2011).

⁸⁹ The *Monte Confurco Case*, *supra* note 39.

⁹⁰ The decision of the primary Judge of the Federal Court was confirmed in appeal, *Olbers Co Ltd v Commonwealth of Australia*, 212 Australian Law Reports (2005), 325. An application for Special Leave for appeal to the High Court of Australia was refused, Transcripts of Proceedings, *Olbers Co. Ltd. v. Commonwealth of Australia*, High Court of Australia, Hayne and Callinan JJ, 22 April 2005.

⁹¹ Australian Fisheries Management Authority, 'Illegal Foreign Fishing', 2 *The Fishing Future* (2004) 3, 20, 21.

EEZ provided by UNCLOS to the coastal state is a result of a delicate compromise between the coastal states and the flag states. If domestic courts reject the application of UNLCOS outright whenever there is a conflict between UNCLOS and the domestic law, it will undermine the very spirit of the Convention. However, this approach is not very uncommon in national courts. It should also be noted that, it has been revealed in these cases that some Australian laws are inconsistent with UNCLOS and the Australian domestic court applied its national law.

In the domestic context, implementation of international law in the domestic arena is within the discretion of the executive and the legislature. National courts in a dualist country have very little to do if the executive specifically intends not to implement certain law in the domestic arena. However, non-implementation of an international convention even after becoming a party to the convention is a clear violation of international law.

Nevertheless, this case is an example of internal morality and force of the international legal system. This case indicates that the UNCLOS dispute settlement system, with all its shortcomings, has a potential to handle disputes over conservation marine living resources effectively.⁹² It may seem that there are some technical violations of international law. Nevertheless, the right in question, right of the coastal State to conserve its living resources, was finally upheld. As in the view of the ICJ, “an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question”⁹³. The forfeiture of the vessel and failure of its owner to release the vessel because of the higher amount of bond is arguably justified if we take account of the rights in question, the coastal State’s rights to conservation of a highly vulnerable species. However, that does not mean that Australia’s noncompliance of its international obligations should be taken lightly.

⁹² As observed by Brunnée and Toope, “[t]he primary test for the existence of law is not in hierarchy or in sources, but in fidelity to internal values and rhetorical practices and thick acceptances of reasons that make law – and respect for law – possible”, J. Brunnée & S. Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’, 39 *Columbia Journal of Transnational Law* (2000) 1, 19, 69.

⁹³ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 56, para. 85.

Regulating Information Flows, Regulating Conflict:

An Analysis of United States Conflict Minerals Legislation

Christiana Ochoa & Patrick J. Keenan*

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Abstract

The focus of this paper is the connection between conflict and commercial activity. In particular, it focuses on the ongoing conflict in the Eastern Democratic Republic of Congo (DRC) that is funded, in large part, by the sale of conflict commodities – minerals, metals, and petroleum – that fund violent groups at their source and then enter legitimate markets and products around the world. Recently, attention has turned to how to regulate conflict commerce as a tool for divesting from violent conflict. In the United States, for example, the recently adopted Dodd-Frank Wall Street Reform and Consumer Protection Act include a provision addressing conflict minerals originating from this region. The violent and secretive nature of conflict minerals transactions makes crafting effective regulation and policing strategies challenging. As a result the Dodd-Frank Act, like other domestic and international efforts, is designed in large part to discover, gather and disseminate information about the nature and scale of conflict commodities emanating from the DRC. This paper analyzes this legislation while also discussing a number of other current conflict commerce governance efforts. It observes the difficulty of regulating in the context of conflict and corruption and analyses the use of regulation as a tool for information-extraction, information-forcing and information-dissemination as opposed to its use as a tool for directly proscribing undesirable behavior.

A. Introduction

Modern, large-scale violent conflict is costly. It is costly to human dignity, security and well-being, of course. It is also expensive for the parties to the conflict. Military spending is among the largest budget items of many states. States raise the funds necessary for these expenditures through a number of palatable and less palatable mechanisms, from taxation to rent seeking and corruption. Large scale, non-state violence is also expensive. For non-state warring parties, however, recourse to funds is a more significant challenge. During Angola's decades-long civil war, the government was able to fund its war effort largely through oil revenues¹ while the most powerful rebel group funded its efforts primarily through the

¹ Angola spent at least 14.4 percent of its annual GDP on defense and security from 1997-2000. T. Hodges, *Angola: Anatomy of an Oil State* (2004), 160.

capture, control and sale of diamonds.² The main rebel group in Colombia is the world's largest cocaine manufacturer and finances a large portion of its military actions through the sale of cocaine and cocaine paste.³ Rebel groups in the Niger Delta sell oil produced at illegal oil refineries⁴ as a means to fund their activities. Other conflicts in a number of locations including Sierra Leone, the Ivory Coast, Liberia, Cambodia and Afghanistan have similarly been funded by the sale of timber, diamonds, and minerals.

The Eastern Democratic Republic of Congo has been the site of an ongoing conflict since May 1997. The conflict, despite its shifting contours and intermittent lulls in violence, has resulted in the deaths of over 5 million people over the past thirteen years,⁵ marking it as one of the deadliest conflicts since World War II.⁶ The location is rich in natural resources – including cobalt, copper, niobium, tantalum, petroleum, industrial diamonds, gold, silver, zinc, manganese, tin, and uranium⁷ – and the illegal or “informal” sale of these raw materials is the primary source of funding for this protracted conflict.

An important aspect of this fact is that these particular materials do not have much intrinsic utility. Unlike potatoes or fish, the average person cannot actually use them until they are processed and transformed into useful goods or components. This means that rebel groups depend on a series of partners along a stream of commerce to move these raw natural

² Hodges, *supra* note 1, 176.

³ Federal Bureau of Investigation New York, ‘Two Top Associates of Colombian Narco-Terrorist Organization Found Guilty of Conspiring to Import Tons of Cocaine into the United States’ (10 April 2010) available at <http://newyork.fbi.gov/dojpressrel/pressrel10/nyfo041410a.htm> (last visited 10 April 2011), summarizing the FARC’s involvement in the cocaine trade.

⁴ C. Purefoy, ‘Death and Oil in Niger Delta’s Illegal Refineries’ (3 August 2010) available at http://articles.cnn.com/2010-08-03/world/nigeria.oil.niger.delta_1_heating-oil-oil-industry-crude?_s=PM:WORLD (last visited 10 April 2011); S. Owen, ‘Nigeria Destroys 600 Illegal Oil Refineries’ (15 December 2009) available at <http://www.reuters.com/article/2009/12/15/nigeria-oil-thieves-idUSLDE5BE28K20091215> (last visited 10 April 2011).

⁵ CIA, ‘The World Factbook – The Democratic Republic of Congo’ available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (last visited 10 April 2011).

⁶ S. Brownback & R. Durban, ‘Hope for Africa’s Forgotten: Fact-Finding Mission Report: DRC, Rwanda, Kenya’ (2005) (on file with the authors).

⁷ CIA, *supra* note 5.

resources from their point of origin to a legitimate recipient who can process them, transform them into component parts for consumer goods and thereby derive value from them. Like in other conflict commerce situations, a large portion of the initial trade in these minerals occurs illegally or through the informal sector.⁸ But unlike cocaine or other illegal goods, these minerals are ultimately used in legal consumer products, including the electronic equipment that occupies a central role in modern western life. As a result, the early points along the trade route for these goods are difficult to fully discern or comprehend,⁹ while points closer to their end-use, once the taint of conflict has been laundered from them, are much more transparent or potentially transparent.

The link between conflict and minerals in the DRC has become the subject of a number of governance efforts including studies, discussions, and reports by non-governmental and international organizations, complaints before the OECD National Contact Points bodies, and, recently, litigation in the UK and legislation in the United States. This paper views these efforts as interrelated, given the intricate web of the global supply chain. It will focus, however, on recent U.S. legislation aimed at addressing conflict minerals emanating from the DRC. The first part will describe this legislation and dissect its underlying theories and goals. The second part will discuss the deficits of the legislation and some of the challenges it is likely to face, while the third part will highlight the legislation's potential to have a beneficial direct impact on the problem of DRC-based conflict commerce. Finally, the conclusion will provide suggestions for additional measures that might be taken to supplement this legislation.

⁸ A. Tegera & D. Johnson, 'Rules For Sale: Formal and informal cross-border trade in Eastern DRC' (May 2007) available at http://www.pole-institute.org/documents/regard19_anglais.pdf (last visited 10 April 2011), 5.

⁹ Resolve, 'Tracing a Path Forward: A Study of the Challenges of the Supply Chain for Target Metals Used in Electronics' (April 2010) available at <http://www.eicc.info/documents/RESOLVEReport4.10.10.pdf> (last visited 10 April 2011), 2-3.

B. Section 1502: Conflict Minerals Legislation

I. Description of the Legislation

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) represents the United States legislative response to the collapse of the world financial market in the fall of 2008 and the credit crisis that has pervaded the banking industry since that time. It is primarily designed to better identify large-scale risk in the financial markets by significantly increasing government oversight and regulation of banks, private financial companies, and public markets, and by dramatically increasing securities regulation. It also mandates the creation of a team of federal regulators who will be charged with detecting systemic financial risk and protecting consumers from dubious financial products.

The ongoing war in the DRC is seemingly disconnected from the recent financial collapse and even more distant from the Dodd-Frank Act. But this act, in addition to attempting to tackle massive financial problems, also contains sections attempting to grapple with very complex social and legal problems like the relationship between the minerals emerging from the DRC and the seemingly interminable conflict in that region.¹⁰

Section 1502 of the Dodd-Frank Act was inserted by Senators Sam Brownback and Russ Feingold for the purpose of restricting the funding sources available to armed groups in the DRC. Section 1502 has essentially three parts. The first is addressed at companies that use conflict minerals in manufacturing their products, while the second is addressed primarily at the United States Secretary of State. The third part imposes reporting requirements on the United States Comptroller and the Secretary of Commerce.

¹⁰ 111th Congress of the USA, 'Dodd-Frank Wall Street Reform and Consumer Protection Act' available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173enr/pdf/BILLS-111hr4173enr.pdf> (last visited 21 April 2011), Section 1502.

1. SEC Disclosures¹¹

Companies covered by section 1502 will have to annually disclose to the SEC and make available on their websites¹² the following information:

a) Whether conflict minerals that are “necessary to the functionality or production of a product”¹³ which they manufacture originated in the DRC or any country with which it “shares an internationally recognized border” (Angola, Burundi, Central African Republic, Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia).¹⁴

b) “[A] description of the measures taken [...] to exercise due diligence on the source and chain of custody” of conflict minerals, including a private audit of such disclosures (that must also be submitted to the SEC), naming the auditor¹⁵ and, in addition, “a description of the products manufactured or contracted to be manufactured that are not DRC conflict free,¹⁶ [...] the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to locate the mine or location of origin with the greatest possible specificity”¹⁷.

These disclosure requirements will remain in place until the President of the United States certifies that “no armed groups continue to be directly or indirectly involved and benefitting from commercial activity involving

¹¹ At the time of this writing, the SEC has tentatively approved a structure for due diligence and reporting requirements for three classes of companies, depending on their listing-status and their known use of conflict minerals. See Federal Register, Securities and Exchange Commission (23 December 2010) available at <http://www.sec.gov/rules/proposed/2010/34-63547fr.pdf> (last visited 21 April 2011) and E. Backes, ‘SEC Recommends Rules on Conflict Minerals Regulation’ (17 December 2010) available at <http://www.enoughproject.org/blogs/sec-recommends-rules-conflict-minerals-regulation> (last visited 21 April 2011).

¹² *Supra* note 10, Section 1502(b) (p)(1)(E).

¹³ *Supra* note 10, Section 1502(2)(B).

¹⁴ *Supra* note 10, Section 1502(e)(1).

¹⁵ *Supra* note 10, Section 1502 (b) (p)(1)(A)(i) and 1502 (b) (p)(1)(A)(ii).

¹⁶ “DRC conflict free” is defined in the Dodd-Frank Act as not containing minerals “that directly or indirectly finance or benefit armed groups in the Democratic Republic of Congo or an adjoining country”, *supra* note 10, Section 1502(b) (p)(1)(D).

¹⁷ *Supra* note 10, Section 1502 (b) (p)(1)(A)(ii).

conflict minerals”.¹⁸ However, no such certification can be made until at least five years of the required reporting have passed.

2. Department of State Strategy and Map

The State Department is charged with developing a strategy and a map addressing DRC conflict minerals – the Conflict Minerals Map. The strategy must “address the linkages between human rights abuses, armed groups, mining of conflict minerals and commercial products”.¹⁹ This strategy must include three components, each aimed at different constituencies. It must include:

a) a plan to assist the relevant agencies of the DRC, its neighboring countries, and the international community (specifically naming the United Nations Group of Experts on the Democratic Republic of Congo) to reduce the connection between minerals, commerce, and conflict by developing stronger institutions for the purposes of promoting transparency, monitoring, and ending conflict commerce in the region;²⁰

b) a plan addressed to commercial entities looking to perform due diligence on the points of origin and chain of custody for minerals emanating from the DRC that are used in their products (or the products of their suppliers) in order to ensure that such minerals are DRC conflict free;²¹ and

c) a description of punitive measures that *could* be taken against parties whose activities support conflict in the DRC.²²

The Conflict Minerals Map will call on data provided by the U.N. Group of Experts on the DRC as well as data received from the governments of the DRC, its adjoining countries, other U.N. member states, and local and international NGOs, disclosing all sources on which the State Department relied. It will produce and regularly update a publically

¹⁸ *Supra* note 10, Section 1502(b) (p)(4).

¹⁹ *Supra* note 10, Section 1502(c)(1)(A).

²⁰ *Supra* note 10, Section 1502(c)(1)(B)(i).

²¹ *Supra* note 10, Section 1502(c)(1)(B)(ii).

²² *Supra* note 10, Section 1502(c)(1)(B)(iii) (emphasis added).

available map of “mineral-rich zones, trade routes, and areas under the control of armed groups” in the region.²³

3. Required Reports Addressing Conflict Minerals

Section 1502 also contains a number of charges to the U.S. Comptroller and Secretary of Commerce regarding baseline and ongoing reporting. These reports have the potential of containing important information. In addition to assessing the effectiveness of the SEC reporting requirements and the challenges faced by the SEC in obtaining the reports required by the Dodd-Frank Act, the Comptroller’s reports are to contain the following: a review of entities not required to file annual reports with the SEC, the use of conflict minerals by non-filing companies, and whether such conflict minerals originate from the DRC and its adjoining countries.²⁴ The Department of Commerce must report on the quality of the required private sector audits required and provide recommendations for improving those audits. It must also provide a list of “all known conflict mineral processing facilities worldwide”²⁵.

II. Objectives Reflected in the Legislation

The new regulations do both less and more than one might expect, given their purpose of restricting the sources of funding available to armed groups in the DRC. The new regulations do not directly prohibit or restrict imports of minerals originating in the DRC. Rather, Section 1502 is designed primarily to extract, gather and disseminate information about the connection between commercial activity and the conflict in the DRC and the sources, flow, and chain of custody between the points of origin for conflict minerals²⁶ and securities issuers that file mandatory reports with the Securities and Exchange Commission.²⁷ In doing so, the new regulations

²³ *Supra* note 10, Section 1502(c)(2).

²⁴ *Supra* note 10, Section 1502(d).

²⁵ *Supra* note 10, Section 1502(d).

²⁶ “Conflict minerals” means “(A) columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing the conflict in the Democratic Republic of Congo or an adjoining country”, *supra* note 10, Section 1502(e)(4).

²⁷ The Dodd-Frank Act actually fails to define what type of company is covered by Section 1502 due to a drafting error in which two paragraphs in which the definition of who is covered cross reference each other, while each failing to provide a

will become part of on-going international governance efforts aimed at stemming the connection between commerce and conflict in the DRC and other locations around the world. This section of the paper will discuss the designed objectives of the legislation, addressing its information-management characteristics and the portions of Section 1502 that provide key links with more proscriptive-model governance efforts addressing the conflict in the DRC.

1. Extracting, Forcing and Devolving Information

This legislation is an outgrowth of other governance and regulatory efforts that attempt to connect market activity with social problems, especially in the areas of human rights,²⁸ environmental protection²⁹ and corruption minimization.³⁰ Like many of those efforts, Section 1502 operates not to proscribe undesirable activity (here, conflict commerce), but rather to significantly affect the flow and location of information with respect to this problem.

a) Underlying Theoretical Foundation

The fundamental theoretical premise of Section 1502 appears to be that information is power and that vital information does not always reside with the state.³¹ This is the theoretical framework for what have been referred to as “information-forcing” rules.³² Environmental law scholars have discussed the information asymmetries that vex environmental

definition. (§§1502(b)(p)(1)(A) and 1502(b)(p)(2)(A)). However, a reasonable interpretation is that it will apply to companies that are required to file mandatory reports under §13(a)(2) of the Securities and Exchange Act of 1934. This Article will hereinafter refer to these entities as “companies.”

²⁸ E.g., the Kimberly Process and the work United Nations Special Representative on the issue of Business and Human Rights.

²⁹ E.g., SEC Regulation S-K, Item 103, Instruction 5.

³⁰ E.g., the Extractive Industries Transparency Initiative.

³¹ F. Foucault, *The History of Sexuality* (1978), 79; F. Foucault, *Power and Knowledge* (1980) and P. Bourdieu, *Language and Symbolic Power* (1991).

³² Most information-forcing literature has arisen in the context of private transactions, with a fundamental observation being that the law often encourages parties with deep legal knowledge to provide legal information to their less sophisticated contracting counter-parties. See A. Schwartz & L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis* (1979) and J. H. Verkerke, ‘Legal Ignorance and Information-Forcing Rules’ (2003) available at <http://ssrn.com/abstract=405560> (last visited 21 April 2011).

regulation of industrial waste, noting that manufacturing firms “almost always know much more than government about the risks associated with their products, technologies and processes”³³. Environmental regulatory approaches, which, unlike human rights efforts, have always had a commercial context in mind, have included, for example, the mandatory reporting requirements of the National Environmental Protection Act (NEPA)³⁴ and mandatory reporting of even non-material environmental litigation.³⁵ Environmental law scholars have thus noted a turn away from proscriptive legislation and toward information-forcing approaches that focus on transparency and the devolution of information to interested parties, including citizens, regulators, and NGOs.³⁶ Essentially, the idea is to move information from the entity best situated to hold or obtain information (the corporation) to the entity most likely to use it for the protection of public interests (civil society and regulators).

Information-forcing has more recently become central to the issue of business and human rights, as the United Nations Special Representative on the Issue of Business and Human Rights has made due diligence for businesses, with respect to their impact on human rights, a core component of the Guiding Principles that have emerged from his efforts.³⁷ In addition, as part of ongoing United Nations efforts with respect to conflict commerce, the Organization of Economic Cooperation and Development (OECD) has

³³ R. Zeckhauser & E. Parson, ‘Seeking Truth for Power: Informational Strategy and Regulatory Policymaking’, 89 *Minnesota Law Review* (2004) 2, 277, 286–87.

³⁴ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370, 1 January 1970.

³⁵ Regulation S-K, Item 103, Instruction 5.

³⁶ B. Karkkainen, ‘Information As Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?’, 89 *Georgetown Law Journal* (2001) 2, 257 and B. Karkkainen, ‘Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation’, 86 *Texas Law Review* (2008) 7, 1409 (noting that while information deficits pervade environmental regulatory problems, the massive amount of information agencies do receive from environmental reporting can often be debilitating).

³⁷ See e.g. J. Ruggie, ‘Engaging Business: Addressing Respect for Human Rights’ (25 February 2010) available at http://www.hks.harvard.edu/m-rcbg/CSRI/newsandstories/Ruggie_Atlanta.pdf (last visited 10 April 2011). See also C. Ochoa, ‘The 2008 Ruggie Report: A Framework for Business and Human Rights’, 12 *ASIL Insights* (18 June 2008) available at: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=439960 (last visited 10 April 2011).

very recently launched a pilot project on due diligence, specifically addressing the mining sector.³⁸

b) Information Asymmetries and SEC Reporting

Similar information flow challenges exist in the conflict commerce context, and information-forcing is thus crucial. Arguably, however, in the area of conflict commerce, even manufacturers and other businesses covered by Section 1502 may lack crucial information about the source of the minerals that go into their products and whether the minerals they use facilitate conflict. In this way, the company disclosure portion of Section 1502 represents a regulatory experiment in information extraction because it addresses companies in a context in which they are not the entity best situated to hold or obtain the relevant information. It is therefore designed to force information not just from covered companies, but also to extract information from their supply chain, all the way to the mine of origin – finding the conflict. The aim is to allow the U.S. Comptroller, the Secretary of State and other interested parties to either – ideally – identify the mines of origin and chain of custody for conflict minerals or – alternatively – determine the points along the chain of custody at which information flows break or transparency stops.

This design seems to embed a number of objectives. First, it is designed to improve the amount and accuracy of information. In other words, it is designed to improve actual knowledge of conflict commerce and, in this way, Section 1502 is innovative. Second, it is designed to increase transparency and to force information about conflict commodities from commercial actors. Third, it is designed to improve the accessibility of information about conflict minerals and conflict commerce by making companies' mandatory reports publically available, on their websites, for example. Presumably, interested parties will use this information to, for example, place pressure at the points along the supply chain where information stops flowing, wherever that may be.

³⁸ OECD, 'Pilot Project on Due Diligence in the Mining and Minerals Sector' (May 2010) available at <http://www.oecd.org/dataoecd/28/49/44322951.pdf> (last visited 21 April 2011).

c) Producing and Gathering Official Information

The portions of Section 1502 imposing duties on the Secretary of State and USAID serve similar information-extracting, -forcing and -devolution purposes. Section 1502 asks the Secretary of State, together with USAID, to use essentially whatever information is at their disposal to collect data for the Conflict Minerals Map. Their data collection must involve the U.N. Group of Experts on the DRC as well as the governments of the DRC and adjoining countries and from local and international non-governmental organizations. This extensive information gathering effort is likely to be more than an information-forcing exercise in which relevant actors, including NGOs, provide pre-existing information. A recent job posting by USAID for an Extractive Industries Technical Advisor for the DRC would suggest that additional and different information than is currently known or verified is being sought with respect to conflict commerce in the region.³⁹

The remainder of Section 1502 requiring to the Secretary of State to develop a strategy on the DRC conflict minerals issue looks much more like a traditional mandate to develop law-like governance efforts. These efforts must be made in consultation with governments and the U.N. Group of Experts on the DRC, including a description of the punitive measures that could be used against actors engaged in conflict commerce in the region.⁴⁰

d) Information Processing, Analysis and Dissemination

The drafters of Section 1502 appear to have been cognizant of the possibility that its SEC reporting aspects will face challenges. The reports the Comptroller General is tasked with preparing must include not only assimilated and processed statistics of the reports the SEC receives but also an assessments of whether Section 1502 appears to have contributed to the region's stability, devoting special attention to sexual and gender-based violence. In addition to these two requirements, the reports must also include information about the larger conflict commerce problem, including presumably all non-reporting actors and all conflict mineral processing

³⁹ USAID solicitation number SOL-660-10-000009, 19 July 2010. (on file with the authors).

⁴⁰ *Supra* note 10, Section 1502(c)(1)(B)(i).

plants around the world.⁴¹ These reports, if prepared well, could be beneficial in raising general awareness of the conflict commerce problem.

The Secretary of Commerce is also charged with filing reports that could have real benefits outside of its discrete mandate. In analyzing the reports of the private audits that must accompany the SEC reports, the Secretary of Commerce is asked to essentially professionalize this type of private sector auditing through two measures. The first is to serve as a performance check on the accuracy of private sector audits and other due diligence measures carried out under Section 1502. The second seems to assume that the auditing process will be flawed and asks the Secretary of Commerce to recommend methods to improve the audits and to set best practice standards for the industry.⁴² Attention to the current quality and practices of social-issue auditing has the potential to have affects not just in the area of conflict commerce but also in other related fields, including corruption reduction measures like those required by the Extractive Industries Transparency Initiative,⁴³ labor standards compliance and human rights monitoring.

2. Connecting to Existing and Developing Governance Efforts

Another aspect of Section 1502 is notable for its potential to have beneficial impacts on the DRC conflict commerce problem. As previously noted, the Secretary of State's reports are to include a strategy that will include "[a] description of punitive measures that could be taken against individuals or entities whose commercial activities are supporting armed groups and human rights violations in the Democratic Republic of the Congo."⁴⁴ This provision will likely be interpreted to mean that the Secretary must prepare an analysis of already-existing measures, but it could also be interpreted as a mandate for the State Department to propose punitive measures. Among the measures that should be included is the

⁴¹ *Supra* note 10, Section 1502(d).

⁴² *Supra* note 10, Section 1502(d).

⁴³ The Extractive Industries Transparency Initiative is a global effort aimed at stemming corruption in the extractive sector by requiring companies and governments to report on payments made and received in connection with extractive activities. Section 1504 of the Dodd-Frank Act enacts many of the requirements of the EITI and has the potential to bring the United States and United States companies closer to EITI compliance.

⁴⁴ *Supra* note 10, Section 1502(c)(B)(iii).

possibility that entities reporting trade in conflict minerals will be subject to targeted sanctions in accordance with two United Nations Security Council Resolutions.

The Section 1502 SEC reporting requirements put the United States in technical compliance with the requirements of UNSC Resolution 1857, under which U.N. member states are requested to ensure that relevant parties are performing due diligence with respect to DRC conflict related natural resources.⁴⁵ However, UNSC Resolutions 1857⁴⁶ and 1896⁴⁷ also call for targeted sanctions in the form of asset bans and travel freezes against “[i]ndividuals or entities supporting the illegal armed groups in the eastern part of the Democratic Republic of the Congo through illicit trade of natural resources”⁴⁸ and encourages member states to submit a list of entities that fit this description.⁴⁹

Arguably, the language in the UNSC Resolutions encouraging member-states to report on relevant entities does not create binding obligations for member-states. However, litigation in the United Kingdom recently addressed claims that the U.K. has acted unlawfully in failing to submit names of British entities trading in conflict minerals in accordance with the terms of UNSC Resolutions 1857 and 1896.⁵⁰ Although the UK High Court has decided not to review the UK government’s decision not to list such companies, the United States Government should be watching this litigation carefully, as it may be a model for claims against the United States if it fails to submit the names of entities who report reliance on conflict minerals in their SEC reports.

⁴⁵ SC Res. 1857, 22 December 2008, para.15.

⁴⁶ SC Res. 1857, paras 4(g), 16-19.

⁴⁷ SC Res. 1896, 30 November 2009, paras 19-20.

⁴⁸ SC Res. 1857, para.15.

⁴⁹ SC Res. 1857, para.16.

⁵⁰ Global Witness, ‘Global Witness takes UK government to court for failing to list UK companies trading Congo conflict minerals for UN sanctions’ (26 July 2010) available at <http://www.globalwitness.org/library/global-witness-takes-uk-government-court-failing-list-uk-companies-trading-congo-conflict> (last visited 21 April 2011). The UK High Court has denied review of the UK government’s decision to not list these companies.

C. Deficits and Challenges

Up to this point in this Article, we have described Section 1502 of the Dodd-Frank Act and provided an analysis of its grounding and purposes. This section will proceed by pointing to the failings and challenges we see in the legislation. They fall into three categories. First, we will critique the information-extraction and information-forcing portions of Section 1502. Second, we will critique the information-dissemination portions of Section 1502. Finally, we will discuss the potential negative consequences of the legislation.

I. Section 1502 Information-Forcing and Information-Extracting Assumptions

The information-extraction and information-forcing portions of Section 1502, both in the context of the required SEC reports and with respect to the Map on Conflict Minerals seem to assume that current information levels regarding DRC conflict minerals are low. The general parameters of the DRC conflict commerce problem are understood by the U.S. Congress at this point⁵¹ and are even reported in the popular press.⁵² A number of international organizations and local and international NGOs that focus on discovering specific and detailed information regarding conflict commodities, specifically conflict commodities emerging from the DRC,

⁵¹ S. Brownback & R. Durbin, *Hope for Africa's Forgotten, A Report on the Fact-Finding Mission to the Democratic Republic of Congo, Rwanda and Kenya* (2005). See also Resolve, 'Tracing a Path Forward: A Study of the Challenges of the Supply Chain for Target Metals Used in Electronics' (April 2010) available at <http://www.eicc.info/documents/RESOLVEReport4.10.10.pdf> (last visited 21 April 2011), 6-7.

⁵² See e.g., B. Harden, 'The Dirt in the New Machine' (12 August 2001) available at <http://www.nytimes.com/2001/08/12/magazine/the-dirt-in-the-new-machine.html> (last visited 21 April 2011) and 'Bringing Congo's Great War to an End' (1 August 2002) available at <http://www.nytimes.com/2002/08/01/opinion/bringing-congo-s-great-war-to-an-end.html> (last visited 21 April 2011) and D. Gilson, 'What's Really Inside Your iPhone?' (31 March 2010) available at <http://motherjones.com/blue-marble/2010/03/whats-inside-your-apple-iphone-ipad> (last visited 21 April 2011) or D. Gilson, 'The Scary Truth About Your iPhone' available at <http://motherjones.com/environment/2010/03/scary-truth-about-your-iphone> (last visited 21 April 2011) or A. Hochschild, 'Blood and Treasure' (March/April 2010) available at <http://motherjones.com/politics/2010/02/congo-gold-adam-hochschild> (last visited 21 April 2011).

regularly produce very valuable information and recommendations.⁵³ In order to make the five-year window for this legislation as effective as possible, such that the work of the relevant agencies results in new knowledge and a better understanding of the conflict minerals problem, rather than simply placing an official imprimatur on pre-existing knowledge, the Secretary of State, together with USAID, the Comptroller General and the Secretary of Commerce must make full use of the pre-existing information.

This is necessary because the biggest challenge with respect to curing information asymmetries in this context is not forcing information from legitimate actors – though that alone may be a significant challenge. Rather,

⁵³ For example, a number of organizations, including U.S. law school human rights clinics have been engaged in the mapping required from the State Department. See e.g., Columbia Law School, ‘Human Rights Clinic Docket’ available at http://www.law.columbia.edu/center_program/human_rights/Docket#165357 (last visited 21 April 2011) and The New Security Beat, ‘DRC’s Conflict Minerals: Can U.S. Law Impact the Violence?’ (13 July 2010) available at <http://newsecuritybeat.blogspot.com/2010/07/drcs-conflict-minerals-can-us-law.html> (last visited 21 April 2011). DRC-based organizations have been studying the issues of conflict minerals and have provided very useful information regarding the chain of custody for many minerals in the region. See e.g. Tegera & Johnson, *supra* note 8 and Pole Institute, ‘Blood Minerals: The Criminalization of the Mining Industry in Eastern DRC’ (August 2010) available at http://www.pole-institute.org/documents/Blood_Minerals.pdf (last visited 21 April 2011). A number of international NGOs have also devoted significant attention to the issue of DRC conflict minerals. See e.g., a description of Global Witness’ campaigns on Natural Resources in Conflict and on the DRC (described here: Global Witness, ‘Conflict’ available at http://www.globalwitness.org/pages/en/natural_resources_in_conflict.html (last visited 21 April 2011) and here Global Witness, ‘Democratic Republic of Congo’ available at http://www.globalwitness.org/pages/en/democratic_republic_of_congo.html (last visited 21 April 2011), respectively). Finally, the UNSC and the Group of Experts on the Democratic Republic of Congo have been focused on this issue for many years. See e.g. K. A. Annan, ‘Letter dated 12 April 2001 from the Secretary-General to the President of the Security Council, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo’ (12 April 2001) available at <http://www.un.org/News/dh/latest/drcongo.htm> (last visited 21 April 2011) and M. L. R. Viotti, Letter dated 21 May 2010 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, UN Doc S/2010/252, 25 May 2010.

given the current level of knowledge, the difficulty and the place of much greater importance lies deeper in the chain of custody, much closer to the mines and the conflict. Information regarding these locations will be crucial in actually linking commercial activity to conflict. Reports from the most relevant regions of the DRC, including very recent reports, indicate that the area is beyond the reach of the DRC government and is, instead, under the control of military and police battalions that operate in a highly occlusive, illegal and corrupt environment.⁵⁴ Similarly, recent efforts to develop a code of conduct on supply chain management for minerals used in electronics discuss the “difficulty verifying sources that enter the supply chain from mines that are illegal or part of the informal economy”⁵⁵.

Obviously, the more accurate, specific, and complete companies are able to be in their SEC reports on conflict minerals, the more useful those reports will be in effectively stopping the use of minerals to fund the DRC conflict. However, when companies discover that minerals on which they depend contribute to the conflict in the DRC, they will face significant disincentives to fully comply with their reporting requirements, given the potential legal and economic consequences of their activities,⁵⁶ including potential litigation under the Alien Tort Statute,⁵⁷ complaints before

⁵⁴ See e.g., P. P. Rudahigwa, ‘Seventy-Two Hours at the Mining Site of Bisie’, in Pole Institute, ‘Blood Minerals: The Criminalization of the Mining Industry in Eastern DRC’ (August 2010) available at http://www.pole-institute.org/documents/Blood_Minerals.pdf (last visited 21 April 2011), 12.

⁵⁵ Resolve, *supra* note 9, 3. The Resolve report is not exclusively focused on the DRC and notes the challenges of illegality and corruption generally. For example, it cites the following report: FinnWatch, ‘Legal and Illegal Blurred: Update on tin production for consumer electronics in Indonesia’ (June 2009) available at <http://makeitfair.org/the-facts/reports> (last visited 21 April 2011) (published as part of the makeITfair campaign, a European wide project on consumer electronics).

⁵⁶ C.Ochoa, ‘Corporate Social Responsibility and Firm Compliance: Lessons from the International Law – International Relations Discourse’, *Santa Clara Journal of International Law* (2011, forthcoming) (discussing compliance theory as applied to businesses in the CSR context).

⁵⁷ 28 USC § 1350. At the time this Article was drafted, *Kiobel v. Royal Dutch Petroleum*, United States Court of Appeals for the Second Circuit, 17 September 2010, available at http://online.wsj.com/public/resources/documents/091710_atruling.pdf (last visited 21 April 2011) had recently been decided. In that case the United States Court of Appeals for the Second Circuit decidedly held that corporations are not subject to liability under the Alien Tort Statute. See also *John Doe I v. Nestle*, CV 05-5133 SVW, United States District Court – Central District of California, 8

National Contact Point bodies, targeted sanctions under the UNSC Resolutions discussed above, and consumer boycotts.

II. Section 1502 Information-Devolution Assumptions

As discussed above, Section 1502 is designed not just to extract and accumulate information but also to increase access to DRC conflict mineral information through requirements that companies post required information on their websites and through the various mandated reports. Below, in the section we have reserved for an optimistic analysis of legislation, we will discuss the benefits this may have for future legislative and international organization efforts and NGO-sponsored campaigns and litigation. Here, however, we merely note that one of the assumptions of this legislation is that consumers will actually care enough about this issue that they will use their purchasing power to dissuade companies from using conflict minerals in electronic equipment. The legislation stands to be extremely effective if consumers are educated about conflict minerals and, on a scale large enough to matter, make decisions to purchase products that can be certified as “conflict free”. The Kimberly Process, which is an effort to end the connection between diamonds and conflict, has been successful largely for this reason. It remains to be seen, however, whether consumers will act similarly in the context of electronic equipment and conflict minerals.

III. Potential Negative Consequences of Section 1502

Although the legislation has been lauded as a real victory and step forward in terminating the link between conflict and minerals in the DRC,⁵⁸ there is real concern that the legislation could have devastating economic consequences in the Eastern region of the DRC. Despite oppressive corruption and abysmal standards of living for miners in the region, the miners still depend on the continued viability of local mines as their only source of work and income. It is possible that Section 1502 will, over time, improve conditions in the Eastern DRC. This could happen if minerals from the region retain their value, but only when “conflict free”. A legitimate

September 2010 holding that the existing authorities fail to show that corporate liability is sufficiently well-defined to sustain an ATS claim.

⁵⁸ See e.g., Global Witness, ‘U.S. passes landmark reform on resource transparency’ (15 July 2010) available at http://www.globalwitness.org/media_library_detail.php/1028/en/u.s._passes_landmark_reforms_on_resource_transparency (last visited 21 April 2011).

concern coming from the region, however, is that the SEC reporting requirements of 1502 will act as a strong deterrent for reporting companies, and they will effectively divest from the region, rendering minerals in the region valueless, leaving a mining-dependent economy in ruins. Locally-based NGOs have warned that this may lead to even more conflict.⁵⁹ This concern is elevated by frustrations expressed by local communities that they are not being consulted by key players tasked with designing conflict commerce governance mechanisms.⁶⁰

D. Moving Forward

In this section we will conclude by analyzing those portions of the bill that support reasonable optimism regarding Section 1502's efficacy. The reporting requirements and performance measures of the portion addressing information-extracting and information-forcing are designed well enough to effectively address some aspects of conflict commerce problem, and may induce firms to adopt a normative stance against the use of conflict minerals. The information dissemination portion opens up the possibility of market behavior shifts resulting from effective consumer awareness, more effective sanctions as well as the use of information in future litigation in coordination with other efforts (e.g., Red Flags, German Federal Bureau of Geo-Sciences and Natural Resources initiative to render Eastern DRC minerals conflict-free, the English Tin Supply Chain Initiative, the World Bank's Department for International Development/Congolese Ministry of Mines work on cassiterite etc.).

⁵⁹ D. Johnson, 'Killing the Economy in the Name of Peace?' (19 July 2010) available at <http://www.pole-institute.org/site%20web/echos/echo138.htm> (last visited 21 April 2011). On March 1, 2011 a group of local NGOs from the DRC filed a submission with the SEC expressing these concerns. See M. Choyt, Democratic Republic of Congo: Mining Cooperatives speak out critically about Dodd-Frank Act' (1 March 2011) available at <http://www.africafiles.org/article.asp?ID=25062> (last visited 21 April 2011) and ITRI, 'DR Congo miners request direct talks with US government on trade embargo' (4 March 2011) available at http://www.itri.co.uk/pooled/articles/BF_NEWSART/view.asp?Q=BF_NEWSART_322533 (last visited 21 April 2011).

⁶⁰ Johnson, *supra* note 59.

I. Compliance with and Effectiveness of Section 1502

Despite a well-developed body of literature that observes high levels of state compliance with international law and theorizes as to the reasons for otherwise sovereign entities to submit to a legal system that curtails their freedom of action, very little attention has been given to the question of why firms comply with global governance initiatives.⁶¹ While a direct analogy to existing theories of compliance with international law and international relations is imperfect, there are very useful insights that suggest reasons for optimism about corporate compliance with Section 1502, as part of the global governance efforts aimed at stemming conflict commerce.

In this particular context, one viable critique of Section 1502 could be that corporations will not or will only marginally comply with the reporting requirements, especially given the SEC's already-thin enforcement capacity. Two observations are important here, however. The first is that a failure to attain full compliance does not necessarily render governance ineffective. In this case, if the legislation results in more or better information than we currently have about the sources of DRC-linked minerals or about the connection between minerals and conflict, the legislation will have been at least somewhat effective. Second, a growing body of research demonstrates that firms have significant incentives to comply with their obligations, and actually do comply, even when not strongly monitored or consistently or strongly sanctioned for deviance.⁶²

Management theory is helpful in explaining this phenomenon. It argues that the inclusion of institutionalized performance measures strongly promotes obedience, even when enforcement is lacking.⁶³ These measures typically include the regular collection of pertinent information, performance reviews of various sorts, and opportunities to modify norms

⁶¹ Ochoa, *supra* note 56.

⁶² See G. Downs *et al.*, 'Is the good news about compliance good news about cooperation?', 50 *International Organization* (1996) 3, 379 (advancing a political economy view of compliance and arguing that the strength of enforcement is central to compliance).

⁶³ D. G. Victor, K. Raustiala & E. B. Skolnikoff, 'Introduction and Overview' in D. Victor, K. Raustiala & E. B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments* (1998), 1-46.

and institutions in light of increased or changing knowledge.⁶⁴ All of these features can be found in the corporate reporting-related components of Section 1502, including the obligations imposed on the Comptroller General and the Secretary of Commerce. This may augur well for corporate compliance with the act and, ultimately, for its effectiveness. All the more so, given the surveillance role for civil society that is implied in the information-devolution aspects of the legislation and the effectiveness-analysis reports required from the Comptroller General.

In addition to the design of Section 1502, which lends itself to optimism given the observations of managerial theory, the growing mass of governance efforts with respect to conflict commerce and business activity in conflict zones to which business actors have actively contributed opens space for earnest reasons for optimism, given the observations of constructivist and legal process compliance scholars.

Constructivist international relations scholars have built their theories around the importance of rules and the power of shared knowledge and dialogue in altering states' value systems, normative beliefs, and identities.⁶⁵ Similarly, international legal process scholars have argued that the discourse and process of norm articulation is effective in moving states toward compliance.⁶⁶ Louis Henkin, like later constructivist compliance theorists, asserted that the process of discursive engagement in the creation of knowledge and the elaboration of norms and expectations is itself the thing that brings states closer to compliance. It is this joint endeavor that has a deep effect on the identity of the affected actors.⁶⁷ Under this view, it is not so much the strategic self-interest of a given regimes' creator that causes compliance, but rather the shared ownership over knowledge and norms arising from the discourse that births the regime.⁶⁸ This would certainly suggest that firms may internalize the conflict commerce reducing norms

⁶⁴ *Id.*

⁶⁵ See e.g., R. Keohane, 'When Does International Law Come Home?', 35 *Houston Law Review* (1998) 3, 699.

⁶⁶ L. Henkin, *How Nations Behave*, 2nd ed. (1979).

⁶⁷ F. Kratochwil, *Rules, Norms and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989).

⁶⁸ K. Raustiala & A.-M. Slaughter, 'International Law, International Relations and Compliance', in T. Risse, W. Carlsneas & B. A. Simmons, *Handbook of International Relations* (2005), 538, 540. This, together with factors such as reputation and domestic politics, tilts states in the direction of compliance.

they are participating in creating, despite the possibility of increased sourcing costs as well as reputational, economic, and legal risks as governance efforts start to eliminate the possibility of taking financial advantage of a market made fragile by its entanglement with conflict.

II. Potential Uses of Information

There are a number of potential uses for information that is accumulated and made publically available. Among these uses are the potential for consumer awareness and boycotts, targeted sanctions from a state or international organizations, the basis for legal or quasi-legal claims, and coordination with or assimilation into other conflict commerce governance efforts.

As mentioned previously, it is reasonable to question whether this legislation will change consumer choices enough that reductions in sales outweigh the economic gains that companies currently implicated in this activity currently enjoy. However, consumer boycott studies have noted that boycotts can be successful in attaining their objectives even when this is not the case.⁶⁹ In addition to this observation, literature on consumer boycotts suggests that conflict commerce is the type of issue that could easily lead to a successful boycott, either because it is effective at significantly altering consumer behavior or because it affects the risk calculation of targeted companies enough that they stop relying on conflict commodities.⁷⁰ The factors that contribute to a boycott's efficacy include the "awareness of consumers; the values of potential consumer participants; the consistency of boycott goals with participant attitudes; the cost of participation; social pressure; and the credibility of the boycott leadership"⁷¹. Many of these factors are likely to fall in the direction of conflict commerce-based boycotts. In addition, the psychological motivations of boycotters indicate that such boycotts would be successful. These motivations include a desire

⁶⁹ N. C. Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability* (1990).

⁷⁰ See generally M. Freedman, *Consumer Boycotts: Effecting Change through the Market Place and the Media*, (1999), 21-32.

⁷¹ J. Klein, A. John & N. C. Smith, 'Exploring Motivation in Consumer Boycott' (November 2001) available at <http://www.london.edu/facultyandresearch/research/docs/01-701.pdf?pagewanted=all> (last visited 21 April 2011), 4-5, citing D. E. Garrett, 'The Effectiveness of Marketing Policy Boycotts: Environmental Opposition to Marketing' 51 *Journal of Marketing* (1987) 2, 46-57.

among consumers to maintain consistent beliefs about the kind of person they already believe themselves to be and to have “clean hands” with respect to behavior or issues they judge as wrong.⁷² These two interrelated motivations suggest some reasons for optimism on this issue, given the strong normative case against contributing, actively or passively, intentionally or unintentionally, to the type of violent conflict present in the DRC.

In addition to consumer boycotts, the UNSC Resolutions mentioned above authorize targeted sanctions against companies engaged in commercial activity associated with the conflict in the DRC. Also, as previously discussed, litigation recently initiated against the United Kingdom arguing that the U.K. had acted unlawfully in failing to submit names of British entities trading in conflict minerals in accordance with the terms of UNSC Resolutions 1857 and 1896 provides evidence of civil-society policing of UN member state compliance with the relevant resolutions.⁷³ This may elevate the pressure on states and international organizations to impose targeted sanctions that might include naming specific corporate actors and conflict leaders, prohibiting business dealings with named entities and imposing asset freezes and travel bans for named entities. As the amount of information about particular companies’ involvement in conflict commerce is improved, targeted sanctions may become a more popular and more useful tool for states to employ.

E. Conclusion

This conclusion will provide some recommendations that fall outside the relatively narrow ambit of Section 1502 that we believe will optimize the likelihood that this legislation – and future efforts on conflict commerce in the DRC and elsewhere – will be effective.

First, we propose that, before financing a transaction in a conflict or post-conflict area, a bank or other lender collect a conflict bond and that finance and guarantee institutions such as the U.S. Overseas Private Investment Corporation and the Multilateral Investment Guarantee Agency consider requiring that such bonds be in place before they will provide

⁷² Klein, John & Smith, *supra* note 71, 6.

⁷³ Global Witness, *supra* note 50.

financing or insure against political risk. In most countries, corporations operate with care for a host of reasons, among them the potential that they will suffer a penalty if they violate a regulation. In conflict areas, this important incentive is absent. Imposing a conflict bond would provide a financial incentive to corporations and other investors to take a similar level of care in conflict areas – where government oversight is virtually non-existent – as they take in non-conflict areas. Such bonds would be forfeited in the face of successful claims before international bodies like the OECD National Contact Points,⁷⁴ or domestic courts.⁷⁵ If forfeited, such a bond would be used to compensate the local community for any harm they suffer as a result of the commercial activity.

Second, we propose vigilant attention to engagement with and empowerment of local communities and civil society so that they can better enforce local norms and preferences. We are concerned, in particular, that a portion of the Congolese community appears dissatisfied by the amount of participation they have had in the SEC rule drafting process.⁷⁶ It is imperative to the legitimacy of any future regulatory regime that local communities and leaders have had (and believe they have had) a role in the process by which it was formed and that it is structured around the realities they live. We propose two specific tactics to give effect to this strategy.

First, we propose that any local Congolese organization asking for an opportunity to inform the SEC's rule formation process be granted a reasonable time and opportunity to make appropriate interventions. This is a mandatory baseline. Second, we propose that the jurisdiction of the World Bank Inspection Panel be expanded to include projects financed by any international body. The Inspection Panel is an independent arm of the World

⁷⁴ 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd' (28 August 2008) available at <http://www.berr.gov.uk/files/file47555.doc> (last visited 21 April 2011).

⁷⁵ In November 2010, a group of Congolese citizens filed a class action case against Anvil Mining Ltd. in Montreal Canada alleging that "the company, by providing logistical assistance, played a role in human rights abuses, including the massacre by the Congolese military of more than 70 people in the Democratic Republic of Congo in 2004". See Global Witness, 'Congolese victims file class action against Canadian mining company' (8 November 2010) available at <http://www.globalwitness.org/library/congolese-victims-file-class-action-against-canadian-mining-company> (last visited 21 April 2011).

⁷⁶ Johnson, *supra* note 59.

Bank created to give a forum to persons affected by Bank-funded projects. As it is currently structured, the Inspection Panel reviews requests for inspection from people adversely affected by Bank-funded projects to ensure that the Bank has followed its own procedures. The Panel has the authority to conduct an independent investigation of complaints and, if necessary, order changes necessary to bring projects into compliance with the Bank's procedures. We propose expanding the Inspection Panel's jurisdiction to permit it to review complaints regarding projects or investments funded by any part of the World Bank Group or other international institution. This would include projects receiving support from e.g. the Multilateral Investment Guarantee Agency (MIGA), any of the regional development banks, or any import/export-credit agencies. Finally, we propose expanding the jurisdiction of the International Center for the Settlement of Investment Disputes (ICSID) to permit community groups to intervene in or initiate claims against corporations for human rights violations. The ICSID is an international institution created by treaty to resolve investment disputes between member states and foreign investors. As currently structured, the ICSID's jurisdiction does not permit members of the local communities affected by investments to raise concerns about those investments. Modifying the ICSID's jurisdiction would begin to put local communities on the same legal footing as the corporations and financial institutions whose projects affect them.

Section 1502 and the forthcoming SEC rules it requires are an experiment in information management and the regulatory capacity of information-extraction, information-forcing and information-devolution. For the reasons we have stated herein, there is room for cautious optimism that it will have some effect on the flow of information and also on the flow of minerals that fund one of the worst on-going conflicts in recent history. How this information is reported and used will ultimately affect other efforts aimed at curbing the connection between minerals and conflict in the DRC. The on-going strategies we describe herein, and also those we have proposed will surely benefit from well drafted SEC rules emerging from Section 1502.

Incentives and Survival in Violent Conflicts

Moshik Lavie & Christophe Muller*

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Abstract

This paper analytically investigates the incentive scheme of perpetrators of violent conflicts. It provides a rational equilibrium framework to elicit how monetary incentives and survival considerations shape a combatant's decision to participate in a conflict. In the model, a leader decides to award soldiers monetary incentives. Civilians finance the militia via donations and soldiers decide on the actual fighting and indulge in looting. We explore the scheduled decision-making that takes place on the path toward a violent conflict and study the principal-agent relationship that exists between the leader and the militia. In addition, we analyze the effect of several internal factors (productivity and survival risk) and external factors (relative economic resources, opponents' military strength) on the intensity of the conflict.

The model shows that soldiers' fighting decisions are set by the risk of personal mortality and the level of identification with the cause of war. In addition, our results link between monetary incentives and participation in fighting and demonstrate a substitution effect of looting and donations as monetary incentives.

A. Introduction

Throughout history, monarchs, warlords and rebels have faced the same problem: how to encourage soldiers to fight for them on the battlefield. From the notorious motivational quote of Frederick the Great during the battle of Kolin ("Rogues, do you wish to live forever!"¹) to the pocketsful of oil money that Colonel Gaddafi is using as of this writing to hire mercenaries to kill Libyan protesters, the question always remains: how does one make a combatant fight to engage in combat? The problem becomes even more acute when the warring parties are non-governmental militant organizations. This paper presents a stylized explanation of the individual decision among militant groups to partake in the fighting in conflict areas. It provides a rational equilibrium framework using logical interactions to elicit how the decision to participate in violence is made. We explore the scheduled decision-making that takes place on the path to

¹ Quoted from C. Duffy, *Frederick the Great, A Military Life* (1985), 128.

violent conflict and the interrelations of leader, militia, and supportive non-combatants.

The underlying assumption is that the outcomes of violent conflicts are shaped by a combination of economic incentives and other social dimensions. In the presence of an ethnic, political, or religious discrepancy, the structure of incentives may make the difference between a peaceful outcome and a violent one. In addition, the study focuses on individuals as the natural unit of analysis. Rather than assuming group cohesion or shared values, we deconstruct the components of individual agents' decision-making in regard to warfare. Recent micro-level evidence suggests that the decision to participate in a rebellious uprising is different from the decision to participate in violence – fighting and killing.² In line with this distinction, we focus on the militia members' decision on actual fighting.³

The results of the theoretical model allow us to study the mechanism that prompts militia members to fight and kill at their leader's behest. The model illuminates two channels through which the leader affects soldiers' fighting decisions: ideological and monetary. Basing ourselves on these channels, we introduce several identifiable triggers that generate the final fighting decision: (a) the cause that the war is supposed to serve, (b) the leader's announcement of future allocation of booty among the soldiers, and (c) transfers of money (donations) from peasants who support the soldiers in return for supplemental defense services. Later, we analyze the effect of internal factors (productivity shocks, as well as aggregate and individual mortality risk) and external factors (relative economic resources, opponents' military strength) on the intensity of the conflict.

² M. Humphreys & J. M. Weinstein, 'Who Fights? The Determinants of Participation in Civil War', 52 *American Journal of Political Science* (2008) 2, 436.

³ At this point, it is important to point out that in some case recruitment and fighting are not a question of decision. Several militias in conflict zones use force to recruit fighters. For example, according to W. Minter, *Apartheid's Contras: An inquiry into the roots of war in Angola and Mozambique* (1995), 174 almost 90% of the Renamo soldiers in Mozambique were forced to join: children were abducted on their way to school; young men were taken away from their homes. The current paper does not address such cases.

I. Monetary Incentives and Looting

While somewhat neglected in the theoretical literature, the issue of monetary incentivization of collective violent action is the subject of a growing empirical literature.⁴ Blattman and Miguel review a large body of evidence from case studies of twentieth-century rebellions.⁵ Several of them offer evidence consistent with selfish actors seeking to maximize material payoffs. For example, Lichbach shows that social movements offer selective material incentives to young men who join them.⁶ Popkin finds that political leaders developed mechanisms to directly reward peasant rebellion in Vietnam.⁷ Weinstein shows how rebel fighters in Mozambique, Sierra Leone, and Peru were compensated in the coin of looted civilian property and drug sales. Still, to be able to offer incentives, the leader needs resources.⁸ In a recent empirical paper, Collier, Hoeffler and Rohner used a global panel data set to examine different determinants of civil wars during the past 45 years.⁹ They report evidence of a feasibility hypothesis: where a rebellion is financially and militarily feasible, it will occur. In other words, the ability of local leaders to initiate a war or a rebellion is linked with their ability to provide the soldiers with sufficient economic resources. Large enough resource endowments may enable leaders to offer short-term reward to soldiers, but in some cases lack of resources force leaders to commit on future payments for recruitment.¹⁰ Collier and Hoeffler suggest that net costs during a conflict may be compensated for by future expected

⁴ A parallel trend in the theoretical literature studies resource allocation between military and non-military uses during a conflict. In S. Skaperdas, 'Cooperation, Conflict, and Power in the Absence of Property Rights', 82 *American Economic Review* (1992) 4, 720, 721 agents decide to allocate financial resources to production or arms, while in H. I. Grossman, 'A General Equilibrium Model of Insurrections', 81 *American Economic Review*, (1991) 4, 912, 912 peasants decide how to divide their labor time among production, soldiering, and insurrection.

⁵ C. Blattman & E. Miguel, 'Civil War', 48 *Journal of Economic Literature* (2010) 1, 3.

⁶ M. I. Lichbach, 'What Makes Rational Peasants Revolutionary?: Dilemma, Paradox, and Irony in Peasant Collective Action', 46 *World Politics* (1994) 3, 383, and, M. I. Lichbach, *The Rebel's Dilemma* (1995).

⁷ S. L. Popkin, 'Political Entrepreneurs and Peasant Movements in Vietnam', in M. Taylor (ed.), *Rationality and Revolution* (1988), 9.

⁸ J. M. Weinstein, *Inside Rebellion* (2007).

⁹ P. Collier, A. Hoeffler & D. Rohner, 'Beyond greed and grievance: feasibility and civil war', 61 *Oxford Economic Paper* (2009) 1, 1.

¹⁰ J. M. Weinstein, 'Resources and the Information Problem in Rebel Recruitment'. 49 *The Journal of conflict Resolution* (2005) 4, 598.

earnings.¹¹ More specifically, militias widely finance themselves through organized external looting (looting of the opposite civilian population). Based on a review of 14 cross-national econometric studies, Ross reports that 'lootable' commodities, like gemstones and drugs, are correlated with the duration of conflict.¹² Similarly, evidence suggests that both government and opposition in many areas of conflict become involved in illegal business and organized crime.¹³ Looting, as well as other forms of violence against civilians, has therefore become the main activity of soldiers in poor countries, where civil wars take place predominantly.¹⁴ Notably, this pattern of warfare results in a humanitarian disaster: "suffering of millions of mutilated children, of raped women, of destroyed homes and stolen property, of damaged crops, and of millions of refugees displaced by the anticipation of massacres and looting"¹⁵.

Following the evidence, in the model, looting is part of fighting. Based on their aggregate relative strength, soldiers loot a share of their opponents' income. The booty allocation rule is credibly declared by the leader in advance, so that soldiers base their fighting decision on the share of the booty that they personally expect. Higher expected personal booty is related to higher probability of participation irrespective of other personal characteristics.

An additional channel of financing is based on the usage of internal material resources. Such resources may include the incomes and wealth of local civilians, the presence of natural resources, and external transfers (foreign aid by countries, global organizations or private supporters). While the existence of natural resources and availability of external transfers may be considered as an initial endowment (mainly since the leader is well informed about their expected size) the magnitude of donations is subject to the supportiveness of the local community of the rebel groups as well as to the ability of peasants to produce during the violent conflict. Clearly, the composition of internal resources varies: for example, Weinstein reports that the National Resistance Army in Uganda lacked money for soldiers'

11 P. Collier & A. Hoeffler (1998), 'On economic causes of civil war', 50 *Oxford Economic Papers* (1998), 563.

12 M. Ross, 'What do we know about natural resources and civil war?', 41 *Journal of Peace Research* (2004) 3, 337.

13 E. Cairns, *A Safer Future : Reducing the Human Cost of War* (1997).

14 J.-P. Azam, 'Looting and Conflict between Ethnoregional Groups: Lessons For State Formation in Africa', 46 *Journal of Conflict Resolution* (2002), 131.

15 Azam, *supra* note 14, 3.

salaries. Therefore, money and supply had to be donated by the local population.¹⁶ In contrast, the Renamo in Mozambique enjoyed generous funding by its external Rhodesian patron.

This paper focuses on the interaction between soldiers, peasants and the leader. Therefore, we single out the channel of monetary transfers between the supportive civilians and the soldiers. All other forms of possible internal funding are considered to be part of the aggregate income of the leader. Hence, the second monetary incentive mechanism in the model is direct donations from the supportive peasants. In the model, peasants produce goods and finance the warfare sector by means of donations (or transfers). The initial reason for the peasant support is social and ethnical cohesion, but intuition has it that peasants also give individual donations to promote better defense of their life and property.¹⁷ Either way, the transfers from peasants to soldiers incentivize soldiers to fight. However, we would expect to find a tradeoff between donations and booty, i.e., when the leader expects generous donations, he may allocate less booty to his soldiers.

II. Patriotism and Identification with the War

On top of the economic incentive, social and political factors play an important role in the decision to fight.¹⁸ While in the classic crime-economics literature, agents are motivated by pure greed,¹⁹ several recent political economy studies emphasize the social and psychological motivation of agents in the warfare sector. Using data gathered from newspaper reports,²⁰ Chen finds that areas of high baseline religiosity experienced more social violence in the aftermath of the Indonesian financial crisis. Krueger and Maleckova claim that terrorists' primary motive is passionate support for their cause and feelings of indignity or

¹⁶ Weinstein, *supra* note 10, 609..

¹⁷ A less naive terminology would suggest that the local militia terrorizes the civilian population and collects a share of their income as protection money.

¹⁸ N. Sambanis, 'Do Ethnic and Non ethnic Civil Wars Have the Same Causes?: A Theoretical and Empirical Inquiry', 45 *The Journal of Conflict Resolution* (2001) 3, 259.

¹⁹ G. Becker, 'Crime and Punishment: An Economic Approach', 76 *The Journal of Political Economy* (1968), 169.

²⁰ D. L. Chen, *Islamic Resurgence and Social Violence During the Indonesian Financial Crisis* (2005, unpublished working paper).

frustration, rather than poverty and education that are posited to play a minor role.²¹

We assume soldiers have an emotional leaning toward political and military action that the leader takes. At another level, soldiers' solidarity and mutual commitment may also play a crucial role in fighting. Since we focus on economic incentives but do not wish to exclude the effect of social, religious, and political factors, the model includes a parameter that reflects the permission identification level of the militia with the leader. Based on patriotism, social cohesion, and values, we assume that soldiers as a collective develop a certain sentiment toward any specific mission or war. When patriotism is high, soldiers are expected to earn a positive psychological reward by joining the army and fighting. When soldiers do not identify with the mission, resent it, and express less patriotism, they experience a psychological cost of fighting.

III. Mortality and Survival

Another key element that influences agents' decisions in wartime is risk to life.²² Although it is almost impossible to mingle survival concerns with more material or psychological motivations, we still believe that in the immediate decision-making that occurs during wars, soldiers take into account changes in risk to life alongside less cardinal concerns. In the model, we differentiate between two survival effects: group and personal. The survival probability of all agents in the model is affected by the war. The mortality probability is a direct function of the relative strength of the fighting army. Once the local militia becomes stronger (e.g., when more soldiers choose to fight), the relative probability of survival increases as well. In addition, soldiers are assumed to be at more risk than civilians. Later in the model, we relax this assumption. Finally, we introduce heterogeneity in the individual's survival probability. Hence, each soldier has a private value that captures his subjective perception regarding the excess risk that he assumes by fighting as a soldier as against quitting and reverting to his civilian life. Naturally, the individual survival value would be a major factor in the individual's decision to fight or desert.

21 A. B. Krueger & J. Maleckova, 'Education, Poverty and Terrorism: Is There a Causal Connection?', 17 *The Journal of Economic Perspectives* (2003) 4, 119.

22 Weinstein, *supra* note 10.

B. The Model

We consider a society in conflict. Individuals are assumed to be grouped into two pre-existing ethnic groups, A and B. We focus on the decisions taken by a unit mass of agents (Group A) and consider all the parameterization of Group B as exogenously given. Group A (i.e., the rebels) is headed by a leader who first initiates the violent phase of the conflict and then sets the allocation rule for the booty. Individuals care for income, survival, and patriotism.²³ Soldiers decide on whether to join the fighting (i.e., to actually to kill people and to loot) while the peasants decide whether to donate to the combatants. The model includes an aggregate-level production shock. The following paragraphs present the building blocks of the model and explain the equilibrium concept that we use.

I. Agents

Agents are *ex ante* identical. Agents may belong to the civilian sector (as peasants) or to the warfare sector (as militia members/soldiers). The mechanism that civilians use to self-select into the warfare sector and the role of ideology are the center of a parallel and more theoretical project.²⁴ Here, in contrast, our point of departure is a society that has a predetermined fixed proportion of soldiers and peasants. S_A denotes the share of soldiers in Society A and P_A denotes the share of peasants. By construction, $P_A = 1 - S_A$. In the civilian (agricultural) sector, peasants produce a single good and donate money to the fighting militia. In the warfare sector, soldiers decide whether to fight or to desert.

II. The Utility Function

The utility of agents is additively decomposable into three components: income, survival, and patriotism: $U_i = I_i + \log(H_i)$. Where I_i is agent i 's disposable income, H_i is his survival rate during the war (see below).

²³ For the sake of simplicity, all individuals are assumed to have the same utility function and to be risk-neutral, so that their utility function in income is linear, broadly defined.

²⁴ M. Lavie & C. Muller, *Incentives and Self-Selection in Violent Conflicts* (2010).

III. The Leader

The sole leader of Group A declares war and decides how the booty is to be allocated within the group. The leader is selfish and gains utility only from his or her own revenues:²⁵ $U_L = I_L$, where I_L denotes the leader's income.

IV. War

When the leader declares war on the incumbent group (B), a war breaks out. We analyze the outcomes of the war using a 'contest success function' that reflects the relative power of the fighting sides. The strength of Group A relative to Group B is given by: $\omega(S_B, S_A^F) = e^{\left(\frac{p_k S_A}{S_B}\right)}$, with $e' > 0$, $e'' \leq 0$ (implying that the return to military strength is positive but not increasing). Let $S_A^F \equiv p_k S_A$ denote the number of soldiers in Group A who actually participate in the fighting.²⁶ The probability of participation in fighting is denoted by p_k . When all soldiers fight, $p_k = 1$. Let S_B denote the number of fighting soldiers in Group B (assuming that all fight). The aforementioned fighting technology (i.e., the contest success function) directly reflects the relative fighting strength of the two armies and is a simpler transformation of the common successes function in the conflict literature.²⁷

War affects the economy in three ways: (i) looting, (ii) increased mortality, and (iii) an identification effect.

- i. Conditional on war, the looting value extracted from the opposite side (Group B) is given by: $L^B = L(\pi_B, \omega) = \pi_B \omega$, where π_B is the total wealth of Group B. For simplicity, we disregard looting of Group A by Group B because it does not affect the soldiers' fighting decision directly.
- ii. Mortality: war reduces the survival probability of both soldiers and peasants. Without war, the survival probability is set at 1. Survival is a decreasing function of ω and depends on the agent's position. We let h_p, h_s denote the respective survival parameter of peasants

²⁵ For brevity, hereinafter we use the masculine form for the leader.

²⁶ Note: the indexation of S using A is omitted below for brevity.

²⁷ See, for example Azam, *supra* note 14, 138 and H. I. Grossman & M. Kim, 'Swords or Plowshares? A Theory of the Security of Claims to Property', 103 *Journal of Political Economy* (1995) 6, 1275, 1279.

and soldiers during a war. Then, the respective survival probabilities are given by: ωh_P and ωh_S . Assume: $h_S = (1 - \mu)h_P$ with $\mu > 0$, reflecting the excess mortality among soldiers. For objective and subjective reasons, soldiers are heterogeneous in their evaluation of the extra risk. Thus an individual soldier experiences $h_{S,i} = (1 - \mu_i)h_P$ when μ_i is drawn from a cdf F_μ .

- iii. Identification effect: commensurate with their level of commitment to and identification with the cause of the war, soldiers who participate in fighting experience a psychological effect of size z . This parameter reflects a wide spectrum of feelings and emotions that soldiers might entertain in respect to their declared mission. A possible intuition may be “patriotism”, but other terms such as “values”, “morals” or “commitment” and “solidarity” may also be in mind. In a nutshell, “ z ” captures the aggregate militia’s sentiment toward fighting. We allow z to be negative or positive. When z is positive, soldiers favor the war and get a psychological reward from fighting; when z is negative, the effect is the opposite.

V. Peasants (Production and Donation)

Peasants produce using a constant-return-to-scale technology: $F_i = \lambda \theta_{t,i}$. Productivity is subject to an aggregate shock. The aggregate shock is $\theta_t \geq 0$, drawn from distribution F_θ . Peasants may transfer (donate) money to the militia. Donation affects the peasants’ probability of survival by incentivizing the soldiers to provide better local protection.²⁸ Let D_i denotes the per-peasant donation level and let d_i denote the per-soldier donation level ($D_i = \frac{p_k S_A}{P_A} d_i$). For the sake of brevity, peasants’ actions are simplified into a reduced form that captures the link between the aggregate productivity level and the monetary transfers to soldiers. Individual donations are a positive function of the peasants’ income: $d_i = D(\theta_t)$ with $D'(\theta_t) > 0$. The intuition is that due to budget constraints and/or liquidity constraints, peasants donate sub-optimally and, as a result, the collective level of donations is a positive increasing function of the

²⁸ Note that this kind of argumentation is true whether the local militia protects the local civilians or represses and brutalizes them.

aggregate productivity shock.²⁹ Finally, the enhanced survival effect is given by $\beta_i(D_i(\theta_{t,i}))$, which increases with $\theta_{t,i}$.

VI. Revenues

Besides production, the other primary source of income in the economy is looting. Looting is a war-related activity; as such, it is organized and controlled by the leader. The leader decides and announces the rule to be used in dividing the booty between the soldiers and the leader. The proportions are denoted by vector $A = \{a_L, a_S\}$, where $a_L + a_S = 1$, and a_L, a_S are those of the leader and the soldiers, respectively.

However, soldiers' revenues depend on their fighting participation: Soldiers who do not fight (by deserting the army and returning to civilian life) are not entitled to either form of financial benefit, donations or booty. Finally, the leader's income is constructed by his share of the booty. The incomes of the leader (I_L), the soldiers (I_S), and the peasants (I_P) are summarized by:

$$(1) \quad \left\{ \begin{array}{l} I_L = (1 - a_S)L^B \\ I_{S,i}|(k_i = 1) = \frac{a_S L^B}{S^F} + d_i \\ I_{S,i}|(k_i = 0) = 0 \\ I_{P,i} = \lambda\theta_{t,i} - D_i \end{array} \right\}$$

Where ' $|(k_i = 1)$ ' represents 'conditional on fighting'.

VII. Schedule

The model is scheduled as follows: (1) productivity shock (θ_t) takes place; (2) the leader declares war and discovers if the militia supports him (identification); (3) the leader announces the sharing rule of the looting (a_L, a_S); (4) peasants transfer their donations; (5) soldiers decide to fight ($k=1/0$); (6) war breaks out and the booty is distributed.

²⁹ For an extended description and full structure of such a system, see Lavie & Muller, *supra* note 24.

VIII. Information structure

The agents and the leader are familiar with all the model parameters and structure. The aggregate productivity shock becomes public knowledge instantaneously after it occurs. Also, after the declaration of war, the leader immediately discovers the reaction of the militia (the realization of z) so he can optimally respond to both the local productivity level and the militia support level when he sets the booty allocation rule. The individual-risk parameter (μ_i) is private information but the distribution of the survival probabilities is known. Finally, all decisions made are also common knowledge.

IX. Equilibrium

The equilibrium results from the players' optimal sequential decisions. The model is solved backward: we start with the final decision of the model – to fight, our main decision of interest – and move backward to previous decisions that make it possible: donations and booty allocation. At each stage, agents choose actions that maximize their utility based on the anticipated response of other players. The equilibrium is characterized by three decision vectors: $\{A, \Delta, K\}$. $A\{a_L, a_S\}$ as the vector of the booty allocation, $\Delta\{D_j, j = 1, \dots, n\}$ as the vector of donations from peasants, and $K\{k_l = \{0 \text{ or } 1\}, l = 1, \dots, n\}$ as the vector of the soldiers' fighting intensity.

We now proceed to analyze the model.

C. Analysis

The model is solved by solving the three decision equations sequentially. Note that, since the aggregate productivity shock precedes the making of any decision, we consider productivity as fixed ($\theta_{t,i} = \theta$). Consequently, the donation level is also fixed ($d_i = d$) and does not attract direct special interest. To solve the rest of the model, we first explicitly express the utility functions. The leader's utility is given by his revenues³⁰:

$$(2) \quad U_L = (1 - a_S)L^B$$

³⁰ Still, it must satisfy the liquidity constraint; thus, $D \leq \lambda\theta_t$.

The soldiers' utility function contains revenues (from their share of the looting and received donations) and, upon fighting, the individual probability of death and the identification parameter:

$$(3) \quad U_{S,i} = k_i \left(\frac{a_S L^B}{S_A^F} + d \right) + \log(h_{S,i}) + k_i z$$

where: $h_{S,i} = \omega(1 - k_i \mu_i) h_P$.

The peasants' utility function accommodates net revenues and the survival probability:

$$(4) \quad U_{P,i} = \lambda \theta_{t,i} - D_i + \log(h_P)$$

where: $H_P = \omega h_P$.

The following paragraphs provide formalization for the agents' three decision equations in reverse order:

I. Fighting decision

Soldier i fights if $E(U_S | k = 1) \geq E(U_S | k = 0)$. Plugging in the utility expression (Equation 3), we get³¹: $a_S^* \frac{L^{B^*}}{p_k^* S} + d + \log(\omega^*(1 - \mu_1) h_P) + z \geq \log(\omega^* h_P)$. Recall that $L^{B^*} = \frac{\pi_B}{S_B} p_k^* S$. Then, using the notation $\chi_i \equiv \log\left(\frac{1}{1 - \mu_1}\right)$, we can rewrite the fighting condition into:

$$(5) \quad \chi_i \leq a_S \frac{\pi_B}{S_B} + d + z$$

Parameter χ_i is a monotone transformation of μ_1 with a cdf F_χ . Similarly, χ_i represents the extra threat of death to a soldier. The higher χ_i gets, the more dangerous the fighting that soldier experiences. Let $\chi_i^F \equiv a_S \frac{\pi_B}{S_B} + d + z$ denote the reservation survival level. Then, any soldier who is more fearful of survival than this level will not fight. Therefore, the fighting rate among the soldiers, p_k , is:

$$(6) \quad p_k = \text{prob.}(\chi_i \leq \chi_i^F) = F_\chi \left[a_S \frac{\pi_B}{S_B} + d + z \right]$$

³¹ The asterisks represent the equilibrium values of the variables. Note that at the moment of decision all previous information is already known; hence the only asterisk (denoting an optimal choice to calculate) left is for p_k^* and we may delete the asterisks from all other variables.

II. Leader's decision

The leader chooses to allocate the booty in a way that maximizes his revenues:

$$(7) \quad \max_{a_S} E[(1 - a_S) L^B]$$

The corresponding F.O.C. is:

$$(8) \quad \frac{\partial L}{\partial a_S} = \frac{\pi_B}{S_B} S \left((1 - a_S) \frac{\partial p_k^*}{\partial a_S} - p_k^* \right) = 0$$

Equations (6) and (8) provide us with the structural characteristics of the model. To complete the analytical analysis, we now use a specific functional form for the distribution of the survival parameters. Let the distribution of the survival parameter be uniform: $\chi_i \sim U[0, \chi_0]$. Then: $p_k = \frac{a_S \frac{\pi_B}{S_B} + d + z}{\chi_0}$. Using the above functional form, we can analytically solve the model and present the equilibrium results. We summarize the result in the following proposition:

Proposition 1: Booty allocation

- $a_S = 0$ if $d + z \geq \frac{\pi_B}{S_B}$
- $a_S = \frac{1}{2} - \frac{d+z}{2 \frac{\pi_B}{S_B}}$ if $\frac{\pi_B}{S_B} \geq d + z \geq -\frac{\pi_B}{S_B}$
- $a_S = 1$ if $-\frac{\pi_B}{S_B} \geq d + z$

III. Proof

Using $p_k = \frac{a_S \frac{\pi_B}{S_B} + d + z}{\chi_0}$, we calculate: $\frac{\partial p_k}{\partial a_S} = \frac{\pi_B}{S_B}$. Plugging into (8), we can solve for a_S and get the interior solution: $a_S^* = \frac{1}{2} - \frac{d+z}{2 \frac{\pi_B}{S_B}}$. Also, the s.o.c is

satisfied: $\frac{\partial^2 L}{\partial^2 a_S} = -\frac{2 \left(\frac{\pi_B}{S_B} \right)^2 S}{\chi_0} < 0$. Re-inserting a_S^* into p_k we get: $p_k^* = \frac{\frac{\pi_B}{S_B} + d + z}{2 \chi_0}$. ■

The soldiers' share of the booty decreases in inverse proportion to donation size; i.e., the higher the donation, the smaller the share in the booty. In

addition, a_s compensates for the size of z . Higher support in the war leads to smaller monetary incentives; when support is little or negative, the soldiers' share increases. Interestingly, the effect of the opponent's wealth and strength is not monotonous in the interior solution segment: $\frac{\partial a_s}{\partial \frac{\pi_B}{S_B}} < 0$ for $d > z$

and $\frac{\partial a_s}{\partial \frac{\pi_B}{S_B}} > 0$ for $d < z$. By implication, when the militia supports the war (or at least does not oppose it vigorously), the higher opportunity value (greater opponent wealth combined with less military power) reduces the soldiers' share. When the militia is strongly against the war, its share of the booty increases when the opponent's income increases or when the opponent's military strength decreases. Note that for $d < z$, soldiers will not fight unless they are offered a share of the booty. In this case, higher opportunity value allows the leader to increase the incentives.

At the corner ($d + z < -\frac{\pi_B}{S_B}$), soldiers sit out the war even if they are offered the entire looting surplus ($a_s = 1$, but $p_k^* = 0$). Finally, when donations are high enough ($d + z \geq \frac{\pi_B}{S_B}$), the soldiers are so keen to fight that the leader can retain all the booty. Note that this result may be achieved either by high donations or by strong support of the war; in both cases, additional monetary incentives become unnecessary.

A possible intuition for donation is taxation. In this sense, we may interpret the last result as in the case of a regular army: the government pays its soldiers enough (in salaries financed by the tax system) to avoid the need to incentivize them with a performance bonus (i.e., booty). In a less organized group, such as that of rebels, donations (given willingly or taken by force) are important but often are not enough to make soldiers fight. In the extreme case where soldiers are non-patriotic, the promised share becomes maximal.

Proposition 2: Fighting decision

- $p_k^* = 0$ if $-\frac{\pi_B}{S_B} \geq z + d$
- $p_k^* = \frac{\frac{\pi_B}{S_B} + d + z}{2\chi_0}$ if $2\chi_0 - \frac{\pi_B}{S_B} > z + d > -\frac{\pi_B}{S_B}$
- $p_k^* = 1$ if $z + d > 2\chi_0 - \frac{\pi_B}{S_B}$

Soldiers do not fight ($p_k = 0$) when the individual risk of fighting is so severe as to make all possible levels of compensation inadequate. Alternatively, soldiers do not fight if the militia is strongly against a war (very negative z). In the interior solution segment, fighting participation rises in tandem with opportunity value, peasants' donations, and support of the militia. Fighting

participation decreases as the opponent's army grows or when the distribution of χ widens; in these cases, soldiers fear that the risk of mortality is very high. In the extreme case of very generous donations and/or very strong patriotism, all soldiers fight; at some point in this segment, the promised share of the booty drops to zero.

IV. Relaxing the Excess Threat Assumption

Previously, we assumed that the survival probability of soldiers is lower than that of civilians ($\chi_i > 0$). However, some evidence suggests that this is not always the case. Azam quotes an aid-agency official who estimated the share of non-combatant casualties at 84% and suggests that deliberate targeting of civilians by militias is part of a well defined military tactic.³² In the analytical terms of the model, this would suggest a negative value of χ . Such a change gives a peasant a lower survival probability than a soldier. Clearly it would tend to increase p_k^* but in parallel it also decreases the soldiers' share of the booty.

Consider a new functional form for the distribution of the individual risk parameter: $\chi_i \sim U[-\chi_0, \chi_0]$. Then: $a_s = \frac{1}{2} - \frac{d+z+\chi_0}{2\frac{\pi_B}{S_B}}$, $p_k^* = \frac{\frac{\pi_B}{S_B} + d+z+\chi_0}{4\chi_0}$. Indeed, fighting participation is higher and the share of the booty is lower. We also see that contrary to the previous model, the parameter of the risk distribution (χ_0) enters directly into the a_s equation. The intuition is clear: when soldiering is safer than remaining a civilian, the practical result is forced recruitment with no exit option. This type of story is common in territories where the local militia terrorizes its own people and inducts men by force.

V. Declaration of War and Occurrence of Shocks

We now observe possible trigger factors for an armed conflict. We consider three main channels through which war becomes more likely (from the point of view of the leader who declares the war). Although this model does not explicitly define how the decision to go to war is made, our results suggest that a leader would tend to declare war when the expected probability of fighting crosses a certain threshold. The following paragraphs suggest such possible scenarios:

³² Azam, *supra* note 14, 131, 132.

- A positive local productivity shock: when the society experiences a positive productivity shock ($\theta_{t,i}$), peasants can make larger donations (alternatively, the leader can more easily collect taxes or protection money, depending on the interpretation). Those transfers serve as a fixed-incentive device for soldiers. The outcome is higher expected probability of compliance among soldiers, resulting in higher expected profits for the leader. To conclude, the model suggests that a jump in productivity (e.g., due to an international increase in the price of a local natural resource) may transform a peaceful leader into a violent one.
- Changes in the opportunity value of looting: when the opponent becomes richer (creating more income to loot) or weaker (fewer soldiers or weaker tendency of soldiers to fight), the effect on the local leader and the militia is similar: an increase in opportunity value that may lead to a war.
- Patriotism and charisma: the support of the militia (i.e., strong identification with the cause of the war) is a major factor in the participation equation. Patriotism and charisma may serve as substitutes for monetary incentives. A leader who cannot pay soldiers properly may compensate for this with the effective manipulation of public opinion. Since different leaders tend to differ in charisma and communication skills, the model suggests that the leader's personal attributes would play a crucial role, especially in low-income economies where alternative ways of financing the army are limited.

D. Concluding Remarks

In essence, this paper takes a closer look at the decision-making process that eventually induces people to become perpetrators of violent conflict. Our model suggests a possible mapping of the effect of incentives on conflicts. We showed the substitutability of looting and donations as monetary incentives for fighting. Also, we studied the effect of perceived survival heterogeneity as an explanatory variable for the sorting of soldiers. Finally, we explored the possibility of leaders using charisma alongside monetary incentives to promote participation.

Much attention in academic, donor and non-governmental organization circles has been given to the role of financial foreign aid in fueling violent civil wars. A parallel concern is focused on the effect of local resources (and especially on the variation of global prices on such resources) as the funding

sources of militia forces and rebels.³³ While we acknowledge the role of foreign aid and natural resources as funding sources, we do not specify them directly in the model. The total resources of the opponent side are captured via the parameter π_B . In that sense, if the opponents enjoy large scale external transfers or payments, it would affect the 'lootable' wealth and by that it should yield a positive motivational effect on the soldiers' decision to fight (due to the higher rent from fighting).

Alternatively, if the opponent obtains a supply of weapons and arms, it may be captured via an increase in the opponent relative strength (via the S_B parameter). As for the funding of the rebel group, the effect of production and production shocks (i.e., changes in global prices of local resources) is well captured via the donation mechanism. Any additional enclave production (with little connection to the productivity of most citizens) would enter directly into the possession of the group leader. The current model does not allow the leader to use the additional funding to incentivize soldiers. However, under some minor adjustments (which were omitted for the sake of brevity) we can show that, given that the leader optimally incentivizes the soldiers using the booty allocation rule, an increase in the total endowment of the leader would only affect the wealth of the leader.

While it is clear that economic incentives play an important role in the decision to fight, the initial motivation for joining the militia remains survival. Joining a militia in a conflict zone is never simple: in many cases, the dilemma is as plain as kill or be killed. While economic models tend to flatten the world into a set of elementary equations, reality is more complex.³⁴ Even so, the careful use of modeling to examine non-trivial circumstances may be productive, mainly in better understanding the dilemmas that young people face and the possible equilibriums to which they lead. Still, understanding does not necessarily mean condoning.

Finally, the study may offer an interesting policy-oriented contribution toward the debate over re-legitimizing a former terrorist or militant. When a conflict comes to its end, it is crucial to be able to differentiate and understand the reasoning process that made people fight and kill. U.S.

³³ For recent examples see T. Janus, 'Natural resource extraction and civil conflict', *Journal of Development Economics* (forthcoming 2011) and Humphreys & Weinstein, *supra* note 2.

³⁴ In a provocative paper, C. Cramer, 'Homo Economicus Goes to War: Methodological Individualism, Rational Choice and the Political Economy of War', 30 *World Development* (2002) 11, 1845, 1856, suggests that orthodox economic theories of war are reductionist, speculative, and misleading.

Secretary of State Hillary Clinton referred to Afghanistan when she said, “[t]he Taliban consists of hard-core committed extremists with whom there is not likely to be any chance of any kind of reconciliation or reintegration. But it is our best estimate that the vast majority [...] are people who are not committed to a cause so much as acting out of desperation”³⁵. Assuming that agents differ in their level of extremism (or, in our terms: patriotism), our model provides mapping of the motivational background of different soldiers in the same army. Such a structure may be used after a war to develop criteria for the clearing of some former combatants and the prosecution of others.

³⁵ ‘Canada Brokers Afghan-Pakistani border security deal.U.S. strategy in flux as 72 countries meet on Afghanistan’s future’ (31 March 2009) available at www.cbc.ca/news/world/story/2009/03/31/hague-conference.html (last visited 28 April 2011).

Enhancing Compliance with International Law by Armed Non-State Actors¹

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¹ This article builds on a research project conducted by the Geneva Academy of International Humanitarian Law and Human Rights (ADH) since 2009 and based on interviews with humanitarian actors, as well as on the results of a workshop held in Geneva in March 2010. See ADH, 'Armed Non-State Actors and International Norms: Towards a Better Protection of Civilians in Armed Conflicts', Summary of Initial Research and Discussions During an Expert Workshop in Geneva in March 2010, available at <http://www.adh-geneva.ch/docs/reports/armednonstateactors.pdf> (last visited 14 April 2011).

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Abstract

Enhancing compliance with international norms by armed non-state actors is central to efforts to improve the protection of civilians in armed conflict. Limited engagement with such actors, as well as lack of clarity as to the precise nature and extent of the international legal regimes that are applicable to them, constitute significant barriers to achieving better compliance. In this article the authors argue for international human rights law to be more widely seen as imposing direct obligations upon armed non-state actors and for counter-terrorism legislation not to be interpreted so as to preclude engagement on positive respect for humanitarian norms. What is needed is greater engagement with armed non-State actors, not less.

A. Introduction

Today's conflicts are mostly qualified under international humanitarian law as being of a non-international character, i.e. a State against one or several armed non-State actors (ANSAs) or even a conflict among different ANSAs in a failed State.² How, and to what extent, international law is formally binding on these actors is debated. While it is largely uncontested that international humanitarian law imposes certain obligations on ANSAs, the application of other bodies of international law, in particular human rights law, is controversial. Nonetheless, the practice of the United Nations, as well as of other international and regional organizations shows that efforts are increasingly being made to hold ANSAs accountable at the international level for the violation of international

² This paper uses the following working definition of ANSA: *any armed group, distinct from and not operating under the control of the State or States in which it carries out military operations, and which has political, religious, or military objectives*. Thus, it does not ordinarily cover private military companies or criminal gangs. However, as the ICRC has observed: "Amongst armed groups, the distinction between politically-motivated action and organised crime is fading away. All too often, the political objectives are unclear, if not subsidiary to the crimes perpetrated while allegedly waging one's struggle [...] Are we dealing with a liberation army resorting to terrorist acts, or with a criminal ring that tries to give itself political credibility? Are we dealing with a clan-oriented self-defence militia relying heavily on criminal funding, or with a Mafia-like gang whose constituency is strongly intertwined with ethnic communities?" ICRC, *Holding Armed Groups to International Standards: An ICRC Contribution to the Research Project of the ICHRP*, (1999), 2–3.

norms. Furthermore, members of ANSAs can be held individually responsible under international criminal law when they commit certain crimes.

Despite these considerations, many difficulties remain in seeking to ensure compliance with international norms by these actors. The reasons for lack of compliance are diverse: strategic arguments (the nature of warfare in internal armed conflicts that may lead to the use of tactics that violate international law, such as launching attacks from within the civilian population); lack of knowledge of applicable norms; and lack of ‘ownership’³ over these norms. Indeed, since ANSAs are not entitled to ratify the relevant international treaties (as, by definition, they are not a State or other entity with the necessary international legal personality), and are generally precluded from participating as full members of a treaty drafting body, they could—and sometimes do—argue that they should not be bound to respect rules that they have neither put forward nor formally adhered to.

Our article aims at identifying the challenges faced by the international community (e.g. States, international organizations, NGOs working in the field) when dealing with ANSAs. It starts with a brief overview of the legal dimension of the problem, but focuses mainly on the *policy* aspect of this issue and in particular on ways to improve respect for international law by ANSAs.

³ In the context of the present article, by ‘ownership’ is meant the capacity and willingness of actors engaged in armed conflict to set and/or take responsibility for the respect of, norms intended to protect civilians as well as other humanitarian norms applicable in armed conflict.

B. Overview of International Law Applicable to Armed Non-State Actors

There is no comprehensive mapping of armed non-State actors around the world.⁴ The Stockholm International Peace Research Institute has determined that in 2009, 17 ‘major’ armed conflicts were active in 16 locations around the world.⁵ “All of these conflicts were intra-state: for the sixth year running, no major interstate conflict was active in 2009”⁶. Thus, as Sassòli has noted:

“By definition, at least half the belligerents in the most widespread and most victimizing of armed conflicts around the world, *i.e.* non-international armed conflicts, are non-State armed groups.”⁷

However, public international law rarely addresses the obligations of *groups* of individuals other than States. There are, however, a few provisions seeking to bind ANSAs – *qua* groups – in international humanitarian law treaties, even if some doubts persist as to how precisely

⁴ The Graduate Institute of International and Development Studies in Geneva, in cooperation with the Programme on Humanitarian Policy and Conflict Research (HPCR) at Harvard University, has launched an online database on non-state armed groups at www.armed-groups.org (last visited 14 April 2011). Currently the database offers analysis and information resources on 50 transnational and non-state armed groups.

⁵ In Africa, this was, according to Stockholm International Peace Research Institute (SIPRI), in Rwanda, Somalia, Sudan, and Uganda; in the Americas, in Colombia and Peru; in Asia, in Afghanistan, India (Kashmir), Myanmar (Karen State), Pakistan, the Philippines (against the Communist Party of the Philippines), the Philippines (Mindanao), and Sri Lanka (‘Tamil Eelam’); in Europe, in Russia (Chechnya); and in the Middle East, in Iraq, Israel (Occupied Palestinian territories), and Turkey (Kurdish areas). The US was involved in major armed conflicts abroad. Since then, the conflict in Sri Lanka has ended. See L. Harbon & P. Wallenstein, ‘Appendix 2A. Patterns of major armed conflicts, 2000–2009’, *SIPRI Yearbook 2010*, SIPRI, Stockholm, available at www.sipri.org/yearbook/2010/02/02A (last visited 14 April 2011).

⁶ L. Harbon & P. Wallenstein, *id.*

⁷ M. Sassòli, ‘Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law’, Paper submitted at the Armed Groups Conference, Vancouver, 13–15 November 2003, 1, available at <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf> (last visited 14 April 2011).

those norms are legally binding on those actors.⁸ Furthermore, contemporary international human rights law has evolved to an extent whereby it can be argued (though not universally agreed) that ANSAs also have human rights obligations.⁹ Let us address each of these bodies of law in turn.

I. International Humanitarian Law

For international humanitarian law (IHL) to apply to an ANSA, two conditions must be fulfilled. First, there must be an armed conflict as defined by IHL, and second, the group must possess a sufficiently developed structure.

1. The Existence of an Armed Conflict

International humanitarian law applies specifically to situations of armed conflict. The existence of such a conflict is a question of fact and does not formally depend on the opinion of concerned states on the matter.¹⁰ International humanitarian law distinguishes between international armed conflicts and non-international armed conflict, although the pertinence of this distinction is now criticized by some scholars.¹¹

⁸ On the binding character of international humanitarian law on armed groups see in particular, S. Sivakumaran, 'Binding Armed Opposition Groups', 55 *International and Comparative Law Quarterly* (2006) 2, 369–394; A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts', 30 *International and Comparative Law Quarterly* (1981) 2, 416–439; A. Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement' (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636 (last visited 14 April 2011); L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002); S. Zašova, 'L'Applicabilité du Droit International Humanitaire aux Groups Armés Organisés, in J-M. Sorel & C-L. Popescu (eds), *La Protection des Personnes Vulnérables en Temps de Conflits Armés* (2010).

⁹ See generally on that point, A. Clapham, *Human Rights Obligations of Non-State Actors* (2006).

¹⁰ S. Vité, 'Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations', 91 *International Review of the Red Cross* (2009) 873, 69–94.

¹¹ See, e.g., J. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', 85 *International Review of the Red Cross* (2003) 850, 313–350; see also R. Kolb, *Ius in Bello. Le Droit International des Conflits Armés* (2003), 71–113.

The notion of international armed conflict is defined in Article 2 common to the four Geneva Conventions of 1949 which states that the Conventions:

“shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”.

The level of intensity of violence to trigger the law of international armed conflict is widely understood to be very low and the conflict needs not to be of a long duration.¹² Situations of occupation, i.e. when a territory ‘is actually placed under the authority of the hostile army’¹³ are also qualified as international armed conflicts with specific regulation of the occupier’s actions. Under Article 1, paragraph 4 of the 1977 Additional Protocol I¹⁴ to the Geneva Conventions, application is extended to:

“armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, [...]”

Such a situation is determined to be an international armed conflict also, even if one of the parties involved is an ANSA. Its politically charged language has, though, meant that it has never successfully been invoked in practice by an ANSA.

Armed conflicts of a non-international character are defined by reference to two texts: Article 3 Common to the four 1949 Geneva Conventions and *1977 Additional Protocol II*¹⁵ to the Geneva Conventions. Common Article 3, which is generally agreed to be part of customary international law,¹⁶ applies “in the case of armed conflict not of an

¹² See Vité, *supra* note 10, 72.

¹³ Article 42 of the 1907 Hague Regulations; see on occupation, Y. Dinstein, *The International Law of Belligerent Occupation* (2009); R. Kolb & S. Vité, *Le droit de L’Occupation Militaire: Perspectives Historiques et Enjeux Juridiques Actuels* (2009).

¹⁴ 1125 U.N.T.S. 3.

¹⁵ 1125 U.N.T.S. 609.

¹⁶ Statements reiterating the customary nature of Common Article 3 have been made by the *ad hoc* international criminal tribunals both for the former Yugoslavia and for

international character occurring in the territory of one of the High Contracting Parties” and requires that “each Party to the conflict shall be bound to apply, as a minimum,” a certain number of provisions.¹⁷

It has sometimes been claimed that the term “each Party” does not actually apply to ANSAs, but only to government armed forces.¹⁸ State

Rwanda. See, notably, ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1, para. 98; and ICTR, *Prosecutor v. Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T, para. 608. According to the International Court of Justice in *Nicaragua v. the United States*:

“Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts.”, *Military and Paramilitary Activities in und against Nicaragua*, (*Nicaragua v. USA*), Merits, Judgment. I.C.J. Reports 1986, 14, para. 218.

¹⁷ Common Article 3 reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

¹⁸ One of the arguments put forward has been that ‘Party’ (with a capital ‘p’) meant ‘High Contracting Party’, i.e. states, and that it was used in a contracted form merely to avoid repetition. See Zašova, *supra* note 8, 58; Zegveld, *supra* note 8, 10.

practice as well as international case law, however, has confirmed that Common Article 3 applies to ANSAs directly.¹⁹

1977 Additional Protocol II, which “develops and supplements” the provisions of Common Article 3 “without modifying its existing conditions of application”, imposes greater restrictions on the conduct of ANSAs. It is, though, applicable in a somewhat narrower set of circumstances as it is meant to apply to “all armed conflicts” not covered by Article 1 of *1977 Additional Protocol I* (which applies to international armed conflicts) as long as they,

“take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has declared that the ‘core’ of *Additional Protocol II* is also part of customary international law.²⁰

Neither Common Article 3 nor *1977 Additional Protocol II* applies in situations of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, [as] not being armed conflicts”²¹. Such situations are, though, covered by international human rights law. It is therefore necessary to establish the threshold of violence to be reached for IHL to apply. Whereas to qualify as an international armed conflict it is said to be enough that there “is a resort to

¹⁹ In *Nicaragua*, the ICJ confirmed that common article 3 was applicable to the *contras*, the non-State armed group fighting the government: “The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character”, *Nicaragua v. USA*, *supra* note 16, para. 219.

²⁰ *Prosecutor v. Tadić*, Judgment (Appeals Chamber), 15 July 1999, Case No. IT-94-1, para. 98.

²¹ *Additional Protocol II*, Article 1, paragraph 2. See Vité, *supra* note 10, 76; ICRC, *How is the Term ‘Armed Conflict’ Defined in International law*, Opinion Paper, March 2008, 3, underlining that the threshold is also valid for situations covered by Common Article 3.

armed force between States”²², for Common Article 3 and *Additional Protocol II* to apply, jurisprudence holds there must be “protracted armed violence” between the parties.²³ In addition, as both Common Article 3 and *Additional Protocol II* apply in situations of armed conflicts where governmental forces and ANSAs are involved, there are certain requirements as to the level or organization of the group. In that regard, the conditions laid down by *Additional Protocol II* to which we are going to turn now, are more stringent.²⁴

2. Conditions with Regard to the Structure of the Group

Common Article 3 does not explicitly determine the level of organization the ANSA must possess in order for the provision to apply to their behavior. The ICTY’s case law lays down indicators to establish the necessary degree of organization of the group:

“As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the “organization” criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.”²⁵

²² ICTY, *Prosecutor v. Tadić*, *supra* note 20, para 70.

²³ *Id.* By ‘protracted’, is meant a certain intensity of combat rather than of a certain duration, as the ordinary meaning of the word implies.

²⁴ A further restriction is foreseen in *Additional Protocol II*. Whereas Common Article 3 also applies in a situation of armed conflict taking place only between non-State armed groups, *Additional Protocol II* only deals with armed conflicts taking place between, at least, one State and one ANSA. See Vité, *supra* note 10, 80.

²⁵ ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, para. 60. See also for a useful review of criteria of organization, ICTY, *Prosecutor v. Boskoski*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008, paras 199–203.

As noted above, Article 1, paragraph 1 of *Additional Protocol II* lays down more stringent conditions of application, namely to the requirement for ‘control of territory’ by an ANSA. It is sometimes difficult to identify in practice when this condition has been fulfilled as interpretations vary as to the degree of control of territory necessary (and the nature of warfare is not static, so control may ebb and flow).²⁶ A strict interpretation would cover only situations in which the ANSA exercises a similar control to that of the State. A less rigid position, as set out in the Commentary of the Protocol published by the International Committee of the Red Cross (ICRC), accepts a situation where control of territory is only partial.²⁷

In conclusion, in a situation of armed conflict, armed groups that have reached the appropriate level of organization are bound by international customary law and by a certain number of treaty provisions, provided the State in which the conflict takes place is a party to the relevant treaty. The International Commission of Inquiry on Darfur enumerated a list of norms of customary international law binding on the rebels, which included the following fundamental provisions:

“(i) the distinction between combatants and civilians [...] (ii) the prohibition on deliberate attacks on civilians; [...] (iv) the prohibition on attacks aimed at terrorizing civilians; [...] (xiv) the prohibition of torture and any inhuman or cruel treatment or punishment; [...] (xvii) the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely”²⁸.

²⁶ Vité, *supra* note 10, 79.

²⁷ *Id.*, 78. As the commentary published by the ICRC notes (para. 4467): “In many conflicts there is considerable movement in the theatre of hostilities; it often happens that territorial control changes hands rapidly. Sometimes domination of a territory will be relative, for example, when urban centres remain in government hands while rural areas escape their authority. In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol.” Commentary on 1977 Additional Protocol II, available at <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument> (last visited 14 April 2011).

²⁸ See the full list in ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General - Pursuant to Security Council Resolution 1564 of 18 September 2004’, Geneva, 25 January 2005, para. 166. For a list of customary

In addition, ANSAs are specifically bound by the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954,²⁹ as well as by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (CCW)³⁰.

II. International Human Rights Law

It is generally understood that human rights law is applicable at all times, including in armed conflicts. This has been formally confirmed on several occasions by the International Court of Justice.³¹ Thus, there is no need to assess whether a certain threshold of violence has been reached (although certain situations of emergency may allow a State Party to derogate from full observance of specific rights). When the threshold for the application of IHL has been reached, IHL and international human rights law will apply in a ‘complementary’ way.³²

international law applicable in non-international armed conflicts, see, e.g., the ICRC database available at www.icrc.org/customary-ihl/eng/docs/home (last visited 14 April 2011).

²⁹ 249 U.N.T.S. 240; Article 19 of this Convention reads as follows: “In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property. 2. The parties to the Conflict shall endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. 3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict. 4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.”.

³⁰ 1342 U.N.T.S. 137.

³¹ See the ICJ Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996, ICJ Reports 1996, as well as the Advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, ICJ Reports 2004. The applicability of international human rights law in situations in armed conflicts was also confirmed by the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)*, Judgment of 9 December 2005, ICJ Reports 2005.

³² See H.-J Heintze, ‘On the Relationship Between Human Rights Law Protection and International Humanitarian Law’, 86 *International Review of the Red Cross* (2004) 856, 789-814.

The applicability of human rights *law* to ANSAs (as opposed to the *norms* of behavior espoused by that corpus of international law) is controversial.³³ One of the reasons put forward by scholars refuting the applicability of this body of law is that the rationale of human rights is the regulation of *States*’ and not *‘private actors’* behavior with respect of individuals under their jurisdiction or control.³⁴ Admittedly, in contrast with IHL instruments, few human rights treaties explicitly mention obligations that could be binding on ANSAs, although the situation is evolving.³⁵

A narrow conception of human rights law does not correspond to the basic philosophy of human rights or to the reality of many situations in

³³ See A. Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’, 88 *International Review of the Red Cross* (2006) 863, 491–523.

³⁴ For Zegveld: “Various bodies, including the Inter-American Commission, the special rapporteurs and working groups of the UN Commission on Human Rights, and the UN Secretary-General have answered the question whether human rights treaties can be applied to armed opposition groups negatively. The principal reason is that human rights regulate the relationship between the government and the governed and aim to check the exercise of state power”, Zegveld, *supra* note 8, 40.

³⁵ See Article 7 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted 22 October 2009, available at http://reliefweb.int/sites/reliefweb.int/files/resources/8F2DDD0E8D2ED16B4925765B0007426C-au_oct2009.pdf (last visited 14 April 2011), which stipulates that: Members of armed groups shall be prohibited from:

- a) Carrying out arbitrary displacement
- b) Hampering the provision of protection and assistance to internally displaced persons under any circumstances
- c) Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family
- d) Restricting the freedom of movement of internally displaced persons within and outside their areas of residence
- e) Recruiting children or requiring or permitting them to take part in hostilities under any circumstances
- f) Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children
- g) Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons
- h) Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials and
- i) Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such places.

which ANSAs operate. As suggested by one author, “the most promising theoretical basis for human rights obligations for non-state actors is first, to remind ourselves the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s dignity. The implication is that these natural rights should be respected by everyone and every entity”³⁶. From a more legal point of view, there seems to be a broader agreement among scholars that human rights norms could be applicable to ANSAs in specific circumstances, in particular when they exercise element of governmental functions and have *de facto* authority over a population. This will normally be the case when an armed group controls a certain portion of the territory. Indeed, the need to regulate the relationship between those who govern and those who are governed, which characterizes the *raison d’être* of human rights law, would be reproduced and thus would justify the application of that body of law.³⁷ Moreover, ANSAs could also be legally bound by core human rights norms whether or not there is such control over a certain territory or population. Thus in a recent study, the International Law Association reached the conclusion that even though “the consensus appears to be that currently NSAs [non state actors] do *not* incur direct human rights obligations enforceable under international law”, ANSAs would still be bound by *ius cogens* norms³⁸ and insurgents should comply with international humanitarian law.³⁹

³⁶ A. Clapham, *supra* note 9, 24.

³⁷ See N. Rodley, ‘Can Armed Opposition Groups Violate Human Rights’, in K. E. Mahoney & P. Mahoney (eds), *Human Rights in the Twenty-First Century*, (1993), 300; also Zegveld, *supra* note 8, 149.

³⁸ Norms of *ius cogens* – the peremptory norms of international law – are defined by Article 53 of the 1969 *Vienna Convention on the Law of Treaties* (1155 U.N.T.S. 331) as norms “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.” The ILC Draft Articles foresee superior means of enforcement for *ius cogens* norms, by including special regulation of both the responsible State and for all other States in the case of violations. Christian J. Tams, ‘Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?’, 13 *European Journal of International Law* (2002) 5, 1161–1180.

³⁹ International Law Association, *Non State Actors*, First Report of the Committee (Non-State Actors in International Law: Aims, Approach and scope of project and Legal issues), The Hague Conference 2010, para. 3.2 (original emphasis). Which human right norms are part of *ius cogens* is not settled. The International Law Commission in its Commentary on the Draft Articles on State Responsibility has identified as peremptory norms of international law the “prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to

In fact, contemporary practice of international institutions shows clearly that there is a political will to hold non-State actors accountable for human rights violations. For example, the UN Security Council has, with respect to Afghanistan, “call[ed] upon all parties to uphold international humanitarian and human rights law and to ensure the protection of civilian life”⁴⁰. In his March 2010 report on the situation in Afghanistan, under the section on human rights, the UN Secretary-General further noted that “closely linked to impunity and the abuse of power are attacks on freedom of expression, carried out by both State and non-State actors”⁴¹. Furthermore, there seems to be no overriding necessity for any given ANSA to reach an equivalent degree of organization as required by IHL to be held accountable for human rights violations.⁴²

Undoubtedly, though, ANSAs do not have the full extent of rights and obligations as States.⁴³ But the rights to life, to freedom from torture and other cruel, inhuman or degrading treatment or punishment, to health, and to education can all be promoted, impeded, or, even violated by ANSAs by the way they act. The practice of international organizations gives further

self-determination”. Commentary on Article 26, in Draft Articles on Responsibility of States for Internationally Wrongful Acts - With Commentaries, 2001, 2 *Yearbook of the International Law Commission* (2001), Part Two, 85. The UN Human Rights Committee has identified the following as acts that would violate *ius cogens* norms: arbitrary deprivations of life, torture and inhuman or degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty, or deviating from fundamental principles of fair trial, including the presumption of innocence. Human Rights Committee, ‘General Comment No. 29: States of Emergency (Article 4)’, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, 4–5.

⁴⁰ S/RES/1746 (2007), para. 25.

⁴¹ Report of the Secretary-General, *The Situation in Afghanistan and its Implication for International Peace and Security*, 10 March 2010, UN Doc. A/64/705-S/2010/127, para. 38.

⁴² *Id.*, 26.

⁴³ Clapham notes that “of course not all rights can be simply transposed onto the non-state actor. A number of early applications (at the European Court of Human Rights) ruled out the idea that non-physical entities have a right to freedom of conscience, although churches and religious organizations have a right to manifest religion, and a religious foundation was held unable to claim the right to education. Non-state actors have no right to marry (no fundamental right to merger!). Nor can non-human non-state actors complain of torture or inhuman or degrading treatment under the European Convention. But the key point remains that organizations are capable of bearing some international rights and that this has been accepted with regard to a limited number of human rights more generally.”, Clapham, *supra* note 9, 4.

indications as to what human rights obligations are relevant for ANSAs. For example, in his March 2010 report on the situation in Afghanistan, under the section on human rights, the UN Secretary-General notes that “closely linked to impunity and the abuse of power are attacks on freedom of expression, carried out by both State and non-State actors”⁴⁴. Again in the context of the Afghan conflict, attacks on schools were condemned as an attack on education and led the Human Rights Council to adopt a resolution that urged “*all parties* in Afghanistan to take appropriate measures to protect children and uphold their rights”⁴⁵.

The protection and respect of the rights of children in armed conflicts are also obligations applicable to ANSAs. The UN Security Council has devoted considerable attention to this issue, which was first included on the Council’s agenda in 1999.⁴⁶ Resolution 1612 (2005) is especially noteworthy because it established the UN-led Monitoring and Reporting Mechanism on Children and Armed Conflict (“the Mechanism”) and its operational country-level Task Forces.⁴⁷ The Mechanism and its Task Forces monitor and report on six “grave violations”:

- killing and maiming of children,
- recruiting and using child soldiers,
- attacks against schools or hospitals,
- rape or other grave sexual violence against children,
- abduction of children, and
- denial of humanitarian access for children.

⁴⁴ Report of the Secretary-General, *The Situation in Afghanistan and its Implications for International Peace and Security*, 10 March 2010, A/64/705-S/2010/127, para. 38.

⁴⁵ Human Rights Council, *Addressing Attacks on School Children in Afghanistan*, 23 June 2010, A/HRC/RES/14/15 (emphasis added).

⁴⁶ See, notably, UN SC Res. 1261, 25 August 1999; UN SC Res. 1314, 11 August 2000; UN SC Res. 1379, 20 November 2001; UN SC Res. 1460, 30 January 2003; UN SC Res. 1539, 22 April 2004; UN SC Res. 1612, 26 July 2005; UN SC Res. 1882, 4 August 2009.

⁴⁷ UN SC Res. 1612 Operative Paragraphs 2-3; and see Watch List on Children in Armed Conflict, ‘UN Security Council Resolution 1612 and Beyond: Strengthening Protection for Children in Armed Conflict’, (May 2009), 4, available at http://watchlist.org/reports/pdf/PolicyPaper_09.pdf (last visited 14 April 2011). The establishment of the mechanism had earlier been proposed by the Security Council in Res. 1539, Operative Paragraph 2, 22 April 2004 (adopted unanimously).

In August 2009, the Security Council adopted Resolution 1882, by which the Council asked the Secretary-General to,

“include in the annexes to his reports on children and armed conflict those parties to armed conflict that engage, in contravention of applicable international law, in patterns of killing and maiming of children [...] in situations of armed conflict”⁴⁸.

Where an ANSA is listed in such an Annex, the UN, especially through UNICEF and the support of the Special Representative of the UN Secretary-General for Children and Armed Conflict,⁴⁹ seeks to address the underlying causes through the negotiation and adoption of so-called Action Plans.⁵⁰ Significantly, these plans are signed by the head of the UN country team and/or by the UNICEF Representative as well as the representative of the government or ANSA concerned.⁵¹ The different mechanisms put in place by the UN for the protection of children in armed conflicts (e.g. “naming and shaming”, monitoring, and encouragement for respect for international standards) suggest a more human-rights-based approach than a strictly humanitarian law one.

⁴⁸ UN SC Res. 1882, 4 August 2009, Operative Paragraph 3.

⁴⁹ See www.un.org/children/conflict/english/index.html (last visited 14 April 2011).

⁵⁰ The ANSA can then be de-listed when the necessary action has been taken.

⁵¹ For example, in Sudan, on 11 June 2007, UNICEF signed an action plan with the Minawi faction of the Sudan Liberation Army (SLA), which had pledged to end recruitment and release all children under the age of 18. ‘Annual Report on the Activities of the Security Council Working Group on Children and Armed Conflict, Established Pursuant to Resolution 1612 (2005) (1 July 2007 to 30 June 2008)’, para. 11, attached to Letter from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/455, 11 July 2008. Subsequently, the UN Secretary-General noted that: “After an initial delay in implementation of the action plan owing to a lack of clarity on the mandate and channels of disarmament, demobilization and reintegration in Darfur, SLM/A (Minnawi) reaffirmed its commitment for the release, return and reintegration of children into its ranks in June 2008; so far, 16 children have been registered for demobilization.” In June 2007, a tripartite agreement was signed between the Government of the Central African Republic, the Union des forces démocratiques pour la rassemblement (UFDR), and UNICEF, in which the UFDR agreed to separate and release all children associated with its armed group, and facilitate their reintegration. ‘Children and armed conflict, Report of the Secretary-General’, UN Doc. A/63/785–S/2009/158, 26 March 2009.

Having reviewed the legal framework applicable to ANSAs, let us turn now to the issue of compliance with the applicable norms.

C. Compliance and Ownership

First, it should be noted that it is by no means only ANSAs who violate humanitarian norms. In many armed conflicts, States can and do violate the most fundamental rules of human rights and humanitarian law. But there is a particular problem with respect for humanitarian norms by ANSAs, since the armed group, by virtue of the fact that it is not, or only partially, recognized as a State, is not entitled to ratify international treaties, and is generally precluded from participating as a full member of a treaty drafting body.⁵²

In addition to rejecting laws they had no role in adopting, ANSAs may further assert that they reject the legitimacy of states against which they are fighting and which are parties to those treaties. This argument, however, will not prevent their prosecution for international crimes⁵³ and in recent years relatively few ANSAs have used this argument to oppose the general application of international humanitarian norms.⁵⁴

Lack of ownership—by all parties to a conflict—can also be explained to a certain extent by ignorance of the law applicable to the situation of armed conflicts in which a given ANSA operates. Indeed, while States have a clear obligation to provide instruction in IHL to their armed forces,⁵⁵ the ICRC notes that:

⁵² There were, for example, 11 ANSAs that participated, as observers, in the deliberations of the Diplomatic Conference that adopted the two *1977 Additional Protocols* to the Geneva Conventions. See Sassòli, *supra* note 6, 7, citing Y. Sandoz *et. al.* (eds), *Commentary on the Additional Protocols*, ICRC (1987).

⁵³ Hence individuals can be prosecuted whether or not armed groups accept the jurisdiction of the International Criminal Court as to the *1998 Statute of the International Criminal Court*, as well as the various *ad hoc* international tribunals specifically permits the indictment and prosecution of members of ANSAs for war crimes.

⁵⁴ Anecdotal information based on interviews with key interlocutors.

⁵⁵ See for example Articles 47, 48, 127, and 144 of *1949 Geneva Convention IV*, 75 U.N.T.S. 287; and Article 83 of *1977 Additional Protocol I*, 1125 U.N.T.S. 3.

“in many non-international armed conflicts, bearers of arms with little or no training in IHL are directly involved in the fighting. This ignorance of the law significantly impedes efforts to increase respect for IHL and regulate the behaviour of the parties to the conflicts”,⁵⁶.

Although the term “asymmetry” of parties to an armed conflict arouses strong—mainly negative—reactions from some quarters, the imbalance between a State’s security forces (in size, weaponry and financial resources) and an ANSA may also be used by the latter as a reason for not respecting certain or many humanitarian norms in practice.⁵⁷ They may claim to feel constrained to adopt certain tactics that violate humanitarian norms as to do otherwise would invite military defeat or even annihilation. They may further note that they will likely be prosecuted under domestic legislation for the mere fact of having taken up arms against the state, irrespective of their respect for international legal norms.⁵⁸ In fact, “asymmetric” conflicts are said to be highly problematic for the protection of civilians as they carry the risk of *both* parties disregarding basic principles of IHL.⁵⁹

⁵⁶ ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, February 2008, 12; see also The Armed Group Project, ‘Curbing Human Rights Violations by Non-State Armed Groups’, Conference Summary and Report, 14–15 November 2003, available at <http://www.armedgroups.org/the-armed-groups-project/events/curbing-human-rights-violations-nonstate-armed-groups> (last visited 14 April 2010).

⁵⁷ Equally, the State may argue that it is difficult in practice to make a distinction between civilians and ANSA fighters, as international law demands.

⁵⁸ Thus, there is no ‘combatant’s privilege’ in non-international armed conflict, whereby combatants in an international armed conflict are entitled to prisoner of war status under certain circumstances. A prisoner of war benefits from the privilege of immunity of prosecution for the mere fact of having participated in hostilities against another state. Conversely, a fighter who is not recognized as a combatant under IHL faces prosecution under the national law of the State capturing him for simply taking up arms. See, *inter alia*, Articles 4 and 118 of *1949 Geneva Convention III*, 75 U.N.T.S. 135 and for example, A. Bellal & V. Chetail, ‘The Concept of Combatant under International Humanitarian Law’, in J. Bhuiyan *et. al.* (eds), *International Humanitarian Law, An Anthology*, (2009), 57.

⁵⁹ As underlined by Robin Geiss: “over time there is a considerable risk that in view of the aforesaid practices, international humanitarian law itself, with its clear-cut categorizations and differentiations between military and civil, may be perceived by a belligerent confronted with repeated violations by its opponent as opening the doors to a kind of war which intentionally does away with such clear demarcations. However, the more immediate risk is that the adversary, faced with such a misuse of the

Finally, the designation of certain ANSAs as ‘terrorists’⁶⁰ may even, in certain instances, encourage the violation of humanitarian norms. Since it is typically far easier to be included on a list of terrorist organizations than it is to be removed from one, practical incentives to improve respect for humanitarian norms may be limited once an armed group has been so designated. Moreover, efforts to promote ownership of humanitarian norms by individuals or organizations may themselves fall foul of broad national legislation that criminalizes material support to any entity designated as terrorist. A recent US Supreme Court decision on the scope of activities with ANSAs listed as terrorist groups that could trigger criminal responsibility is one example of a worrying trend.⁶¹ Criminalizing humanitarian organizations or individuals that seek to engage ANSAs in enhanced respect for international norms is not the way forward. It may have serious consequences for humanitarian negotiators (and more generally anyone) seeking to negotiate peace treaties or other agreements for the promotion of international law.

principle of distinction, could feel compelled gradually to lower the proportionality barrier.” R. Geiss, ‘Asymmetric conflict structures’, 88 *International Review of the Red Cross* (2006) 864, 766.

⁶⁰ Notwithstanding the plethora of widely differing definitions of the term under relevant national legislation. For instance, a 2003 study for the US Army quoted a source that counted 109 definitions of terrorism that covered a total of 22 different definitional elements. See J. Record, *Bounding the Global War on Terrorism* (2003), 6, citing A. P. Schmid, et al. (eds), *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (1988), 5–6.

⁶¹ See Supreme Court of the United States, *Holder, Attorney General, et al. v. Humanitarian Law Project et al.*, Decision of 21 June 2010. In this controversial decision, the Court held that the training in international law for PKK members planned to be given by a US NGO (the Humanitarian Law Project) could be used by the PKK “as a part of a broader strategy to promote terrorism, and to threaten, manipulate, and disrupt”. According to the Court, the planned training would thus rightly fall under the *Anti-terrorism and Effective Death Penalty Act of 1996* which criminalizes any material support given to terrorist groups. The fact that in the circumstances of the case, such a training was prohibited by the law was not found to be a violation of the First Amendment (freedom of expression) enjoyed by the NGO. See also, ‘The Supreme Court Goes too far in the Name of Fighting Terrorism’, *Washington Post Editorial*, 22 June 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104267.html> (last visited 14 April 2011); and ‘What Counts as Abetting Terrorists’, Editorial, *New York Times*, 21 June 2010, available at <http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/> (last visited 14 April 2011).

There are, though, still reasons to believe that ANSAs can be influenced to better respect international law. Indeed, the practice of international organizations shows that a number of “incentives”, also termed “resources and rewards”⁶², may have a significant role to play.

I. Incentives for Compliance

The first and primary reason for compliance is the group’s own self-interest. This has military, political, and legal aspects.

The *military* arguments for compliance comprise both an element of reciprocity and strategic choices. There is an obvious temptation – and often also pressure from within the armed group or the concerned communities – to respond to abuses by government forces or other non-state armed actors. Responding with abuses of their own will merely risk an increasing spiral of violence. It may be the case that better compliance by the state armed forces may lead to better compliance by non-state armed forces, too, but so far the evidence is largely anecdotal. In any case, restraint will ultimately help to retain the support of the civilian population. In terms of strategic choices, focusing on attacking legitimate military targets instead of unlawfully targeting civilians means that the armed non-state actor is more likely to further its military objectives.⁶³ Furthermore, an ANSA that treats captured soldiers with humanity encourages soldiers to surrender. Mistreatment or summary execution, on the other hand, is more likely to lead to soldiers fighting on to the death.

The *political* arguments for compliance center on the desire of many armed non-State actors and/or the causes they may espouse, to be recognized as legitimate. In addition, many armed non-state actors need the support (e.g. human, material, and financial) of the “constituency” on behalf of whom they claim to be fighting. Further, in certain cases ANSAs may wish to be seen as more respectful of international norms than the state that

⁶² H. Slim, *Killing Civilians—Method, Madness and Morality in War* (2007), 279–282.

⁶³ ANSAs may thus understand that certain means and methods of warfare are counterproductive or have excessive humanitarian costs, which lead to a loss in support.

they are fighting.⁶⁴ Finally, some armed groups are sensitive to the argument that better respect for norms applicable in armed conflicts facilitates peace efforts and strengthens the chance of a lasting peace.

The *legal* arguments for compliance are primarily the avoidance of international criminal sanction and other coercive measures, such as arms embargoes, travel bans, and asset freezes. Effective command and control by an ANSA over its own fighters is in the self-interest of the group's senior officials.⁶⁵ Fear of prosecution for international crimes is a factor that influences the behavior of certain ANSAs or of senior individuals within that group. Compliance with international norms will not prevent their risk of prosecution under domestic criminal law for taking up arms against the state, but in some instances governments have offered amnesties to those who have taken up arms against them.⁶⁶ Such amnesties should not, though, confer immunity for international crimes.⁶⁷

The *humanitarian* arguments for compliance relate to the fundamental desire of certain ANSAs to respect human dignity. Such a desire should not be underestimated and may allow for opportunities to go beyond actual international obligations and engage ANSAs on norms which provide a higher level of protection for civilians than that strictly demanded by international law. Humanitarian agencies may in turn provide assistance for activities, such as mine clearance, which benefit the communities on whose

⁶⁴ For example, many of the armed non-state actors that have signed Geneva Call's Deed of Commitment whereby they renounce the use of anti-personnel mines have done so in states that are not party to the 1997 Anti-Personnel Mine Ban Convention, 2056 U.N.T.S. 211.

⁶⁵ This will also have implications for the attribution of command responsibility under international criminal law.

⁶⁶ Certain humanitarian actors, for example, have stressed that it may be worth encouraging states to treat captured fighters from ANSAs who respect international humanitarian law in accordance with the protection accorded to prisoners of war under applicable international law.

⁶⁷ Amnesties granted in case of violations of international crimes violate the right of individuals to an effective remedy which is protected by international human rights law. See the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005, C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005); see also C. A. Bakker, 'A Full Stop to Amnesty in Argentina, the Simoó Case', 3 *Journal of International Criminal Justice* (2005) 5, 1106-1120.

behalf the armed non-state actors claim to be fighting in addition to finding solutions to help the armed non-state actor to fulfill the commitment to the norm in question. So, for example, agencies may provide reintegration and education programmes for children formerly associated with armed forces to enable their safe release.

II. Good Practice in Engagement with Armed Non-State Actors

There has been considerable experience over the years in engagement with ANSAs on the protection of civilians in armed conflict. Below are included some of the key lessons that have been learnt and which may offer other opportunities to enhance compliance with international norms.

First, even if it is not realistic for ANSAs to participate formally in the drafting of multilateral treaties nor that such actors formally adhere to those treaties, their views could, for example, be discerned by analyzing relevant agreements or unilateral declarations. It may be easier to include former members of ANSAs in such processes. In addition, greater efforts can be made to ensure that relevant international treaties address directly the behavior of ANSAs.

Second, an important step in enhancing compliance with international norms is to ensure that the relevant ANSA is aware of its obligations under international law. In some cases, for example, such groups have not been aware of the prohibition on child recruitment and the potential individual liability. This can be done through dissemination efforts at a senior level or below by those engaged in promoting compliance, or by the ANSA itself.

Furthermore, engagement with an ANSA should typically occur at the highest level within the group, but may also demand engagement with influential individuals outside the group. Engaging an armed non-State actor at the highest level helps, in theory at least, to ensure that a commitment is more likely to be honored in practice. However, enhancing compliance is made significantly more challenging by the fragmentation of ANSAs into different factions. In that regard, former members of other ANSAs may be able to play a helpful role in engagement. It is also important to consider whether constituencies and foreign patrons can help to secure better compliance with norms.

Once an ANSA is clear about its obligations and undertakings, it will be necessary for it to ensure that this is reflected in its practice. It should therefore internalize its international obligations and other commitments, for example by ‘translating’ norms into internal codes of conduct. There may be a need for outside technical assistance in achieving this, but care should be taken to ensure that the relevant ANSA assumes the responsibility for adoption, dissemination, and implementation of applicable norms.

Finally, the practice of international organizations and NGOs shows that monitoring is a critical element in promoting compliance with norms, both in identifying norms whose respect needs to be specifically enhanced and in promoting successful implementation with relevant agreements or declarations.

D. Conclusion

This article has sought to identify key elements in the international legal framework applicable to armed non-state actors, and to suggest ways that better compliance may be achieved. One thing is certain, however: dialogue, through sustained, coherent, and focused engagement, is needed to influence behavior. In this respect, the June 2010 US Supreme Court decision in the *Holder* case is most unwelcome. It flies in the face of logic and reality, placing dogma over the promotion of humanitarian norms. What is needed is greater engagement with armed non-State actors, not less.

Regulation of Private Military Companies

Alexander Kees*

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Abstract

The increasing use of private military companies by states in armed conflict raises questions regarding the regulation of those non-state actors. However, even though the privatization of core state functions might be an emerging phenomenon with respect to its extent and quality, there is no legal vacuum for the activities of private military contractors. According to international humanitarian law, states must ensure respect for the *ius in bello* and enforce applicable international law also with respect to private contractor personnel if they are charged with functions governed by international law. Against this background, the challenge for future regulation is on the national and administrative level. States must intensify their efforts to implement existing standards.

A. Introduction

The employment of private military companies in the context of armed conflicts raises manifold concerns with respect to the legality and legitimacy of the transfer of state functions to private actors. The conflicts in Afghanistan and Iraq brought privatization within the scope of peace, war, and security to the fore. Indeed, private contractors had already been used before in African or South American states in internal conflicts or in the fight against drug trafficking.¹ Today, however, the focus has shifted from a mercenary-like deployment of military companies by warlords or rebel groups towards a long-term policy of outsourcing sovereign functions by highly industrialized, often western states. This systematic extension of privatization into spheres where the monopoly on the use of force and the laws of war are concerned provokes calls for a strong international regulation of activities of private military companies.²

What is the international legal framework for the use of private military companies in the context of armed conflicts? To what extent is this use internationally regulated and what is the perspective for further

¹ For a survey of the applications of private military companies see A. Kees, *Privatisierung im Völkerrecht – Zur Verantwortlichkeit der Staaten bei der Privatisierung von Staatsaufgaben* (2008), 51-69.

² See e. g. the statements of the UN Working Group on the use of mercenaries, 'Guns for hire' (29 April 2010) available at <http://www.ohchr.org/EN/NewsEvents/Pages/Gunsforhire.aspx> (last visited 4 May 2011).

regulation? After having briefly clarified the role international law can play in this respect (B), the most important aspects and their regulative influence on the deployment of private military companies will be highlighted (C). Finally, attempts towards specific instruments of regulation will be summarized (D).

B. Levels of Regulation

Obviously, there is no specific international legal regime for the regulation of private military companies. In fact, states usually are very reluctant to commit to new regulations that will restrict their scope of sovereign decisions. The failure of important international treaty projects in various fields in the last few years – like environmental law, criminal law, and the restriction of certain weapons – is only one result of this reluctance. Thus, when considering existing standards and the perspective of regulation from an international point of view, the following distinction should be drawn. On the one hand, it has to be taken into account to what extent the current international legal regime contains principles and rules that may directly or indirectly affect the use of private military companies in certain cases. Only then, on the other hand, after having ascertained existing standards, can the development and enhancement of this legal regime be tackled successfully, not only on the international level, but also by incorporating general international legal standards into more detailed national legislation.

In default of a specific legal regime, limits and guidelines for the use of contractors have to be deduced from the rules of general international law that govern the deployment of non-state actors. Such rules are not only those that reserve certain functions explicitly for state organs. In other cases, states may have to exercise due diligence in a way that the private contractor must be supervised by state organs. To a certain degree, this general framework restricts and regulates the use of private military companies. It is up to states and their national administration to implement this general framework by adopting effective legislative and administrative measures that govern the use of private military companies in detail.

C. Regulative Standards in International Law

International law regulates some basic aspects with respect to the employment of private military companies. Certain functions are excluded from being transferred to non-state actors or must at least be exercised under the control of state organs. In other cases, states are subject to more or less severe obligations of due diligence in relation to private entities in their service or to other restrictions with respect to the composition of their forces. While there are few special provisions dealing directly with these issues, regulative effects are usually indirect consequences of a more general rule of international law. As a result of those standards, states are not entirely free in the use of private military companies.

I. Internment Camps

Certain functions must be exercised by state organs or under their effective control. According to the Fourth Geneva Convention, for example, places of internment shall be put under the authority of a responsible officer who must be chosen from the regular military forces or civil administration (Art. 99). Under the Third Geneva Convention, prisoner of war camps and labor detachments must be under the immediate authority of a responsible commissioned officer belonging to the regular armed forces (Art 39). The staff of the institution must be instructed and supervised (see Arts 56 and 57 Third Geneva Convention, Art. 99 (1) 3 Fourth Geneva Convention). This means that states must have officials on-site. They may not hand over these facilities totally to private organizations without adequate monitoring systems that enable the official or commissioned officer to supervise the staff in control of detainees, to give binding instructions, and to enforce them effectively.³

³ For a closer analysis see Kees, *supra* note 1, 269-274.

II. Piracy

With respect to conflict-related activities on the sea, the United Nations Convention on the Law of the Sea (UNCLOS) can be of relevance. In fighting piracy along the coasts of Somalia, western governments are considering the employment of a “private navy” in order to support international military forces.⁴ While support by security contractors to enable merchant vessels to repel immediate pirate attacks should be comprised by the right of self-defense, the assignment of private military companies by states to fulfill pre-emptive functions normally carried out by the military or the police is subject to certain restrictions. Those functions are in particular the right to visit and board a ship if there is ground for suspecting that the ship is engaged in illegal activities like piracy, as well as the right to seize a ship (Arts 105, 110 UNCLOS). Those functions may be carried out by warships (Arts 107, 110 (1) UNCLOS), which are defined as ships belonging to the armed forces and being under the command of an officer (Art. 29 UNCLOS). Governments may also authorize other ships to carry out those functions if those ships are clearly marked and identifiable as being on government service (Arts 107, 110 (5) UNCLOS). In both cases, however, states are liable for any loss or damage caused by an arbitrary visit and examination or an illegal seizure of a ship (Arts 106, 110 (3) UNCLOS). This strict liability regime should lead states to a cautious use of private companies in this context.

III. Direct Participation in Hostilities

Restrictions also exist for the employment of private military companies in order to carry out armed activities directed against another party to a conflict. By virtue of the imposition of a strict disciplinary regime, international humanitarian law indirectly regulates the use of private contractors.

Employees of a company are considered civilians as long as they are not incorporated into the armed forces. This incorporation requires that the

⁴ See C. Milmo, ‘Insurance firms plan private navy to take on Somali pirates’ (28 September 2010) available at <http://www.independent.co.uk/news/world/africa/insurance-firms-plan-private-navy-to-take-on-somali-pirates-2091298.html> (last visited 4 May 2011); S. Utler, ‘Mit Söldnern gegen die Piraten’ (28 September 2010), <http://www.spiegel.de/panorama/0,1518,720136,00.html> (last visited 4 May 2011).

employee is under the command of a military commander and subject to a disciplinary system. In contrast, military companies are usually bound to the state only through contracts between the contracting entities⁵, meaning that “[c]ommanders do not have direct control over contractors or their employees [...]; only contractors manage, supervise, and give directions to their employees”⁶. Thus, as the case may be, military commanders cannot give binding instructions to employees of contractors. In principle, however, states are allowed to conduct hostilities only through their armed forces, but they may not charge entities with combat operations that act independently from the armed forces and whose members are not subject to a disciplinary system that enables states to enforce compliance with international humanitarian law in terms of Art. 43 Protocol I to the Geneva Conventions.

The consequence of a direct participation in hostilities by members of private military companies in their capacity as civilians is not only the loss of their protection against dangers arising from military operations (Art. 51 Protocol I to the Geneva Conventions). States will also come into conflict with their duty to ensure that all their personnel taking part in hostilities on their behalf is subject to an effective disciplinary system. The constitution of such a disciplinary system is a legal obligation imposed by Art. 43 Protocol I to the Geneva Conventions.⁷ Failure to enforce compliance with the rules of international humanitarian law accordingly can constitute a breach of Arts 43, 86 and 87 Protocol I to the Geneva Conventions and thus entail the international responsibility of the state (Art. 91 Protocol I to the Geneva

⁵ For rare cases of a real incorporation of private persons into the armed forces see Congress of the United States, Congressional Budget Office, *Logistics Support for Deployed Military Forces* (2005), 60. For a description of the usual (contractual) relationship between the armed forces and employees of private military companies see United States Headquarters Department of the Army, *Contractors on the Battlefield, Field Manual 3-100.21 (200-21)* (2003).

⁶ Field Manual, *supra* note 5, para. 1-22. The field manual stresses further that “[m]anagement of contractor activities is accomplished through the responsible contracting organization, not the chain of command” (para. 1-22). “It is important to understand that the terms and conditions of the contract establish the relationship between the military (US Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract” (para. 1-25). “Maintaining discipline of contractor employees is the responsibility of the contractor’s management structure, not the military chain of command” (para. 4-45).

⁷ W. A. Solf, ‘Commentary to Art. 43 Protocol I’, in M. Bothe *et al.* (eds), *New Rules for Victims of Armed Conflicts* (1982), para. 2.3.2.

Conventions).⁸ Consequently, states are not allowed to charge individuals or entities with the exercise of functions that amount to a direct participation in hostilities as long as the state does not exercise effective control.⁹

The definition of the term “direct participation in hostilities” thus constitutes a limitation for the use of private military companies in armed conflicts. While this fact seems to be widely accepted,¹⁰ this definition itself is far less clear. Generally, the decisive factor is whether the conduct in question directly causes harm to the enemy. In practice, however, the line between security or support functions and combat operations often blurs. Civil military providers are, for example, contracted to use deadly force in order to protect assets and persons.¹¹ During the occupation of Iraq, private military contractors were, while bearing military arms, even allowed to exercise pre-emptive functions like to stop, search, disarm, and detain civilian persons if required for the safety of the former or if specified in the contract, regardless of the private or public nature of the contracting entity.¹² According to US Army regulations, such security services do not constitute the exercise of inherently governmental functions that may lead to a direct participation in hostilities.¹³

⁸ Solf, *supra* note 7, para. 2.3.2; K. Ipsen, ‘Kombattanten und Nichtkombattanten’, in D. Fleck (ed.), *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten* (1994), 61.

⁹ H. Krieger, ‘Der privatisierte Krieg: Private Militärunternehmen im bewaffneten Konflikt’, 44 *Archiv des Völkerrechts* (2006) 2, 159, 184.

¹⁰ See the opinion of the US Department of Defense, ‘Policy and Procedures for Determining Workforce Mix, Instruction 1100.22’ (12 April 2010) available at www.dtic.mil/whs/directives/corres/pdf/110022p.pdf (last visited 25 March 2011), 17, 52; for the German government see Deutscher Bundestag, ‘Antwort der Bundesregierung, BT-Drs. 16/1296’ (26 April 2006) available at http://www.bundeswehr-monitoring.de/fileadmin/user_upload/media/BT1601296.pdf (last visited 25 March 2011), 12.

¹¹ For the United States see e. g. Defense Federal Acquisition Regulation Supplement, ‘Contractor Personnel Authorized to Accompany U.S. Armed Forces’ (DFARS Case 2005-D013) (16 June 2006) available at <http://edocket.access.gpo.gov/2006/pdf/E6-9499.pdf> (last visited 4 May 2011).

¹² Coalition Provisional Authority, ‘Memorandum 17: Registration Requirements for Private Security Companies (PSC)’ (26 June 2004) available at http://www.iraq-coalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf (last visited 4 May 2011), Annex A, para. 5 b.

¹³ See DFARS Case 2005-D013, *supra* note 11; for the British government the use of firearms by private contractors could play a “legitimate role” and should accordingly not generally be considered as the conduct of combat operations that is reserved for

IV. The Duty to Exercise Due Diligence

During armed conflicts, as well as being occupying powers, states are subject to certain restrictions in exercising their rights and duties. Under international humanitarian law, as well as by virtue of their human rights obligations, states must obey certain standards as to the organization of their forces. Those organization-related standards prevent states not from outsourcing auxiliary or supply functions, but from an uncontrolled and uncontrollable deployment of private actors in the most sensitive functions of the exercise of governmental authority.

1. International Humanitarian Law

According to the Geneva Conventions, states and their military commanders are obliged to ensure respect for the Conventions by any person under their authority. Besides the duty of states to effectively control all persons directly taking part in hostilities on their behalf,¹⁴ in and after armed conflicts, general obligations to exercise due diligence with respect to the forces and units used by states apply. To ensure respect for humanitarian law, to prevent violations of the Geneva Conventions (see common Art. 1 of the Geneva Conventions), and to repress grave breaches of the laws of war and to initiate disciplinary and penal action (Arts 86 and 87 Protocol I to the Geneva Conventions), it will generally require, for example, that states, when charging private entities with functions that are governed by international humanitarian law, have access to information, that commanders are able to direct operations, and that they can, where necessary, give binding orders. In contrast, those obligations will probably not be achievable if the commanders on-site do not have any possibility to direct the exercise of a function by contractor employees or at least to order its immediate cessation.

By virtue of the Hague Regulations, states have to take all measures to restore and ensure public order and safety in an occupied area (Art. 43 Hague Regulations with Respect to the Laws and Customs of War on Land), i. e. to guarantee, as far as possible, the security and welfare of the civilian

army forces; see Ninth Report of the Foreign Affairs Committee, 'Private Military Companies, Session 2001-02, Response of the Secretary of State for Foreign and Commonwealth Affairs' (October 2002) available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcaff/922/response.pdf> (last visited 4 May 2011), 4, para. k.

¹⁴ *Supra* chapter C. III.

population.¹⁵ An occupying power that uses non-state actors to, for example, guard certain facilities or to fulfill police functions in certain quarters must ensure the respect for those international law obligations the occupying power is subject to. The use of private military companies must at least not lead to the contrary result that the safety of the civilian population is threatened due to problems of control and discipline with regard to private employees. It would be inconsistent with international humanitarian law if the use of private military companies brought a “Wild West mentality to the streets”¹⁶ of occupied areas as might have been the case in Iraq where excessive use of force and the lack of legal accountability made private military contractors “especially feared and unpopular with the Iraqi population”¹⁷.

As a result of those obligations, states must guarantee an organization that enables them to effectively and permanently supervise all their personnel including employees of private military companies. Not only does the status of combatants require the incorporation into the armed forces of any person participating directly in hostilities. As shown above, such incorporation means the submission of the person under an internal, state-run disciplinary system that enforces compliance with international law (Art. 43 Protocol I to the Geneva Conventions). Also in the scope of functions which do not constitute a direct participation in hostilities, but where international law also imposes specific duties with respect to their implementation, the transfer of these functions with the subsequent total withdrawal of public organs can violate international humanitarian law. States must, even in employing private military companies be able at any time to fulfill their duty to ensure respect for international humanitarian law. This implies that, despite the transfer of certain tasks, states must guarantee their capability to effectively control the implementation of the privatized function. Absence of disciplinary procedures, lack of monitoring systems, and insufficient law enforcement can bring states into conflict with their obligation to ensure respect for international humanitarian law.¹⁸

¹⁵ See M. Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, 16 *European Journal of International Law* (2005) 4, 661, 663.

¹⁶ ‘Outsourcing the War’, *Time* of 26 March 2007, 36, 38.

¹⁷ UNHCR, *Country of Origin Information – Iraq* (3 October 2005) available at <http://www.unhcr.org/refworld/docid/435637914.html> (last visited 4 May 2011), 45.

¹⁸ See Swiss Federal Council, *Report by the Swiss Federal Council on Private Security and Military Companies* (2 December 2005) available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0021.File.tmp/PMSCs%20Bericht%20Bundesrat%20en.pdf> (last visited 4 May 2011), paras 2.5, 5.2-5.4.

2. Human Rights

These examples show that international obligations to obtain a certain degree of organization in the exercise of a governmental function can constitute important guidelines for the selection and supervision of the personnel entrusted with this function. Indeed, in the last few decades, international law has developed more and more influence on the internal organization of states:

“[L]a norme suivant laquelle, pour le droit international, l’organisation de l’Etat est un domaine réservé par excellence souffre d’exceptions dont le nombre a tendance à croître au fur et à mesure qu’augmentent les règles requérant des Etats des résultats dont l’obtention dépend de la manière d’être de leur droit interne.”¹⁹

Besides the general humanitarian law obligations, human rights are playing a considerable role in this respect. International human rights treaties establish the duty to monitor the exercise of certain functions by private entities in order to guarantee the respect for, and to prevent violations of, human rights. The UN Convention against Torture, for example, requires the education and instruction of all persons that are involved in the custody, interrogation or treatment of any individual subjected to any form of arrest (Art. 10) as well as the systematic review of all arrangements for the custody and treatment of persons subjected to any form of arrest (Art. 11) in order to prevent any cases of a violation of the convention. To achieve these objectives, states must establish effective “ongoing monitoring systems”²⁰ if they entrust private security providers

¹⁹ L. Condorelli, ‘L’imputation à l’État d’un fait internationalement illicite: solutions classiques et nouvelles tendances’, 189 *Recueil des Cours* (1984), 19, 30. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Merits)* (*Nicaragua v. United States of America*), ICJ Reports 1986, 14, 313; G. Ress, ‘Supranationaler Menschenrechtsschutz und der Wandel der Staatlichkeit’, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 11, 621, 626.

²⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf(2002)6 (2001) available at <http://www.cpt.coe.int/documents/gbr/2002-06-inf-eng.pdf> (last visited 4 May 2011), 46, para. 134 (emphasis deleted), with respect to

with the treatment of persons under arrest or internment.²¹ This requires the exercise of “full supervisory authority”²² over private security companies. With respect to Art. 10 ICCPR (treatment of persons deprived of their liberty), the Human Rights Committee stressed that states must, in order to meet their obligations under the Covenant, establish an “effective mechanism of day-to-day monitoring”²³ if functions falling within the scope of Art. 10 are contracted out to private institutions.

D. The Perspective of Regulation

As this short outline illustrates, international law provides a (rough) framework for the employment of private military companies.²⁴ However, there is no detailed regime that could answer problems of oversight, transparency, implementation, and law enforcement. What is the prospect of the development of specific regulatory instruments? From an international perspective, there is no consistent development towards a more specific regulation. While the position of UN institutions is rather reluctant with respect to the use of private military companies, and thus supports a stronger regulation, there are interstate as well as privately-run processes that focus on non-binding instruments, which essentially refer further means of regulation to the national level.

I. The United Nations: Institutionalized Regulation?

Inside the United Nations, the use of private military companies is discussed against the same background as the problem of mercenarism. The

the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

²¹ For problems with private contractors that have been charged with interrogation and translation services in US prisons in Iraq see ‘AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade (Fay Report)’ (2004) available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (last visited 4 May 2011); ‘Article 15-6 Investigation of the 800th Military Brigade (Taguba Report)’ (2004) available at <http://www.fas.org/irp/agency/dod/taguba.pdf> (last visited 4 May 2011).

²² Committee Against Torture, Summary record of the first part of the 424th meeting: United States of America, UN Doc. CAT/C/SR.424, 9 February 2001, para. 34.

²³ Human Rights Committee, Concluding observations of the Human Rights Committee: New Zealand, UN Doc. CCPR/CO/75/NZL, 7 August 2002, para. 13.

²⁴ For a thorough analysis see Kees, *supra* note 1.

transfer of core state functions to non-state entities is considered as illegitimate and even illegal.

In 1987, the former Human Rights Commission installed a Special Rapporteur that was concerned with the question of the use of mercenaries. The increasing use of private military companies came to the fore in the 1990s. The Special Rapporteur at that time was of the opinion that the exercise of essential sovereign functions by private companies constituted an infringement of the state's sovereignty as well as of international human rights and humanitarian law.²⁵ In 2005, the (new) Special Rapporteur acknowledged certain - fiscal and economic - needs for states to reorganize their forces and to resort to support by private armed units.²⁶ However, this was no fundamental paradigm shift. A 2010 draft convention on private military and security companies²⁷ is still based on the conviction that "inherent state functions" must not be fulfilled by private actors (Art. 4 (3)). The convention assumes a broad understanding of what should be considered as an inherent state function. This includes, *inter alia*, "direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees" (Art. 2 (i)). But the convention also bans the outsourcing of some further functions (Arts 9-11) and establishes a principle according to which "[e]ach state party bears responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the state" (Art. 4 (1)). Finally, the draft proposes obligations of states to

²⁵ See E. Bernales Ballesteros, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self determination, UN Doc. E/CN.4/1997/24, 20 February 1997, UN Doc. E/CN.4/1998/31, 27 January 1998, UN Doc. E/CN.4/1999/11 13 January 1999, UN Doc. E/CN.4/2001/19, 21 December 1999 and UN Doc. E/CN.4/2003/15, 16 December 2002.

²⁶ S. Shameen, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self determination, UN Doc. A/60/263, 17 August 2005.

²⁷ Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, Annex to the Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc. A/HRC/15/25, 5 July 2010.

establish licensing and monitoring systems as well as effective national legislative measures, in order to guarantee the legal accountability of private persons and legal entities (parts III and IV).

Thus, the draft convention contains very far-reaching obligations and restrictions for states that exceed current standards under international law. It seeks to extend existing legal obligations and to increase restrictions. As far as it restricts the use of private contractors, this approach seems to be in conflict with the actual practice and the evident opinion of a large number of states that the employment of contractors is generally a sovereign decision of the state. With regard to the wide range of possible functions private contractors may be used for - e. g. the contracting of private companies by local quasi-governmental warlords in order to secure diamond trafficking on the one hand and the mandate to guard facilities of an occupying power on the other - it is doubtful whether all forms of the use of private contractors may be treated indistinctively.

While it is widely accepted that some basic forms of monitoring are needed in order to ensure civil and criminal accountability, and to enhance transparency in contracting and employing private companies, states do not seem willing to expand the scope of functions that are considered to be “inherently governmental” and therefore reserved to state organs as proposed. This is true, for instance, with regard to “police powers”, like “arrest of detention including the interrogation of detainees” (Art. 2 (i) of the draft convention). These are functions in the scope of which private contractors “respond to some real needs and are already part of reality”²⁸ and thus seem to be widely accepted. While the Parliamentary Assembly of the Council of Europe, for example, indeed recommends establishing an international legally-binding instrument for the regulation of private military and security companies,²⁹ the governments of the member states of the Council of Europe emphasize at the same time their opinion that they are allowed to use private contractors also in the scope of core state functions, such as the detention of prisoners³⁰ and forced return.³¹ Regulation does not necessarily mean prohibition.

²⁸ Council of Europe, Parliamentary Assembly, Recommendation 1858 (2009): Private military and security firms and erosion of the state monopoly on the use of force, 29 January 2009, para. 6.

²⁹ See Recommendation 1858 (2009), *supra* note 28.

³⁰ Council of Europe, Committee of Ministers, *Recommendation Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules*, 11 January 2006, and the commentary thereto CM Document CM(2005)163 Addendum,

Thus, the position of the human rights bodies of the United Nations seems to be an “extreme point of view”³². It is the result of an opposition to the privatization of public functions by states mainly of the southern hemisphere. These countries have witnessed the widespread use of private military companies (with sometimes negative consequences) by foreign contracting entities, which are often western states or corporations. Given this antagonism of interests, attempts to enforce unilateral and extensive perceptions may impede the general acceptance of legally binding international instruments.

II. Informal Processes: The ICRC, Non-Binding Instruments and Codes of Conduct

A more practical process was launched by the Swiss government and the International Committee of the Red Cross (ICRC) in 2006. The participating states of several governmental meetings finalized the “Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict”³³. It is a non-binding instrument that does not seek to develop legal standards but to ascertain the existing “pertinent international legal obligations” (part I) and to provide states with voluntary “good practices” relating to the selection, contracting and monitoring of private military and security companies (part II). The document is open to states and international organizations. By February 2011, it was signed by 36 states.³⁴

2 November 2005, rule 78; both documents have been adopted by Decision CM/Del/Dec(2006)952/10.2E, 13 January 2006.

³¹ See guideline 18 of the Twenty Guidelines of the Committee of Ministers of Europe on Forced Return, CM(2005)40 Addendum final, 20 May 2005, and the commentary thereto by the Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, CM/Del/Dec(2005)925, 10 May 2005.

³² United Kingdom, Foreign and Commonwealth Office, ‘Private Military Companies: Options for Regulation’, HC 577 (2002) available at <http://www.official-documents.gov.uk/document/hc0102/hc05/0577/0577.pdf> (last visited 4 May 2011), 15, para. 37.

³³ Annex to the Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary General, UN Doc. A/63/467-S/2008/636, 6 October 2008.

³⁴ States which have “communicate[d] their support for this document” (last paragraph of the preface of the document) are: Afghanistan, Albania, Angola, Australia, Austria, Bosnia and Herzegovina, Canada, Chile, China, Cyprus, Denmark, Ecuador, France, Georgia, Germany, Greece, Hungary, Iraq, Italy, Jordan, Liechtenstein, Macedonia, Netherlands, Poland, Portugal, Qatar, Sierra Leone, South Africa, Spain, Sweden,

Part one of the document recalls the obligations under international humanitarian law, human rights, and international criminal law that may apply to non-state entities³⁵ and defines legislative and administrative ways to implement those international standards in the national legal order. With respect to functions that should not be contracted out, chapter A. (2.) refers to such activities that international law “explicitly assigns to a state agent or authority”. As shown above, those cases are rare. This perception differs clearly from the wide definition of exclusive state functions proposed by the 2010 UN draft convention.³⁶ The same is true for the extent to which states may be held responsible for misconduct of employees of private military companies. The document confines responsibility to those cases in which private conduct is attributable according to the existing rules in the law of state responsibility (chapter A. (8.)).

In its second part, the document compiles suggested standards of good practices.³⁷ The main aspects are the selection of companies and their personnel in order to ascertain their qualifications and background. Secondly, the terms of the contract should ensure respect for all applicable national and international law and entail a concrete definition of the mandate. Finally, there should be effective monitoring systems while executing the contract. Those systems should also provide for criminal and civil accountability.

In the light of the duty of states to ensure respect for humanitarian law and human rights and the practical problems that exist so far, rule 21 seems to be of considerable importance because it suggests specific conditions for the implementation of these international obligations of a state within its domestic legal order. To provide for “appropriate administrative and other monitoring mechanisms” contracting states should, *inter alia*,

Switzerland, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, see also Federal Department of Foreign Affairs, ‘Participating States of the Montreux Document’ (16 February 2011) available at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (last visited 4 May 2011).

³⁵ *Supra* chapter C.

³⁶ *Supra* chapter D. I.

³⁷ It is remarkable that the document only deals with “good” practices while on the international plane it is common to refer to “best” practices in order to assign a certain desired standard that should be achieved. The language chosen here seems to be another indication for the reluctance of governments to engage even in any further political commitment in this respect.

- “a) ensure that those mechanisms are adequately resourced and have independent audit and investigation capacity;
- b) provide Contracting State government personnel on-site with the capacity and authority to oversee proper execution of the contract by the PMSC [private military and security company] and the PMSC’s subcontractors;
- c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;
- d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;
- e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;
- f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms”.

Similar mechanisms are proposed for the states where private military companies operate (rules 46-52) and the states where a company is registered, incorporated, or where it has its principal place of management (rules 68-73).

Based on the Montreux Document, another initiative that was also launched by the Swiss government finalized a code of conduct for private security companies in late 2010.³⁸ This code is intended to be committed to by the private military industry. The (private) signatories “endorse the principles of the Montreux Document” (paragraph 3) and commit to respect applicable law and certain basic principles (paragraphs 3 and 6), e. g. to refrain from contracting with entities “in a manner that would be contrary to United Nations Security Council sanctions” and from committing crimes (paragraph 22). The code further enumerates specific principles regarding

³⁸ Swiss Confederation, ‘International Code of Conduct for Private Security Service Providers’ (9 November 2010), available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf> (last visited 4 May 2011).

the conduct of personnel, management, and governance (paragraphs 28-69). By November 2010, 70 companies have agreed to the document.³⁹

Finally, there are a number of privately-run initiatives. Especially associations of the private security industry have a strong interest in anticipating national legislative measures by adopting voluntary codes of conduct. Such codes of conduct exist, e. g., in the United Kingdom, where the British Association of Private Security Companies (BAPSC) pronounced a “Charter” that contains some basic principle to which member corporations shall adhere.⁴⁰ Similar documents are published by the International Stability Operations Association (ISOA) whose code of conduct provides member companies with ethical standards⁴¹, and by the Australian Security Industry Association Limited (ASIAL).⁴²

In the United Kingdom, the government began to consider possible options for regulations in a “Green Paper”⁴³ in 2002. In April 2010, the Foreign and Commonwealth Office, in coordination with the private security industry and non-governmental organizations, announced that it favored drawing up a (voluntary) code of conduct instead of implementing legislative measures.⁴⁴ This code of conduct should be based, *inter alia*, on the Montreux Document as well as the document finalized by the BAPSC. The implementation of the code should be secured by a “commercial incentive” as well as by independent auditing and monitoring procedures the results of which should be made public to some extent. Whether these mechanisms allow to regulate the use of private military companies effectively remains to be seen.

³⁹ Among them companies like Xe (formerly Blackwater), Aegis Group, Control Risks Group, DynCorp International.

⁴⁰ The Charter is available at http://www.bapsc.org.uk/key_documents-charter.asp (last visited 4 May 2011).

⁴¹ ISOA, ‘Code of Conduct 12 – English’ (11 February 2009) available at <http://ipoaworld.org/eng/codeofconduct/87codecodeofconductv12enghtml.html> (last visited 4 May 2011).

⁴² ASIAL, ‘ASIAL Code of Professional Conduct’ (24 February 2011) available at <http://www.asial.com.au/Codeofconduct> (last visited 4 May 2011).

⁴³ United Kingdom, Foreign and Commonwealth Office, *supra* note 32.

⁴⁴ Foreign and Commonwealth Office, ‘Private Military and Security Companies (PMSCs): Summary of Public Consultation Working Group’ (April 2010) available at <http://www.fco.gov.uk/resources/en/pdf/about-us/our-publications/pmsc-working-group-summary-060410> (last visited 4 May 2011).

E. Conclusion

International law provides a regulative framework for the employment of private military companies in and after armed conflicts. In accordance with the nature of the international legal order, this framework contains only basic principles and general parameters. In the foreseeable future the establishment of an international binding instrument that regulates the use of private military companies in detail is unlikely. It is furthermore doubtful whether it would be desirable, given the nature of international law and the complexity of international relations. The implementation and further specification of requirements imposed by international law are generally best achievable within the national administrative, civil, and criminal legal systems. It is this implementation that has to be pursued more consistently because there is no lack of rules but rather a failure to enforce international law. The coordination of an international process that identifies the basic elements of a more effective national regulation of private military companies seems to be a sustainable basis to achieve these ends.

Armed Forces as Carrying both the Stick and the Carrot?

Humanitarian Aid in U.S. Counterinsurgency Operations in Afghanistan and Iraq

Alice Gadler*

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Abstract

The fight against insurgents in Afghanistan and Iraq has led the U.S. and its allies to devote growing attention and resources to counterinsurgency strategies, stability operations and civil-military operations. Humanitarian and development assistance have acquired an important role in military strategies. However, the activities carried out by armed forces in the field of humanitarian assistance in Afghanistan and Iraq have been criticized for blurring the distinction between civilian and military actors and thus increasing the risk of being targeted for humanitarians and civilians. The article analyzes the conduct of U.S. armed forces in Afghanistan and Iraq and the challenges it has posed to humanitarian actors. It then examines U.S. military doctrines and manuals and argues that their most recent versions have increasingly taken into account the needs of humanitarian actors and the principles of humanitarian action, but reasons for concern remain. The engagement of the military in humanitarian assistance has not been definitely limited. In addition, humanitarians should be careful in their relationships with the armed forces in the field of information-sharing.

A. Introduction

Over the last few years, insurgency and other methods of so-called “irregular warfare” have gained increased attention. In particular, the conflicts in Afghanistan and Iraq have posed complex challenges to the U.S. and its allies, in the sense that both have been characterized by the confrontation with insurgents, enemies who do not distinguish themselves from civilians and thus are difficult to identify among the population and to defeat.¹

These realities have led to a partial re-thinking of military doctrines and strategies, with the publication in 2006 of the first U.S. military field manual on counterinsurgency (COIN) after 20 years.² Central to

¹ See, for example, G. Sitaraman, ‘Counterinsurgency, the War on Terror, and the Laws of War’, 95 *Virginia Law Review* (2009) 7, 1745, 1771-1773. See also U.S. Headquarters Department of the Army, *Counterinsurgency*, Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5 (December 2006), 1-23 [COIN FM 2006]; U.S. Joint Chiefs of Staff, *Counterinsurgency Operations*, Joint Publication 3-24 (October 2009), II-3 – II-4 and II-13 – II-14 [COIN JP 2009].

² See COIN FM 2006, *supra* note 1, Foreword.

counterinsurgency strategies is the assumption that, given that it is difficult to identify insurgents among the population, it is necessary not only to use hard means of combat, in the sense of military force to defeat the enemy, but also soft means, meaning methods and instruments to gain the trust of the local population, which may then deny support to the insurgents and possibly help identify them.³ Growing importance has thus been attributed to so-called ‘stability operations’ and to the need for armed forces to cooperate with civilian actors, for example in the framework of civil-military operations (CMO). Emphasis has been put on the need for armed forces to be trained and ready to carry out not only traditional combat functions, but also functions related to assistance to the population, in order to gain their “hearts and minds”, and to nation-building.⁴ Interventions of the army in these fields are not a completely new phenomenon, but what is new is their importance in current military strategies, since official U.S. doctrine considers that “[i]nsurgency will be a large and growing element of the security challenges faced by the United States in the 21st century”⁵ and that “[a]chieving victory will assume new dimensions as [the U.S.] strengthen[s] [its] ability to generate ‘soft’ power”⁶.

Afghanistan and Iraq have witnessed American and allied forces performing tasks typically carried out by civilian actors, such as the provision of humanitarian and development assistance to the local population. However, scholars and practitioners have raised vocal complaints against the activities of the military especially in the field of humanitarian assistance, arguing that they have led to a blurring of the distinction between civilian and military actors and thus have increased both the risk for humanitarian actors of being targeted and the actual number of attacks against them.⁷ This article examines the use of humanitarian

³ See, for example COIN JP 2009, *supra* note 1, X-2.

⁴ COIN FM 2006, *supra* note 1, Appendix A: A Guide for Action, A-5.

⁵ United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (2009), Preface.

⁶ U.S. Headquarters Department of the Army, *Stability Operations*, Field Manual No. 3-07 (FM 3-07) (October 2008), Foreword [Stability Operations FM 2008].

⁷ A clear example of an attack against a humanitarian organization was the one against the ICRC headquarters in Baghdad in October 2003. See, for example, BBC News, ‘Baghdad terror blasts kill dozens’ (27 October 2003) available at http://news.bbc.co.uk/1/hi/world/middle_east/3216539.stm (last visited 27 April 2011). For an analysis of data regarding attacks against aid workers, see A. Stoddard, A. Harmer & K. Haver, ‘Providing Aid in Insecure Environments: Trends in Policy and Operations’ (September 2006) available at <http://www.odi.org.uk/resources/>

assistance as a resource in the conflicts in Afghanistan and Iraq and in recently developed U.S. counterinsurgency and stability strategies, in the sense of a tool available to the armed forces to achieve their mission and objectives. The aim is to understand what role this resource has played and may play in the future and what problems have emerged and may arise.

After an analysis of the meaning traditionally assigned to humanitarian assistance and of the principles associated with this activity, a description of the role played by the military in the field of humanitarian assistance in Afghanistan and Iraq is provided, together with an overview of the relationships between humanitarian and military actors and of related problems. The trend that sees the military claiming a role in humanitarian assistance and increasingly collaborating with NGOs raises questions of whether belligerents are allowed to give relief to civilians and whether this relief can be classified as humanitarian assistance. It is argued that, while belligerents are not prohibited from providing relief to civilians in need under international humanitarian law (IHL), humanitarian assistance in conflict has traditionally referred to activities that are supposed to be apolitical and thus carried out by actors different from combatants and in accordance with certain rules and principles. The use of the term “humanitarian assistance” for activities carried out by combatants without respecting these principles may lead to higher risks for actors traditionally involved in humanitarian action, first of all because of the blurring of the distinction between humanitarians and the military, and the perception of the former as legitimate targets. Also, humanitarian actors may lose entitlement to the specific privileges provided under IHL, in case their action favors one of the parties to the conflict (and thus does not respect the principles of humanitarian assistance). Finally, the military may endanger respect for the principle of distinction if they wear non-standard uniforms or civilian clothes when involved in humanitarian assistance, so that negative consequences may derive not only for traditional humanitarian actors, but also for the civilian population more in general, including the beneficiaries of relief.

The article examines recent military documents issued by the U.S., to verify the use they make of the term “humanitarian assistance”, the role they assign to this kind of activity, and the instructions they give regarding humanitarian-military relations. It concludes with reflections regarding gaps

download/231.pdf (last visited 27 April 2011); A. Stoddard, A. Harmer & V. DiDomenico, ‘Providing aid in insecure environments: 2009 Update: Trends in violence against aid workers and the operational response’, (April 2009) available at <http://www.odi.org.uk/resources/download/3250.pdf> (last visited 27 April 2011).

and possible improvements in recent U.S. military doctrines and manuals in the field of humanitarian assistance. Increasing attention has been given to the need to respect the identity of humanitarian agencies and organizations and the principles that characterize such identity. Still, concerns remain regarding both the role envisaged for the military in the provision of humanitarian assistance and the relationships between military and humanitarian actors, especially in the field of information-sharing.

B. Humanitarian Assistance in Armed Conflict

There is no international treaty or binding document providing a clear definition of the term “humanitarian assistance” or “humanitarian relief”. The Institute of International Law defined the term as “all acts, activities and the human and material resources for the provision of goods and services *of an exclusively humanitarian character*, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters”⁸. By emphasizing its attitude to satisfy only immediate basic needs in order to allow people to survive, humanitarian assistance has been traditionally distinguished from development assistance, which deals with longer-term problems and thus presents a more political character, since tackling the root causes of a conflict implies political choices regarding how to build or rebuild a society.⁹

In addition to the fact that humanitarian assistance is related to the provision of goods and services to save lives and reduce suffering, humanitarian action coming from outside and carried out by a state or non-state actor in situations of armed conflict has been traditionally characterized by three principles—humanity, impartiality, and neutrality—which would allow it to be identified as such, and not be considered an unlawful interference in the conflict. These principles are embodied in international treaties dealing with the law applicable in armed conflict, and they have also been reaffirmed in the case-law of the International Court of

⁸ Institute of International Law, ‘16ème Commission: L’Assistance Humanitaire; Sixteenth Commission: Humanitarian Assistance: Resolution. Bruges Session, September 2, 2003’ (2 September 2003) available at http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF (last visited 27 April 2011), para. I(1) (emphasis added); see also J. Salmon, *Dictionnaire de Droit International Public* (2001), 98-99.

⁹ See, for example, K. Anderson, ‘Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts’, 17 *Harvard Human Rights Journal* (2004), 41, 57.

Justice and in other documents adopted in international fora. The Fourth Geneva Convention of 1949 and the two Additional Protocols of 1977,¹⁰ a source of binding law dealing with the provision of humanitarian assistance to civilians in armed conflicts, make explicit reference to the principles of humanity and impartiality for relief actions. These treaties do not use the term “humanitarian assistance”, but rather frequently mention “relief” in terms of the provision of specific goods.¹¹ Notwithstanding the different regulation for international armed conflicts, non-international armed conflicts, and occupation, in general when mentioning the possibility for external (state and non-state) actors to offer their services to the parties to the conflict in the field of humanitarian assistance or to provide humanitarian assistance to civilians under the control of a party, constant reference is made to relief actions which are “humanitarian and impartial in character and conducted without any adverse distinction”¹² or to “impartial humanitarian organisation”¹³ or “impartial humanitarian body”¹⁴. The consequence following from respect of these principles is that special privileges are afforded to the personnel carrying out humanitarian actions, including the right to have access to victims with the consent of the parties

¹⁰ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 [GC IV]. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3 [AP I]. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 609 [AP II]. The U.S. is not a party to AP I and AP II, but it is a signatory to both of them and it has “recognized that certain provisions of Protocol I reflect customary international law or are positive new developments, which should in time become part of that law”, including “much of th[e] part” on the protection of the civilian population. M. J. Matheson, ‘Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions’, 2 *American University Journal of International Law & Policy* (1987), 419, 421, 426-428.

¹¹ See Arts 23, 59 and 108 GC IV; Art. 69 AP I; Art. 18 AP II.

¹² Art. 70 AP I. Similarly, see Art. 18 AP II. As far as relief provided by states is concerned, this possibility is expressly envisaged by Art. 59 GC IV in favour of the civilian population of the occupied territory, but the commentary states that “[o]nly those States which are neutral [...] are capable of providing the essential guarantees of impartiality.” Also, the Commentary to Art. 70 AP I simply notes that relief actions undertaken by a state in favor of the civilian population of one party to the conflict only would still satisfy the principles.

¹³ Arts 10 and 59 GC IV.

¹⁴ Art. 3 GC IV.

concerned (which arguably cannot be denied for arbitrary reasons), the protection from attack, and the possibility to move freely in the territory controlled by the parties (except in case of imperative military necessity).¹⁵

The ICRC Commentaries to the Fourth Geneva Convention and to the two Additional Protocols specify that, in order to be humanitarian, an organization “must be concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit” and its activities in order to be “purely humanitarian in character ... must be concerned with human beings as such, and must not be affected by any political or military consideration”¹⁶. Impartiality of relief actions is considered to be different from “mathematical equality,” since “[t]he degree and urgency of the need should, for example, be taken into consideration when distributing relief”¹⁷. Relief shall thus be granted to all the victims without discrimination, and priority shall be established only on the basis of needs.¹⁸

In the case *Military and Paramilitary Activities in and against Nicaragua* in 1986, the International Court of Justice highlighted that the provision of humanitarian assistance must “be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering,’ and ‘to protect life and health and to ensure respect for

¹⁵ See Arts 3, 10, 59, 61, 63 GC IV, Arts 70, 71, 81 AP I, and Art. 18 AP II, and the respective commentaries by the ICRC. Also, see, J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (2005), 105-111 and 193-202; J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Volume II: Practice, Part I* (2005), 588-639 and 1174-1243; and, on the position of the U.S., J. B. Bellinger, III & W. J. Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’, 89 *International Review of the Red Cross* (2007) 866, 443, 448-454.

¹⁶ J. S. Pictet (ed.), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 96-97 (commentary to Art. 10). Also, in order for a relief action to be humanitarian it is necessary that “the action is aimed at bringing relief to victims” and that the crucial issue is “to avoid deception, that is to say, using the relief action for other purposes.” However, “the humanitarian character of an action could not be contested merely on the basis of its intention”, but rather on a factual basis only. Y. Sandoz *et al.* (eds), *Commentary to the Additional Protocols of 8 June 1977 of the Geneva Conventions of 12 August 1949* (1987), 817-818 (commentary to Art. 70 AP I).

¹⁷ Pictet, *supra* note 16, 97 (commentary to Art. 10).

¹⁸ See Sandoz *et al.*, *supra* note 16, 818 (commentary to Art. 70 AP I).

the human being”¹⁹. The Court added that relief “must also, and above all, be given without discrimination to all in need in Nicaragua”²⁰. In other words, humanitarian assistance to be classified as such should respect the principles of humanity, meaning that it should have the aim to “prevent and alleviate human suffering wherever it may be found [...] protect life and health and [...] ensure respect for the human being;”²¹ and the principle of impartiality, meaning that aid should be given solely on the basis of needs, without any “discrimination as to nationality, race, religious beliefs, class or political opinions”²².

In addition to humanity and impartiality, another principle that has been usually associated with the provision of humanitarian assistance is neutrality, which for the International Red Cross and Red Crescent Movement means that “[i]n order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”²³. This definition has been often questioned by other humanitarian actors for its breadth, since it comprises both military neutrality, in the sense of not favoring any party to the conflict with the assistance, and ideological neutrality, implying the duty not to take a position on the conflict or any other dispute.²⁴ The requirement of ideological neutrality for humanitarian actors has been the subject of a wide debate, started with the Biafra conflict and the creation of Médecins Sans Frontières (MSF) and continued with the discussion about the so-called “new humanitarianism”²⁵. On the other hand, there is general agreement among scholars and practitioners on the need to

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, 115, para. 243.

²⁰ *Id.*

²¹ International Committee of the Red Cross (ICRC), ‘The Fundamental Principles of the Red Cross and Red Crescent’ (1996) available at http://www.icrc.org/eng/assets/files/other/icrc_002_0513.pdf (last visited 27 April 2011), 2.

²² *Id.*, 4.

²³ *Id.*, 7.

²⁴ *Id.*, 7-8.

²⁵ See, for example, A. De Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (1997); D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2002); M. Barnett, ‘Humanitarianism Transformed’, 3 *Perspectives on Politics* (2005) 4, 723; F. Fox, ‘New Humanitarianism: Does It Provide a Moral Banner for the 21st Century?’, 25 *Disasters* (2001) 4, 275; M. Duffield *et al.*, ‘Editorial: Politics and Humanitarian Aid’, 25 *Disasters* (2001) 4, 269; K. Mills, ‘Neo-Humanitarianism: The Role of International Humanitarian Norms and Organizations in Contemporary Conflict’, 11 *Global Governance* (2005) 2, 161.

respect military neutrality in order for an action to be recognized and protected as humanitarian assistance and not to constitute an unlawful interference in a conflict.²⁶

The three fundamental principles of humanity, impartiality, and neutrality have been included in various UN documents dealing with humanitarian assistance, and one can note that the principles have often been related to the concept of humanitarian assistance *per se*, independently from the actor carrying out the action. For example, already in 1988 the UN General Assembly in resolution 43/131 “recall[ed]” that “in the event of natural disasters and similar emergency situations, the principles of humanity, neutrality and impartiality must be given utmost consideration by all those involved in providing humanitarian assistance”²⁷. The second of the “Guiding Principles on the strengthening of the coordination of humanitarian emergency assistance of the United Nations”, annexed to resolution 46/182 of 1991, explicitly states that “[h]umanitarian assistance *must* be provided in accordance with the principles of humanity, neutrality and impartiality”²⁸. A General Assembly resolution adopted in 2004 for the first time “[e]mphasizes the fundamentally *civilian character* of humanitarian assistance, reaffirms the leading role of civilian organizations in implementing humanitarian assistance, particularly in areas affected by

²⁶ See, for example, R. Ojinaga Ruiz, *Emergencias Humanitarias y Derecho Internacional: la Asistencia a las Víctimas* (2005), 269-274; F. Zorzi Giustiniani, *Le Nazioni Unite e l'Assistenza Umanitaria* (2008), 140-142 and 193-196; R. Abril Stoffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuración Jurídica, Principios Rectores y Mecanismos de Garantía* (2001), 361-362 [Abril Stoffels, *La Asistencia Humanitaria*]; R. Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’, 86 *International Review of the Red Cross* (2004) 855, 515, 542-543 [Abril Stoffels, *Legal Regulation*]; K. Mackintosh, ‘The Principles of Humanitarian Action in International Humanitarian Law’ (March 2000) available at <http://www.odi.org.uk/resources/download/249.pdf> (last visited 27 April 2011), 8-9.

²⁷ GA Res. 43/131, 8 December 1988, preamble. Similarly, see GA Res. 45/100, 14 December 1990, preamble.

²⁸ GA Res. 46/182, 19 December 1991, Annex, para. 2 (emphasis added). In 2003, the General Assembly, in addition to “[r]eaffirming the principles of humanity, neutrality and impartiality for the provision of humanitarian assistance,” introduced the guiding principle of independence, “meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented”. GA Res. 58/114, 17 December 2003, preamble. This definition is different from that of independence as a fundamental principle of the International Movement of the Red Cross and Red Crescent: see ICRC, *supra* note 21, 9-10.

conflicts, and affirms the need, in situations where military capacity and assets are used to support the implementation of humanitarian assistance, for their use to be in conformity with international humanitarian law and humanitarian principles”²⁹. The Security Council has also recalled at various times the “importance of the activities of the relevant United Nations bodies, agencies and other international humanitarian organizations and the need for these activities to continue to be carried out in accordance with the principles of humanity, neutrality and impartiality of humanitarian assistance”³⁰, first in presidential statements and subsequently in resolutions.³¹

Similarly, the (non-binding) *Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict* prepared by the UN Office for the Coordination of Humanitarian Affairs (OCHA) mentions “the basic humanitarian principles of humanity, impartiality and neutrality” as principles that “*must*” be respected when providing humanitarian assistance, “as stated in General Assembly Resolution 46/182”³², and the (binding) Treaty on the Functioning of the European Union (TFEU) states in Article 214 that “[h]umanitarian aid operations shall be conducted in

²⁹ GA Res. 59/141, 15 December 2004, para. 11 (emphasis added). See also GA Res. 60/124, 15 December 2005, para. 7; GA Res. 61/134, 14 December 2006, para. 5; GA Res. 62/94, 17 December 2007, para. 6.

³⁰ SC Pr.St. 1997/34, 19 June 1997.

³¹ SC Res.1296, 19 April 2000, para. 11. A more general reference was then made by “Stress[ing] the importance *for all, within the framework of humanitarian assistance*, of upholding and respecting the humanitarian principles of humanity, neutrality, impartiality and independence”. SC Res. 1674, 28 April 2006, para. 21 (emphasis added). Reference has been then added to “the importance for Humanitarian [sic] organizations to uphold the principles of neutrality, impartiality, humanity of their humanitarian activities and independence of their objectives.” SC Pr.St. 2004/46, 14 December 2004.

³² The *Glossary* defines the principles as well: UN Office for the Coordination of Humanitarian Affairs (OCHA), ‘Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict’ (2003) available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=100572> (last visited 27 April 2011), 13 and 15 (emphasis added). The 2003 resolution by the Institute of International Law on humanitarian assistance states that “[h]umanitarian assistance shall be offered and, if accepted, distributed without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups” and that “[t]he assisting State or organization may not interfere, *in any manner whatsoever* in the internal affairs of the affected State.”, Institut de Droit International/Institute of International Law, *supra* note 8, paras II.3 and IV.3 (emphasis added).

compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination”³³.

The rationale behind the principles characterizing humanitarian actions under IHL is the need to ensure that those providing humanitarian assistance do not interfere in the conflict and are perceived as neutral by the belligerents, so as to have access to all the victims. The principles are thus a means to an end, and a very important role in achieving this end is played by the perception belligerents have of humanitarian actions. If the actors involved in the provision of humanitarian assistance are perceived as not being concerned with the needs of the victims only, their safety may be at risk. Following this reasoning, relief provided by combatants that aims to achieve a specific military or political objective and that blurs the distinction between politico-military and humanitarian action and between military and humanitarian actors, runs against the intention of the law, namely ensuring humanitarian actors’ safety. For example, the Fourth Geneva Convention and the First Additional Protocol envisage a role for the military of one party to the conflict in the distribution of relief in occupation, but still this aid has to be given “without any adverse distinction” (and nonetheless it is not classified as “humanitarian”).³⁴

In conclusion, even if there seems to be no universally agreed upon definition of humanitarian assistance contained in a binding international document, the term has been arguably used to describe, generally, not the activities undertaken by armed forces in conflict (especially of a party to it), but rather by UN specialized agencies and other humanitarian

³³ Council of the European Union, *Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union*, 30 April 2008, 6655/1/08 REV 1, 187. While these principles are not defined in the treaty itself, the previous (non-binding) European Consensus on Humanitarian Aid of 2008 provides that “humanity means that human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population,” “[n]eutrality means that humanitarian aid must not favour any side in an armed conflict or other dispute,” and “[i]mpartiality denotes that humanitarian aid must be provided solely on the basis of need, without discrimination between or within affected populations.”, Council of the European Union, *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 Consensus on Humanitarian Aid*, OJ 2008 C 25/1, C 25/2, paras 11-13.

³⁴ See Arts 55 GC IV and 69 AP I. The requirement of absence of any adverse distinction is explicitly provided in Art. 69 AP II. The adjective “humanitarian” to characterize this aid is used neither in Arts 55 GC IV and 69 AP I, nor in the ICRC Commentaries to them.

nongovernmental organizations. Moreover, there has been a constant trend towards recognition of the need for actions to comply with the principles of humanity, impartiality, and neutrality in order to be classified as humanitarian, so that scholars have affirmed the customary nature of these three traditional principles for external humanitarian assistance to be considered as such and not an unlawful interference in a conflict.³⁵

Using the term “humanitarian assistance” for actions that do not respect these principles risks leading to a blurring of the distinction between military and humanitarian actors, endangering the latter and running contrary to the rationale behind the principles themselves.³⁶ For armed

³⁵ This is true especially in armed conflict, with the principles being enshrined in the GCs and in the APs; however, some of the aforementioned documents containing the principles deal with humanitarian assistance more in general, also in the case of natural disasters. For the purpose of this article, only situations of armed conflict are taken into consideration. See, for example, J. Alcaide Fernández, ‘La Asistencia Humanitaria en Situaciones de Conflicto Armado’, in J. Alcaide Fernández *et al.*, *La Asistencia Humanitaria en Derecho Internacional Contemporáneo* (1997), 77-79; Mackintosh, *supra* note 26, 8-9; M. Torrelli, ‘From Humanitarian Assistance to “Intervention on Humanitarian Grounds”?’’, *32 International Review of the Red Cross* (1992) 288, 228, 239-241; Zorzi Giustiniani, *supra* note 26, 193-197; Abril Stoffels, *La Asistencia Humanitaria*, *supra* note 26, 412-416; Abril Stoffels, *Legal Regulation*, *supra* note 26, 539-544; D. Plattner, ‘ICRC Neutrality and Neutrality in Humanitarian Assistance’, *36 International Review of the Red Cross* (1996) 311, 161. See also, *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 19, paras 242-243.

³⁶ Blondel affirms that “[w]ithout actually defining the word ‘humanitarian’, IHL, like other branches of law, makes clear its aims, which are to ensure respect for human life and to promote health and dignity *for all*. It is concerned with men and women *for their own sake*, setting aside weapons, uniforms and ideologies, men and women who could very well be ourselves.” J. L. Blondel, ‘The Meaning of the Word “Humanitarian” in Relation to the Fundamental Principles of the Red Cross and Red Crescent’, *29 International Review of the Red Cross* (1989) 273, 512 (emphasis added). On the need to maintain a distinction between humanitarian and military actors “at all times”, see J. Grombach Wagner, ‘An IHL/ICRC Perspective on “Humanitarian Space”’, *Humanitarian Exchange* (2005) 32, 25. Spieker affirms the need for the military to satisfy the criteria provided in Art. 70 AP I as conditions to the right to offer humanitarian assistance, but she adds that it is not necessary to satisfy such principles as preconditions of “humanitarian action as such” (for example, the armed forces of an occupying power may provide “humanitarian assistance” even if taking part in hostilities). She also adds that “as a legal concept, the provision of humanitarian assistance by governments and by governmental authorities, including the military, is nothing exceptional”: H. Spieker, ‘The International Red Cross and Red Crescent and Military-Humanitarian Relationships’, in D. Dijkzeul (ed.), *Between Force and Mercy: Military Action and Humanitarian Aid* (2004), 206 and 221. Other

forces, a first consequence deriving from the fact of presenting themselves as involved in a humanitarian action may be a positive image in the eyes both of the beneficiaries and of their own national constituencies. Also, while it does not seem to be arguable that armed forces who do “humanitarian assistance” are entitled to the protection and the privileges envisaged for the civilian actors traditionally involved in this activity during armed conflict, another consequence may be the adoption of behaviors that jeopardize the principle of distinction. The risk is indeed that military actors carrying out “humanitarian” and not combat tasks may decide, in order to increase their security, to wear civilian clothes and not to distinguish themselves from the civilian population, as happened in Afghanistan.³⁷ In addition to offending the principle of distinction, this conduct may lead to negative consequences for civilian humanitarian actors involved in humanitarian assistance, for whom it is important not only to respect the principles in order to have safe access to victims, but also to be perceived as such. Moreover, increased risks of being targeted for humanitarian actors imply increased risks for civilians who get in contact with these actors in order to receive relief.

Humanitarian actors who interact with the military must be aware that “[t]heir activities or location may [...] expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities”³⁸. Furthermore, they must be careful both not to commit acts that exceed their mission, thus leading to the loss of entitlement to their specific privileges, and not to get involved in activities that may amount to direct participation in hostilities and thus to the loss of protection from attack.³⁹

authors affirm that the term “humanitarian assistance” under IHL refers only to relief actions coming from outside (thus not to the actions carried out by the parties to the conflict themselves): see, for example, Zorzi Giustiniani, *supra* note 26, 15; Abril Stoffels, *La Asistencia Humanitaria*, *supra* note 26, 41.

³⁷ See W. H. Parks, ‘Special Forces’ Wear of Non-Standard Uniforms’, in R. B. Jaques (ed.), *Issues in International Law and Military Operations*, Naval War College International Law Studies, Volume 80 (2006), 69, 71. The article analyses the principle of distinction and the possibility and limits for members of the armed forces to wear non-standard uniforms or civilian attires.

³⁸ N. Melzer (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), 37. This statement is made with reference to “[p]rivate contractors and employees of a party to an armed conflict”.

³⁹ *Id.* For example, the transmission of tactical intelligence to carry out an attack may amount to direct participation in hostilities, in case the act “meet[s] three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a

Below the article provides an overview of the practice that has taken place in Afghanistan and Iraq, to examine problems that have emerged, their consequences in the field and in the formulation of U.S. instructions for its armed forces.

C. The Conflicts in Afghanistan and Iraq: A New Role for the Military in Relief?

The interventions in Afghanistan and Iraq have presented the U.S. and its allies with complex challenges connected to the nature of the conflict, and more specifically to the difficulties in defeating enemies who do not distinguish themselves from the civilian population.⁴⁰ Indeed, after an initial brief military campaign to remove the Taliban and Saddam Hussein from government, in both these situations the U.S. has found itself confronting an insurgency, meaning “an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control”⁴¹.

According to U.S. military doctrine, insurgents are characterized by the fact that they “use subversion, guerrilla warfare, and terrorism, in the face of capable counterinsurgent forces”⁴² and that they are “complex, dynamic, and adaptive” and “can rapidly shift, split, combine, or reorganize”⁴³, so that in order to defeat them, it is not sufficient to fight and kill them, but equally important is to gain the trust of the population, so as to deprive insurgents of their primary source of support.⁴⁴ In this sense, in

belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.”, *id.*, 35 and 46.

⁴⁰ See *supra* note 1.

⁴¹ COIN FM 2006, *supra* note 1, 1-1. U.S. military sources also define insurgency as “[t]he organized use of subversion and violence by a group or movement that seeks to overthrow or force change of a governing authority.” U.S. Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (12 April 2001, as amended through April 2010), 233 [DoD Dictionary 2010].

⁴² COIN JP 2009, *supra* note 1, I-1.

⁴³ *Id.*, I-2.

⁴⁴ See, for example, International Security Assistance Force (ISAF), Headquarters, Kabul, Afghanistan, ‘Tactical Directive’ (6 July 2009) available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last visited 28 April 2011): “Protecting the people is the mission. The conflict will be won by persuading the population, not by destroying the enemy.” Similarly, see Lieutenant General

addition to offensive and defensive operations, it is necessary for “counterinsurgents to address the insurgency’s causes through stability operations as well”, which “initially involves securing and controlling the local populace and providing for essential services”⁴⁵. Actions to respond to the humanitarian needs of the population and to stimulate economic development and good governance have been recognized as playing a role as relevant as that of traditional military activities, in both Afghanistan and Iraq. However, the involvement of the military in the provision of relief and their relationships with humanitarian actors have prompted numerous complaints from humanitarian agencies and NGOs. In particular, it has been claimed that the strategies adopted in Afghanistan and Iraq have led to a blurring of the distinction between military and humanitarian actors and to the perception of the latter as aligned with the former and as legitimate targets for insurgents.⁴⁶

As far as Afghanistan is concerned, the opinion of the U.S. on the contribution by humanitarian organizations was already made clear in October 2001: the then Secretary of State Colin Powell explicitly described U.S. NGOs as “a force multiplier” of the coalition and as “an important part of our combat team”⁴⁷. Highly controversial initiatives were then the distribution of leaflets making the delivery of humanitarian assistance conditional upon the provision of intelligence information,⁴⁸ and the choice

D. H. Petraeus, ‘Learning Counterinsurgency: Observations from Soldiering in Iraq’, 86 *Military Review* (2006) 1, 2, 8-9: “[...] *success in a counterinsurgency requires more than just military operations*. Counterinsurgency strategies must also include, above all, efforts to establish a political environment that helps reduce support for the insurgents and undermines the attraction of whatever ideology they may espouse.” (emphasis in the original).

⁴⁵ COIN FM 2006, *supra* note 1, 1-3.

⁴⁶ While this article focuses on problems that emerged in Afghanistan and Iraq in relation to actions and positions taken by states/military actors, it has been highlighted that the conduct of so-called humanitarian actors themselves has sometimes contributed to the blurring of the distinction and to increasing risks for them in Afghanistan and Iraq. See, for example A. Donini, ‘Afghanistan: Humanitarianism under Threat’ (March 2009) available at <https://wikis.uit.tufts.edu/confluence/download/attachments/22520580/Donini-Afghanistan.pdf?version=1> (last visited 28 April 2011). Anderson, *supra* note 9, 64.

⁴⁷ Secretary of State C. L. Powell, ‘Remarks to the National Foreign Policy Conference for Leaders of Nongovernmental Organizations’ (26 October 2001) available at http://avalon.law.yale.edu/sept11/powell_brief31.asp (last visited 28 April 2011).

⁴⁸ See K. Gluck, ‘Coalition Forces Endanger Humanitarian Action in Afghanistan’ (6 May 2004) available at <http://www.msf.org/msf/articles/2004/05/coalition-forces-endanger-humanitarian-action-in-afghanistan.cfm> (last visited 28 April 2011). See also E. MacAskill, ‘Pentagon Forced to Withdraw Leaflet Linking Aid to Information

by the U.S. and other coalition forces to move around in civilian clothes and sometimes with concealed weapons, even “claim[ing] they [we]re on a ‘humanitarian mission’ to assist NGOs in their work”, thus leading civilians to suspect humanitarian workers of being in reality American soldiers.⁴⁹ Similarly, it has been affirmed that in Iraq “a dangerous blurring of the lines between humanitarian and political action” has taken place, also due to the fact that the occupying powers were among the main providers of funds to NGOs, so that the preservation of an appearance of independence was particularly difficult.⁵⁰ Two other tools developed for the first time in Afghanistan and Iraq by American and coalition forces in the field of relief have further stimulated concerns from humanitarian agencies and NGOs regarding the blurring of the distinction between military and humanitarian actors—Provincial Reconstruction Teams (PRTs) and the Commander’s Emergency Response Program (CERP).

In 2002 the first PRT was established by the U.S. in Afghanistan, as “[a]n interim interagency organization designed to improve stability in a given area by helping build the legitimacy and effectiveness of a host nation local or provincial government in providing security to its citizens and

on Taliban’, *The Guardian* (6 May 2004) available at <http://www.guardian.co.uk/world/2004/may/06/afghanistan.usa> (last visited 28 April 2011).

⁴⁹ See M. Kelly & M. Rostrup, ‘Identify Yourself: Coalition Soldiers in Afghanistan Are Endangering Aid Workers’ (1 February 2002) available at <http://www.guardian.co.uk/world/2002/feb/01/afghanistan.comment> (last visited 28 April 2011). See also P. M. Diskett *et al.*, ‘Civil-Military Relations in Humanitarian Assistance: Where Next in the Aftermath of 11 September?’, in D Dijkzeul (ed.) *Between Force and Mercy: Military Action and Humanitarian Aid* (2004), 321. N. de Torrente, ‘The War on Terror’s Challenge to Humanitarian Action’, *Humanitarian Exchange* (2002), 22, 44. Against these criticisms, see for example J. J. Collins & M. J. McNerney, ‘Security and Humanitarian Assistance: The US Experience in Afghanistan’, in D. Dijkzeul (ed.), *Between Force and Mercy: Military Action and Humanitarian Aid* (2004), 187.

⁵⁰ A. Donini *et al.*, ‘Between Cooptation and Irrelevance: Humanitarian Action after Iraq’, 17 *Journal of Refugees Studies* (2004) 3, 260, 261-262. One sign of the use of the humanitarian activity as a political tool was the fact that before the intervention in Iraq, the U.S. Department of Defense (DoD) created an Office for Reconstruction and Humanitarian Assistance (ORHA) within the Pentagon, instead of relying on the U.S. Agency for International Development (USAID) as usual practice. See S. Kenyon Lischer, ‘Military Intervention and the Humanitarian “Force Multiplier”’, 13 *Global Governance* (2007) 1, 99, 105. On this and other aspects of the politicization of humanitarian aid before, during, and after the attack in Iraq in March 2003, see N. de Torrente, ‘Humanitarian Action under Attack: Reflections on the Iraq War’, 17 *Harvard Human Rights Journal* (2004), 1.

delivering essential government services”⁵¹. The number of PRTs in Afghanistan rapidly grew, with other nations establishing them and then NATO’s International Security Assistance Force (ISAF) taking control over all the existing ones by 2006.⁵² Since 2005 PRTs have been established in Iraq as well. At present, 27 PRTs are operating in Afghanistan and 18 in Iraq,⁵³ and they have been classified as “[p]erhaps the most important of new initiatives” by the U.S. in the field of counterinsurgency, since they “bring together civilian and military personnel to undertake the insurgency-relevant developmental work that has been essential to success in both Iraq and Afghanistan”⁵⁴. The central characteristic of PRTs is that they include both civilian and military components, however the size of each of them, the ratio between military and civilian members, and the military or civilian leadership can vary. Indeed, there are important differences not only between the structure and activities of PRTs in Afghanistan and Iraq respectively, but also among the various PRTs operating in Afghanistan, since different lead nations have interpreted the broad mandate assigned to PRTs in different ways.⁵⁵ In particular “[t]he PRTs’ open-ended mandate of

⁵¹ DoD Dictionary 2010, *supra* note 41, 379.

⁵² ISAF is a multinational force which “was created in accordance with the Bonn Conference in December 2001” and whose leadership was then assumed by NATO on 11 August 2003. NATO thus “became responsible for the command, coordination and planning of the force, including the provision of a force commander and headquarters on the ground in Afghanistan.” ISAF, ‘About ISAF: Mission’ available at <http://www.isaf.nato.int/history.html> (last visited 28 April 2011). Each PRT is now led by an ISAF nation (including the U.S.). See, for example, ISAF, *ISAF PRT Handbook, Edition 4* (2010), 2 [ISAF, PRT Handbook]; see also Special Inspector General for Afghanistan Reconstruction (SIGAR), *Quarterly Report to the United States Congress, 30 July 2010*, 76.

⁵³ SIGAR, *supra* note 52, 76; In Iraq, the 18 PRTs are differentiated between 15 PRTs, two embedded PRTs (e-PRTs), and one Regional Reconstruction Team (RRT). They are supplemented by 15 satellite offices, designated as “Forward Presences”. See *id.*

⁵⁴ United States Government Interagency Counterinsurgency Initiative, *supra* note 5, preface.

⁵⁵ In 2005, the PRT Executive Steering Committee stated that PRTs “will assist The Islamic Republic of Afghanistan to extend its authority, in order to facilitate the development of a stable and secure environment in the identified area of operations, and enable Security Sector Reform (SSR) and reconstruction efforts.” B. R. Rubin, H. Hamidzada & A. Stoddard, ‘Afghanistan 2005 and Beyond: Prospects for Improved Stability Reference Document’, Netherlands Institute of International Relations ‘Clingendael’ (April 2005) available at http://www.clingendael.nl/publications/2005/20050400_cru_paper_barnett.pdf (last visited 28 April 2011), Appendix I. See also NATO, ‘NATO’s role in Afghanistan’ (last updated 9 August 2010) available at

‘enabling reconstruction’ has been interpreted differently across ISAF’s 26 PRTs⁵⁶.

PRTs in Afghanistan have been strongly criticized for contributing to the blurring of the distinction between humanitarian and military actors, since in certain cases they have been involved in the direct provision of assistance, not respecting the traditional principles.⁵⁷ Aid organizations have thus complained about the misuse of the term “humanitarian assistance” in connection to relief provided by military components of the PRTs and by the military more in general: not being provided solely on the basis of the needs of the beneficiaries but rather being guided by military objectives, such aid would not be impartial and thus not humanitarian.⁵⁸ Furthermore, it

http://www.nato.int/cps/en/natolive/topics_8189.htm (last visited 28 April 2011). On the absence still in 2008 of “[any] clear definition of the PRT mission, [any] concept of operations or doctrine, [any] standard operating procedures”, see U.S. House of Representatives, Committee on Armed Services, Subcommittee on Oversight & Investigations, *Agency Stovepipes vs Strategic Agility: Lessons We Need to Learn from Provincial Reconstruction Teams in Iraq and Afghanistan* (2008), 18.

⁵⁶ British and Irish Agencies Afghanistan Group (BAAG) & European Network of NGOs in Afghanistan (ENNA), ‘Aid and Civil-Military Relations in Afghanistan’, BAAG and ENNA Policy Briefing (October 2008) available at <http://www.baag.org.uk/publications/category/reports> (last visited 28 April 2011). On the different U.S., British, and German PRTs models, see, for example, Institute for the Study of War, ‘Provincial Reconstruction Teams (PRTs)’ (15 April 2009) available at <http://www.understandingwar.org/themenode/provincial-reconstruction-teams-prts> (last visited 28 April 2011); N. Abbaszadeh *et al.*, ‘Provincial Reconstruction Teams: Lessons and Recommendations’ (January 2008) available at http://www.princeton.edu/research/pwreports_f07/www591b.pdf (last visited 28 April 2011), 5 and 7.

⁵⁷ See, for example, ISAF, PRT Handbook, *supra* note 52, 196. See also Actionaid *et al.*, ‘Quick Impact, Quick Collapse: The Dangers of Militarized Aid in Afghanistan’ (26 January 2010) available at <http://www.oxfam.org/en/policy/quick-impact-quick-collapse> (last visited 28 April 2011), 3; S. Cornish & M. Glad, ‘Civil-Military Relations: No Room for Humanitarianism in Comprehensive Approaches’ (2008) available at http://www.atlanterhavskomiteen.no/files/atlanterhavskomiteen.no/Publikasjoner/Sikkerhetspolitisk_bibliotek/Arkiv/2008/Sik.pol_5_2008_final.pdf (last visited 28 April 2011).

⁵⁸ See G. Mc Hugh & L. Gostelow, Save the Children UK, ‘Provincial Reconstruction Teams and Humanitarian–Military Relations in Afghanistan’ (2004) available at http://www.rusi.org/downloads/assets/Save_the_Children_UK_-_PRTs_and_Humanitarian-Military_Relations_in_Afghanistan_2004_09.pdf (last visited 28 April 2011), 39-40. See also Médecins sans Frontières (MSF), ‘NATO Speech – Rheindalen, Germany, December 8, 2009’ (9 December 2009) available at <http://www.msf.org/msf/articles/2009/12/nato-speech-.cfm> (last visited 28 April 2011); P. Krähenbühl, ‘Humanitarian Security: “A Matter of Acceptance, Perception, Behaviour...”’, ICRC Official Statement (31 March 2004) available at <http://www.icrc.org/web/eng/>

has been claimed that PRTs, at least in certain cases, have engaged in the collection of intelligence while providing relief and thus have generated suspicion among the population that actors providing humanitarian assistance more generally may be allied with a belligerent and collectors of intelligence.⁵⁹

Regarding the situation in Iraq, it appears that PRTs have been less dangerous than in Afghanistan in terms of generating confusion between civilians and the military, partly because Iraqi PRTs have been more focused on “improv[ing] the capacity of provincial government bodies” and “improving budget execution”.⁶⁰ Also, differently from those in Afghanistan, U.S. PRTs in Iraq are civilian-led, with a member of the Department of State playing the leading role in each of them.⁶¹ However, notwithstanding the civilian leadership of the PRTs and the fewer complaints against them, it has been reported that in Iraq the military has been active in providing humanitarian assistance and contingents have sometimes “portray[ed] their presence as essentially humanitarian,” so that it has been “often virtually impossible for Iraqis (and sometimes for humanitarian professionals) to distinguish between the roles and activities of local and international actors, including military forces, political actors and other authorities, for-profit contractors, international NGOs, local NGOs, and U.N. agencies”⁶².

Some initiatives have been adopted following the concerns and vocal criticism of the humanitarian community, such as the approval by the PRT Steering Committee in Afghanistan of the *PRT Policy Note Number 3* in 2007, which states *inter alia* that “[h]umanitarian assistance is that which is

siteeng0.nsf/html/5XSGWE (last visited 28 April 2011). On the allocation of aid to the various regions on the basis of insecurity rather than needs, see also Actionaid *et al.*, *supra* note 57, 3-4; BAAG & ENNA, *supra* note 56, 11. It is also arguable that aid provided by military actors supporting a party to a conflict can hardly be classified as neutral.

⁵⁹ NATO itself in 2007 contributed to a perception that “[h]umanitarian assistance operations” helped in gathering information for “tracking down anti-government forces” and contributed to “fight[ing] the global war on terror.”, NATO, ‘ARSIC-N and ANA travel outside boundaries to deliver aid’ (23 December 2007) available at <http://ocha-gwapps1.unog.ch/rw/RWB.NSF/db900SID/PANA-7A7FC7?OpenDocument> (last visited 28 April 2011).

⁶⁰ Abbaszadeh *et al.*, *supra* note 56, 12.

⁶¹ U.S. House of Representatives, *supra* note 55, 14.

⁶² G. Hansen, ‘Taking Sides or Saving Lives: Existential Choices for the Humanitarian Enterprise in Iraq: Humanitarian Agenda 2015: Iraq Country Study’ (June 2007) available at <https://wikis.uit.tufts.edu/confluence/download/attachments/14553635/H2015+Iraq+Country+Study.pdf?version=1> (last visited 28 April 2011), 43-44.

life saving and addresses urgent and life-threatening humanitarian needs”, that “[i]t must not be used for the purpose of political gain, relationship building, or ‘winning hearts and minds’”, and that it “must be distributed on the basis of need and must uphold the humanitarian principles of humanity, impartiality and neutrality”⁶³. In 2007 the U.S. Department of Defense (DoD) and InterAction, “the largest coalition of U.S.-based international development and humanitarian non-governmental organizations”⁶⁴, adopted the *Guidelines for Relations between U.S. Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments*. These guidelines list a series of instructions for the U.S. armed forces, which “should be observed consistent with military force protection, mission accomplishment, and operational requirements”, such as the recommendation that military personnel wear uniforms or other clothes to distinguish themselves from humanitarian actors when carrying out relief activities, and the recommendation to arrange meetings with NGOs in advance and possibly outside military installations, for the exchange of information. Recommendations are also formulated for humanitarian NGOs, including not to wear military clothes, not to co-locate with the military and not to travel in military vehicles.

However, a limitation of these guidelines is that they do not apply to the relationships of U.S. armed forces with humanitarian NGOs in general, but only with “Non-Governmental Organizations [...] belonging to InterAction that are engaged in humanitarian relief efforts in hostile or potentially hostile environments”⁶⁵. Furthermore, notwithstanding these initiatives, the UN Humanitarian Coordinator in Afghanistan, Robert Watkins, affirmed as recently as 17 February 2010, that “[t]he 26 Provincial

⁶³ PRT Executive Steering Committee, ‘Policy Note Number 3: PRT Coordination and Intervention in Humanitarian Assistance’ (22 February 2007, updated on 29 January 2009) available at https://www.cimicweb.org/Documents/PRT%20CONFERENCE%202010/Policy_Note_3_Humanitarian_Assistance.pdf (last visited 28 April 2011), para. 4 (emphasis omitted). On the membership and function of the PRT Executive Steering Committee see ISAF, ‘PRT Executive Steering Committee Meets’ (23 February 2007) available at <http://www.nato.int/isaf/docu/pressreleases/2007/02-february/pr070223-124.html> (last visited 28 April 2011).

⁶⁴ United States Institute of Peace, InterAction & U.S. Department of Defense, ‘Guidelines for Relations between U.S. Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments’ (July 2007) available at http://www.usip.org/files/resources/guidelines_pamphlet.pdf (last visited 19 March 2011), ‘Key Terms’ section. Interaction is reported as comprising “over 165 members operating in every developing country”.

⁶⁵ *Id.*

Reconstruction Teams (PRTs) currently in Afghanistan represent the varying agendas of different nations and each PRT allocates aid to the specific area where they are located” and thus “aid is being distributed on a geographical basis rather than according to needs”⁶⁶. In his view, “[d]istribution of humanitarian assistance should remain solely within the realm of humanitarian actors and not the military”⁶⁷.

The Commander’s Emergency Response Program, another innovation introduced by the U.S. in the framework of the interventions in Afghanistan and Iraq and related to the provision of aid to civilians, was established for the first time in Iraq in 2003. The U.S., as an occupying power, fulfilled its obligations under IHL to satisfy the basic needs of the population by using seized funds belonging to the former Iraqi regime.⁶⁸ When, towards the end of 2003, it was realized that the seized funds had been almost entirely spent, Congress decided to continue the program with U.S. funds and to start the program in Afghanistan as well.⁶⁹ Since then, Congress has annually assigned a growing amount of money to CERP in Afghanistan and in Iraq: cumulatively, until 2010 the Congress has appropriated for CERP \$3.82 billion in Iraq and almost \$2.64 billion in Afghanistan.⁷⁰ For the Fiscal Year 2011, the DoD has requested \$1.3 billion for CERP, of which \$1.1 billion for Afghanistan and \$0.2 billion for Iraq.⁷¹

CERP is defined as a program “designed to enable local commanders in Iraq and Afghanistan to respond to urgent *humanitarian relief* and reconstruction requirements within their areas of responsibility by carrying

⁶⁶ UNAMA, ‘UN Humanitarian Coordinator Press Conference’ (17 February 2010) available at <http://unama.unmissions.org/Default.aspx?tabid=1761&ctl=Details&mid=1892&ItemID=7810> (last visited 28 April 2011).

⁶⁷ *Id.* He added that “the military may be called upon only in exceptional circumstances and by the appropriate authorities”, since “[t]he distribution of aid by military personnel gives the wrong signal to communities who then perceive all aid to be associated with the military” and “[t]his has led to threats of violence against the humanitarian community and hampered their ability to deliver needed services”.

⁶⁸ For a detailed description of the origins of CERP, see M. Martins, ‘No Small Change of Soldiering: The Commander’s Emergency Response Program in Iraq and Afghanistan’, *The Army Lawyer* (2004) 2, 1, 3-6. As far as the duties of an occupying power to satisfy the basic needs of the civilian population of an occupied territory are concerned, see in particular Arts 55 and 59 GC IV, and Art. 69 AP I.

⁶⁹ Martins, *supra* note 68, 9-10.

⁷⁰ SIGIR, *supra* note 53, 34; SIGAR, *supra* note 52, 46.

⁷¹ U.S. Department of Defense, ‘Fiscal Year 2011 Budget Request: Overview’ (February 2010) available at http://comptroller.defense.gov/defbudget/fy2011/fy2011_budget_request_overview_book.pdf (last visited 28 April 2011), 6-9.

out programs that will immediately assist the indigenous population”; “urgent” means “any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action”⁷². The primary destination of CERP funds should be “small-scale projects that, optimally, can be sustained by the local population or government”, meaning projects of less than \$500,000 each, while special procedures are required for approval of more expensive ones.⁷³ Areas in which CERP funds can be spent include water and sanitation, food production and distribution, healthcare, education, battle damage/repair, condolence payments, hero payments, and other urgent humanitarian or reconstruction projects.⁷⁴

With these various uses, CERP has been identified as “ammunition”⁷⁵, as a critical instrument “provid[ing] local commanders with the funds and flexibility required to bring needed urgent *humanitarian assistance* and reconstruction to areas that have been affected by years of conflict and neglect” and thus as representing “a unique, rapid, high-impact *COIN tool*”⁷⁶. Indeed, it has been highlighted that in the absence of CERP, U.S. local commanders would not have funds at their disposal to spend on discretionary humanitarian and reconstruction programs, so that an important instrument for “winning hearts and minds” in counterinsurgency and stability operations would be missing.⁷⁷ In Iraq, CERP has allowed commanders to undertake “quick-impact, high-visibility projects” intended to “help tactical units on the ground gain community support, improving public perceptions of the Coalition (‘winning hearts and minds’) and enhancing troop safety (force protection)”, however not really “foster[ing] long-term change on their own, but rather serv[ing] as vehicles for allowing the military to operate with greater local cooperation in the short-term”⁷⁸.

⁷² U.S. Department of Defense, ‘DoD Financial Management Regulation Volume 12, Chapter 27’ (January 2009) available at http://comptroller.defense.gov/fmr/12/12_27.pdf (last visited 28 April 2011), 27-3 (emphasis added).

⁷³ *Id.*, 27-3 – 27-4.

⁷⁴ See *Id.*, 27-4 – 27-5. For definitions of these categories and a list of potential projects, see U.S. Department of Defense, *supra* note 72, Annex A.

⁷⁵ Petraeus, *supra* note 44, 4 (emphasis omitted).

⁷⁶ U.S. Department of Defense, ‘Fiscal Year 2010 Budget Request: Summary Justification’ (May 2009) available at http://comptroller.defense.gov/defbudget/fy2010/fy2010_SJ.pdf (last visited 28 April 2011), 4-5 (emphasis added).

⁷⁷ See Martins, *supra* note 68, 12-15.

⁷⁸ SIGIR, *Hard Lessons: The Iraq Reconstruction Experience* (2009), 237-238.

CERP has been again subject to the criticism that it comprises the distribution of relief on the basis of political and military strategic objectives, rather than purely on the basis of needs, and that it leads to a blurring of the distinction between military and humanitarian actors and roles.⁷⁹ Concerns have been expressed also regarding the lack of reporting and accountability for how CERP funds are spent and for the high percentage of funds used for expensive, development-type projects, with inadequate mechanisms for maintenance and follow-through.⁸⁰ These complaints and criticisms against CERP, PRTs, and the role of the military in providing relief more generally, have been partly taken into account in the most recent versions of American military doctrines and manuals.⁸¹ These doctrines and manuals are analyzed in the next section, in order to verify the role they assign to humanitarian assistance and whether they provide responses to the aforementioned concerns, or whether problematic issues still remain unsolved.

⁷⁹ For example, it has been affirmed that “[o]ne-third of CERP funds for the coming year (approximately \$400 million, or \$285 per capita) are reportedly earmarked for Helmand province, while more secure provinces will receive just a fraction of this assistance through civilian institutions.”, Actionaid *et al.*, *supra* note 57, 3-4. On the blurring of the distinction between humanitarian and military actors, see, for example, Hansen, *supra* note 62, 58.

⁸⁰ See D. Hedgpeth & S. Cohen, ‘Money as a Weapon: A Modest Program to Put Cash in Iraqis’ Hands Stretches Its Mandate with Big Projects’ (11 August 2008) available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/10/AR2008081002512.html> (last visited 28 April 2011). See also the quarterly reports issued by SIGIR and SIGAR available at <http://www.sigir.mil/publications/quarterlyreports/index.html> and at <http://www.sigar.mil/ReportToCongress.asp> (last visited 20 March 2011).

⁸¹ On the debate on the role of military manuals in the formation of customary international law, see, for example, Bellinger & Haynes, *supra* note 15; J.-M. Henckaerts, ‘Customary International Humanitarian Law: A Response to US Comments,’ 89 *International Review of the Red Cross* (June 2007) 866, 473; C. Garraway, ‘The Use and Abuse of Military Manuals,’ 7 *Yearbook of International Humanitarian Law* (2004), 425; D. Turns, ‘Military Manuals and the Customary Law of Armed Conflict,’ in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* (2009), 64.

D. U.S. Instructions to Its Armed Forces

Over the last five years, the shift in the importance of soft power in relation to hard power in the strategy to win contemporary wars has led the U.S. DoD to devote growing attention to activities that have been traditionally considered in the realm of civilian actors, including the provision of humanitarian assistance and development assistance. In 2005 the Secretary of Defense signed a directive dedicated to “stability operations”, which provided that these operations “are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support” and “[t]hey shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DoD activities”⁸². Stability operations are defined as “various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and *humanitarian relief*”⁸³.

Stability operations are a primary component of counterinsurgency campaigns, which combine them with offensive and defensive operations, and which in order to be successful not only require the existence of a “unity of effort” among the military and other actors present in the theater of operations,⁸⁴ but also “require[] Soldiers and Marines to employ a mix of familiar combat tasks and skills more often associated with nonmilitary agencies”, to be “nation builders as well as warriors”⁸⁵. Given the importance of traditionally civilian activities in COIN and in stability

⁸² U.S. Department of Defense, ‘Directive 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations’ (28 November 2005) available at <http://www.scribd.com/doc/27538315/DoD-Directive-3000-05-Military-Support-for-Stability-Security-Transition-And-Reconstruction-SSTR-Operations> (last visited 28 April 2011), para. 4.1. In this Directive, stability operations were defined as “[m]ilitary and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions” (para. 3.1).

⁸³ U.S. Department of Defense, *Instruction Number 3000.05, Stability Operations* (16 September 2009), para. 3 (emphasis added).

⁸⁴ COIN FM 2006, *supra* note 1, 2-1. Unity of effort means “[c]oordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization - the product of successful unified action.” DoD Dictionary 2010, *supra* note 41, 493.

⁸⁵ *Id.*, Foreword.

operations, civil-military operations are essential, since they are “[t]he activities of a commander that establish, maintain, influence, or exploit relations between military forces, governmental and nongovernmental civilian organizations and authorities, and the civilian populace in a friendly, neutral, or hostile operational area *in order to facilitate military operations, to consolidate and achieve operational US objectives*” and that “may include performance by military forces of activities and functions normally the responsibility of the local, regional, or national government”⁸⁶.

Clearly, these new doctrinal developments may lead to activities in the field that affect humanitarian actors and the “humanitarian space”⁸⁷, as seems to have been the case in Afghanistan and Iraq. This calls for a careful analysis of official military documents, to examine whether they take into account these possible problems and how they try and solve them. A brief overview of the provisions regarding the delivery of humanitarian assistance and NGOs, in particular humanitarian NGOs, contained in the most recent American joint doctrines and field manuals demonstrates that over the last few years increasing attention has been devoted to the special needs of humanitarian actors, their concerns related to being perceived as neutral, impartial, and independent, and the rationale behind these concerns. Nonetheless, reasons for caution still remain, both in relation to the use of the term “humanitarian assistance” (and the possible blurring of the distinction between activities carried out by the military and activities carried out by humanitarian actors) and to the use of NGOs as a source of information for the military.

A development in the consideration of humanitarian actors’ identity and point of view is represented by the appendix on “Humanitarian Response Principles” contained in the 2008 Stability Operations Field Manual.⁸⁸ While the manual still advocates for unity of effort and even

⁸⁶ U.S. Joint Chiefs of Staff, *Civil-Military Operations*, Joint Publication 3-57 (JP 3-57) (July 2008), GL-6 (emphasis added) [CMO JP 2008].

⁸⁷ “Humanitarian space” is defined by OCHA as “an operating environment in which humanitarian organisations can discharge their responsibilities both effectively and safely”, which is best guaranteed through “[t]he perception of adherence to the key operating principles of neutrality and impartiality in humanitarian operations”. OCHA, *supra* note 32, 14.

⁸⁸ Stability Operations FM 2008, *supra* note 6, Appendix E. The 2003 version of this manual already acknowledged that “[t]he first line of security for most NGOs is adherence to a strict principle of neutrality” and that “[a]ctions which blur the distinction between relief workers and military forces may be perceived as a threat to this principle, resulting in increased risk to civilian aid workers”, but the new version

introduces the term “comprehensive approach”⁸⁹, the appendix explicitly recognizes that “many actors, particularly nongovernmental organizations, participate in unified action at their own discretion”, since “their activities are driven by fundamental humanitarian principles and may have goals separate from the United States Government (USG) or the international community”⁹⁰. It further states that “[p]roviding humanitarian aid and assistance is primarily the responsibility of specialized *civilian*, national, international, governmental, and nongovernmental organizations and agencies”, but that “military forces are often called upon to *support* humanitarian response activities either as part of a broader campaign, such as Operation Iraqi Freedom, or a specific humanitarian assistance or disaster relief operation”⁹¹. After mentioning General Assembly resolution 46/182, which “articulates the principal tenets for providing humanitarian assistance—humanity, neutrality, and impartiality—while promulgating the guiding principles that frame *all humanitarian response activities*”⁹², parts of four different documents enunciating humanitarian principles are reproduced or summarized.⁹³ The principles of humanity, neutrality, and

complements the paragraph with a reference to the principles of impartiality and independence and devotes much more space to humanitarian organizations. U.S. Headquarters Department of the Army, *Stability Operations and Support Operations*, Field Manual No. 3-07 (2003), A-11. Stability Operations FM 2008, *supra* note 6, A-10.

⁸⁹ The term is defined as “an approach that integrates the cooperative efforts of the departments and agencies of the United States Government, intergovernmental and nongovernmental organizations, multinational partners, and private sector entities to achieve unity of effort toward a shared goal”. Stability Operations FM 2008, *supra* note 6, 1-4 – 1-5.

⁹⁰ *Id.*, 1-3 – 1-4. It is then highlighted that NGOs “must retain independence of action” and “[r]econciling that independence with the mission requirements may pose specific challenges to unity of effort and must be considered throughout the operations process.”, *id.*, 1-5.

⁹¹ *Id.*, E-1. The actions of the military in this field usually “fall under the primary stability task, restore essential services.”, *id.*

⁹² *Id.*, E-1 (emphasis added).

⁹³ These documents are the 2007 U.S. DoD-InterAction, Guidelines, *supra* note 64), the 1994 *International Red Cross and Red Crescent Movement and Nongovernmental Organization Code of Conduct in Disaster Relief*, the 1994 *Oslo Guidelines on The Use of Foreign Military and Civil Defence Assets In Disaster Relief* (which were updated in 2006 and revised in 2007), and the 2004 *IASC Reference paper on Civil-Military Relationship in Complex Emergencies* (this paper “complements the ‘Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies’ of March 2003”, which are neither reproduced nor mentioned in the Field Manual).

impartiality are thus presented together with other generally agreed operational principles for actors involved in the provision of humanitarian assistance. Also, the whole InterAction-U.S. DoD guidelines are reproduced, except for the definitions of key terms, so that it seems that “non-governmental humanitarian organization” may be interpreted by the U.S. administration to include non-InterAction members.⁹⁴

While the core humanitarian principles have been increasingly taken into consideration, the term “humanitarian assistance” is still used in U.S. military doctrines and manuals to describe actions that do not satisfy these traditional principles. In this way, no clear difference is made between truly humanitarian actions and actions pursuing political or military objectives. It seems that humanity, neutrality, and impartiality are given relevance only as tools that humanitarian actors choose to follow in order to enhance their security, not as necessary characteristics for an action to be truly “humanitarian” according to the letter and spirit of IHL. In the U.S. military doctrine, Humanitarian Assistance (HA) is defined as “[p]rograms conducted to relieve or reduce the results of natural or manmade disasters or other endemic conditions such as human pain, disease, hunger, or privation that might present a serious threat to life or that can result in great damage to or loss of property”⁹⁵. It is clarified that “[h]umanitarian assistance provided by US forces is limited in scope and duration” and that “is designed to supplement or complement the efforts of the host nation civil authorities or agencies that may have the primary responsibility for providing humanitarian assistance”⁹⁶. However, no reference is made to the duty to distribute assistance solely on the basis of needs or not to use it for political ends, and the ambiguous use of the term and the use of assistance as a tool for military objectives is illustrated, for example, by the description of Operation Anaconda carried out in Afghanistan in 2002, which encompassed Civil Affairs personnel “support[ing] UW [unconventional warfare] operations” through the provision of “HA to the distressed populace in the area”⁹⁷.

⁹⁴ Reference to the InterAction-U.S. DoD *Guidelines* as “official guidance on dealing specifically with humanitarian NGOs” is contained also in COIN JP 2009, *supra* note 1, IV-3.

⁹⁵ DoD Dictionary 2010, *supra* note 41, 218.

⁹⁶ *Id.*

⁹⁷ U.S. Headquarters Department of the Army, *Civil Affairs Tactics, Techniques, and Procedures*, Field Manual No. 3-05.401 (September 2003), 1-11 – 1-12. The role of civil affairs personnel in humanitarian assistance implied not only “overseeing HA operations in 17 provinces of the area”, but also “plann[ing] and manag[ing] the

Humanitarian and Civic Assistance (HCA) is a military term used to describe “assistance to the local populace provided by predominantly US forces in conjunction with military operations and exercises”⁹⁸, which “must fulfill unit training requirements that *incidentally* create humanitarian benefit to the local populace”⁹⁹. With respect to CERP, the 2009 U.S. *Operational Law Handbook* classified it among the “DoD GWOT [Global War on Terror] Humanitarian Assistance (HA) Authorizations and Appropriations”, together with rewards programs, thus clearly connecting HA to a political and military strategy. The title has been changed in the 2010 U.S. *Operational Law Handbook* to “Special Authorities in Counterinsurgency”¹⁰⁰.

Finally, the 2009 Handbook *Money as a Weapon* published by the Multi-National Corps-Iraq (MNC-I) lists as the three primary components of CERP “Humanitarian Assistance, Condolence/Battle Damage payments, and Reconstruction”¹⁰¹. However, no explicit reference is made to the requirement to assign CERP funds exclusively on the basis of the objective needs of the beneficiaries and not on the basis of military and political considerations, since it is acknowledged that “[r]esources, particularly money, have a central role in ongoing operations given the effects they bring to bear on the fight” and money “is truly a ‘weapons system’ [...] in Iraq”, so that “[u]nits must manage their limited resources (labor, material, time and money) to achieve the Commander’s intent, Joint Campaign objectives and desired end state”¹⁰². The corresponding Handbook *Money as a Weapon System* issued by the U.S. Army Combined Arms Centre – Center for Army Lessons Learned, highlights the purpose of CERP as “enabl[ing] local commanders in Afghanistan and Iraq to respond with a *nonlethal weapon* to urgent, small-scale, *humanitarian relief*, and

delivery of HA supplies”, therefore with a direct involvement of the military in the distribution of relief.

⁹⁸ DoD Dictionary 2010, *supra* note 41, 218.

⁹⁹ U.S. Joint Chiefs of Staff, *Joint Operations*, Joint Publication 3-0 (17 September 2006, Incorporating Change 2, 22 March 2010), VII-7 [Joint Operations JP 2010].

¹⁰⁰ International and Operational Law Department, The Judge Advocate General’s Legal Center & School (TJAGLCS), *Operational Law Handbook* (2009), 281. International and Operational Law Department, The Judge Advocate General’s Legal Center & School (TJAGLCS), *Operational Law Handbook* (2010), 241.

¹⁰¹ Multi-National Corps-Iraq (MNC-I), *Money As A Weapon System (MAAWS)* (January 2009), B-5.

¹⁰² *Id.*, 3 (emphasis added).

reconstruction projects and services that immediately assist the indigenous population and that the local population or government can sustain”¹⁰³.

It may be argued that terminology does not play a significant role in the distinction between military and civilian actors or in influencing action in the field, or that the use of the term “humanitarian” to describe actions carried out to fulfill political or military objectives does not really have practical consequences. However, the members of the Interagency Standing Committee (IASC) concluded that “calling an act *relief* or *humanitarian* does have practical consequences that go beyond mere wording”, meaning that, “[f]or example, as military relief activities conducted in support of a military mission are not civilian humanitarian acts, these must be carried out wearing military uniforms (not in civilian clothing as was seen in parts of Afghanistan in 2003 and early 2004) in order to maintain a distinction between civilians and the military.”¹⁰⁴ Similarly, humanitarian actors have complained about the employment of white vehicles, traditionally used by humanitarian actors, by ISAF in Afghanistan.¹⁰⁵ This conduct may illustrate

¹⁰³ U.S. Army Combined Arms Centre – Center for Army Lessons Learned, *Commander’s Guide to Money as a Weapon System: Tactics, techniques, and Procedures* (April 2009), 13 (emphasis added). Again urgent is defined as “as any chronic or acute inadequacy of an essential good or service that *in the judgment of the local commander* calls for immediate action” (emphasis added). The four key elements for selecting projects to finance with CERP funds are: “Execute quickly. Employ many people from the local population. Benefit the local population. Be highly visible.” However, it also states that commanders should “[e]nsure local, donor nation, nongovernmental organization, or other aid or reconstruction resources are not reasonably available before using CERP funds”.

¹⁰⁴ M. Bessler & K. Seki, ‘Civil-Military Relations in Armed Conflicts: A Humanitarian Perspective’, 3 *Liaison – A Journal of Civil-Military Humanitarian Relief Collaborations* (2006) 3, 4, 8-9 (emphasis in the original). The IASC is a “unique inter-agency forum for coordination, policy development and decision-making involving the key UN and non-UN humanitarian partners”. It “was established in June 1992 in response to United Nations General Assembly Resolution 46/182 on the strengthening of humanitarian assistance” and that “General Assembly Resolution 48/57 affirmed its role as the primary mechanism for inter-agency coordination of humanitarian assistance.”, IASC, ‘About the Inter-Agency Standing Committee’, available at <http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=about-default> (last visited 28 April 2011).

¹⁰⁵ See United Nations Humanitarian Information Unit – IRIN, ‘Afghanistan: Aid Agencies Win NATO Concession on Vehicle Markings’ (1 June 2009) available at <http://www.irinnews.org/Report.aspx?ReportId=84634> (last visited 28 April 2011). While reporting that “[i]nternational forces under NATO command in Afghanistan w[ould] stop using white vehicles from 1 June in response to calls from NGOs for clearer markings to distinguish between civilian and military vehicles”, it was

a worrying trend not only towards the involvement of the military in traditional humanitarian assistance, but also towards the adoption by armed forces of some of the distinctive signs of NGOs or of other behaviors to make their recognition more difficult, in order to avoid attack. By blurring the distinction between military and humanitarian actors, these actions increase the risk for humanitarians.

Another source of risk for humanitarian personnel is being perceived as allied with the military. The international President of MSF argued in a 2009 speech that “aid efforts undertaken to assist counterinsurgency strategies or build the state cannot be impartial because they are not based with an exclusive eye upon need” and that “[s]uch aid should not be attached to the term ‘humanitarian’”¹⁰⁶. The consequence of “[n]on-aid actors [...] hav[ing] portrayed [them]selves as somehow part of this humanitarian project” has been that “[t]he humanitarian project [has] become[] militarized, either in terms of its modus operandi or its public perception,” and thus it “[has] become[] a military target”¹⁰⁷. This statement underlines the importance not only of the actual respect of the principles by humanitarian actors in order to maintain their identity and not to be attacked, but also of the perception by the beneficiaries and the belligerents regarding the respect of these principles and the non-allegiance to any of the parties to the conflict. In 2004, when five MSF staff were killed in Afghanistan and the organization decided to leave the country (where it then returned in 2009), it openly blamed the “coalition’s attempts to co-opt humanitarian aid and use it to ‘win hearts and minds’”¹⁰⁸.

In contrast to the sometimes ambiguous use of the term “humanitarian assistance” in U.S. military documents, the fourth edition of the *ISAF PRT Handbook* states a duty to apply and respect the traditional core humanitarian principles for all actors involved in the provision of humanitarian assistance, including the military “while undertaking to be a partner to humanitarian agencies”, and it differentiates humanitarian assistance, with the principles that characterize it, from the “the activities of

underlined that this policy “w[ould] not apply to thousands of US troops operating beyond the writ of NATO/ISAF and engaged mainly in counter-insurgency and ‘anti-terrorism’ military activities.”

¹⁰⁶ MSF, *supra* note 58. See also, for example, Krähenbühl, *supra* note 58: “We do on the other hand want to avoid the current blurring of lines produced by the characterisation of military ‘hearts and minds’ campaigns or reconstruction efforts as humanitarian.”

¹⁰⁷ MSF, *supra* note 58.

¹⁰⁸ MSF, ‘MSF Pulls Out of Afghanistan’ (28 July 2004) available at <http://www.msf.org/msf/articles/2004/07/msf-pulls-out-of-afghanistan.cfm> (last visited 28 April 2011).

a military force”, which “are not always driven by the same constraints”¹⁰⁹. The handbook is thus similar to *PRT Policy Note Number 3*, which unambiguously relates humanitarian assistance to the traditional principles, independently from the actor implementing it.¹¹⁰ These two documents have been taken into consideration in the recent handbook *Money As A Weapon System Afghanistan* of December 2009 adopted by the U.S. Forces in Afghanistan (USFOR-A).¹¹¹

However, U.S. field manuals contain some ambiguous statements, which may lead one to think that there is still space for disrespect for humanitarian space and the use of aid as a political tool. Not only in the field manual and in the joint doctrine on counterinsurgency it is stated that “[t]he organizing imperative is focusing on what needs to be done, not on who does it”, but the Counterinsurgency Field Manual also contains an appendix entitled “A Guide for Action” which incorporates a statement affirming that “[t]here is no such thing as impartial humanitarian assistance or CMO in COIN”, since “[w]henver someone is helped, someone else is hurt, not least the insurgents”¹¹². In other words, there seems to be in reality an implied acknowledgement that whenever humanitarian actors operate in COIN, their identity is automatically undermined and their perception by the insurgents as well, so that there can be no humanitarian space left. Also, the recommendation contained in an article annexed to the 2009 Tactics in Counterinsurgency Field Manual to practice “so-called blue-green patrolling, where you mount daylight, overt humanitarian patrols, which go covert at night and hunt specific targets”, further diminishes the distinction between humanitarian and military activities and actors.¹¹³

Finally, while U.S. military documents increasingly take into account the need for humanitarian actors to be perceived as distinct from military efforts, room seems to be left for an instrumental use of these NGOs, in particular as an important source of intelligence. This military strategy calls for increasing caution on the part of humanitarian actors in order to preserve a truly impartial, neutral, and independent nature and in order to continue to

¹⁰⁹ ISAF, PRT Handbook, *supra* note 52, 185-186.

¹¹⁰ PRT Executive Steering Committee, *supra* note 63, para. 4.

¹¹¹ U.S. Forces, Afghanistan (USFOR-A), *Money As A Weapon System Afghanistan (MAAWS-A)* (2009), 60-61.

¹¹² COIN FM 2006, *supra* note 1, Annex A, A-7.

¹¹³ U.S. Headquarters Department of the Army, *Tactics in Counterinsurgency*, Field Manual No. 3-24.2 (FM 3-24.2) (April 2009), C-5. The article by David Kilcullen, entitled ‘Twenty-Eight Articles: Fundamentals of Company-Level Counterinsurgency’, was originally published in the May-June 2006 issue of *Military Review*.

be perceived as such. In the 2006 Counterinsurgency Field Manual, NGOs are listed among the “key counterinsurgency participants” and thus they arguably fall among those which commanders should “seek to persuade and influence [...] to contribute to achieving COIN objectives” in their attempt “to achieve unity of effort”¹¹⁴. Attention to NGOs seems to be strictly connected to the fact that, as underlined in various field manuals and joint doctrines, information coming from them, for example on “local and regional affairs and civilian attitudes”, “[l]ocal political structure, political aims of various parties, and the roles of key leaders”, and “[s]ecurity situation”, can be “invaluable”¹¹⁵.

The 2008 Joint Doctrine for Civil-Military Operations clarifies that information obtained from NGOs should be “acquired in a collateral fashion, and not part of intelligence collection operations”¹¹⁶. However, the reason for this is that NGOs “will hesitate or refuse to cooperate if there are any implications that this comes under the heading of ‘intelligence gathering’”¹¹⁷. Recent documents also provide that the relationship of the armed forces with NGOs should be managed primarily by civil affairs personnel, who are explicitly defined as not being intelligence gatherers.¹¹⁸ The reasoning offered is that, since NGOs may have valuable information that “is frequently not available through military channels”, “[t]herefore, it is important not to compromise the neutrality of the IGOs [intergovernmental organizations] and NGOs and to avoid *the perception by their workers* that their organizations are part of an intelligence gathering mechanism”¹¹⁹. In the end, even if civilian affairs personnel are not

¹¹⁴ COIN FM 2006, *supra* note 1, 2-4 and 2-3.

¹¹⁵ CMO JP 2008, *supra* note 86, IV-15 – IV-16; U.S. Joint Chiefs of Staff, *Interagency, Intergovernmental Organization, and Nongovernmental Organization Coordination During Joint Operations Vol I*, Joint Publication 3-08 (March 2006), III-25 [Coordination JP 2006]. See also, *id.*, II-26 and III-25 – III-26; Stability Operations FM 2008, *supra* note 6, A-10.

¹¹⁶ CMO JP 2008, *supra* note 86, IV-16.

¹¹⁷ *Id.* Still, this clarification represents a positive development compared to the previous version of the joint doctrine, which merely stated that “[b]ecause of NGOs’, international organizations’, and other organizations’ and agencies’ sensitivities regarding negative perceptions generated by working with military organizations, the term ‘information’ should be used in place of ‘intelligence.’”, U.S. Joint Chiefs of Staff, *Joint Doctrine for Civil-Military Operations*, Joint Publication 3-57 (February 2001), III-23.

¹¹⁸ CMO JP 2008, *supra* note 86, II-14.

¹¹⁹ Coordination JP 2006, *supra* note 115, III-26 (emphasis added). See also Joint Operations JP 2010, *supra* note 99, VII-10.

intelligence gatherers, they are nonetheless personnel who collect information that “can supplement the intelligence effort” and “general information provided by personnel from IGOs and NGOs may corroborate intelligence gained from other sources”¹²⁰. Furthermore, in counterinsurgency operations all counterinsurgents are potential collectors.¹²¹

In sum, increasing attention seems to be given to the need not to compromise the neutrality of humanitarian NGOs and not to generate in their workers *the perception they are used* as a source of intelligence, but merely because otherwise they may choose not to collaborate and share information. The importance of these strategies was underlined by the U.S. Special Representative for Afghanistan and Pakistan Richard Holbrooke, who, in 2009, lamented the deficit in U.S. intelligence on Afghanistan and the Taliban and affirmed that “the U.S. would ‘concentrate on that issue, partly through the intelligence structure’ and partly through private aid groups that provide humanitarian and other services in Afghanistan”, since “[h]e estimated that 90 percent of U.S. knowledge about Afghanistan lies with aid groups”¹²². Humanitarian actors should therefore be careful in their interactions with the military, being aware both of the risk of being caught in attacks directed against members of the armed forces and of the possibility of losing entitlement to their specific privileges or even protection from attack, in case they exceed the terms of their mission or directly participate in hostilities respectively.

E. Conclusion

In Iraq, in the same way as in Afghanistan, the provision of humanitarian assistance has been seen as part of the “hearts and minds” approach, and thus as part of a trend towards so-called comprehensive or integrated approaches which consider soft power as important as traditional means of hard power to win armed conflicts in the 21st century. The implementation of these approaches in the field, with the involvement of the

¹²⁰ U.S. Headquarters Department of the Army, *Civil Affairs Operations*, Field Manual No. 3-05.40 (FM 3-05.40) (September 2006), 3-30; and Coordination JP 2006, *supra* note 115, III-22.

¹²¹ COIN JP 2009, *supra* note 1, V-3 and V-4.

¹²² R. Burns, ‘Envoy Laments Weak US Knowledge about Taliban’ (7 April 2009) available at <http://www.foxnews.com/wires/2009Apr07/0,4670,USAfghanistan,00.html> (last visited 21 March 2011).

military in activities traditionally considered to be in the realm of civilian actors, has seriously blurred the distinction between military and humanitarian actors and increased the risk of attacks against the latter, and it has led to complaints and changes in military doctrines and manuals.

Some changes have been introduced in American military doctrines and strategies following the complaints voiced by humanitarian actors both in Afghanistan and Iraq against the instrumental use of relief and NGOs and the labeling as “humanitarian assistance” of aid given without respecting the traditional principles of humanity, impartiality, and neutrality, thus representing a political and not a truly humanitarian action,. However, while increased attention has been devoted to the principles and needs of humanitarian actors, a skeptical reader still finds reasons for inviting humanitarians to exercise caution in their relationships with the military. The U.S. military doctrine has not consistently followed the trend of international bodies and the humanitarian movement to use the term “humanitarian assistance” to describe only actions carried out in accordance with the principles of humanity, impartiality, and neutrality, thus placing clear limits on the involvement of armed forces in these activities. It may not therefore be excluded that instances of blurring of the distinction between military and humanitarian actors will continue to take place in the future. Possible improvements in the American instructions to its armed forces are clear, when looking at the provisions contained in the *ISAF PRT Handbook* and in the recent USFOR-A’s handbook.

Also, there seems to be no real prohibition in U.S. military doctrines and strategies on the use of information gained from nongovernmental organizations for intelligence purposes. Thus, humanitarian agencies and NGOs should be careful in their relationships with the military as far as the sharing of information is concerned. Otherwise, they will risk compromising their neutrality and the neutrality of their action, thus losing entitlement to the specific privileges they are afforded under international humanitarian law and, in certain cases, being classifiable as direct participants in hostilities.

Settling Trade Disputes over Natural Resources:

Limitations of International Trade Law to Tackle Export Restrictions

Stormy-Annika Mildner & Gitta Lauster*

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Abstract

In the light of rising competition, scarce natural resources are increasingly perceived as a potential national security risk. Hence, governments are increasingly intervening in primary commodity markets to secure domestic supply at lower prices, for instance, by restricting exports through tariffs and quotas. While limiting exports may be justified in certain cases such as temporary shortages of food supply, they are often a second-best policy tool to address domestic market failures, risking international trade distortions. Some import-dependent countries have therefore lobbied for an update of WTO regulations to curtail the use of export restrictions; others have turned to preferential trade agreements (PTAs) to achieve stricter disciplines. In this paper, the following questions are addressed: What are the current WTO rules regulating export restrictions on natural resources, and what are their limitations? Are PTAs better equipped to prevent trade distortions through export restrictions? To answer these questions, we confine our analysis mostly to Free Trade Agreements (FTAs), not considering the multitude of one-sided preferential agreements.

“We have spent six decades creating an open trading order by pushing down import duties for goods – only to have export restrictions putting those gains into reverse.”

*Former EU Trade Commissioner Peter Mandelson*¹

“I believe not only that there is room for mutually beneficial negotiating trade-offs that encompass natural resources trade, but also that a failure to address these issues could be a recipe for growing tension in international trade relations”.

*WTO Director-General Pascal Lamy*²

¹ P. Mandelson, “‘The Challenge of Raw Materials’, Speech before the EU Parliament on September 29, 2008’ (29 September 2008) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/467&type=HTML&aged=0&language=EE&guiLanguage=en> (last visited 15 February 2011).

² Quoted in: WTO, ‘WTO Report Calls for More Cooperation among Governments in Natural Resource Trade’ (23 July, 2010) available at http://www.wto.org/english/news_e/pres10_e/pr611_e.htm (last visited 15 February 2011) [WTO, Report Calls for More Cooperation].

A. Introduction

The markets for primary products – energy resources and metals, but also agricultural products – have been highly turbulent in recent years: High growth rates of GDP, particularly in emerging economies, and increasing worldwide demand have led to steep price hikes. Between 2002 and 2008, the price of non-fuel commodities rose by 159 percent, metal and mineral prices by 285 percent and agricultural raw material prices by 133 percent.³ Although primary commodity prices dropped considerably during the financial and economic crisis in 2008/2009, they are, following the global economic recovery, already on the rise again. While one barrel oil was priced at 50 dollars in January 2009, the price has hiked back to 80 dollars in July 2010.⁴ Within a year, the price for steel increased by about 40 percent (May 2009 to July 2010).⁵ While wheat prices have not quite reached their 2008 peak, they are again standing at around 250 dollars per ton (August 2010).⁶ In light of the flood in Pakistan and the drought in Russia, the Food and Agricultural Organization (FAO) warned against a new food crisis.

Growing competition as well as increasing prices and price volatility have raised concerns about future access to key natural resources at sustainable prices in many import-dependent countries. The worries about supply security are fuelled by the highly uneven geographical distributions of many natural resources across the globe. High-tech raw materials such as lithium or rare earth minerals are of particular concern, as they are increasingly the basis of information and innovative green technologies. For many of these materials, the exploitable reserves are generally found in one or a few geographic regions. For example, in the case of rare earths, China

³ EurActiv, 'Raw Materials: Heading for a Global Resource Crunch?' (4 February 2011) available at <http://www.euractiv.com/en/sustainability/raw-materials-heading-global-resource-crunch-links dossier-188526> (last visited 15 February 2011).

⁴ International Energy Agency, 'Oil Market Report' (10 September 2010) available at <http://omrpublic.iea.org/omrarchive/10sep10over.pdf> (last visited 15 February 2011).

⁵ 'Up to Date Information on Steel Prices from around the Globe' available at <http://www.worldsteelprices.com/> (last visited 15 February 2011).

⁶ F. Redruello, 'Global Wheat Price Forecast for 2010 and 2011' (19 August 2010) available at <http://blog.euromonitor.com/2010/08/global-wheat-price-forecast-for-2010-and-2011.html> (last visited 15 February 2011).

alone accounts for about 97 percent of global production. A lack of substitutes and low degrees of recyclability reinforce the problem.⁷

Many import-dependent countries are worried about yet another trend: More and more countries are intervening in the primary commodity markets, restricting commodity exports. According to the OECD, the number of countries applying export duties over the period 2003 to 2009 was noticeably higher than in previous years.⁸ Motivations for implementing restrictions are manifold: to nurture infant industries, to underpin social policy and income distribution, to buttress government revenues, to protect the environment and to preserve natural resources. During the food crisis of 2007/2008, dozens of countries imposed various forms of export restrictions to secure domestic supplies of foodstuffs. According to the FAO, around one-quarter of the 60 low-income countries surveyed had some form of export restriction in place on food-related agricultural products in 2008.⁹ While countries resorting to these measures consider them a necessary policy tool to address market failures, import-dependent countries criticize unfair price advantages that these measures create for downstream producers in the country instituting them.¹⁰

Some countries have therefore turned to the World Trade Organization (WTO) to curtail the use of export restrictions. However, the WTO is not optimally equipped to deal with export barriers to trade. Whereas multilateral trade law generally prohibits quantitative export restrictions like quotas, only few constraints concern the application of export taxes, as long as they equally apply to all export markets. Furthermore, there are many exceptions to protect national security or health of human, animal and plant life. This generates legal uncertainties, adding to disaccord between exporters and importers.

⁷ J. Korinek & J. Kim, 'Export Restrictions on Strategic Raw Materials and their Impact on Trade', *OECD Trade Policy Working Papers* (2010) 95.

⁸ J. Kim, 'Recent Trends in Export Restrictions', *OECD Trade Policy Working Paper* (2010) 5.

⁹ S. Mitra & T. Josling, 'Agricultural Export Restrictions: Welfare Implications and Trade Disciplines', *IPC Position Paper Agricultural and Rural Development Policy Series* (2009), 4 available at http://www.agritrade.org/documents/ExportRestrictions_final.pdf (last visited 15 February 2011).

¹⁰ B. Karapinar, 'Export Restrictions and the WTO Law: "Regulatory Deficiency" or "Unintended Policy Space"' (21 May 2010) available at http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_21may10_e.htm (last visited 15 February 2011).

For that reason, an increasing number of importing countries – the EU being at the forefront – have lobbied for an update of the rules and the inclusion of the topic in the current negotiations, the Doha Development Round. The reform proposals include tariffication of all export restrictions, i.e. converting existing export restrictions into tariffs and binding them under the WTO. As these proposals have received a cold response from many developing countries, some economists recommend dealing with the issue on a bilateral and plurilateral level rather than in the context of the WTO. The American economist Claude Barfield, for example, argues that a modification of WTO rules is currently unlikely. Trying to solve disputes over export restrictions through the WTO's dispute settlement procedure, while rules remain weak, promises little to no success Barfield argues. Even worse, this strategy would be highly risky as it could intensify the rift between industrialized and developing countries within the WTO.¹¹

We therefore ask two questions:

1. How are export restrictions on natural resources regulated by the WTO?
2. Are PTAs really better equipped to prevent trade distortions through export restrictions? Apart from the introduction and conclusion, the paper is divided into three sections.

First, we give an overview of export restrictions, their global patterns, motivations and economic implications. We find that while limiting exports may be justified in certain cases such as temporary shortages of food supply, they are often a second-best policy tool to address domestic market failures, risking international trade distortions. In the second part of the paper, we analyze multilateral trade rules dealing with export restrictions, also taking a closer look at three dispute settlement procedures on export restriction:

1. WTO – Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,
2. WTO – United States – Measures Treating Export Restraints as Subsidies, and
3. WTO – China – Measures Related to the Exportation of Various Raw Materials.

¹¹ C. Barfield, 'Trade and Raw Materials – Looking ahead' (29 September 2009) available at <http://www.aei.org/speech/28745> (last visited 15 February 2011).

This section highlights the shortcomings of WTO rules on export restrictions. Last, we turn to preferential trade agreements, evaluating their ability to regulate export restrictions and to settle disputes on this matter. To ensure comparability, we restrict our analysis to Free Trade Agreements (FTAs), not considering the multitude of one-sided preferential agreements. As we are not aware of any bilateral dispute settlement on export restrictions within FTAs, a case by case comparison with multilateral dispute settlement is not possible at this point. Thus, while we question whether FTAs are a viable policy tool to address export restriction, our second question remains partially unanswered.

B. Export Restrictions: Why and Where?

I. Patterns of Export Restrictions

What are export restrictions? According to the WTO Panel Report, “United States – Measures Treating Export Restraints as Subsidies”, export restraints are “a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the products calculated to limit the quantity of exports”¹². Within the WTO’s Trade Policy Reviews,¹³ export restrictions are dealt with in the section “measures directly affecting exports”.

Export restrictions can take many different forms such as taxes, duties and charges, quotas and export bans, mandatory minimum export prices, reductions of value added tax (VAT) rebates on exports, and stringent export licensing requirements. The most frequently used form is export taxes. These can be applied either in form of an ad valorem tax, i.e. specified as a percentage of the value of the product, or as a specific tax, i.e. a fixed amount to pay per unit or per weight of a product. Furthermore, they can be applied in a progressive manner – high, when the price of the product is high and, conversely, low, when the price is low. They can be applied to a particular good or across multiple goods of a certain category. An export

¹² Panel Report, ‘United States – Measures Treating Export Restraints as Subsidies’, WT/DS194/R, 2001.

¹³ All WTO members are reviewed, the frequency of each country’s review varying according to its share of world trade.

quota, on the other hand, is a restriction imposed by a government on the amount or quantity of goods that may be exported within a given period. Its most radical form is an export ban, which is an absolute restriction of exports. Export licensing schemes require the exporters to get government approval prior to exporting. Licensing can be automatic or discretionary, based on a quota, a performance requirement, or some other criterion.¹⁴

There is no comprehensive list of world-wide export restrictions. In principle, Article X of the GATT 1994 (Publication and Administration of Trade Regulations) requires a member to:

1. publish its trade-related laws, regulations, rulings and agreements in prompt and accessible manner;

2. abstain from enforcing measures of general application prior to their publication; and

3. administer the above-mentioned laws, regulations, rulings and agreements in a uniform, impartial and reasonable manner. Notifiable measures include quantitative restrictions, other non-tariff measures (such as licensing), and export taxes. A 1995 decision by the WTO Council for Trade in Goods created a biennial notification of Members' quantitative restrictions. However, as the WTO itself points out, statistics on quantitative restrictions, in particular, are often neither complete nor consistent. The WTO has devoted its most recent annual report, in 2010, to trade in raw materials, also covering export restrictions,¹⁵ and the OECD has recently conducted a series of studies on the effects of export restrictions. We base our summary mainly on these publications.

According to the WTO's Trade Policy Reviews, export taxes cover 11 percent of natural resources trade compared to 5 percent of other merchandise trade.¹⁶ In a 2010 analysis of the WTO's Trade Policy Reviews, the OECD finds that about half of the WTO members reviewed (65 of 128) impose export duties. The OECD study highlights three findings: first, the percentage of countries applying these duties over the period 2003 to 2009 was higher than in the previously analyzed period of

¹⁴ Korinek & Kim, *supra* note 7, 11; J. Bonarriva *et al.*, 'Export Controls: An Overview of the Use, Economic Effects, and Treatment in the Global Trading System', *U.S. International Trade Commission – Office of Industries Working Paper* (2009) available at http://www.usitc.gov/publications/332/working_papers/ID-23.pdf (last visited 15 February 2011).

¹⁵ WTO, 'World Trade Report. Trade in Natural Resources' (2010).

¹⁶ WTO, *supra* note 15, 116 ff.; WTO, 'Report Calls for More Cooperation', *supra* note 2.

1997 to 2002. While only 39 of 100 member countries had imposed export restrictions in the earlier period, the number increased to 65 of 128 countries in the second period of analysis. Second, this particular trade policy instrument is mainly used by developing and least developed countries (LDCs). Of the 31 OECD countries under review, only 4 resorted to export duties. This percentage is considerably higher with regard to LDCs: In 21 of the reviewed 25 countries, the OECD found export duties. While export duties are usually applied to a limited number of products, many LDCs apply a blanket export tax, albeit at a low level. These countries include for example Bangladesh, Cameroon and Pakistan. There is also a clear geographic concentration of such measures: Of 35 African countries, reviewed by the Trade Policy Review Body (TPRB), 30 applied export restrictions; of 31 Asian/Pacific countries, 18 resorted to these measures.¹⁷ The WTO's annual trade report confirms that export restrictions are mostly used by developing countries: The top ten users of export taxes (measured in terms of the share of natural resource exports covered by export taxes) are Argentina, Cameroon and Gabon, Gambia, the Central African Republic, Lesotho, the Solomon Islands, Mali, Dominica, Sri Lanka, the Maldives, and Zambia. China ranks 19th in the list of countries that heavily use export tariffs.¹⁸

Third, the OECD points out that the items most subjected to export duties were agricultural products (36 of 65 members), mineral and metal products (28 of 65 members), products made from leather, hide and skin (17 of 65 members), forestry (15 of 65 members) and fishery (13 of 65).¹⁹ In a second study (2010) on export restrictions on 21 strategic metals and minerals, the OECD found quantitative restrictions on 13 of the materials in at least one exporting country in at least one year since the late 1990s. Taxes levied on exports range from 3 to 30 percent.²⁰

The U.S. International Trade Commission (ITC) made another interesting finding in a 2009 study: The preferred type of controls varies between developing and industrialized countries, and they are used for different purposes. Export taxes appear to be imposed rather for economic reasons. Many lower-middle income and low-income countries employ them to generate government revenues and protect domestic industries.

¹⁷ Kim, *supra* note 8, 5.

¹⁸ WTO, *supra* note 15, 116 ff.; WTO, 'Report Calls for More Cooperation', *supra* note 2.

¹⁹ Kim, *supra* note 8, 5.

²⁰ Korinek & Kim, *supra* note 7, 11.

Quantitative restrictions, on the other hand, are employed to meet a wider range of goals, including national security and environmental goals. High-income countries tend to impose restrictions most frequently for security reasons or in accordance with international agreements and conventions. Low- and lower-middle income countries, on the other hand, impose restrictions most frequently for resource conservation purposes and to ensure public health.²¹

II. Motivations for Export Restrictions

Export restrictions are applied for a number of reasons, which can be divided into economic objectives (such as raising government revenues, promoting downstream industries to diversify exports, controlling price fluctuations) and non-economic objectives (national security, protection of the environment, broader social goals). Whilst in general, income from (import and export) tariffs as percentage of overall government revenues has decreased steadily, least developed countries, in particular, still consider them a reliable source of income. They often find raising government revenues through export tariffs easier than through more complicated and politically difficult forms of taxation such as income or land taxes.²² Albeit rarely presented explicitly as a policy objective due to its questionable compatibility with international trade law, the promotion of downstream processing industries is another motivation for export restrictions. By providing them with cheap raw materials and inputs, governments hope to incentivize the development of domestic manufacturing, thus also diversifying the country's exports. Further economic objectives include maintaining international commodity prices or orderly marketing, and changing terms of trade in favor of the exporting country – the relative price of a country's exports compared to its imports.

One of the foremost non-economic rationales for export restrictions is national security, peace and stability. Examples of international treaties under which the signatory countries have agreed on a restriction of certain exports are the UN Treaty on the Non-Proliferation of Nuclear Weapons and the UN Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction. Another frequently cited policy objective is the protection and preservation of the environment. For example, several countries restrict the export of

²¹ Bonarriva *et al.*, *supra* note 14, 13.

²² *Id.*, 3.

endangered species, referring to the UN Convention on International Trade in Endangered Species of Wild Fauna and Flora. In 2007, China eliminated the value-added reseller (VAR) rebates on exports of hundreds of items to restrain the export of products regarded as highly energy- or raw material-intensive and highly polluting. The argument here, again, was the protection of the environment and conservation of natural resources.²³ During the food crisis in 2007/2008, when prices for many agricultural products skyrocketed, many developing countries resorted to export restrictions to protect the local population from shortages of foodstuffs or other essential goods. Just recently (2010), Russia imposed a ban on wheat exports after a severe drought and after fires had destroyed the country's crops.

Some observers consider export restrictions a necessary policy tool to address market failures²⁴; others point to their trade-distorting effects. While they are justified in certain cases such as national shortage of food supplies and national security considerations, they often entail net-welfare losses for the domestic economy as well as for the importing countries: An export restriction on raw materials penalizes exporters of the restricted product, redistributing income from the primary to the secondary sector of an economy. The producer of the raw material is taxed; the downstream processing industries are subsidized.²⁵ This can result in inefficiencies, incentivizing too much production in the exporting country's industry. While export restrictions might help to diversify production and exports, a negative side-effect could be greater economic and social inequalities between rural and urban areas. In addition, less capital is available for much-needed investments in the primary sector. In the long run, domestic producers of raw materials will decrease their supply in response to the lower price, entailing losses to the economy. Revenues from an export tax can neutralize these losses only in part. Thus, while appearing attractive on paper, the OECD finds that they rarely achieve their economic, social or environmental objectives. From an economic standpoint, imposing trade restrictions as a means of addressing market failures is merely a "second-best" policy. A particularly risky strategy is applying export restrictions to shift a country's terms of trade. Not only are most exporting countries not large enough to influence world prices by reducing the supply of a product.

²³ Kim, *supra* note 8, 5.

²⁴ See for example Karapinar, *supra* note 10.

²⁵ R. Piermartini, 'The Role of Export Taxes in the Field of Primary Commodities' (2004) available at http://www.wto.org/english/res_e/booksp_e/discussion_papers4_e.pdf (last visited 15 February 2011).

They also encourage counter-strategies in the importing countries, at best incentivizing the development of substitutes, at worst the application of retaliatory measures.

Export restrictions risk aggregate economic welfare losses in the rest of the world as they reduce the global supply of the restricted product: International prices will increase and consumer welfare will decline. By pushing a wedge between the price available to domestic processors and the price charged to foreign processors, export restrictions are often trade diverting. It is for this reason that many countries have turned to the WTO to curtail the use of export restrictions.

C. The WTO and Export Restrictions

I. Multilateral Rules on Export Restrictions

The WTO is based on “a benign mercantilist political economy (exports are good; imports are bad)”.²⁶ Therefore, the organization concentrates on imports and import restrictions rather than on exports and export barriers to trade.²⁷ Export taxes are not prohibited by the WTO, though such taxes must be non-discriminatory and transparent under Articles I and X of the 1994 GATT. Thus, Article I (Most Favoured Nation Clause) states: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges [...] any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” According to Article X, 3(a), “each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article”, these measures being “laws, regulations, judicial decisions and administrative rulings of general application”. While they are to be applied indiscriminately, export tariffs are – unlike import barriers – not bound, i.e. once reduced, export

²⁶ Barfield, *supra* note 11.

²⁷ P. Collier & A. J. Venables, ‘International Rules for Trade in Natural Resources’ (2010) available at http://www.wto.org/english/res_e/reser_e/ersd201006_e.pdf (last visited 15 February 2011).

duties can be increased again without violating a country's obligations under WTO rules. There is no legal framework for members to schedule commitments with respect to exports. GATT Article II (Schedules of Concession) only concerns import duties and charges in connection with importation. Accordingly, the application of export taxes has not, so far, been found to violate WTO rules.²⁸

Although general WTO rules thus do not discipline members' application of export taxes, members can agree to legally binding commitments through their accession agreements. While these commitments vary in scope and economic effect, some of them go quite a bit beyond the general WTO rules, not only prohibiting export quotas but also restricting the application of certain export duties. One country submitting itself to stricter rules was Bulgaria. While the country applied a range of export taxes mainly to prevent and relieve critical shortages of foodstuffs before its accession in 1996, it agreed on minimizing these measures upon accession. The TPRB found in 2003 that the country no longer imposed any export duties. Other countries agreeing to such rules include the Ukraine and Vietnam, but the commitments undertaken by China are by far the most comprehensive. China committed not to apply export duties other than on 84 items listed in the Annex of the Accession Agreement.²⁹ Export restrictions are also an important issue in the accession negotiations with Russia. Contentious issues include export barriers on minerals, ferrous and non-ferrous metals and scraps, petrochemicals, natural gas, and raw hides and skins. For example, Russia has implemented high trade barriers for the export of many raw materials, the export tax on copper scrap from Russia amounts to 50 percent. Also India has implemented an export tax of 15 percent on iron ore. The Ukraine also inhibits the trade of raw materials like aluminum scrap of up to 24 percent, while Venezuela even forbids the export of some materials like copper, lead and cobalt scrap.³⁰

²⁸ D. Crosby, 'WTO Legal Status and Evolving Practice of Export Taxes', 12 *Bridges Review* (2008) 5 available at <http://ictsd.org/i/news/bridges/32741/> (last visited 15 February 2011).

²⁹ 'China's Accession to the WTO and its Relationship to the Chinese Taipei accession and to Hong Kong and Macau, China' (2010) available at www.wto.org/english/thewto_e/acc_e/chinabknot_feb01.doc (last visited 15 February 2011).

³⁰ Bundesverband der Deutschen Industrie (BDI), *Übersicht über bestehende Handels- und Wettbewerbsverzerrungen auf den Rohstoffmärkten* (January 2011), unpublished overview.

The main rule pertaining to quantitative export restrictions is Article XI:1 of the 1994 GATT (General Elimination of Quantitative Restrictions): “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party [...] on the exportation or sale for export of any product destined for the territory of any other contracting party”. Hence, the application of export duties, taxes and other charges is permitted, while all other measures which might restrict the quantity of exports of a product are prohibited. Quantitative measures include for example quotas, bans, minimum prices and non-automatic licensing requirements. To date, there have been only a few dispute cases which have dealt with alleged Article XI:1 export restrictions; its scope therefore remains unclear. Another relevant Article is Article VIII of the GATT, which applies to measures imposed in the context of customs formalities. Thus, for example, it prohibits excessive customs fees and requires that fees do not represent (i) a taxation of export for fiscal purposes; or (ii) an indirect protection to domestic products.³¹

But there are also exceptions to these rules, allowing export prohibitions and restrictions for certain public policy purposes. These can be found in GATT Articles XI, XX and XXI. Article XI:2 (critical shortage) permits the imposition of quantitative restrictions if they (i) are temporarily applied to relieve critical shortages of foodstuffs or other products; or (ii) are necessary for the marketing of commodities. Article XX of the GATT may also be applicable: The article exempts certain measures from WTO obligations if (b) they are “...necessary to protect human, animal, or plant life and health...” or (g) they relate “...to the conservation of exhaustible natural resources”. The exception, however, does not apply for export restrictions designed to protect or promote a domestic processing industry. In addition, Article XX(i) permits export restrictions for price stabilization purposes, and Article XX(c) contains an exception related to gold and silver. Export restrictions to safeguard national security can be justified under Article XXI. Article XXI(b) concerns nuclear and military-related goods as well as actions “taken in time of war or other emergency in international relations.” As many of the other articles, this rule leaves ample space for interpretation. Thus, it is not clear whether “other emergency in

³¹ WTO, ‘General Agreement on Tariffs and Trade’ (1994) available at http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf (last visited 5 February 2011) [=GATT 1994].

international relations” applies only to political emergencies or also extends to social and economic emergencies.³²

Additional treatment of export restrictions can be found in Article 12 in the WTO Agreement on Agriculture, which stipulates that any member, instituting “any new export prohibition or restriction on foodstuff in accordance with paragraph 2(a) of Article XI of GATT 1994” shall (a) “give due consideration to the effects of such prohibition or restriction on importing Members’ food security”; (b) “give notice in writing, as far in advance as practicable, to the Committee on Agriculture” and “consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question”, before imposing such a measure.³³ However, these obligations do not apply “to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned.” While Article 12 requires members to notify the WTO when they restrict food exports, there are no penalties for ignoring the rule.³⁴

Certain export restrictions can be challenged under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). A subsidy exists if there is (i) a financial contribution by a government or public body; and (ii) the financial contribution confers a benefit. Accordingly, some observers argue that lower prices for the domestic industry resulting from the imposition of export taxes could be considered a ‘financial contribution’ under the SCM Agreement. However, the Panel in the dispute ‘United States – Measures Treating Export Restraints as Subsidies’ explicitly found that an export restraint, defined as including export taxes, “cannot constitute government-entrusted or government-directed provision of goods [...] and hence does not constitute a financial contribution” under the SCM Agreement.³⁵

In the light of the illustrated limitations of WTO rules, the EU strongly supports including the issue in the current negotiations, the Doha Development Agenda, asking for substantive commitments by all WTO

³² *Id.*

³³ WTO, *Agreement on Agriculture* available at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf (last visited 5 February 2011), Article 12.

³⁴ Mitra & Josling, *supra* note 9, 4.

³⁵ Panel Report, ‘United States – Measures Treating Export Restraints as Subsidies’, WT/DS194/R (29 June 2001) available at <http://www.worldtradelaw.net/reports/wtopanel/us-exportrestraints%28panel%29.pdf> (last visited 5 February 2011), 94.

Members to bind and eliminate or reduce export taxes. The EU tabled three main arguments for limiting export restrictions:

1. export taxes can have serious trade distorting effects, in particular when applied by major suppliers;
2. export taxes can serve as indirect subsidization of processing industries, creating unfair trade advantages; and
3. export taxes can serve to displace imports on the market of the exporting country.³⁶

To get the issue on board despite strong opposition from the developing countries, the EU resorted to quite a creative approach: It dealt with export tariffs in its NAMA proposal (non-agricultural market access negotiations) on non-tariff barriers (NTBs) to trade, declaring the issue a 'tax' matter – albeit with little success. The most recent draft modalities for NAMA do not refer to the EU's proposal. Slightly more promising was an initiative by the U.S., Japan and Korea on transparency, focusing on export licensing. In addition, export restrictions were also discussed during the agriculture negotiations. While most participants agreed that some disciplines were needed to ensure stable supplies for importing countries, there was no agreement on the scope of these disciplines.

II. Settling Disputes on Export Restrictions

In accordance with the above-mentioned rules, countries negatively affected by export restrictions can file an official complaint with the WTO and, if bilateral consultations do not resolve the disagreement, request the establishment of a dispute settlement panel. In general, the WTO's quasi-adjudicative dispute settlement procedure is a well-functioning mechanism to solve trade disputes. While there are some elements of political dispute settlement, it has a strong legal base: It provides for clear procedural rules, and sets timeframes for each clearly defined stage of the dispute settlement process (consultations, panel review and appellate stage). If a member brings a dispute against another member, the responding country cannot refuse to be judged. An independent dispute panel, usually chosen in consultation with the countries in dispute, reviews the case. While either side can appeal a panel's ruling, they have to be based on points of law such as legal interpretation. The panel's and the Appellate Body's rulings are automatically adopted unless there is a consensus to reject a ruling (negative

³⁶ Kim, *supra* note 8, 20.

consensus).³⁷ The most important element of the dispute settlement procedure is that the decisions, once they are adopted, are legally binding upon the parties to the dispute, and failure to comply with the ruling can be sanctioned by the plaintiff. Multilateral dispute settlement offers further clear advantages: All WTO Members have equal access, and decisions are made on the basis of rules rather than on the basis of economic power. The system offers another advantage, in particular for small countries, which might not have the capacity to make sufficient use of the dispute settlement mechanism: Members who have a substantial interest in the matter can participate as third-party countries in the consultations. In fact, the system works quite well: About two-thirds of the disputes brought to the WTO for adjudication are resolved to the satisfaction of the complainant.³⁸

Quantitative export restrictions in violation of Article XI:1 of the GATT, or export duties and other restrictions contrary to WTO accession agreements, can be challenged directly before the WTO. However, it is relatively easy to justify restrictions under the many exemptions, in particular because these leave ample space for interpretation. There are, for example, no definitions of what is “temporary,” “critical” or what constitutes a “shortage” under Article XI:2. As a consequence, there has yet to be any successful challenge to the export restrictions implemented by an exporter of foodstuffs.³⁹ Other exceptions for quantitative restrictions such as Article XX⁴⁰ and XXI leave equal room for interpretation. Trying to resolve disputes over export restrictions through the WTO’s dispute settlement procedure, while rules remain weak, thus promises little to no success. Moreover, this strategy is politically risky since these duties are introduced primarily by developing and least developed countries. As the economist Claude Barfield argues, pushing the issue into dispute settlement

³⁷ E. Ramirez Robles, ‘Political and Quasi-Adjudicative Models in European Union Free Trade Agreements. Is the Quasi-adjudicative Model a Trend or is it Just Another Model?’ *WTO Staff Working Paper ERSD-2006-09* (2006) available at http://www.wto.org/english/res_e/reser_e/ersd200609_e.pdf (last visited 27 February 2011).

³⁸ M. Busch & E. Reinhardt, ‘The WTO Dispute Settlement’, *SIDA Trade Brief* (April 2004), 3 available at <http://userwww.service.emory.edu/~erein/research/SIDA.pdf> (last visited 5 February 2011).

³⁹ Mitra & Josling, *supra* note 9, 4.

⁴⁰ There are already many cases on the interpretation of Art. XX b) and g) pertaining to import barriers. These include the 1998 ruling “United States – Import Prohibition of Certain Shrimp and Shrimp Products”. By contrast, there has not yet been a case on Art. XX i) on the exceptions for gold and silver.

(in the hope to set precedents) could intensify the rift between industrialized and developing countries within the WTO.⁴¹

In the following section, we will take a closer look at three dispute settlements procedures on export restriction:

1. WTO – Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,

2. WTO – United States – Measures Treating Export Restraints as Subsidies, and

3. WTO – China – Measures Related to the Exportation of Various Raw Materials.

1. The EU against Argentina: Export Restrictions on Hides and Bovine Leather

Our first case deals with the question in how far administrative procedures are export restraints, violating WTO rules. The relevant article is therefore GATT Article XI:1.

In 1998, the EC requested consultations with Argentina regarding bovine hides and calf skins, semi-finished and finished leather. The EC alleged that Argentine's export regulations violated GATT provisions. The complaint addressed two points, the first being of relevance to our study: (1) the mandatory presence of representatives of the Argentine leather tanning industry during customs procedures for exports and the disclosure of information about slaughterhouses for hides and bovine leather (violation of GATT Article XI:1; export restrictions); and (2) advance tax payments that allegedly imposed a higher tax burden on imports.

The WTO dispute settlement panel found, with regard to the first part of the complaint, that the claim concerning Article XI by the EC was not valid. The Argentinean regulations on export procedures were not an export restricting measure under the provisions of Article XI. The EC won on another point, however, concerning Article X:3(a). After the panel had established that Article X:3(a) applied to the measure at issue, as (1) the substance of the measure at issue was "administrative in nature" and (2) the measure was a law of "general application", it found that the measure was

⁴¹ Barfield, *supra* note 11.

not administered in a reasonable and impartial manner and was consequently inconsistent with the respective article. What rendered the measure an “unreasonable administration” was that the confidentiality of information was not guaranteed and that the procedure allowed persons with adverse commercial interest to obtain confidential information to which they had no right (partial administration).⁴² The dispute settlement body (DSB) recommended that Argentina adjusted its trade policies in this regard. Argentina consented to do so within a “reasonable period of time”, which was set to February 2002. In March 2002, the dispute parties finally notified the DSB of their agreement.

2. Canada against the U.S.: Measures Treating Exports Restraints as Subsidies

Our second case study concerns the question whether export restraints can be considered a subsidy; the relevant agreement is therefore the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Under U.S. trade law, export restraints are treated like an export subsidy, in which case the government can apply countervailing measures. Accordingly, the U.S. contended that Canada’s log export restrictions provided a subsidy to lumber producers. Canada, on the other hand, alleged that the treatment of export restraints under U.S. countervailing duty law and practice obliged the government to treat export restraints as a “financial contribution” under Article 1.1 of the SCM Agreement, which was an interpretation inconsistent with the subsidies agreement.⁴³ In May 2000, Canada requested consultations with the U.S. concerning this matter. After bilateral consultations failed to forge an agreement, a dispute settlement panel was established in the same year. The key issue, the panel dealt with,

⁴² WTO, ‘Argentina – Hides and Leather’, DS 155 available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds155sum_e.pdf (last visited 5 February 2011).

⁴³ M. E. Janow & R. W. Staiger, ‘The Treatment of Export Restraints as Subsidies under the Subsidies Agreement of the WTO’, *American Law Institute* (March 2003) available at <http://www.ali.org/doc/wto/wto2001/exportrestraints.pdf> (last visited 5 February 2011), 18; Panel Report, ‘United States – Measures Treating Export Restraints as Subsidies’, WT/DS194/R (29 June 2001) available at <http://www.worldtradelaw.net/reports/wtopanels/us-exportrestraints%28panel%29.pdf> (last visited 5 February 2011), 3.

was whether export restraints constituted a “financial contribution” (or income or price support) under Article 1.1 under the SCM Agreement.

The dispute parties agreed that export restraints, in principle, could confer a benefit. However, they had diverging views on what exactly constituted an export restraint. According to Canada, an export restraint was “a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted. Such measures could also take the form of a government imposed fee or tax on exports of the product calculated to limit the quantity of exports”. The U.S., on the other hand, interpreted export restrictions more broadly as “any action or an act that holds back or prevents exports”. The SCM Agreement, on the other hand, does not define exports restraints. The two parties also had diverging views on the subsidy character of export restrictions. The U.S. believed that exports restraints could, indeed, be considered a financial contribution within the meaning of SCM Agreement 1.1 (a) (1), while Canada took the opposite position.

The panel concluded that an export restraint did not constitute a financial contribution in the sense of Article 1.1 (a) (1) of the SCM Agreement as it does not have clear legal language on the matter. Subsequently, the panel found that the U.S. regulations did not violate the SCM Agreement. As both claims by Canada had been rejected, the case was dissolved and no recommendations were made by the DSB panel.⁴⁴ Some economists interpret the dispute foremost as a challenge to the WTO and its consistency with existing legal measures on trade, in this case, on the proper definition of subsidies.⁴⁵

3. The United States, the EU and Mexico against China: Export Restrictions on Metals

The third case concerns obligations on export restriction under accession agreements and the importance of Article XX when dealing with export restrictions. The case, however, is still pending (October 2010).

On 23 June 2009 the United States and the European Union (later joined by Mexico) presented a formal Request of Consultation to deal with the dispute existing with China, claiming that export restraints (including

⁴⁴ *Id.*, 108-109.

⁴⁵ Janow & Staiger, *supra* note 43, 1.

quotas and export taxes) imposed by China on a number of raw materials violated WTO rules on export restrictions.⁴⁶ In response to the filed Requests of Consultation, three dispute cases were established (U.S. versus China DS394; EU versus China DS395 and Mexico versus China DS398). After consultation with China on multiple occasions did not lead to a settlement, the complainants proceeded to require a Panel establishment by the WTO on November 4, 2009. On 21 December 2009, the DSB established a single panel, pursuant to Article 9.1 of the DSU, to examine the disputes DS394, DS395 and DS398. Several countries including Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, and Turkey joined the case as third-parties.

The complainants basically claim three types of violations:⁴⁷ (1) The first violation is related to export quotas imposed by China. According to the complainants, China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quantitative restrictions such as quotas. The rules that are infringed by these measures are Article XI:1 of the GATT 1994 as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Protocol on the Accession of the People's Republic of China (WT/L/432) (Accession Protocol), which incorporates commitments in paragraphs 162 and 165 of the Working Party Report on the Accession of China (WT/MIN(01)/3). (2) Furthermore, the complainants criticize the fact that China imposes "temporary" export duty rates, and/or "special" export duty rates of various magnitudes on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc. This conflicts with China's obligations under paragraph 11.3 of Part I of the Accession Protocol, which require the country to refrain from export duties on products that are not listed in Annex 6 of the Accession Protocol. These obligations also require China to limit any export duties imposed on products that are listed in Annex 6 to the rates provided therein. Most of the 84 exceptions, listed in annex 6, concern metals, providing for export levies

⁴⁶ L. Van Den Hende & J. Paterson, 'Export Restrictions on Raw Materials – WTO Rules and Remedies' (2009) available at <http://www.herbertsmith.com/NR/rdonlyres/393EFC20-DB64-4FC1-8C0C-8BA85768092E/16346/ExportrestrictionsonrawmaterialsWTOrulesandremedie.pdf> (last visited 27 February 2011).

⁴⁷ European Commission, 'EU Requests WTO Panel on Chinese Export Restrictions on Raw Materials' (4 November 2011) available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=481> (last visited 27 February 2011); EurActiv, 'EU, U.S. Act against China on Raw Material Exports' (24 June 2009) available at <http://www.euractiv.com/en/trade/eu-us-act-china-raw-material-exports/article-183436> (last visited 27 February 2011).

of 20 to 40 percent on products ranging from lead and zinc ores to scrap iron.⁴⁸ The third complaint concerns additional restraints imposed on exportation. The complainants claim that China administers its measures in a manner that is not uniform, impartial, and reasonable by imposing excessive fees and formalities on exportation, and not publishing certain measures pertaining to requirements, restrictions, or prohibitions on exports (in violation of Article VIII, VIII:1, VIII:4, Article X).⁴⁹ The three complaining states submitted their first written statements in June 2010. The U.S. submission finds that China now subjects over 600 items to non-automatic licensing and over 350 items to export duties. These export restraints have become increasingly restrictive over time; export quota amounts have decreased while export duty rates have increased.⁵⁰

China has submitted its first written statement in August 2010.⁵¹ Some of China's previous officially stated rationales for these restrictions included 1. the conservation of natural resources, using prohibitions, export quotas, licensing and taxes, 2. environmental protection and energy saving, using quotas, taxes, and only partial VAT rebates; 3. ensuring stable domestic supply, and therefore avoiding large price fluctuations, in certain products, using quotas, export taxes, only partial VAT rebates, and state trading; and 4. management of trade so as to, for example, reduce China's current account surplus.⁵² China alleges that these export barriers are necessary for the sake of natural resource and energy conservation. "The goal of export administrative measures on some raw materials is to protect the environment and our limited resources", the Ministry of Commerce

⁴⁸ 'U.S. Mulls WTO Case over Chinese Export Restrictions', 12 *Bridges Weekly Trade News Digest*, (2008) 29, 2.

⁴⁹ 'EU Requests WTO Consultations on Chinese Export Restrictions on Raw Materials' (23 June 2009) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/287&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 27 February 2011).

⁵⁰ 'Executive Summary of U.S. First Written Submission' (6 June 2010) available at http://www.ustr.gov/webfm_send/2078 (last visited 27 February 2011).

⁵¹ EU, 'General Overview of Active WTO Dispute Settlement Cases Involving the EU as Complainant or Defendant and of Active Cases under the Trade Barriers Regulation' available at http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf (last visited 18 April 2011), 10.

⁵² WTO, 'Trade Policy Review, China, 2010' (31 May and 2 June 2010) available at http://www.wto.org/english/tratop_e/tpr_e/s230-03_e.doc (last visited 27 February 2011), 44.

argued.⁵³ This is, however, not the only reason for the export restrictions. A Chinese Ministry of Commerce statement emphasized: “The regulations conform to the needs of China's own [sustainable] development, while also advancing China’s efforts towards the sustainable development of the global economy”⁵⁴. Two consecutive hearings were held in September and November 2010, and on April 1 2011, the panel circulated the confidential final report to the dispute parties.⁵⁵

On 7 May 2010, the dispute settlement panel issued a ruling on certain preliminary objections raised by China; the panel decided in favor of China only on minor procedural points that do not affect the main legal challenge.⁵⁶ As the complainants have just recently submitted their written statements, a panel ruling is still quite a long way down the road. However, there are some indicators for a possible verdict. In 2007, the WTO’s Trade Policy Review found that China applied statutory export duties on 88 items and interim export duties on 174 products, 64 of which were also subject to statutory export duties. In January 2008, the coverage of interim export duties increased to 334 lines at the HS 8-digit level;⁵⁷ these include key raw materials, such as yellow phosphorous, bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide and zinc. In its biennial review of China’s trade policies in June 2010, the WTO alleged China may be giving its manufacturers an unfair advantage by restricting exports of some raw materials. It found that export restrictions, explicit or implicit, were a major feature of China’s trade regime. The main explicit restrictions involved: export prohibitions, export quotas, export licensing requirements, and export taxes. Implicit restrictions included less-than-full

⁵³ Quoted in: ‘China Defends Export Restrictions on Raw Materials’ (11 May 2009) available at <http://business.inquirer.net/money/breakingnews/view/20091105-234406/China-defends-export-restrictions-on-raw-materials> (last visited 27 February 2011).

⁵⁴ Quoted in: BBC News, ‘China Defends Export Restrictions’ (5 November 2009) available at <http://news.bbc.co.uk/2/hi/business/8344053.stm> (last visited 27 February 2011).

⁵⁵ EU, ‘General Overview of Active WTO Dispute Settlement Cases Involving the EU as Complainant or Defendant and of Active Cases under the Trade Barriers Regulation’ available at http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf (last visited 18 April 2011), 10.

⁵⁶ WTO, ‘China – Measures Related to the Exportation of Various Raw Materials – Communication from the Panel’ (18 May 2010) available at <http://www.worldtradelaw.net/prelims/china-rawmaterials-prelim.pdf> (last visited 27 February 2011).

⁵⁷ Korinek & Kim, *supra* note 7, 13.

rebate of VAT on exports, and state trading arrangements. This Trade Policy Review, however, has no legally binding effect, as it is not a verdict. The next procedural step is the presentation of the dispute settlement panel's report to the parties to the dispute, and until then it cannot be definitively stated that the measures adopted by China violate WTO rules.

D. PTAs – A Better Way to Deal with Export Restrictions?

While the scope and ambition of rules on export restrictions vary among the bilateral and plurilateral PTAs, some FTAs go well beyond the WTO, including stricter rules on export tariffs. For example, export taxes are prohibited among the member countries of several regional FTAs such as the EU, the North American Free Trade Agreement (NAFTA), and the Mercado Comun del Cono Sur (Mercosur). They are also prohibited in some bilateral FTAs, including, among others, the FTAs between Canada and Chile, between Canada and Costa Rica, between Japan and Singapore, Australia and New Zealand as well as between the EU and Mexico.⁵⁸ Given the multitude of FTAs currently in force, we concentrate on U.S. and EU FTAs as representatives for FTAs concluded by industrialized countries. Representatives for South-South FTAs in our paper are Mercosur, the Southern African Development Community, the South African Customs Union, and ASEAN (Association of Southeast Asian Nations).

I. The United States' FTAs

Prohibitions of export restrictions have been a common scheme in U.S. Free Trade Agreements. Often, the obligation on export tariffs reads: "Neither Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of the other Party, unless such duty, tax, or charge is adopted or maintained on any such good when destined for domestic consumption"⁵⁹. Rules on quantitative export restrictions are in

⁵⁸ Piermartini, *supra* note 25, 2.

⁵⁹ 'Free Trade Agreement United States-Chile' (6 June 2003), Art. 3.11 available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file837_3992.pdf (last visited 27 February 2011), 3-9; 'Free Trade Agreement United States-South Korea' (30 June 2007) available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file904_12701.pdf (last visited 27 February 2011).

general modeled in accordance with WTO rules: “Except as otherwise provided in this Agreement, neither Party may adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its interpretative notes, and to this end Article XI of GATT 1994, including its interpretative notes, is incorporated into and made a part of this Agreement”⁶⁰. Often, however, the agreements feature exceptions with regard to quantitative restrictions on sensitive products which vary within the different FTAs.

NAFTA, for example, has quite stringent rules regarding export restrictions. Article 314 imposes a prohibition on export taxes. It prohibits a party from adopting or maintaining any duty, tax or other charge on the export of any good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on: a) exports of any such good to the territory of all other Parties; and b) any such good when destined for domestic consumption. An exception is granted to Mexico for basic foods set out in Annex 314. In line with Article XI of the GATT 1994, NAFTA also provides general rules on quantitative restrictions. But here again, there are exemptions: Article 315 specifies the conditions of exceptions in Articles XI 2(a) or XX(g), (i) or (j) of the GATT 1994. Furthermore, NAFTA exempts controls by Canada on the export of log species, as well as controls on the export of unprocessed fish, from the rules on quantitative export restrictions.

There are many more examples of exceptions: For example, the FTA with Chile stipulates that the rules on export restrictions, listed under Article 3.11, shall not apply to controls by the United States on the export of logs of all species.⁶¹ A similar exception is made in the FTA between the U.S. and South Korea as well as the U.S. and Australia. CAFTA, the agreement with the Central American Countries, while restricting both the use of export duties as well as quantitative export restrictions, features a multitude of exceptions on quantitative restrictions: restrictions on the export of wood, coffee, ethanol and crude rums, as well as controls to establish a minimum export price for bananas.

⁶⁰ See for example the ‘Free Trade Agreement United States-Australia’ (18 May 2004) available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf (last visited 27 February 2011), Art. 2.9 s. 1.

⁶¹ *Free Trade Agreement United States-Chile*, *supra* note 59, Annex 3.2 Section A lit. a.

II. EU FTAs

The EU prohibits both export taxes and quantitative restrictions on intra-EU trade. Within its FTAs with third countries, rules and exceptions on quantitative export restrictions are, by and large, modeled according to WTO rules. Some agreements specifically refer to the WTO rules (the EU-Korea FTA, for example), while others use their own language on rules and exceptions (EU-South Africa). In many of the EU's FTAs these read along the following lines (for example the EU-South Korea FTA): "Neither Party may adopt or maintain any prohibition or restriction other than duties, taxes or other charges on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, in accordance with Article XI of GATT 1994 and its interpretative notes. To this end, Article XI of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*"⁶². Some of the EU's (in particular more recent) bilateral FTAs also include additional disciplines on the use of export taxes. These are formulated along the following lines (EU-South Korea FTA; the agreement is not implemented yet): "Neither Party may maintain or institute any duties, taxes or other fees and charges imposed on, or in connection with, the exportation of goods to the other Party, or any internal taxes, fees and charges on goods exported to the other Party that are in excess of those imposed on like goods destined for internal sale".⁶³ The FTA with Algeria, for example, features the following obligation in Article 17(1): "[n]o new customs duties on imports or exports or charges having equivalent effect shall be introduced in trade between the Community and Algeria, nor shall those already applied upon entry into force of this Agreement be increased". The obligations are similar within the EU's 1999 Agreement on Trade, Development and Co-operation with South Africa, where no quantitative measures that inhibit exports or imports shall be implemented and existing ones shall be abolished. Further, no new customs duties shall be applied and existing ones shall not be increased from the implementation of the agreement onwards.⁶⁴ An agreement with Croatia calls for the abolition of

⁶² See for example 'Free Trade Agreement EU-South Korea' (6 October 2010) available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en> (last visited 27 February 2011), Section C, Art. 2.9.

⁶³ See for example *id.*

⁶⁴ See 'Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa,

“any customs duties on exports and charges having equivalent effect” upon its entry into force.⁶⁵ Within Europe, the European Community – Croatia Interim Agreement on trade and trade-related matters calls for the abolishment of export restrictions and of customs duties for many products, calling for Croatia to make its legislations compatible.⁶⁶

However, as in the case of U.S. FTAs, the EU’s FTAs feature many exceptions. The FTA with South Africa declares in Article 27: “The Agreement shall not preclude prohibitions or restrictions on imports, exports, goods in transit or trade in used goods justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of intellectual, industrial and commercial property or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail or a disguised restriction on trade between the Parties”.⁶⁷

III. South-South FTAs

While Mercosur, for example, includes rules on export tariffs, the issue is anything but resolved within this regional FTA. With reference to Annex 1, containing the so-called *Trade Liberalization Programme*, the parties to Mercosur agreed to eliminate all duties, charges and any non-tariff restrictions on the movement of traded goods applied to reciprocal trade (Article 1). The larger countries set the date of December 31st 1994 for this removal; Paraguay and Uruguay got an extended deadline until the end of 1995. Duties and charges imply customs duties and any measures of similar effect; “restrictions” are termed as all administrative, financial, foreign exchange and other means by which reciprocal trade would be inhibited.

of the other part’, OJ 1999 L 311/3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:311:0003:0297:EN:PDF> (last visited on 26 April 2011).

⁶⁵ WTO, *World Trade Report. Trade in Natural Resources* (2010), 180.

⁶⁶ See ‘European Community – Croatia Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part’ available at <http://www.worldtradelaw.net/fta/agreements/eccrofta.pdf> (last visited on 26 April 2011).

⁶⁷ ‘Free Trade Agreement EU-South Africa’, 11 October 1999, available at <http://www.worldtradelaw.net/fta/agreements/ecsafrafta.pdf> (last visited 27 February 2011).

However, Argentina – a frequent user of export restrictions - argues that export taxes are in fact not a trade distorting measure.⁶⁸

The Southern African Development Community (SADC) provides, in its contract, that all export duties should be eliminated and that duties on goods for export to other members are prohibited. The clause on the elimination of export duties further states that no less favorable treatment should be granted to member states than it is to third party countries. Article 8 of the agreement contains a general interdiction of any quantitative restrictions on exports to any other SADC member, although exceptions apply. These are listed in Article 9, stating that exports of goods within the SADC may be regulated if they are necessary for public moral or order, for human, animal or plant life or health, if they are necessary to abide by laws and regulations of the WTO, or if they are necessary to protect intellectual property rights. Further, exceptions apply if critical shortages of foodstuffs occur, or the stocks of natural resources and the environment may be threatened. Last, metals and precious stones are excluded from the export restriction prohibitions.

The second Southern African trade agreement, the South African Customs Union (SACU), has developed a complex framework for internal trade and prevention of unwanted trade distortions. Article 25 (Import and Export Prohibitions and Restrictions) recognizes “the right of each Member State to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by the Council”⁶⁹. This is to be decided by a council. Further, SACU members may not use the instrument of export restrictions to enhance domestic industrial production. Article 18 of the SACU agreement provides that restrictions in imports or exports can be imposed by members, if this serves the protection of health of humans, plants and animals, if the environment or treasures of the country are threatened by trade, or if public morals, intellectual property rights, natural security or resource stocks are at risk. Any regulations within the SACU are valid indiscriminately for the other members as well.⁷⁰

In the Southern Asian Free Trade Area (ASEAN), non-tariff restrictions like quantitative restrictions are to be eradicated according to

⁶⁸ Bonarriva *et al.*, *supra* note 14, 3.

⁶⁹ ‘Southern African Custom Union Agreement’ (2002) available at <http://www.sacu.int/main.php?include=docs/legislation/2002-agreement/part5.html> (last visited 27 February 2011), Art. 25 s. 1 [=SACU Agreement].

⁷⁰ *Id.*, Art. 29 s. 1.

Articles 5 and 41. Further, the States are obliged to abide by the provisions in Article XI of GATT 1994. General exceptions from this are included in the agreement, though, which are similar to the exceptions in the GATT/WTO provisions on export restrictions. Members of the ASEAN may restrict exports of goods, if they are domestic materials, which are necessary to ensure the country's industry and maintenance.

IV. Shortcomings of FTAs

Even though rules on export restrictions in PTAs often go beyond WTO rules, there are several shortcomings which reduce their attractiveness as a viable policy tool. First, as many raw materials are traded globally, the scope of most PTAs does not reach far enough. Second, to date, no FTAs exist between the big importers (the EU and the U.S.) and some of the most frequent users of export restrictions, above all China – and while both countries have extensively negotiated bilateral trade deals in the past years, any such agreements are nowhere in sight. Third, PTAs often feature exceptions with regard to sensitive products. Even though the rules on export restrictions may in general be stricter than in the WTO context, certain products are exempted from these rules. Fourth, there is the issue of transparency and inclusiveness, of which FTAs offer much less than the WTO.

The fifth shortcoming merits some more space: There are many disadvantages of dispute settlement within FTAs. Most FTAs typically contain a chapter on dispute settlement that establishes committees and procedures for handling disputes between the parties of an agreement.⁷¹ However, dispute settlement procedures vary considerably, with models ranging from political to quasi-adjudicative. Dispute resolution under these agreements is often governed by a simple clause in which the parties agree to consult on matters of implementation and enforcement of the obligations contained in the agreement. In particular, older FTAs tend to be based on a diplomatic dispute settlement mechanism. While in some of these FTAs legal adjudication is generally possible, the procedure has several weaknesses: It lacks defined legal stages, and there are no detailed procedural rules and timeframes for each stage of the process. In many FTAs, members can block the establishment of a panel; decisions made on the basis of the panel are not legally binding. Compliance measures are not

⁷¹ P. Drahos, 'The Bilateral Web of Trade Dispute' available at <http://www.twinside.org.sg/> (last visited 27 February 2011), 2.

specified, and there is often no retaliation procedure. Before the turn of the century, the EU's FTAs were, with the single exception of the EEA, all based on a diplomatic approach to dispute settlement. The EU-South Africa FTA served as a turning point, representing the first modest steps towards legalization. Newer FTAs such as the EU-Mexico FTA (2000) and the EU-Chile FTA (2002) have stronger adjudicative characteristics. Like many of the U.S. FTAs such as NAFTA, they include detailed procedural rules for arbitration, time frames for each step of the dispute settlement process, automatic procedures for the establishment of the arbitration panel and compliance proceedings.⁷² Despite these more legalistic characteristics, the EU often prefers diplomatic approaches to settle trade disagreements. U.S. FTAs generally incorporate a formal dispute settlement mechanism, through which the U.S. government can seek to resolve disputes by presenting the case to a tribunal. Generally, if a tribunal finds that a trading partner's measure is not in compliance with the FTA and the trading partner does not bring the measure into compliance, the complainant can request authorization to suspend "equivalent" benefits to the defendant, or in some cases, the defendant can provide monetary compensation as set out in the FTA.⁷³ Dispute settlement in many South-South FTAs, however, is also based rather on a diplomatic than a legal basis. Thus, the South African Customs Union (SACU) Agreement provides for the development of "policies and instruments to address unfair trade practices between Member states", but these policies and instruments have yet to be finalized.⁷⁴

In addition, FTAs unlike the DSU of the WTO, do not offer non-FTA members the possibility to join as third parties. There is yet another argument in favor of WTO dispute settlement: When conflicting parties resolve a dispute within the context of the WTO, which requires a determination of obligations, they deliver a public good to other WTO members as this results in a greater certainty of the interpretation of WTO rules. WTO members profit in another way as well: When the infringing

⁷² G. Bercero, 'Dispute Settlement in EU FTAs: Lessons learned?', in L. Bartels & F. Ortino (eds), *Regional Trade Agreements and the WTO System* (2006), 383.

⁷³ International Trade Administration, 'Free Trade Agreement Compliance' (7 November 2006) available at <http://www.ita.doc.gov/fta/compliance.asp> (last visited 27 February 2011).

⁷⁴ *SACU Agreement*, Art. 41, "The Council shall, on the advice of the Commission, develop policies and instruments to address unfair trade practices between Member States. These policies and measures shall be annexed to this Agreement". See also G. Brink, 'International Trade Dispute Resolution: Lessons from South Africa' available at <http://ictsd.org/i/publications/31682/> (last visited 27 February 2011).

State implements the panel's finding by bringing a measure in conformity with its WTO obligation, all other members will, by virtue of the Most Favoured Nation Treatment (MFN), benefit.⁷⁵

E. Tentative Results

In the light of increasing scarcities and rising prices of many raw materials, more and more countries restrict exports of certain raw materials through export taxes and quantitative restrictions. While temporary restrictions are justified in national crises such as food shortages, these restrictions are often trade distorting, entailing welfare losses not only for importing countries but also for the country imposing the measure. As a consequence, several importing countries such as the EU and the U.S. have turned to the WTO, lobbying for stricter rules on export restrictions, which would give the WTO "sharper teeth" to deal with the issue. Due to the strong opposition by many developing countries, which view the WTO's lack in precise rules as much needed policy space to address market failures, an update of WTO regulations is unlikely. At the same time, trying to solve the problem through WTO dispute settlement promises little success as long as rules on export restrictions remain weak. Some economists therefore recommend addressing the issue through FTAs. We agree that many FTAs provide for rules which go beyond the scope of the WTO. But we also caution that this strategy has severe shortcomings, which can be found in the many exceptions to the rules, the limited reach of FTAs as well as in limitations of their dispute settlement. In the end, however, we cannot fully answer the second question we posed in this paper. With regard to the multilateral level, the WTO panel's decision on Chinese export restrictions on metals will cast more light on the issue. With regard to the bilateral and regional level, we will have to wait until disputes on export restrictions are actually settled by FTAs' dispute settlement procedures.

⁷⁵ Drahos, *supra* note 71.

Resource Conflicts over Arable Land in Food Insecure States:

Creating an United Nations Ombudsman Institution to Review Foreign Agricultural Land Leases

Anastasia Telesetsky*

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Abstract

In the last decade of globalization, States in the Middle East, East Asia, Europe, and North America have looked towards Africa and Southeast Asia for opportunities to lease for 30-50 years large tracts of arable land for production of commodity crops and biofuels in order to meet the needs of home markets. Facing their own governance challenges, States in Africa and Southeast Asia have leased land to private foreign investors without requiring any environmental review or mitigation of the proposed land leases. This paper argues that in food insecure states the recent flurry of land leasing activity to foreign agribusiness is likely to lead to unintended long term consequences for the ecology in land-leasing States by depleting the already fragile environment through monocropping, chemical pesticide and fertilizer applications, and large scale irrigation.

This paper argues that international investment law may provide foreign investors with legal protection if land leasing States in the future decide to regulate the leases in a manner that discriminates against large agribusiness. The current proposals for self-regulatory voluntary codes of conduct do not provide sufficient oversight over the leasing process to protect the public's interest in a healthy and productive environment against foreign investors who have under the current lease structure no incentive to improve the land that they are leasing. The creation of an United Nations based ombudsman to provide legal and technical oversight and support for States making long-term leases has greater potential than a voluntary code for ensuring a balanced negotiation among the interests of host State governments for investment, investors for arable land, and the public for long-term sustainability.

A. Introduction

The world population is 6.8 billion and increasing¹ while the total arable land is approximately 4.1 billion acres and decreasing.² Some regions such as States within North Africa and the Near East are using all of their arable land.³ Without enough arable acreage to go around, foreign investors from land poor States such as Saudi Arabia are vying for potentially arable land in States like Ethiopia that appear to have surplus land to lease. While these 30 to 50 year investments are perceived by States needing foreign direct investment as a windfall, this paper argues that these very same investments may sow unintended seeds of long-term conflict over scarce resources.

The challenge of managing the remaining arable land is prodigious. As far as the application of international law to ensure protection, we are entering uncharted territory. We have neither treaties nor specific customary international law to guide us. What we have instead is a collision between the goals of international economic law to improve security and predictability for investors and the goals of international environmental and human rights law to protect fragile ecosystems, limited natural resources, and vulnerable communities. To better understand the emerging incompatibility between international investment law and international environmental law, the first part of this paper starts with a description of the recent phenomenon of large-scale arable land leases to foreign direct agribusiness investors. Without any conditions being placed on how the land will be farmed, the current land leases have a high potential for contributing to long-term degradation of already scarce arable land. The second part of the paper reviews the emerging and conflicting international legal framework within which these investments are being made. The third part of the paper responds to the concern that degraded land in already food insecure countries may contribute to conflicts over arable land by proposing

¹ U.S. Census Bureau, 'US & World Population Clock' available at <http://www.census.gov/main/www/popclock.html> (last visited 20 April 2011).

² A. J.Bot, F. O.Nachtergaele & A.Young, 'Food and Agricultural Organisation World Soil Resources Report: Land Resource Potential and Constraints at Regional and Country Levels' (2000) available at <ftp://ftp.fao.org/agl/agll/docs/wsr.pdf> (last visited 20 April 2011), Appendix 8, 101-110.

³ *Id.*, Table A8b, 103. (As of 1994, Afghanistan, Egypt, Iran, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Tunisia, United Arab Emirates, and Yemen had all of their potentially arable land in production.).

a precautionary approach to land leases made possible through a U.N. based office of the International Ombudsman for Environment and Development.

B. Large Scale Agricultural Land Leases

Disputes over the control of territory have long been and continue to be the source of international conflict. The situation with large-scale agricultural land leases introduces a new wrinkle in the older theme of territorial disputes. As this section will describe, most of the large-scale agricultural land leases are direct investments made by a combination of public and private foreign investors. While investors are not claiming inalienable interests in the land that they are leasing, they are securing a temporary legal interest in arable land under investor-friendly face of possible food shortages, investors may ultimately contribute to latent but nevertheless volatile conditions of environmental scarcity.

The first part of this section will describe some of the characteristics of these large-scale land leases in food insecure regions in both Africa and Southeast Asia and how these leases illustrate the dynamics of elite resource capture. The second part of this section will argue that this growing trend in overseas agribusiness investment is likely to further degrade fragile environments and may trigger threats to social security in some regions of the world.

I. Characteristics of Overseas Land Leases in Food Insecure Regions

The concept of overseas land leases where companies from a foreign country have exclusive access to arable land within another the territory of an unrelated nation is not an entirely new idea. Western colonial powers throughout the 18th and 19th centuries controlled land and populations through systems of plantations exporting rubber, cocoa, bananas, sugar and other commodities which could not be grown back in Europe.⁴ Like the former plantation owners who were granted generous concessionary rights by colonial governments, the current investors are granted long-term leasehold interests over large acreages of land by the government. This results in a schism between agribusiness investors and local farmers. For example, in Ethiopia, the Indian company Karuturi Global has obtained

⁴ M. Kugelman, Introduction, in M. Kugelman (ed.), *Land Grab: The Race for the World's Farmland* (2009), 3.

300,000 hectares⁵ for an export business even though the majority of smallholder farmers in Ethiopia are generally restricted to operating on less than 2 hectares.⁶

What distinguish the current overseas land leases from the former colonial regimes are the participants, the products, and the legal governance structures. While some of the overseas investors are former colonizers from Europe who are now seeking new biofuel sources, many of the overseas investors are those who were formerly colonized including businessmen from India and Qatar. Instead of seeking to grow high-value indigenous crops which cannot be grown at home such as coffee, the new agribusiness investors are increasingly growing global commodities such as wheat and rice that are already in high demand in home countries and in other global markets.⁷ While most colonial enterprises were governed by colonial officials using some variation of home state laws, the current land leases are governed in large part by private international law and international investment law.

Most of the countries that are currently leasing land in Africa and Southeast Asia are food insecure countries including Pakistan, Cambodia, Cameroon, Ethiopia, the Democratic Republic of Congo, Madagascar, Mali, Somalia, Sudan, Tanzania and Zambia.⁸ Because overseas investors recognize that they are operating in risky political environments, they seek guarantees from government officials that will be able to legally export their commodities. Focused on the immediate prize of foreign direct investment, some countries are prepared to provide these assurances. For example, the government of Pakistan offers 99 year leases of agricultural lands with unrestricted repatriation of all profits and produce.⁹ With shrinking water

⁵ M. Fitzgerald, 'The New Breadbasket of the World?' (30 January, 2010) available at <http://www.irishtimes.com/newspaper/weekend/2010/0130/1224263415739.html> (last visited 20 April 2011).

⁶ S. Gebreselassie, 'Land, Land Policy, and Smallholder Agriculture in Ethiopia' (January 2006) available at http://www.future-agricultures.org/index.php?option=com_docman&task=doc_download&gid=129&Itemid=510 (last visited 20 April 2011).

⁷ Fitzgerald, *supra* note 5.

⁸ O. de Schutter, Special Rapporteur on Food Security, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge, A/HRC/13/33/Add.2, 28 December 2009, para. 11.

⁹ N. Sadeque, 'Giving Away the Family Silver' (26 October 2009) available at <http://www.newslinemagazine.com/2009/10/giving-away-the-family-silver/> (last visited 20 April 2011).

tables in their own countries and with large amounts of food being imported, a number of Arab Gulf states have expressed interest in Pakistan's open-ended offer for agricultural investment opportunities and have entered into agreements. Bahrain has initiated a long-term lease for rice production and the United Arab Emirates is leasing 370,657 acres of agricultural land near a dam.¹⁰ In the case of threats to its own food security, the Pakistani government has publicly indicated they will not interfere with the investments. Commenting on a Saudi Arabian investment in land, the Investment Minister for Pakistan stated to the press that the Saudi investors would be able to remove "100 per cent crop yield to their countries, even in the case of food deficit"¹¹.

The Food and Agricultural Organization has been less sanguine about the long-term viability of the leases. It has observed that while foreign direct investment for agriculture has been flowing into African markets, the "related food production increases are often meant to be exported to the investing company, raising a number of possible political and economic concerns when investments are made in a country that itself is food insecure"¹². These export-oriented foreign investors are competing for land with the growing demands for land to produce agricultural products for growing local markets. 80% of Africa's food is produced by smallholder farmers whose numbers grew more than 3.5% in 2008.¹³

Financing the acquisition of lands for large scale agribusiness are investors from China, Korea, Saudi Arabia, Qatar, India, and other states who have applied sovereign wealth funds to lease approximately 20 million hectares (50 million acres) of land within Africa for export-oriented commodities including biofuel materials and commercial staples.¹⁴ Investors

¹⁰ *Id.*

¹¹ S. Shah, 'Corporate Farming Raises Concerns among Local Growers' (28 January 2009) available at <http://www.thenews.com.pk/print1.asp?id=159380> (last visited 23 January 2011).

¹² Food and Agriculture Organization, 'How to Feed the World in 2050, High-Level Experts Forum, Investment' (12-13 October 2009) available at http://www.fao.org/fileadmin/templates/wsfs/docs/Issues_papers/HLEF2050_Investment.pdf (last visited 20 April 2011), 3.

¹³ Food and Agriculture Organization, '2050 – Africa's food challenge: Prospects good, resources abundant, policy must improve' (28 September 2009) available at <http://www.fao.org/news/story/en/item/35770/icode/> (last visited 20 April 2011).

¹⁴ Food and Agriculture Organization (FAO), 'Foreign direct investment – win-win or land grab?', prepared for World Summit on Food Security (16-18 November 2009) available at <ftp://ftp.fao.org/docrep/fao/meeting/018/k6358e.pdf> (last visited 20 April 2011), 1.

in developing countries such as the United States through financial firms such as Morgan Stanley are financing the large scale land leases by creating agricultural funds designed to capitalize on the growing agricultural export market in Africa.¹⁵ Institutional investors including representatives of the largest pension funds and university endowments have also expressed interest in investing in the large scale overseas land leases.¹⁶ Overseas investors have high expectations of returns on agribusiness ventures such as 13-20% annual returns¹⁷ which some investors consider too good to be true.¹⁸ Some of the rationales proffered for overseas agribusiness investment raise ethical issues about both the rule of law and the legitimacy of an investor's expectations. For example, Jarch Capital, a U.S. investment company has been seeking large scale agricultural land leases in southern Sudan because as Philippe Heilberg, founder of Jarch Capital unapologetically reported to journalists: "When food becomes scarce, the investor needs a weak state that does not force him to abide by any rules"¹⁹.

On the other side of the negotiating table, central government investment ministries are the key players offering arable land for lease. Government ministries have the authority to lease the land because the land is held on trust by the government and few citizens have actionable private rights to their land. Government officials and private overseas investors continue to negotiate export-oriented agriculture land leases in spite of the food insecure status of many of the States offering leases. For example, in Ethiopia, the government recently leased to the Indian company Karuturi Global 300,000 hectares with water usage rights for 50 years at the cost of 20 birr (\$1.12) per hectare per year to farm commercial staples including maize, wheat, and rice for export.²⁰ All the while Ethiopia remains a

¹⁵ J. Silver-Greenberg, 'Land Rush in Africa' (25 November 2009) available at http://www.businessweek.com/magazine/content/09_49/b4158038757158.htm (last visited 20 April 2011).

¹⁶ H. Knaup & J. von Mittelstaedt, 'Foreign Investors Snap Up African Farmland' (30 July 2009) available at <http://www.spiegel.de/international/world/0,1518,639224,00.html> (last visited 20 April 2011).

¹⁷ Pharos Global Agricultural Fund, 'Fund Description' available at http://www.pharosfund.com/fund_agriculture.html (last visited 20 April 2011). (Fund is operating in Moldova, Romania, Ukraine, Russia, Kazakhstan, Tanzania and Ghana).

¹⁸ K. Allen, 'The land rush doesn't have to end in a poor deal for Africans' (16 August 2010) available at <http://www.guardian.co.uk/business/2010/aug/16/foreign-land-grab-threat-to-africa> (last visited 20 April 2011).

¹⁹ Knaup & Mittelstaedt, *supra* note 16, part 2.

²⁰ Fitzgerald, *supra* note 5.

recipient of World Food Programme Aid.²¹ Currently, Ethiopia has not imposed any legal conditions on foreign investors to preferentially supply the Ethiopian market in the event of a national food crisis.

Tensions simmer between local government officials and central government officials in relation to these land deals. For example, in Ethiopia, a Saudi Arabian investor has been given a lease of 1000 hectares for 99 years on which to operate a greenhouse. The greenhouse's water usage is the same as the water needs of 100,000 Ethiopians. Yet, local officials cannot charge for the company's water usage since the local officials have no representation at the government negotiating table and the agreement between the central government and the private investors explicitly does not permit local government oversight.²²

Encouraging both foreign investors and government ministries to conclude these leases are economic development reports from international organizations. In 2009, a jointly sponsored study by the World Bank and Food and Agriculture Organization proposed intensifying agriculture in a 400 million hectare area that it refers to as the "Guinea Savannah" which includes portions of 25 countries including numerous food insecure countries.²³

Meanwhile, citizens from countries leasing land to foreign investors have been largely excluded from participating in the negotiations for these large scale leases in spite of the leases having real impacts on customary land tenure. Many of the deals are kept confidential.²⁴ When the public has been able to participate in the process, the participation has not always been

²¹ World Food Programme, 'Ethiopia' available at <http://www.wfp.org/countries/ethiopia> (last visited 20 April 2011) (WFP anticipates assisting 10 million people in Ethiopia in 2010, approximately 1/8th of the countries' population).

²² J. Vidal, 'How Food and Water are Driving a 21st Century Land Grab' (7 March 2010) available at <http://www.guardian.co.uk/environment/2010/mar/07/food-water-africa-land-grab> (last visited 20 April 2011).

²³ World Bank Publications (ed.), *Awakening Africa's Sleeping Giant: Prospects for Commercial Agriculture the Guinea Savannah and Beyond* (2009). (Guinea Savannah countries include Senegal, Sierra Leone, Guinea, Mali, Cote D'Ivoire, Burkina Faso, Ghana, Togo, Benin, Nigeria, Cameroon, Chad, Central African Republic, Sudan, Ethiopia, Uganda, Kenya, Tanzania, Angola, Democratic Republic of Congo, Angola, Zambia, Malawi, Mozambique, and Madagascar), 2.

²⁴ E. Aryeetey & Z. Lewis, 'African land Grabbing: Whose Interest are Served, Brookings Institute' (25 June 2010) available at http://www.brookings.edu/articles/2010/0625_africa_land_aryeetey.aspx (last visited 20 April 2011).

meaningful as the World Bank acknowledged in a recent report.²⁵ Without any concerted interest on the part of host governments or legal obligations on the part of investors to protect existing land tenure structures or existing public goods such as regional biodiversity, soil fertility or water quality, the existing large scale land leases are classic examples of resource capture. Here the decline in quantity of available worldwide commodities coupled with the spike in commodity prices has resulted in powerful groups both international and domestic working together to capture control over the distribution of remaining arable land.

A number of international briefings have queried whether the land leases can result in a win-win situation.²⁶ This isn't the right question. The government elites negotiating the agreements are clearly winners as far as enhancing their career by creating new connections with foreign capital. The overseas investors have clearly won in terms of accessing low-cost but valuable resources.²⁷ The question that needs to be posed in terms of the potential long-term impacts of these investments is whether there can be a win-win-win situation. Can today's public and tomorrow's public be winners in this game of business and political elites?

The answer depends on choices made by the governments leasing their "surplus" land and on choices made by the multinational industries using the land. This is not a question of merely bilateral interest but rather one of international concern. If the land becomes degraded through conventional agriculture methods, the situation is more likely to be a lose-win-lose situation. Governments will lose the trust of their citizens and valuable territorial resources. Overseas investors will win by walking away from depleted soils and contaminated groundwater without legal obligations to remediate. The public will lose by being trapped in a cycle of ever-increasing conditions of environmental scarcity. The following section of

²⁵ J. Blas, 'World Bank warns on 'farmland grab'' (27 July 2010) available at <http://www.ft.com/cms/s/0/62890172-99a8-11df-a852-00144feab49a.html#axzz1CLg1t8pb> (last visited 20 April 2011). (Citing the World Bank Report, *The Global Land Rush: Can it yield sustainable and equitable benefits?*).

²⁶ e.g. FAO, *supra* note 14.

²⁷ D. Vashisht, 'Punjab's African plot' (11 July 2010) available at <http://www.indianexpress.com/news/punjab-af-rican-plot/644788/0> (last visited 20 April 2011). (Farmer commenting after visiting Africa, "Vast tracts of arable land are lying vacant. There is no technology. In my entire trip of seven days, I saw two tractors and that too of the sort that we stopped using in India some 30 years ago. The land is fertile, the climate is suitable and water is abundant. Also, both land and labour are cheap.").

this paper examines the conditions of environmental degradation associated with conventional agricultural practices and suggests that an unregulated approach to land leasing may contribute to regional conflicts if government negotiators continue to neglect questions of protecting livelihoods through long-term protection of arable land resources.

II. Potential Environmental Impacts of Large Scale Land Leases

Conflict is particularly likely to emerge where foreign investors with the cooperation of government ministries either displace small-scale farmers from their customary lands or farm their allocated land in such a manner as to create conditions of environmental scarcity for both the current and the future generation. While there has been some evaluation of the impact of land leases on customary tenure, there has been little analysis of the current agricultural land leasing boom's potential to impact fragile and already stressed ecosystems. As the system is currently structured, there is little incentive for environmental stewardship. The owners of many of the agribusiness ventures in Africa and South Asia are foreign governments or private commercial entities focused on acquiring foreign leases to satisfy production demands for their home countries or for global markets. These ventures are bankrolled by hedge funds, pension funds, and sovereign wealth funds that expect some return on their capital. Assigned as 30 or 50 year leases, these foreign ventures do not have strong economic incentives to ensure long-term environmental protection for biodiversity, water quality, or soil productivity unless they are legally obliged to rehabilitate the land. There is no evidence that the existing contracts require investors to follow best environmental practices to prevent erosion or contamination of waterways.

Government officials from countries with investors seeking land leases believe that the onus for good policymaking is not on the investor but on the governments leasing the land. In a surprisingly candid remark on land leasing, the Minister of Investment in Egypt Mahmoud Mohieddin remarked that host countries must set their own responsible investment conditions and not blame "those who are coming to exploit and extract"²⁸.

²⁸ J. Bladd, 'ME's farmland buy in Africa seen as a win-win partnership' (15 April 2010) available at <http://www.arabianbusiness.com/586105-gulfs-farmland-policy-seen-as-win-win-partnership-for-africa> (last visited on 20 April 2011).

Resource capture focuses on the current economic benefits to a core set of involved actors without contemplating the externalities associated with large scale agricultural production. There are four critical environmental impacts on public goods that the current resource capture approach to large scale land leases has largely ignored. These impacts are all related to conventional farming practices: soil erosion/mining, habitat loss, environmental pollution, and water loss.

Pro-investment reports such as the FAO and World Bank Report *Awakening Africa's Sleeping Giant* gloss over probable environmental impacts. Relying on African case studies in Mozambique, Nigeria, and Zambia, the authors of the report observe that existing agricultural intensification for the purposes of commercial farming and subsistence farming practices has had impacts on both biodiversity and soil quality. For example, in Zambia, the decline in productivity of soil has been attributed to continued applications of inorganic fertilizers without adequate crop rotation²⁹: two practices common to large-scale commercial agriculture. Nothing is said in the FAO and World Bank Report about the potential for local, national, or regional conflict to emerge over degraded resources. The report authors instead remark, “[e]nvironmental change is an inevitable outcome of economic growth and development. Economic activity, including commercial agriculture, qualitatively transforms the physical environment within which it takes place—that is inevitable.”³⁰

The remainder of this section will evaluate how conventional farming practices on the leased land may result in irreversible soil erosion, habitat loss, environmental pollution, and water loss thereby exacerbating current conditions of environmental scarcity. The failure to address many of these concerns in agreements with foreign investors raises issues of whether States may be violating their international environmental treaty commitments.

²⁹ World Bank, *supra* note 23, 170.

³⁰ *Id.*, 171-172.

1. Soil Degradation

Soil degradation is a major issue for future food production for States that are already leasing large tracts of land to foreign investors or are contemplating entering such leases. For example, in Kenya, 56% of land in the well-populated Nyando River Basin is moderately to severely degraded.³¹ With only 9.2% of the country's land being designated as arable,³² the continuing loss of arable land costs Kenya up to 3.8% of gross domestic product.³³ In Africa, soil losses can average between 30 to 40 metric tons per hectare per year while soils are typically replaced at an average of between 1 to 2.5 metric tons per hectare per year.³⁴ Major sources of soil degradation include erosion caused by repeated cultivation, the removal of plant cover, soil compaction, overplanting, and salinization.³⁵

Mono-cropping is particularly problematic for topsoil erosion since soils are left exposed when seed is planted.³⁶ The current large scale land leases will contribute to soil erosion since the crops that are being planted are annual crops such as wheat and corn. The governments leasing the lands have not legally obliged investors to employ best soil erosion management practices such as letting land lie fallow, installing windbreaks, or keeping land planted with cover crops. Unabated erosion may also contribute to sedimentation in adjacent surface waters. Monocropping of commodities such as wheat will also contribute to soil degradation. Continually planting wheat in an area will deplete nutrients in otherwise fertile soil.³⁷

Without a concerted effort on the part of those governments who are leasing land to ensure that soil quality is not degraded, the land which may be restored to the government in 20, 50, or 99 years depending on the lease term will likely have been depleted of much of its original organic material. The current leases do not take into consideration the future costs of rehabilitating soil quality. For example, in Ethiopia, the Indian company

³¹ World Bank, *World Development Report 2008: Agriculture for Development* (2007), 191.

³² FIAN International Secretariat, 'Land Grabbing in Kenya and Mozambique' (April 2010) available at <http://www.fian.org/resources/documents/others/land-grabbing-in-kenya-and-mozambique/pdf> (last visited 20 April 2011), 16 [FIAN Report].

³³ World Bank, *supra* note 31, 191.

³⁴ J. Clay, *World Agriculture and the Environment: A Commodity-by-Commodity Guide to Impacts and Practices* (2004), 47.

³⁵ *Id.*, 47-48.

³⁶ *Id.*, 48.

³⁷ *Id.*, 380.

Karuturi Global is only paying \$99 per hectare for the life of the lease. Estimates in 1990s dollars for rehabilitation of degraded land ranged between \$2,000 per hectare to improve irrigated land and \$400 per hectare to restore rainfed cropland.³⁸ The government ministry's failure to systematically address future losses in soil fertility may inadvertently create irreversible conditions of environmental scarcity. As available arable land disappears from local food production, the stage is set for localized and potentially violent struggles over remaining arable land.

2. Habitat and Biodiversity Loss

Most of the States who are engaged in large land leases are signatories to the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources which call for parties to respectively for States to undertake "the conservation of biological diversity"³⁹ and "conservation and sustainable use of plant genetic resources for food and agriculture"⁴⁰. Yet the current leases do not explicitly require private investors to make any guarantee that their agribusiness activities will not interfere with State international environmental obligations. Given that most of the land leases are motivated by supplying overseas markets with specific large production crops, many of the leases are for single commodity crops such as wheat or rice.

Conventional agriculture puts pressure on protecting remaining biodiversity both at the species and habitat level. As a result of monocropping with only a limited and uniform variety of seeds, farmers have already lost access to 90% of genetic variations in crops.⁴¹ In many areas of the world local varieties of plants are being replaced by internationally managed varieties with better yields. Conventional agriculture has broad impact not just on wild habitats such as forests and wetlands biodiversity but also has a profound impact on agricultural biodiversity. The ongoing loss of human-generated biodiversity impacts the survival capacity of plants

³⁸ H. E. Dregne & N-T. Chou, Global Desertification Dimensions and Costs, in H. E. Dregne (ed.), *Degradation and Restoration of Arid Lands* (1992), 249-281.

³⁹ Convention on Biological Diversity, 31 I.L.M. (1992), 818, 823 Art. 1.

⁴⁰ 'International Treaty on Plant Genetic Resources for Food and Agriculture' (29 June 2004) available at <ftp://ftp.fao.org/docrep/fao/011/i0510e/i0510e.pdf> (last visited 20 April 2011), 2, Art. 1.1.

⁴¹ J. R. Treweek, C. Brown & P. Bubb, 'Assessing Biodiversity Impacts of Trade: a Review of Challenges in the Agriculture Sector' (December 2006) available at <http://www.cbd.int/impact/case-studies/cs-impact-iapa24-4-treweek-et-al-2006-en.pdf> (last visited 20 April 2011), 301.

and animals necessary for our food. Much of what constitutes agricultural biodiversity is now being preserved ex situ rather than in situ. Relying on genetic storage and captive breeding has fundamental impacts on the resiliency of living ecosystems.

One concern associated with mono-cropping is the elimination of wild varieties that cannot compete effectively with seeds bred for plantation style production. East Africa where a number of large land leases have been secured has had relatively success at promoting the conservation of agricultural biodiversity on smallholder farms.⁴² In Ethiopia, farmers in certain areas have used certain soil management practices to cultivate intensive but diverse gardens.⁴³ Depending on the proximity of large scale leases in countries such as Ethiopia or Tanzania to smallholder farms, mono-cropping practices could detrimentally interfere with practices of smallholders who are at least contributing to ongoing agricultural diversity.

Permitting large-scale conventional agriculture without putting any conditions on minimal environmental performance fails to secure appropriate integration between the environmental and agricultural sectors. Export-oriented farming activities of the intensity that are contemplated by foreign investors are likely to impact species either by removing their habitat or by removing species. There is no evidence in those States that are engaging in large-scale land leases that large commercial private investors are being required to evaluate their habitat impacts and mitigate for those impacts. In fact, evidence from civil society groups indicate that some foreign investors are flaunting what little environmental review has been done of their projects and are undertaking projects with irreversible impacts on habitat. In Kenya, civil society groups point to Dominion Farms, a US based investment that received environmental approval for rice production. Civil society groups observe that the project is now undertaking intensive aquaculture for export with effluent from the fish farm being dumped into a neighboring wetland.⁴⁴

Many communities depend on indigenous plants and animals for both their basic sustenance and their culture. The local loss of these plants and

⁴² M. Stocking, F. Kaihura & L. Liang, 'Agricultural biodiversity in East Africa – Introduction and acknowledgements', in F. Kaihura & M. Stocking (eds), *Agricultural Biodiversity in Smallholder Farms of East Africa*, (2003), 3.

⁴³ A. Konde *et al.*, 'Creating Gardens: The Dynamics of Soil Fertility Management in Wolayta, Southern Ethiopia', in I. Scoones (ed.), *Dynamics and Diversity: Soil Fertility and Farming Livelihoods in Africa* (2001), 45.

⁴⁴ FIAN report, *supra* note 32, 24.

animals as a result of large agricultural operations may contribute to conditions of environmental scarcity and increased competition over remaining resources. Some adaptation on the part of communities to the loss of certain species on the part of communities is possible, but these transitional periods may be complicated by the simultaneous loss of arable land. Where local populations can neither grow nor collect indigenous food, the conditions for social instability are created.

3. Environmental Pollution

The current laissez-faire approach to agricultural land leasing may also jeopardize States abilities to fully regulate pesticide applications by foreign investors even though many of the land-leasing States such as Ethiopia and Kenya are signatories to the Stockholm Convention on Persistent Organic Pollutants.⁴⁵ Pesticide application is low in Africa, with Africa absorbing only 2-4% of the global pesticide market and most of the chemicals being applied by commercial users on cotton, cocoa, oil palm, coffee, or vegetable plantations.⁴⁶ Wide scale pesticide application may result in unintended environmental consequences with impacts on crop production. Minor pests can become major problems when pesticide application unintentionally eliminates beneficial insects which had previously consumed minor pests. Equally concerning, some insects will develop resistance to pesticides so that more powerful pesticides will need to be applied to combat new strains of pesticide resistant species.

The application of certain chemicals to enhance crop production is likely to lead to freshwater contamination, soil contamination, loss of biodiversity both on and off the farm, and bioaccumulation of certain chemicals leading to problems both up and down the food chain. Leaching of chemicals from agricultural land into neighboring lands may lead to toxins entering water systems and impacting local communities.

Increased pesticide usage is also likely to have measurable implications for human health of farmworkers. In the United States where there is public knowledge of the dangerous aspects of pesticide usage, there are according to Monsanto approximately 300,000 reports of serious pesticide-related illnesses among farmworkers.⁴⁷ In Africa, current pesticide application is complicated by a general lack of education among farmers

⁴⁵ Stockholm Convention on Persistent Organic Pollutants, 40 I.L.M. (2001), 532.

⁴⁶ S. Williamson, A. Ball & J. Pretty, 'Trends in Pesticide Use and Drivers for Safer Pest Management in Four African Countries', 27 *Crop Protection* (2008) 10, 1327, 1327.

⁴⁷ Clay, *supra* note 34, 52. (citing Monsanto, *Fact Sheet on Pesticide Use* (1999)).

and a specific lack of awareness of the dangers of pesticide application. Researchers in the field have observed that pesticide application will often involve poorly maintained equipment, the use of banned products, dangerous combinations of products in pesticide cocktails, lack of minimal protective clothing, and overapplication.⁴⁸

Unregulated pesticide usage may impact fragile freshwater and marine habitats depending on the proximity of the leased land to surface water. Pesticide run off from United States agriculture has resulted in a dead zone in the Gulf of Mexico, and the Great Barrier Reef in Australia is threatened by runoff from pesticides and herbicides.⁴⁹

There is no indication in the current land leases that investors are expected to control the amount or the type of pesticide and herbicide applied. Currently, African farmers apply only modest amounts of chemical inputs to their fields. If agribusiness begins to apply large amounts of pesticides and herbicides to their leased lands as is common for current large scale agribusinesses, certain African ecosystems may be severely impacted by rising levels of pesticide residue resulting in growing health risks to both humans and other species. Unmanaged pesticide and fertilizer contamination could create local conflicts between investors and communities depending on the response of the government. In China, there is increasing concern that unmanaged environmental concerns will undermine the national and regional government. Chronic air and water contamination has generated protests from otherwise reticent Chinese including 50,000 pollution related protests in 2005⁵⁰ including some violent protests.⁵¹

⁴⁸ Williamson *et al.*, *supra* note 46, 1327-1329.

⁴⁹ Clay, *supra* note 34, 49.

⁵⁰ A. Ramzy, 'Are Chinese Citizens Ready for a Green Revolution (19 August 2009) available at <http://www.time.com/time/world/article/0,8599,1917369,00.html> (last visited 20 April 2011).

⁵¹ J. Yardley, 'Rural Chinese Riot as Police Try to Halt Pollution Protest' (14 April 2005) available at http://www.nytimes.com/2005/04/14/international/asia/14riot.html?_r=1&scp=1&sq=Rural%20Chinese%20Riot%20as%20Police%20Try%20to%20Halt%20Pollution%20Protest&st=cse (last visited 20 April 2011).

4. Water Loss

Agriculture uses 86.8% of fresh water in developing countries as compared to 46.1% in the developed world.⁵² Even taking into account that certain aspects of subsistence farming in developing countries are extremely inefficient in water usage, the problem of water allocation between foreign direct investors and subsistence farmers has the potential to threaten both community and environmental survival. In Africa where desertification has reclaimed formerly cultivatable lands, foreign agribusiness investors may gain preferential access to water needed by other users because just as there is no formal land tenure in many States, there is also no recognition of priority water rights.

Where States fail to require specific water conservation efforts on the part of private agribusiness investors or regulate water usage of agribusiness investors, States may be failing to achieve their obligations under the United Nations Convention to Combat Desertification.⁵³ Specifically, African states have agreed to “adopt the combating of desertification and/or the mitigation of the effects of drought as a central strategy in their efforts to eradicate poverty” as well as “reinforce participation of local populations and communities”⁵⁴.

In Africa, there is already existing tension between States in the Nile Basin on the equitable use and distribution of the water. Efforts are being made through the Nile Basin Initiative to reach some agreement on integrated water management. Given the water security needs of all of the States who rely on the Nile, it has proven difficult to negotiate agreements between upstream and downstream states. Arguably, foreign agribusiness has the potential to hijack current efforts to equitably resolve water allocations. Sudan and Ethiopia, both stakeholders in the Nile Basin, have leased large tracts of agricultural land to overseas investors. What arrangements have been made by the foreign investors to procure water for these tracts are unknown, but overseas investors may place undue influence on State water negotiators leading to long-term implications for water usage in the Nile region. For example, Sudan recently inaugurated the Merowe dam on the Nile River; the dam is being financed by Chinese and Middle Eastern investors at the same time as sovereign wealth funds and private

⁵² N. Mabey & R. McNally, ‘Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development’ (August 1999) available at <http://www.oecd.org/dataoecd/9/48/2089912.pdf> (last visited 20 April 2011), 24.

⁵³ United Nations Convention to Combat Desertification, 33 I.L.M. (1994), 1328.

⁵⁴ *Id.*, Annex 1, Art. 4.

investors from both China and certain Middle Eastern countries are procuring large land leases in Sudan.⁵⁵

Tensions over water usage are already apparent in East Africa where a 2010 Cooperative Framework Agreement, signed by land leasing upstream states such as Ethiopia guarantee equal access to the resources of the Nile river by all Nile Basin states.⁵⁶ Sudan has refused to sign the agreement and argues that it is guaranteed 15 billion cubic meters of Nile water and protests the ongoing hydroelectric projects installed by Ethiopia. Interests of large scale foreign agribusinesses who depend on irrigation for their commodities could further muddy these already delicate negotiations.⁵⁷

Given the challenges of obtaining access to clean water in Africa, there have been no public consultations about sharing water between foreign investors and local communities. As noted above, local government officials are not in a position to assert community rights to equitable utilization. Even if local governments are able to speak out on behalf of communities in their jurisdiction, unresolved ecological problems remain. No one at this time seems to be discussing protecting in stream values or the impact of agricultural water withdrawals on riparian species.

Even though large-scale export oriented mono-cropping has environmental risks that may interfere with the ability of States to meet their international environmental obligations,⁵⁸ States have generally refused to publicly acknowledge that land leases to foreign direct investors have negative externalities. The States instead focus on the growth opportunities associated with the investment including promises of new infrastructure

⁵⁵ 'Merowe Dam living model for South-South cooperation: Sudanese President' (10 April 2010) available at <http://english.peopledaily.com.cn/90001/90777/90855/6945283.html> (last visited 2 March 2011); A. A. Ali, 'Sudan's policy of selling land is more dangerous than building dams' (29 April 2010) available at <http://www.sudantribune.com/spip.php?article34911> (last visited 20 April 2011); D. Lepeska, 'In bid for food security, Qatar sows seeds globally' (2 September 2010) available at <http://farmlandgrab.org/post/view/15210> (last visited 20 April 2011).

⁵⁶ See in this volume D. Z. Mekonnen, 'Between the Sylla of Water Security and Charybdis of Benefit Sharing: The Nile Basin Cooperative Framework Agreement – Failed or Just Teetering on the Brink?', 3 *Goettingen Journal of International Law* (2011) 1, 345.

⁵⁷ R. Rotberg, 'The threat of a water war' (2 July 2010) available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/07/02/the_threat_of_a_water_war/ (last visited 20 April 2011).

⁵⁸ Two of the largest land leasing States are Sudan and Ethiopia. Both States are signatories to the Convention on Biological Diversity as well as the Convention to Combat Desertification.

built by private investors or State investors. The following section of this article explores the discontinuities that emerge between international economic law as a driver of arable land leasing to foreign investors and international human rights and environmental law as a legal approach requiring a precautionary angle on new investment to ensure adequate long-term protection for individual rights and ecosystems.

C. International Legal Context

These foreign land leases are at the nexus of two conflicting bodies of international law. On the one hand, international economic law enables these land leases while, on the other hand, foundational principles from international human rights law and international environmental law caution against proceeding with these leases unless the leases are conditioned to protect public, social and environmental values. This section examines how in the specific context of land leases some principles of international economic legal frameworks clash with competing human rights and environmental principles.

I. International Economic Framework

International investment law governs most of the land leases since most of the investors are foreign nationals or foreign corporations seeking to extend their resource base for home state markets. Many of the land leases are governed by the terms of Bilateral Investment Treaties (BITs) which frequently include provisions promoting national treatment for foreign investors, reducing risks for foreign investors, and providing injured foreign investors with access to State-investor international arbitration. States whose investors heavily invest in another State frequently require the source country for their investment to enter into a BIT before they will encourage their national to invest. In 2000, China concluded a BIT in Ethiopia which governs the \$1 billion of investment that China made in Ethiopia in 2009 as well as “future investment in agricultural projects”⁵⁹.

The Chinese-Ethiopian BIT is a prime example of how the law may be implemented to protect Chinese investors including both those who are

⁵⁹ M. Fitzgerald, ‘China invests in Ethiopia but at what cost?’ (27 January 2010) available at <http://abbaymedia.com/News/?p=3636> (last visited 20 April 2011).

funded by sovereign wealth funds and those who are privately funded.⁶⁰ The BIT is used here as illustrative of some of the international economic disputes that might arise in the context of land leases.

The BIT would apply to land leases since the term “investment” includes “immovable property”⁶¹ as well as “concessions [...] to [...] exploit natural resources”⁶². Both parties have agreed to accord to each other’s investments “fair and equitable treatment” as well as “protection in the territory of the other Contracting Party”⁶³. In the context of land leases without any existing environmental conditions in the lease, this may create a “legitimate expectation” that the investor will be free to operate through conventional mono-cropping without any restraints being placed on extracting surface water and groundwater for irrigation purposes. “Legitimate expectations” have been considered by investment tribunals to be possibly “relevant to the application of the fair and equitable treatment clause contained in the BIT”⁶⁴. Therefore, a breach of a “legitimate expectation” may be construed as a violation of a BIT’s “fair and equitable treatment” clause.

States such as Ethiopia may be inadvertently creating expectations by making promises of non-interference with investments. Since leasing arable land has become a competitive enterprise by African States with States such as Ethiopia creating specific government agencies to promote the leases, host states may find their investment sales pitches being transformed into “legitimate expectations”. As the *Saluka v. Czech Republic* tribunal observed, an investor’s legitimate expectations include that a State “will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on

⁶⁰ ‘Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investments’ (entered into force May 2000) available at http://www.unctad.org/sections/dite/iaa/docs/bits/china_ethiopia.pdf (last visited 20 April 2011) [Ethiopia-China Agreement].

⁶¹ *Id.*, Art. 1 (1) (a).

⁶² *Id.*, Art. 1 (1) (e).

⁶³ *Id.*, Art. 3 (1).

⁶⁴ *CMS Gas Transmission Company v. Argentina*, Decision of the *ad hoc* Committee on the Application for Annulment (25 September 2007) available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4 (last visited 20 April 2011), para. 89.

unjustifiable distinctions)”⁶⁵. Could a casual promise of no future burden some social or environmental regulatory action made by a government agent interested in closing the deal be interpreted as creating “legitimate expectations” if the State was to impose environmental conditions or local market conditions on the investment?

Likewise, both have agreed that neither State will expropriate or nationalize investments unless the actions are taken for the public interest, “without discrimination”⁶⁶ and the investors are compensated.⁶⁷ It is unclear at this juncture whether investing parties might file “expropriation” claims if States leasing land impose subsequent environmental or export conditions on investment designed to protect public interest. If, for example, Ethiopia was to impose certain regulations designed to minimize the damage associated with heavy irrigation, heavy pesticide application or monocropping on large agricultural tracts, Chinese foreign investors may claim that they are being singled out and discriminated against because the profitability of their investment depends on water intensive and pesticide intensive practices. Likewise, if Ethiopia was to require through a regulation promulgated after the start of the investment a certain amount of the food produced enter local Ethiopian markets as a safeguard against famine, this regulatory action could also be construed as a regulatory expropriation. Ethiopia could find itself paying China for the difference between what the crops could command in a Chinese market and the market price in Ethiopia.

International economic law governs any disputes that might arise under the BIT between an investor from China and Ethiopia. Article 9 provides that disputes over the amount of compensation for expropriation may be submitted to ICSID tribunal if the investor has not submitted the dispute to an Ethiopian court. Generally investors avail themselves of this option because of the perception that tribunals will focus only on the alleged economic losses of the investor and not on the underlying host-state policies triggering the loss. The touchstone case exemplifying a tribunal’s investor-friendly approach to legitimate environmental State action is *Santa Elena v.*

⁶⁵ *Saluka Investments B.V. v. Czech Republic*, Partial Award of the Permanent Court of Arbitration (17 March 2006) available at <http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf> (last visited 20 April 2011), para. 309.

⁶⁶ Ethiopia-China Agreement, *supra* note 59, Art. 4 (1) (c).

⁶⁷ Ethiopia-China Agreement, *supra* note 59, Art. 4 (2).

Costa Rica.⁶⁸ While the case narrowly focused on what compensation was fair for a rezoning of property adjacent to a national park that the investors had hoped to develop, the tribunal offered broad reflections on expropriation and environmental protection which could be construed by future panels to prioritize international economic legal concerns over non-economic concerns. Specifically, the tribunal stated “Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains”⁶⁹.

In addition to the investor-friendly BITs, some investor and host-State agreements may also contain stabilization clauses that allow investors to avoid compliance with new environmental measures.⁷⁰ In some instances, these stabilization clauses will receive international protection under international investment law. In *AGIP v. Republic of Congo*, an arbitration tribunal agreed that the government could not apply an ordinance to an investment that would change the private character of the investment because of the existence of a stabilization clause. Finding the State in breach of its agreement, the Tribunal stated:

“These stabilization clauses, freely accepted by the Government, do not affect the principle of its sovereign legislative and regulatory powers, since it retains both in relation to those, whether national or foreigners, with whom it has not entered into such obligations, and that, in the present case, changes in the legislative and regulatory

⁶⁸ *Compania del desarrollo de Santa Elena, S.A. and The Republic of Costa Rica*, ICSID Case No. ARB/96/1, 15 *ICSID Review – Foreign International Law Journal* (2000), 169.

⁶⁹ *Id.*, para.72.

⁷⁰ International Finance Corporation, ‘Stabilization Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights’ (27 March 2009) available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClause sandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClause sandHumanRights/$FILE/Stabilization+Paper.pdf) (last visited 20 April 2011), ix. (Broad stabilization clauses, with exemptions from new laws, are found in investment contracts based in Sub-Saharan Africa and North Africa).

agreements stipulated in the agreement simply cannot be invoked against the other contracting party”⁷¹.

International investment law as currently structured protects investors and facilitates foreign direct investment in a globalizing world. Yet conventional agribusiness leases of arable land in food insecure countries with fragile environments raise legitimate non-investment concerns. Where is the balance point among an investor’s expectations of return, society’s expectation of livelihood and sustenance, and the need for some long-term ecosystem protection in vulnerable habitats? The following section describes an international legal framework that threatens the security of existing reciprocal investment obligations by focusing on both non-corporate interests and non-economic interests.

II. International Human Rights and Environmental Legal Framework

The priorities of international human rights and environmental legal frameworks are in many instances in direct conflict with the priorities of guaranteeing predictability and security of investments. In contrast to protecting investment assets and returns on investments, international human rights and environmental law focus on protecting the rights of individuals particularly vulnerable groups and the integrity of ecosystems. In the context of land leases, there is no demonstration by States leasing land that they are requiring private investor’s interests to align their investment projects with the interests of community groups or long-term environmental protection. In return for the arable land concessions, States are bargaining for large infrastructure projects such as deepwater ports that could have inadvertent impacts on human rights through displacement of vulnerable groups leaving in the vicinity of the redevelopment area or on the marine environment.⁷²

The United Nations has raised concerns about the compatibility of the land leases with human rights obligations. Special Rapporteur on the Right

⁷¹ *AGIP Company v. Popular Republic of Congo*, Award of 30 November 1979, 21 ILM (1982), 726, 735-736, para. 86.

⁷² R. Laishley, ‘Is Africa’s land up for grabs?: Foreign acquisitions: some opportunities, but many see threats’ (October 2009) available at <http://www.un.org/ecosocdev/geninfo/afrec/vol23no3/233-land.html> (last visited 20 April 2011). (In exchange for 40,000 hectares in the Tana River Valley in Kenya, Qatar has agreed to build a deep-sea port for the Kenyan government.)

to Food, Olivier de Schutter expressed concerns about whether the leases would interfere with the right to adequate food, right of indigenous peoples to use their land, rights of local communities to exploit national natural resources, and the rights of development.⁷³ Relying on Article 11 of the International Covenant on Economic, Social, and Cultural Rights,⁷⁴ he observes that States must provide citizens with opportunities to obtain sufficient, nutritionally adequate, and safe food. He indicates that, the “human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives”⁷⁵. News reports indicate that foreign investors may already be violating the right to food. In December 2010, in Mali, small-scale farmers were informed that Libyan leader Muammar el-Qaddafi was now in possession of the lands that they had cultivated for multiple generations and would use the land to grow rice for export to Libya.⁷⁶

Special Rapporteur de Schutter recommends taking a transparent approach to understanding the long-term implication of the land leases. He proposes adopting a social and environmental impact report “prior to the completion of the negotiations on (a) local employment and incomes, disaggregated by gender and, where applicable, by ethnic group; (b) access to productive resources by local communities, including pastoralists or itinerant farmers; (c) the arrival of new technologies and investments in infrastructure; (d) the environment, including soil depletion, the use of water resources and genetic erosion; and (e) access, availability and adequacy of food”⁷⁷. His pre-investment commitment approach mirrors the basic international environmental principle of the precautionary approach.

Recognizing that planning can avoid irreversible environmental impacts, environmental negotiators have agreed over the last three decades to apply a precautionary approach where a State action may have adverse effects on the environment. Where there is a risk that a State is aware of, States have a duty to investigate the risk further. “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be

⁷³ De Schutter, *supra* note 8.

⁷⁴ Committee on Economic, Social and Cultural Rights, The right to adequate food (Art. 11), UN Doc. E/C 12/1999/5, 12 May 1999, para. 14.

⁷⁵ De Schutter, *supra* note 8, para. 4.

⁷⁶ N. MacFarquhar, ‘African Farmers Displaced as Investors Move in’ (21 December 2010) available at www.nytimes.com/2010/12/22/world/africa/22mali.html (last visited 20 April 2011).

⁷⁷ De Schutter, *supra* note 8, 17, principle 9.

used as a reason for postponing cost-effective measures to prevent environmental degradation [, States] according to their capabilities”⁷⁸ are expected to apply the precautionary approach. While there is some debate about the international legal status of the precautionary approach,⁷⁹ it seems reasonable to extend the concept of the “precautionary approach” to require State action either by prohibiting an activity or conditioning an activity where States have already experienced similar environmental degradation.

Taking a precautionary approach is particularly relevant regarding fresh water usage by foreign land investors in light of both the existing water shortages and future climate-related water shortages in Africa.⁸⁰ Many of the investors who are investing in African lands are nationals of water-insecure States. These investors have made no public indication that they will be employing water efficient irrigation techniques in their leased lands or protecting local water sources from agricultural runoff. Host states under Principle 15 should assume that investors will not voluntarily engage in sustainable agriculture approaches and should require some “cost-effective” affirmative action by private investors indicating how national water resources will be protected.

The precautionary approach as a general principle of law may serve an importing bridging function between the competing goals of international economic law and international environmental and human rights law in relation to overseas land leases. As Birnie, Boyle, and Redgwell suggest, the precautionary approach may be instrumental in determining “how conflicts between other rules or principles will be resolved”⁸¹. The final section proposes introducing an explicit precautionary approach into creating land leases that are conditioned to protect both social and environmental interests. While the Human Rights Council has already taken an active role in understanding the implication of the land leases on individual human rights, there has not been any similar response in terms of protecting arable lands from overexploitation. To address the anticipatory concerns of environmental exploitation of arable land raised earlier in this paper, this

⁷⁸ Report of the UN Conference on Environment and Development, UN Doc. A/CONF.151/26/Vol.1, 15 August 1992, principle 15.

⁷⁹ P. Birnie, A. Boyle & C. Redgwell, *International Law & the Environment*, 3rd ed. (2009), 159-160.

⁸⁰ United Nations Environmental Programme, *Africa Water Atlas* (2010). (Identifying Africa is the world's second-driest continent with only 9% of global renewable water resource and 15% of the global population.)

⁸¹ Birnie *et al.*, *supra* note 79, 28.

final section proposes the creation of a new international legal institution concerned with protecting the long-term environmental health of vulnerable, arable lands on behalf of vulnerable communities.

D. Policy Proposals for Ensuring a Precautionary Approach to Land Leases

Assuming application of ordinary conventional methods of large scale farming and no intention on the part of the investor to deliberately damage the land, the leased land, if it is farmed by conventional mono-cropping practices is likely to be returned depleted of nutrients and contaminated with some level of pesticides and herbicides. Likewise, where a crop requires irrigation, local aquifers may be over-tapped. Without some regulation of the agribusiness practices of private investor, the available production yield for the land will decrease over the lifetime of the lease.

Existing international economic law does not provide much guidance in terms of reconciling the interests in attracting foreign direct investment and the need to do so in a precautionary fashion that takes into account long-term social and environmental concerns. As such, the legal approaches embodied in economic law versus environmental and human rights law seem mutually incompatible. Is there some approach that might bridge present concerns of facilitating economically advantageous international investment transactions with the more forward-looking concerns of economic and social sustainability embodied in international environmental and international human rights law?

Intergovernmental institutions have made policy recommendations to respond to a variety of concerns involving the overseas leases including displacement of small scale farmers and environmental degradation but all of these recommendations are non-binding and left to the discretion of investors and States to implement without any monitoring. The Food and Agriculture Organisation and the World Bank have proposed a voluntary code of conduct for States engaged in land leasing encompassing several principles.⁸² Principle 7 of the draft code calls for environmental impacts due to a project to be “quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative

⁸² J. Blas, ‘UN to regulate farmland grab deals’ (18 November 18 2009) available at <http://farmlandgrab.org/9050> (last visited 20 April 2011).

impacts and mitigating them”⁸³. Interestingly, the principle appears to have been deliberately drafted in passive language to avoid assigning responsibilities. Who will be responsible to quantify and mitigate the impacts?

As drafted, principle 7 is too vague to be applied meaningfully. To address the issues raised by the large scale leases require detailed agro-ecological studies on a lease by lease basis and not just vague prescriptive language to quantify and mitigate environmental impacts. The authors of the principle recognize the inherent limitation of Principle 7 when they recognize several concrete impediments to public protection of environmental resources: arbitrary implementation of regulations, limited capacity of regulatory institutions, overlapping institution competencies, and limited opportunities “for the public to lodge complaints”⁸⁴. What becomes apparent from reading the text of the draft principles is that there are insufficient monitoring and accountability measures to ensure that foreign direct investment does not negatively impact competing social and environmental needs.

This paper proposes two legal strategies to ensure that environmental concerns are prioritized rather than marginalized in the lease making process. The first strategy is to rewrite draft principle 7 to be more specific in its intent and to empower both government agencies and citizens that have been marginalized from participating in the current land leases. For example, in Kenya, where the government has agreed to lease 40,000 acres to Qatar for export-based commodities, senior members of the Ministry of Lands were never informed of the proposed deals.⁸⁵ The second strategy is to create an institution that can assist in the full implementation of a revised Principle 7 that provides oversight to ensure adequate socio-environmental impact assessments are undertaken and that facilitates disagreements between the public and investors when alleged.

⁸³ FAO *et al.*, ‘Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources’ (25 January 2010) available at http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf (last visited 20 April 2011), 18.

⁸⁴ *Id.*, 19.

⁸⁵ FIAN Report, *supra* note 32, 19.

I. Redrafting Principle 7 of the FAO and World Bank Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources

First, Principle 7 should be redrafted to reflect the concerns raised in the FAO and World Bank's text about arbitrary implementation of regulations and limited capacity of national institutions. In order to address both substantive and procedural concerns, the language might read:

“Governments leasing agricultural land or land targeted for agricultural use will require third-party expert environmental assessment of a project's quantifiable impact on soil fertility, soil erosion, eutrophication of adjacent waterways, water quality, air quality, human health, biodiversity, water quantity, land tenure rights, and labor rights. Expert data will be communicated to communities in a form that is easily accessible to the communities. Individuals and communities will have an opportunity to lodge pre-investment complaints with a governmental department detailing their general socio-environmental concerns. The government officials must consider these complaints, investigate the nature of the complaint, and respond before a project can be tentatively approved. Copies of the complaints and responses must be provided to the office of the International Ombudsman. Investors must file a mitigation plan before the project can be finally approved to address public complaints. Mitigation plans are subject to public review. For approved projects where there are socio-environmental impacts, individuals and communities will have the opportunity to file their complaint with an International Ombudsman.”

As rewritten, the principle addresses the international and civil society concerns over the lack of transparency associated with the current land leases as well as the lack of meaningful input from citizens on national resource management. The principle provides specific guidance of what aspects of an investment a government must review as well as providing a neutral dispute resolution procedure outside of the influence of the host State. International investment law permits States to require that a private

investor undertake a pre-investment environmental impact assessment report.⁸⁶

II. Creating a UN Based International Ombudsman's Office for Socio-Environmental Review of Land Leases and Dispute Settlement

Second, in order to provide both marginalized government agencies and citizens with an opportunity to be heard, there is a need for an institution that can technically assist governments with undertaking environmental assessment, neutrally evaluate mitigation options to ensure long-term environmental health of the land and social protection of vulnerable groups, and monitor compliance with mitigation plans. To address all of these needs, it would be useful to create an International Ombudsman's office operating under the auspices of the United Nations Secretary-General who could assist developing governments and act as a neutral intermediary between environmental government ministries, labor ministries, and citizens on the one hand and investment ministries and investors on the other hand.

The first public sector ombudsman was created by the Swedish Parliament to protect individual rights against the excesses of the governmental bureaucracy.⁸⁷ Public sector ombudsmen are frequently employed as government intermediaries whose office is created by legislation. Ideally, the ombudsmen offices are able to receive and investigate complaints against governmental agencies, criticize government agencies, recommend corrective action, and issue public reports.⁸⁸ The Ombudsman proposed by this paper would continue in the tradition of other public sector ombudsman by operating as an intermediary between host States and investors with the single task of protecting remaining arable land from environmental degradation.

The idea of creating an international ombudsman who investigates environmental matters involving States is not new. In responding to a need voiced at the 1992 Environment and Development Conference, the

⁸⁶ *Maffezini v. Spain*, ICSID Case No.ARB/97/7, 13 November 2000, 5 *ICSID Reports*, 419 (2002), para. 67.

⁸⁷ United States Ombudsman Association, 'History' (2011) available at http://www.usombudsman.org/en/About_Us/history.cfm (last visited 20 April 2011).

⁸⁸ United States Ombudsman Association, 'Legislative Model for Ombudsman' (2011) available at http://usoa.non-profitsites.biz/en/About_Us/legislative_model.cfm (last visited 20 April 2011).

Ombudsman Centre for the Environment and Development (OmCED) opened in 2000 at the United Nations University of Peace in Costa Rica as part of a non-governmental initiative.⁸⁹ Created to provide non-adversarial and non-judicial methods of resolving transboundary environment and development disputes, OmCED offered mediation services including at the request of the Government of Costa Rica a mediation among the Government of Costa Rica, indigenous populations, and the World Bank regarding the construction of the a hydroelectric dam.⁹⁰ However, OmCED eventually ceased operating due to funding constraints.⁹¹

Some national ombudsmen are specifically charged with investigating environmental matters. For example, in Namibia, under the Ombudsman Act of 1990, the Ombudsman's office can investigate environmental degradation under its own authority. Specifically, the Ombudsman has the duty "to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of nonrenewable resources, the degradation and destruction of ecosystems"⁹².

Hungary has created an ombudsman's office that advocates on behalf of future generations.⁹³ The office is charged with investigating matters associated with the Hungarian constitutional right to a healthy environment. The office produces national reports focused on implementing cultural heritage preservation and nature conservation obligations for future generations. In a recent report on the development of a straw-fired energy plant, the Commissioner indicated that he would be seeking an annulment of the plant's environmental permits on the grounds that long-term environmental impacts were not properly considered. One of the environmental considerations that the Commissioner found was overlooked by local authorities was, interestingly enough, impacts on arable land. The

⁸⁹ Environmental Data Interactive Exchange (Edie), 'New Environmental Ombudsman Centre Begins Work this Month' (14 July 2000) available at http://www.edie.net/news/news_story.asp?id=2958 (last visited 20 April 2011).

⁹⁰ J. Carls & W. Haffar, 'Resolving the Boruca dam conflict in Costa Rica' (4 November 2008) available at http://www.monitor.upeace.org/archive.cfm?id_article=560 (last visited 20 April 2011).

⁹¹ N. L. Bridgeman & D. B. Hunter, 'Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism', 20 *Georgetown International Environmental Law Review* (2008) 2, 217.

⁹² 'Ombudsman Act No. 7 of 1990', *Government Gazette of the Republic of Namibia* (1990) 32, 1.

⁹³ See Parliamentary Commissioner for Future Generations available at <http://jno.hu/en/> (last visited 20 April 2011).

Commissioner found that the reliance on straw to fuel the energy plant “encourages intensive arable cultivation” leading potentially to “the loss of biodiversity, topsoil degradation, water pollution and destruction of habitats”⁹⁴.

As this paper envisions, the International Ombudsman’s office would house a combination of technical and legal experts who would operate independently of each other. In order to avoid conflicts of interest between employees and their national governments, ombudsman employees would only review projects from states where they are not citizens or have other substantial ties. Technical experts would be responsible for assisting government staff with measuring project impacts using generally accepted socio-environmental impact methodologies, providing feedback on an investor’s proposed mitigation plan, and monitoring subsequent compliance with approved mitigation plans. The work would be politically neutral. Legal experts would be responsible for reviewing complaints from individuals and communities and raising specific environmental concerns including potential treaty obligations with responsible government officials. The legal experts would work separate from the technical experts in order to avoid politicizing the work of the technical experts.

The Ombudsman’s dispute resolution mandate would be limited to addressing the impact of overseas investment on socio-environmental protection in member states. Where the Ombudsman is made aware of an emerging transboundary environmental or social issue (e.g. leases that may trigger international migration), the Ombudsman would be empowered to request that a government permit it to investigate the facts even though a complaint may not have been filed. The Ombudsman would not have the authority to respond to wholly domestic disputes unless mediation was requested by a government as in the OmCED-Case described above involving Costa Rica. Where the Ombudsman is aware of a domestic dispute, the Ombudsman could offer its facilitation services.

As a neutral, the Ombudsman would be in a unique position to investigate facts, publish findings of fact, and then serve as a mediator in the application of competing economic and environmental or human rights laws. Creating a more inclusive decision-making and enforcement process may be enough to challenge the current dynamics of elite resource capture

⁹⁴ Parliamentary Commissioner for Future Generations, ‘Main Conclusion of the Parliamentary Commissioner for Future Generations’ statement on the effects of the prospective straw-fired power plant in Szerencs’ available at http://jno.hu/en/?&menu=cas_summ&doc=szerencs (last visited 20 April 2011).

where marginalized government agencies and the public remain uninformed of critical development decisions. Food-insecure Africa and Southeast Asia need new investment, but citizens of these regions also need some assurances that external investment will not compromise the integrity of resources that they and their future generations are likely to depend on for sustenance. Based on the current secretive land deals whose details are known only by certain government elites, citizens cannot rely solely on their governments for these assurances.⁹⁵

E. Conclusion

Foreign investors leasing agricultural land in food insecure countries is an emerging case of elite resource capture that threatens human security. Agricultural land leases between private foreign investors and public governments should not be regarded as exclusively private business deals outside of the ambit of international law. They are business deals with potential long-term health consequences for the public and long-term implications for the environment. Unless investors are required to steward their leases and prevent soil degradation, water contamination, and loss of biodiversity, States may find themselves 20 to 100 years from now receiving land from investors that is no longer arable. In making leases, States need to consider the long-term sustainability of land for their own food security needs.

Since many States lack the management resources, the legislative will or the enforcement resources to ensure that short-term foreign investments do not undermine long-term public interests, there is a need for international cooperation. This paper proposes introducing an international ombudsman to provide environmental review of potential leases in hopes of avoiding future conditions of environmental scarcity. Globally we need to be forward-thinking in tackling a very real problem – how do we equitably feed growing populations?

Critics may say that creating a new institution would simply distract from the powerful economic interests underlying the existing leases. The opposite is true. The new institution would bring much-needed transparency into the current shadowy closed-door world of arable land negotiations and provide an important body to ensure a precautionary approach to foreign investment in arable land. Will this new institution be able to effectively

⁹⁵ FIAN report, *supra* note 32, 19.

mitigate for emerging conflicts over arable land in food insecure regions? It will depend on the resources allotted by the UN, the support of UN member states, and the vision of the proposed Ombudsman's office.

Every year, up to 30 million hectares of farmland are lost due to severe soil degradation, conversion to industrial use and urbanization.⁹⁶ Unfortunately, we have no technological fix for this loss of arable land. Given the pressures of population growth coupled with the uncertainties of climate change, the time for the global leaders to respond to the clash between long-term environmental obligations and the push for new investment opportunities supported by international economic law is now.

⁹⁶ 'Farmers hurt as pressure on arable land grows: U.N.' (21 October 2010) available at <http://www.reuters.com/article/idUSTRE69K42X20101021> (last visited 20 April 2011).

Overcoming State-Centrism in International Water Law:

‘Regional Common Concern’ as the Normative Foundation of Water Security

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Abstract

The peaceful management of the world's freshwater resources is one of the most challenging tasks the international community is facing. While 'water war' is a catchphrase mainly used by the media, one cannot overstate the disruptive force water disputes have on all aspects of socio-economic development and the environment. Furthermore, the accelerating global water crisis draws a dark picture in which the future may look nothing like the present. With rising demand and declining availability of key natural resources, the world might soon face a 'perfect storm' of food, energy and water shortages. A simultaneous occurrence of these crises would seriously threaten global stability, and thus endanger the very foundation of international security.

The aim of this paper is to contribute to progressive legal discourse by asking how the notion of 'regional common concern' can serve as a normative foundation of water security, in order to help overcoming the state-centricism in orthodox international water law. The refinement of international (water) law is vital; should it play a more prominent role in addressing the challenges of global water insecurity.

A. Introduction

The international community is faced with the crucial task of peacefully managing the world's shared freshwater resources – which is getting increasingly challenging, since water is an integral part of the planet's social, economic, political and environmental wellbeing. While the potential disputes over shared water resources may not have led to outright conflict,¹ it nevertheless has been used as a political tool or even military target, frequently.² Realizing the pressure on the sustainable management of freshwater resources added by population growth, economic development and global environmental change, one cannot overrate the disruptive force water disputes (local or international) already have for the socio-economic

¹ The only known war solely fought over water, between the ancient Mesopotamian city states of Lagash and Umma, occurred some 4,500 years ago; see S. L. Postel & A. T. Wolf, 'Dehydrating Conflict', *Foreign Policy* (2001) 126, 60,60.

² P. H. Gleick, 'Water and Terrorism', 8 *Water Policy* (2006) 6, 481, 481.

development and the environment. Coming to grips with global water insecurity is an exceptionally complex challenge with multilevel and polycentric forces that all have to be taken into account. For too long, the debate has been focused on piecemeal approaches solely within the ‘water box.’ Here, the concept of ‘water security’ could provide a new pathway – one which leads the discourse beyond military aspects and the narrow interests of nation states. In order to achieve this, however, the political notion of water security needs to be underpinned by international law, which plays a key role in maintaining ‘international peace and security.’³

Earlier work has introduced the novel analytical framework of water security – the ‘4As’ of availability, access, adaptability, and ambit – as a solid concept for looking at the global water crisis from the perspective of international law. It exposes the shortcomings of the current legal regime; above all state-centrism, which has thwarted true hydrosolidarity among riparians. In order to stabilize global security, international water law has to better address the ‘common’ character of the vital resource. This can only be achieved by rethinking some of the most fundamental tenets of international law (such as state sovereignty); which, in turn, will strengthen its own role and relevance.

A promising way forward seems to be considering water security as a matter of ‘regional common concern’, drawing from the notion of ‘common concern of mankind’. The looming global water crisis and the increased interdependence of states sharing the freshwater resources could provide the necessary push to justify re-examination of established paradigms – and ultimately help to overcome prevalent political reluctance. Fully apprehending the notion of ‘ambit’, which does justice to the fact that security can no longer be considered as a zero sum game between states, will allow for a take on water security which acknowledges that ‘ultimate’ (i.e. common and sustainable) security can only be achieved with a truly joint strategy for the benefit of the whole region. This paper will contribute to the forward-looking legal debate by asking how the notion of ‘regional common concern’ can serve as a normative foundation of water security, in order to ultimately overcome the state-centrism of international water law. It will do so by (1) briefly illustrating the ‘4A’ analytical framework of water security; (2) highlighting the main shortcomings of the current legal regime;

³ Art. 1(1) of the *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. 16 [UN Charter].

and (3) proposing a way out of the state-centered quandary by phrasing water security as a matter of 'regional common concern'.

It is our responsibility to transform this time of crisis into a time of opportunity – the opportunity to drive new thinking forward. Only if we develop the fundamental tenets of international law further, can it live up to the challenges of global water insecurity, and ensure the peaceful management of our shared freshwater resources.

B. Water in Crisis

Although our planet will never run out of freshwater,⁴ due to its extremely uneven distribution (caused by both natural and human factors), the technical and economic constraints on tapping some of the largest volumes of freshwater, increasing pollution of the easily available stocks, and the fact that moving water around is mostly non-economical, billions of people around the world are denied access to safe drinking water and adequate sanitation.⁵ While this scarcely poses an immediate inter-state military threat, the consequent increase in local and regional tensions over access to freshwater resources is nonetheless jeopardizing global stability and international security.⁶ Without playing down the importance of other levels of water security (national, local, and even individual), the focus of this paper is on the international dimension. Not only do transboundary watercourses constitute a hugely important source of freshwater;⁷ they are

⁴ Globally, the total volume of freshwater resources has always been, and will always be, around 35 million km³ (of which 90 per cent are locked up in polar ice caps and groundwater reservoirs which are presently inaccessible) – which equals 2.5% of the 1.4 billion km³ of water on Earth; see I. A. Shiklomanov, 'World Fresh Water Resources', in P. H. Gleick (ed.), *Water in Crisis: Guide to the World's Fresh Water Resources* (1993), 13.

⁵ United Nations Department of Economic and Social Affairs, 'The Millennium Development Goals Report 2010' (2010) available at <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20low%20res%2020100615%20-.pdf> (last visited 28 April 2011), 59.

⁶ B.-O. Magsig, 'Introducing an Analytical Framework for Water Security: A Platform for the Refinement of International Water Law', 20 *Journal of Water Law* (2009) 2/3, 61, 61.

⁷ The 270 basins shared by two or more countries cover around fifty per cent of the global landmass, contribute almost sixty per cent of freshwater flow, and make forty per cent of the world's population dependent on these transboundary water resources; S. E. Draper & J. E. Kundell, 'Impact of Climate Change on Transboundary Water Sharing', 133 *Journal of Water Resources Planning and Management* (2007) 5, 405,

also heavily influenced by the complex power games of geopolitics, making international water security even more multi-faceted than water management in general. Here, the gap between the surging increase in demand for freshwater with sufficient quality and its declining supply, the uneven distribution of resources, and unilateral development of (often big in scale and in social/environmental impact) water projects frequently constitute disruptive factors in co-riparian relations.⁸

Chronic water scarcity, as well as water-related disasters like droughts and floods, are affecting communities in both developed and developing countries. While sometimes the impacts are quite vivid – e.g. the recent flood in Pakistan which caused the death of at least 1.500 people, left more than ten million Pakistanis homeless and had a detrimental impact on the country's food-security;⁹ or the armed battles for water between tribes in Kenya¹⁰ – often, the linkages are rather hidden. As the world becomes more and more interdependent, the world water crisis gets more and more complex, as well. A recent report by the Royal Academy of Engineering, for instance, found that the UK is heavily relying on 'virtual water' (imported in form of goods) from drought-prone countries.¹¹ Hence, its main recommendation was to put water at the centre of the UK's international development policy – not only to avoid surging water insecurity abroad, but also at home.¹² Recognizing that through 'virtual water' the market is a powerful driver of water policies even in distant countries, another report looking at the impacts of the UK's water footprint through a case study of Peruvian asparagus is calling the investors and retailers to change existing

405; W. T. Jarvis, 'Water Wars, War of the Well, and Guerilla Well-Fare', 48 *Ground Water* (2010) 3, 346, 347.

⁸ United Nations Environment Programme, 'Atlas of International Freshwater Agreements' (2002) available at <http://www.transboundarywaters.orst.edu/publications/atlas/> (last visited 14 April 2011), 2.

⁹ Alert Net, 'Interview – Pakistan flood rebuilding to take at least 3-5 years' (24 March 2011) available at <http://www.trust.org/alertnet/news/interview-pakistan-flood-rebuilding-to-take-at-least-3-5-years> (last visited 28 April 2011).

¹⁰ N. Colundalur, 'Tribes in Kenya Wage Water War' (6 September 2010) available at http://www.inthesetimes.com/article/6335/tribes_in_kenya_wage_water_war (last visited 28 April 2011).

¹¹ The Royal Academy of Engineering, 'Global Water Security: An Engineering Perspective' (2010) available at http://www.raeng.org.uk/news/publications/list/reports/Global_Water_Security_report.pdf (last visited 28 April 2011), 6.

¹² *Id.*

market standards which apparently fail to sufficiently consider the sustainability of water resource use.¹³

According to the United Nations World Water Assessment Programme, chances are high that two-thirds of the world's population will suffer from a lack of freshwater within a couple of decades.¹⁴ The projected water scarcity will certainly have a negative impact on the annual crop yield – in spite of a 70-90 per cent increase in global food demand.¹⁵ One of the future flash points will be Asia, where, in some regions, demands won't even be met by half.¹⁶ Furthermore, the added variability and uncertainty caused by climate change exacerbates the risk of conflicts over shared water resources even more.¹⁷ Considering that global demand for safe water already exceeds supply, the evermore widening 'water gap' is drawing a dark picture of the future.

By sheer dimension of this challenge, governments and businesses are acting in exceptional ways. International 'land grabs', for instance, are thought to alleviate the global water crisis by foreign states or co-operations acquiring (or leasing) fertile tracts of land in other countries to meet their

¹³ N. Hepworth *et al.*, *Drop by Drop: Understanding the Impacts of the UK's Water Footprint through a Case Study of Peruvian Asparagus* (2010), 6.

¹⁴ United Nations World Water Assessment Programme, 'The United Nations World Water Development Report 3: Water in a Changing World' (2009) available at http://www.unesco.org/water/wwap/wwdr/wwdr3/pdf/WWDR3_Water_in_a_Changing_World.pdf (last visited 14 April 2011), 36.

¹⁵ World Economic Forum Water Initiative, 'Managing Our Future Water Needs for Agriculture, Industry, Human Health and the Environment: The Bubble Is Close to Bursting: A Forecast of the Main Economic and Geopolitical Water Issues Likely to Arise in the World During the Next Two Decades' (2009), available at <http://www.waterlink-international.com/download/WaterInitiativeFutureWaterNeeds.pdf> (last visited 28 April 2011), 4.

¹⁶ 2030 Water Resources Group, 'Charting Our Water Future - Economic Frameworks to Inform Decision-Making' (2009) available at http://www.mckinsey.com/client-service/Water/Charting_our_water_future.aspx (last visited 28 April 2011).

¹⁷ S. E. Draper & J. E. Kundell, 'Impact of Climate Change on Transboundary Water Sharing', 133 *Journal of Water Resources Planning and Management* (2007) 5, 405, 409; Intergovernmental Panel on Climate Change, 'Climate Change 2007: Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Fourth Assessment Report of the IPCC' (2007) available at http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml (last visited 28 April 2011).

own agricultural needs.¹⁸ While these practices are not necessarily bad, and have been actively promoted by the World Bank and the Food and Agriculture Organization of the United Nations (FAO) as possible ‘win-win’ deals where poor countries not only receive money, but also infrastructure and know-how in exchange for their land,¹⁹ they nonetheless gives rise to new concerns. Financially weak governments are often all too eager to offer up what they consider ‘useless’ land, but which might serve as the livelihood for indigenous populations. Further, these agribusiness deals can bring about ecosystem destruction, loss of biodiversity, exploitation of workers, market distortion and food insecurity in the host country. As the overthrow of the government in Madagascar has demonstrated, these challenges have to be carefully considered before entering into such long-term agreements.²⁰ Even the World Bank has now taken a more cautious view of the topic in its recent report; warning that investors are targeting countries with weak laws, buying arable land on the cheap and failing to deliver on promises.²¹

All this demonstrates that due to the increasing mismatch between supply and demand, competition over the (re)allocation of freshwater resources is not only getting rougher, but is also involving more and more actors with novel strategies on various levels of water management and policy. Businesses (like Coca-Cola, Lloyd’s, McKinsey, Nestlé) are playing an increasingly important role and engage more and more in the debate about water management;²² either because they are directly affected by the water crisis, or because they are expecting benefit from new business opportunities, like the emerging speculative hedge funds buying water rights

¹⁸ See M. Görgen *et al.*, ‘Foreign Direct Investment (FDI) in Land in Developing Countries’ (2009) available at <http://www.responsibleagroinvestment.org/rai/sites/responsibleagroinvestment.org/files/gtz-foreign-direct-investment.pdf> (last visited 14 April 2011), 6; M. Kugelman & S. L. Levenstein (eds), ‘Land Grab? The Race for the World’s Farmland’ (2009), available at http://www.wilsoncenter.org/topics/pubs/ASIA_090629_Land%20Grab_rpt.pdf (last visited 14 April 2011), 2.

¹⁹ L. Cotula *et al.*, ‘Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa’ (2009) available at http://www.ifad.org/pub/land/land_grab.pdf (last visited 28 April 2011), 11.

²⁰ *Id.*, 37.

²¹ K. Deininger *et al.*, ‘Rising Global Interest in Farmland : Can It Yield Sustainable and Equitable Benefits?’ (2010) available at http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf (last visited 14 April 2011), 4.

²² See 2030 Water Resources Group, *supra* 16, 24; G. Pegram, ‘Global Water Scarcity: Risks and Challenges for Business’ (2010) available at <http://www.lloyds.com/~media/4f955e64b88c43a9be1f4b4aa8010e49.ashx> (last visited 28 April 2011), 13.

to glaciers,²³ or shipping companies planning to export bulk water from Alaska to drought prone India.²⁴

While the water gap, naturally, will be closed, the most crucial question is: How to share the diminishing pie of freshwater resources in the most equitable way, to avoid unnecessary suffering of the poor. Given the dimension of global water insecurity and its intertwining with other crises, it is obvious that any solution to the water crisis has to look beyond the national level. Following the established state-centered approach is simply inappropriate; since the degree of interdependence between the various actors at the different levels renders even the respective international river basins an all too small zone for sustainable water management. Further, it becomes obvious that some of the causes for the water crisis – like rapid economic development, population growth, and global environmental change – do not lend themselves to quick fix solutions. Instead, a multi-faceted approach is needed to sufficiently comprehend and tackle the looming water insecurity.

C. Water Security

The fact that the global water crisis is already reshaping foreign policy – and will do so even more extensively in the future – put ‘water security’ high on the political agenda. One example is Kashmir, where the border between India and Pakistan, both nuclear-armed, has been continually contested – a situation which has led to a perpetual state of instability in the region. Fears by Pakistan that its powerful neighbor could use water control as a weapon have been exploited by extremists to keep up the pressure on Kashmir by claiming India is stealing water.²⁵

²³ Global Risk Network of the World Economic Forum, ‘Global Risks 2009: A Global Risk Network Report’ (2009) available at <https://members.weforum.org/pdf/globalrisk/globalrisks09/> (last visited 28 April 2011), 17.

²⁴ L. Song, ‘US company plans to ship fresh water from Alaska to India’ (6 September 2010) available at <http://www.guardian.co.uk/environment/2010/sep/06/ship-fresh-water-alaska-india> (last visited 28 April 2011).

²⁵ N. Amies, ‘Water security the new front in Kashmir struggle between India, Pakistan’ (2 September 2010) available at http://www.dw-world.de/popups/popup_printcontent/0,,5935413,00.html (last visited 28 April 2011); World Economic Forum Report, ‘Global Risks 2009 – A Global Risk Network Report’ (January 2009) available at https://members.weforum.org/pdf/globalrisk/globalrisks09/global_risks_2009.pdf (last visited 28 April 2011).

But the whole region of the Himalayas has to be considered as a potential hot-spot of water insecurity. The glaciers of the Tibetan Plateau, also known as the ‘Third Pole’, feed the headwaters of the mighty rivers Yangtze, Yellow, Mekong, Salween, Brahmaputra, Indus, among others. More than 1.5 billion people downstream directly depend upon these waters – not to mention the implication for ‘virtual water’ trade. Since the outlook for this region is especially worrisome,²⁶ it seems reasonable to expect that governments will try to secure as much water resources as possible, which may force them to look beyond their borders – leading to even more geopolitical tensions. How China, for example, manages and dams its waters, will not only have a major impact on the water quality and quantity downstream, but also on the political stability of whole nations; since the societies heavily depend on the seasonal river flows for their energy production, water and food security.²⁷ This makes the question about the future status of Tibet even more sensitive, as its plateau stores abundant wealth of freshwater – the vital resource which will only become more valuable.

I. Water Wars vs. Water for Peace

Despite the fact that the only ‘water war’ has occurred more 4,500 years ago,²⁸ the aforementioned security implications of the global water crisis suggest that the past may not be an adequate basis from which to make predictions about the potential for future water conflicts. While this may play into the reasoning of ‘Neo-Malthusians’ which believe that violent conflicts can erupt due to overexploitation of a specific resource,²⁹ often driven by population growth, rapid economic development and inequitable distribution of resources, ‘Cornucopians’ draw a much more optimistic picture of the future. They stress the argument that rather than being a crisis

²⁶ 2030 Water Resources Group, *supra* 16, 9.

²⁷ P. Bosshard, ‘China Dams the World’, 26 *World Policy Journal* (2009) 4, 43, 48; P. H. Gleick, ‘China and Water’, in P. H. Gleick *et al.* (eds), *The World's Water 2008-2009* (2009), 79, 97; J. Shaofeng *et al.*, ‘Will China's Water Shortage Shake the World's Food Security?’, 35 *Water International* (2010) 1, 6, 7.

²⁸ 2,500 BC, the two Sumerian states of Lagash and Umma signed an agreement that resolved a violent dispute; see S. L. Postel & A. T. Wolf, ‘Dehydrating Conflict’, *Foreign Policy* (2001) 126, 60, 60.

²⁹ T. F. Homer-Dixon, ‘Environmental Scarcities and Violent Conflict: Evidence from Cases’, 19 *International Security* (1994) 1, 5, 39.

of absolute resource scarcity, the water challenge is one of management.³⁰ This is why, in their view, it can and will be resolved through international trade ('virtual water'), economic development, and investment in infrastructure.³¹

While the academic debate has long been a rather bipolar one, several studies have moved away from this rather simplistic approach into new fields of study. Some suggest there is a clear link between relative water scarcity and different intensities of conflict – as well as cooperation;³² others argue that conflicts over scarce resources only cross the threshold of violence in cases where certain socio-political factors allow for it.³³ Rohloff adds another spin to the discourse by criticising the branch of empirical conflict research for starting off from the flawed assumption that complex social relations (e.g. violent conflicts) can be classified and analysed by reducing them to their characteristic variables; while at the same time arguing that they are able to identify common and comparable traits irrespective of the singularity of each conflict situation.³⁴ A forth group of scholars tries to avoid the danger of generalization, and rather focuses on the concept of 'hydro-hegemony' in order to explain how the most powerful actor in a basin can impose its own policies on the weaker states, due to their respective power asymmetries.³⁵

³⁰ N. P. Gleditsch, 'Armed Conflict and the Environment: A Critique of the Literature', 35 *Journal of Peace Research* (1998) 3, 381, 383.

³¹ T. Allan, *The Middle East Water Question: Hydropolitics and the Global Economy* (2002), 4; T. Allan, 'Global Trade: Balancing Existing and Future Regional Water Resource Deficits', in H. G. Brauch *et al.* (eds), *Facing Global Environmental Change - Environmental, Human, Energy, Food, Health and Water Security Concepts* (2009), 575, 587; W. Barnaby, 'Do Nations Go to War over Water?', 458 *Nature* (2009) 7236, 282, 283.

³² H. P. W. Tose *et al.*, 'Shared Rivers and Interstate Conflict', 19 *Political Geography* (2000) 8, 971, 993.

³³ G. Baechler, 'Environmental Degradation in the South as a Cause of Armed Conflict', in A. Carius & K. M. Lietzmann (eds), *Environmental Change and Security - a European Perspective* (1999), 108.

³⁴ C. Rohloff, 'Conflict Research and Environmental Conflicts: Methodological Problems', in A. Carius & K. M. Lietzmann (eds), *Environmental Change and Security - a European Perspective* (1999), 147.

³⁵ M. Zeitoun & J. A. Allan, 'Applying Hegemony and Power Theory to Transboundary Water Analysis', 10 *Water Policy* (2008) 2, 3, 6; M. Zeitoun & A. Jägerskog, 'Influencing and Challenging Power Asymmetry in Transboundary Waters' (2009), 1; M. Zeitoun & J. F. Warner, 'Hydro-Hegemony: A Framework for Analysis of Transboundary Water Conflicts', 8 *Water Policy* (2006) 5, 435, 436.

In any case, even if the future conflicts over water are not likely to lead to fully fledged wars between the riparian countries, early interaction between the states will help alleviate the water crisis. A discourse solely focused on whether we will face 'water wars' in the future or not can never do justice to the complexity of the global water crisis. It has to be acknowledged that conflict and cooperation always coexist – in the form of water interaction.³⁶ Not only does this observation limit the danger of alarmism; it also recognizes that although dissent between riparian states regarding the (re)allocation of their shared waters may not always pose a military threat; it nevertheless has the potential to destabilize societies in a world which is already highly unstable. Hence, instead of focusing on the likelihood of military inter-state conflicts, more research is needed in order to be able to fight the 'long war' of sharing transboundary waters equitably.

II. The Securitization of Water

In recognizing that the threat of 'water wars' is a political argument, mainly driven by the media, which often ignores the complexity of the issues involved in the transboundary water management, a different conceptual framework is needed to comprehend the global water crisis. Here, the notion of water security seems much more appropriate to address the crux of the challenge, since it touches the realm of various other securities – just as water is the gossamer that links all socio-economic activities with the environment.

Simply put, securitization is a strategy for managing risk perceptions of stakeholders which aims at moving a security issue to the top of the agenda in order to generate the political will needed to address it. Thus, in theory, an issue becomes a security issue when it poses an existential threat and can only be handled with extraordinary measures. While this would obviously support the political status of transboundary water issues, would it automatically achieve a more peaceful management of the shared resource; or would it rather be a "regrettable detour to a virtual blind-alley?"³⁷ There

³⁶ M. Zeitoun & N. Mirumachi, 'Transboundary Water Interaction I: Reconsidering Conflict and Cooperation', 8 *International Environmental Agreements: Politics, Law and Economics* (2008) 4, 297, 312; M. Zeitoun *et al.*, 'Transboundary Water Interaction II: The Influence of 'Soft' Power', *International Environmental Agreements: Politics, Law and Economics* (forthcoming).

³⁷ D. Z. Mekonnen, 'The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-De-Sac?', 21 *European Journal of International Law* (2010) 2, 421, 421.

are certainly risks involved in the securitization of water. First of all, it may bring up discursive absolutes that are conceived to be ‘non-negotiable’ between the parties or it could enforce ‘nationalistic feelings’³⁸ – both potentially limiting the usefulness of negotiations by promoting disparities between riparians. In addition, it could also lead to a militarization of water policy, rather than a demilitarization of security policy.³⁹

However, these concerns can be overcome by following a contemporary path of security, rather than applying the orthodox state-centered and military-focused approach. While the literal meaning of ‘security’ is simply a state of living without care and concern,⁴⁰ the perception of the concept has changed dramatically. It no longer needs a violent conflict over scarce resources to affect the security and development of nations.⁴¹ As Wolf noted correctly, “[m]ore people are affected each year by the water crisis than by all wars in any given year”.⁴² This is why, today, security is being recognized as something more than just the absence of military conflict. However, this has not always been the case. Traditionally, the discipline of security studies has always focused on military threats to the integrity (sovereignty) of nation states.⁴³ This changed considerably during the 1980s, following the realization that various new threats to security – i.e. economic, social, and environmental – simply could not be addressed by looking through the military lens alone.⁴⁴ The subsequent inclusion of non-military threats – so called ‘widening’ process – was accompanied by efforts to also ‘deepen’ security studies. Here, the strategy was to regard the individual, rather than the state, as the main referent

³⁸ B.-O. Magsig, ‘Rising to the Challenge of Water Security: International (Water) Law in Need of Refinement’, *International Journal of Sustainable Society* (forthcoming).

³⁹ See D. Deudney, ‘The Case against Linking Environmental Degradation and National Security’, 19 *Millennium – Journal of International Studies* (1990) 3, 461.

⁴⁰ J. F. Warner & R. Meissner, ‘The Politics of Security in the Okavango River Basin: From Civil War to Saving Wetlands (1975-2002): A Preliminary Security Impact Assessment’, in L. Jansky *et al.* (eds), *International Water Security: Domestic Threats and Opportunities* (2008), 252.

⁴¹ R. H. Ullman, ‘Redefining Security’, 8 *International Security* (1983) 1, 129, 140.

⁴² UN General Assembly Economic and Financial Committee, ‘Panel Discussion on Enhancing Governance on Water’ (2009).

⁴³ H. G. Brauch, ‘Introduction: Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century’, in H. G. Brauch *et al.* (eds), *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (2008) 27, 27.

⁴⁴ B. Buzan, *Peoples, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd ed. (1991), 2.

object, introducing the concept of ‘human security’.⁴⁵ Along this line of thought the ‘essential freedoms’ discourse placed the security paradigm within the fundamental freedoms of: freedom from want, freedom from fear, freedom to live with human dignity, and freedom from hazardous impact.⁴⁶ The widening and deepening process has recently led to the notions of collective and sustainable security,⁴⁷ which try to pave the way towards a mutual understanding that security can no longer be regarded as a zero sum game between states; since a contemporary take on the notion unveils its ‘common’ characteristic.⁴⁸

While, obviously, the debate about fully fledged ‘water wars’ is very appealing to the media, it can be argued that it is not only incapable of comprehending the complex challenge of the water crisis, but it also constitutes a ‘red herring’ – distracting from the real issues. The fact that more than 3.5 million people die each year because of poor water, sanitation, and hygiene clearly suggests a wider approach to water security than the narrow military one.⁴⁹ It has been estimated that by 2020, if the international community fails to effectively address global water insecurity, as many as 135 million preventable deaths could occur.⁵⁰

Furthermore, the debate about cooperation *or* conflict over freshwater usually ignores the quality of cooperation and the various levels of conflict – since not all cooperation is automatically good; and not all conflict is inherently bad. Also, the interlinkages between different layers and other crises are consistently being overlooked. Sustainable freshwater management is strengthening a whole web of securities. For instance, a

⁴⁵ See O. Brown, ‘The Environment and Our Security: How Our Understanding of the Links Has Changed’ (2005) available at <http://www.iisd.org/publications/pub.aspx?pno=696> (last visited 28 April 2011).

⁴⁶ P. Wouters *et al.*, ‘Water Security, Hydrosolidarity and International Law: A River Runs through It ...’, 19 *Yearbook of International Environmental Law* (2009) 97, 101.

⁴⁷ For an introduction to the concepts, see W. Scholtz, ‘Collective (Environmental) Security: The Yeast for the Refinement of International Law’, 19 *Yearbook of International Environmental Law* (2009) 135; C. Voigt, ‘Sustainable Security’, 19 *Yearbook of International Environmental Law* (2009), 163.

⁴⁸ B.-O. Magsig, ‘Introducing an Analytical Framework for Water Security: A Platform for the Refinement of International Water Law’, 20 *Journal of Water Law* (2009) 2/3, 61, 64.

⁴⁹ C. J. Schuster-Wallace *et al.*, *Safe Water as the Key to Global Health* (2008), 8.

⁵⁰ United Nations Environment Programme, ‘The Greening of Water Law: Managing Freshwater Resources for People and the Environment’ (2010) available at http://www.unep.org/dec/PDF/UNEP_Greening_water_law.pdf (last visited 28 April 2011), 17.

situation of acute water scarcity (caused by drought or mismanagement) in a developing country which is highly dependent on agriculture would certainly compromise human security (increasing poverty and affecting health), food security (domestic and, potentially, of food importing countries), economic security (decrease in agricultural output), energy security (diminishing availability of water for production of electricity), and environmental security (putting ecosystems under stress and causing biodiversity loss) at the local, regional or even international level. Just like hydropolitics and transboundary water interaction, 'security' is a multi-level, multi-centered, and multi-actor approach linking various schools of thought and disciplines.⁵¹ Further, water is a multi-purpose resource of high economic, social and environmental significance, with diminishing availability and uneven distribution in space and time – exposing it to conflicting claims of different users and uses, both domestically and internationally.⁵² Without question, this clearly justifies giving freshwater resources special treatment as a key component of 'ultimate security'.⁵³

III. 4A Analytical Framework

Although 'water security' is now featured prominently in the policy arena, and academia is slowly picking it up as well, it still lacks a precise definition or any normative parameters. Various attempts to carve out the precise essence of the emerging concept did result in a variety of interpretations:

- Water security, at any level from the household to the global, means that every person has access to enough safe water at affordable cost to lead a clean, healthy and productive life, while

⁵¹ A. Kibaroglu *et al.*, 'Transboundary Water Issues in the Euphrates-Tigris River Basin: Some Methodological Approaches and Opportunities for Cooperation', in L. Jansky, *et al.* (eds), *International Water Security: Domestic Threats and Opportunities* (2008), 223.

⁵² P. Wouters *et al.*, *supra* 46, 103.

⁵³ E. Burlinson, 'Water Is Security', 31 *Environ - Environmental Law and Policy Journal* (2008) 2, 197, 197; B.-O. Magsig, 'Introducing an Analytical Framework for Water Security: A Platform for the Refinement of International Water Law', 20 *Journal of Water Law* (2009) 2/3, 61, 65.

ensuring that the natural environment is protected and enhanced.⁵⁴

- [T]he notion of water security can be understood as the state of having secure access to water; the assured freedom from poverty of, or want for, water for life.⁵⁵
- [Water security is] adequate protection from water-related disasters and diseases and access to sufficient quantity and quality of water, at affordable cost, to meet the basic food, energy and other needs essential for leading a healthy and productive life without compromising the sustainability of vital ecosystems.⁵⁶

Considering the vagueness of these attempts, international law can, and definitely should, provide the normative content for this concept. While there are different views on the actual role and relevance of international law in preventing conflicts and ensuring the fair use of shared resources,⁵⁷ the global water crisis simply cannot be alleviated without generally recognized ‘rules of the game’ about how to manage this vital resource. The ultimate goal of international law is ‘to maintain international peace and security’⁵⁸ – and the global water crisis is threatening this fundamental premise.

This is why the concept of ‘4As’ proposes a legal framework to examine water security by focusing on issues of (1) availability; (2) access;

⁵⁴ Global Water Partnership, ‘Towards Water Security: A Framework for Action’ (2000) available at http://www.gwptoolbox.org/images/stories/Docs/water%20security_2000_doc_78_en.pdf (last visited 28 April 2011), 12.

⁵⁵ P. Wouters, ‘Water Security: What Role for International Water Law?’, in F. Dodds & T. Pippard (eds), *Human and Environmental Security: An Agenda for Change* (2005), 166, 168.

⁵⁶ L. Jansky *et al.*, ‘Introduction: From Domestic to International Water Security’, in N. I. Pachova *et al.* (eds), *International Water Security: Domestic Threats and Opportunities* (2008), 1, 1.

⁵⁷ D. Tarlock, ‘Water Security, Fear Mitigation and International Water Law’, 31 *Hamline Law Review* (2008) 3, 704, 705.

⁵⁸ Art. 1(1) UN Charter.

(3) adaptability; and (4) ambit.⁵⁹ These core elements comprise important legal themes for comprehending the concept of water security, and could help, through the normative strength of international law, maintaining ‘international peace and security’ in spite of the increasing potential for conflict over shared freshwater resources.

1. Availability

Issues of ‘availability’ relate to concerns of water quality as well as water quantity. Primarily, this facet deals with the management of the resource as such – including its control and sustainable protection. The legal rules addressing the quantitative aspects are numerous and can be found, predominantly, in treaties, where states aim to specify the basic principles of international water law.⁶⁰ In trying to spread the risk of water stress among all riparians, states often allocate water corresponding to percentage and time of flow, rather than a fixed amount.⁶¹ While doing this, however, it still puts downstream users at particular risk if developmental changes occur upstream, as their share in the water they receive will almost certainly diminish. Often, states negotiate so-called ‘escape clauses,’ which allow countries that suffer from water scarcity to deliver less water than they would have to under normal circumstances.⁶²

⁵⁹ See B.-O. Magsig, ‘Introducing an Analytical Framework for Water Security: A Platform for the Refinement of International Water Law’, 20 *Journal of Water Law* (2009) 2/3, 61, 65.

⁶⁰ See, e.g. Treaty between India and Pakistan Regarding the Use of the Waters of the Indus (19 September 1960, entered into force 1 April 1960) 419 U.N.T.S. 125 (1960) (Indus Waters Treaty); Art. 1 of the Treaty between His Majesty’s Government of Nepal and the Government of India concerning the Integrated Development of the Mahakali River including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project, 12 February 1996 (entered into force June 1997) reprinted in 36 ILM 531 (1997) [Mahakali Water Treaty].

⁶¹ I. Fischhendler, ‘Legal and Institutional Adaptation to Climate Uncertainty: A Study of International Rivers’, 6 *Water Policy* (2004) 4, 281, 283.

⁶² Article 4(B)(d) of the Treaty between the United States of America and Mexico relating to the ‘Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande’ (14 November 1944; entered into force 8 November 1945) available at <http://www.usembassy-mexico.gov/bbf/bfboundwater.pdf> (last visited 28 April 2011) [Colorado-Rio Grande Treaty].

Examples for obligations regarding pollution control and prevention in transboundary water agreements, however, are rather limited.⁶³ The aspect of mitigating the destructive force of water-related natural disasters (like floods) is first and foremost stipulated by rules dealing with emergency preparedness and response.⁶⁴ Further, the need to maintain the natural integrity of the freshwater resource – by requiring environmental flows or introducing terms like ‘peak ecological water’ – is being addressed in the sphere of ‘availability’ as well.⁶⁵ However, water for the environment has still no priority in water management practices, which has caused tremendous environmental pressures around the world.⁶⁶ In China, for instance, 70 per cent of the rivers and lakes are significantly contaminated, while 50 per cent of its cities only have access to polluted groundwater resources – not only affecting businesses and communities in China, but also further downstream.⁶⁷ Yet, state practice shows that new thinking in the sustainable management of water resources is slowly emerging; and international water law can provide the basic tools for effectively addressing the environmental protection and sustainability of transboundary watercourses.⁶⁸

⁶³ Art. 7 of the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 5 April 1995 (entered into force 5 April 1995) reprinted in 34 ILM 864 (1995) [Mekong Agreement].

⁶⁴ E.g., Art. 1, 10 of the Mekong Agreement.

⁶⁵ A. Forslund *et al.*, ‘Securing Water for Ecosystems and Human Well-Being: The Importance of Environmental Flows’, 24 *Swedish Water House Report* (2009); M. Palaniappan & P. H. Gleick, ‘Peak Water’, in P. H. Gleick *et al.* (eds), *The World's Water 2008-2009* (2009), 1.

⁶⁶ United Nations Environment Programme, *supra* note 50, ix.

⁶⁷ P. H. Gleick, ‘China and Water’, in P. H. Gleick *et al.* (eds), *The World's Water 2008-2009* (2009) 79, 83; Responsible Research, ‘Water in China: Issues for Responsible Investors’ (2010) available at http://www.syntao.com/Uploads/%7BBE7D448C-9F86-4D6D-A550-055781FD7F52%7D_WATER-IN-CHINA-Issues-for-Responsible-Investors-FEB2010.pdf (last visited 28 April 2011), 4.

⁶⁸ Arts 5, 20 of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (21 May 1997, not yet entered into force) UN Doc A/51/869, reprinted in 36 ILM 700 (1997) (UN Watercourses Convention); Art. 2(2) of the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (17 March 1992, entered into force 6 October 1996) reprinted in 31 ILM 1312 (1992) [UNECE Helsinki Convention].

2. Access

The element of ‘access’ describes the right to make use of the shared water resources and is at the center of the water security debate. It covers a broad spectrum of concerns across the increasing diversity and growing number of users and uses with regard to matters of (re)allocation. Here, the principle of ‘equitable and reasonable utilization,’ the cornerstone of international water law, determines the right of a state to use the waters of an international watercourse. It does so in two distinct ways. First, it establishes the objective to be achieved (an equitable and reasonable use of the water), which then specifies the lawfulness of the new (or increased) utilization of an international watercourse. Second, it incorporates an important operational function, since it requires that all relevant factors and circumstances have to be considered when determining what qualifies as an equitable and reasonable use. The obligation to balance all the interests of the various stakeholders is essential to the notion of ‘access.’⁶⁹ In order to help with the application of this relatively vague principle, the UN Watercourses Convention provides a (non-exhaustive) list of factors to be considered in each specific case – all the factor being principally equal in weight; although there might be a priority of use regarding vital ‘human’ and ‘environmental’ needs.⁷⁰

However, the issue of fairness of access still continues to divide states in various transboundary basins. One recent example, where Nepalese Maoists destroyed copies of the Mahakali Water Treaty between India and Nepal in public, arguing the agreement is unfair and against the interest of Nepalese people, is just one of many showing that the complex issue of fair ‘access’ will remain one of the most difficult legal challenges of water security.⁷¹ Whether the respective international water regime provides for specific rules on conflict resolution or not, in cases of deadlock in transboundary water interactions, the general rules of public international law require the peaceful resolution of the differences through ‘negotiation,

⁶⁹ P. Jones, *The Application of Equitable and Reasonable Utilisation to Transboundary Water Resources Disputes: Lessons from International Practice*, PhD Thesis (2009).

⁷⁰ Arts 6, 10, 21 of the UN Watercourses Convention.

⁷¹ B.-O. Magsig, ‘Introducing an Analytical Framework for Water Security: A Platform for the Refinement of International Water Law’, 20 *Journal of Water Law* (2009) 2/3, 61, 66.

enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means'.⁷²

3. Adaptability

Considering that, in most of the cases, the key variable of sharing freshwater resources is the resilience of the institutions that govern water management, rather than absolute water scarcity,⁷³ a future-proof framework for transboundary watercourses has to include a fair amount of flexibility. This is vital for ensuring adaptability in order to be able to address changing conditions in supply and demand, but still provide for some level of predictability. Since many states depend on the waters from shared basins, they need certainty on the quantities and qualities of the water they are entitled to utilize and obliged to provide – and this within the ever changing interplay between supply and demand. Here, law has to provide for 'security of expectations' – which can be considered as one of its main functions, and proves to be crucial within transboundary water management and the constantly changing societal, political, and environmental needs.⁷⁴

In addition to this 'legal challenge,' the impacts of global climate change, population growth, and economic development are all uncertain variables which have a considerable impact on transboundary water interaction. Furthermore, the notion of 'security' as such is a moving target rather than an end in itself. Not only does the evolving perception of the concept correlate with the ever-changing requirements of the individual users – it also depends to a large extent on the international relations between the respective countries. Thus, in order to be able to continuously adapt to the complex emerging trends and challenges, any transboundary freshwater regime has to be reasonably flexible.⁷⁵

⁷² Art. 33 UN Charter.

⁷³ G. Eckstein, 'Water Scarcity, Conflict, and Security in a Climate Change World: Challenges and Opportunities for International Law and Policy', 27 *Wisconsin International Law Journal* (2009) 3, 409, 414.

⁷⁴ M. Bothe, 'Security in International Law since 1990', in H. G. Brauch *et al.* (eds), *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (2008), 475.

⁷⁵ See S. C. McCaffrey, 'The Need for Flexibility in Freshwater Treaty Regimes', 27 *Natural Resources Forum* (2003) 2, 156, 161.

4. Ambit

The final element is the concept of ‘ambit’, which, in this context, delimits the scope of water security – i.e., the sphere of influence of the notion.⁷⁶ In addition to the traditional meaning of ‘scope’,⁷⁷ the approach here is to better reflect the ‘common’ character of the challenges of water insecurity. So far, the main weakness of transboundary water interaction has been the inability to link the various influencing factors in a comprehensive manner – a serious shortcoming which has led to ‘water blindness’⁷⁸.

The ‘scope’ of a transboundary water agreement usually determines (1) the waters covered by the regime;⁷⁹ (2) the range of stakeholders that are eligible to participate in the utilization of those waters;⁸⁰ and (3) the breadth of objectives addressed.⁸¹ In addition to this traditional perception of scope, the concept of ‘ambit’ also does justice to the fact that water security has to be regarded as a collective security issue. Unsustainable and unilateral water management of one state not only poses a domestic threat in this country, but will most certainly also affect other riparians. Due to the aforementioned interconnectedness of the globalized world and the role water plays in linking the various emerging crises, negative impacts may even be felt outside the river basin in apparently remote countries. The times where

⁷⁶ B.-O. Magsig, ‘Introducing an Analytical Framework for Water Security: A Platform for the Refinement of International Water Law’, 20 *Journal of Water Law* (2009) 2/3, 61, 67.

⁷⁷ See P. Wouters *et al.*, ‘Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model’ (2005) available at <http://unesdoc.unesco.org/images/0013/001397/139794e.pdf> (last visited 28 April 2011), 19.

⁷⁸ M. Falkenmark, ‘The Greatest Water Problem: The Inability to Link Environmental Security, Water Security and Food Security’, 17 *Water Resources Development* (2001) 4, 539, 542.

⁷⁹ E.g. ‘water resources’ (Article 4 UNECE Helsinki Convention), ‘international watercourse’ (Article 2(b) UN Watercourses Convention), ‘international drainage basin’ (Article II Helsinki Rules), or ‘tributaries’ (Article I(2) Indus Waters Treaty; Article 5 Mekong Agreement).

⁸⁰ State practice has demonstrated support for applying a basin-wide approach, although, still, too many international watercourse agreements lack the inclusion of all riparians – like the Indus Waters Treaty or the Mekong Agreement – which constitutes a high political risk.

⁸¹ The extend ranges from merely quantitative agreements (like the Indus Waters Treaty) to highly sophisticated institutions (e.g. the Mekong River Commission) which also govern aspects of water quality and emergency situations (Article 11 Mekong Agreement).

water can solely be regarded as a national security issue are long past, since our most fundamental common value is under threat – the survival of humankind.⁸²

Although water management is, in principle, a local challenge, several of its aspects, e.g. the ‘right to water,’ are debated in the global arena. This indicates that the linkages between the different scales of water interaction have become more and more fluid; calling for international water law to act as an interface between those layers.⁸³ Not only will the effectiveness of the international rules depend on a strong support of domestic norms (and vice versa); the impact of treaties outside the ‘water box’ (e.g. Biodiversity Convention; Ramsar Convention; UNFCCC) has to be factored into the analysis as well.⁸⁴ Finally, the notion of water security has to be open to novel ideas about how to best address the world water crisis; and thus it has to be able to integrate concepts like ‘virtual water’ or ‘peak ecological water;’ reflecting the interconnectedness of the global crises of water, food, and energy – and propose ways out of this tricky challenge.⁸⁵

D. International Law and Water Security

Having used the ‘4As’ analytical framework as an entry point of looking at international water law through a security lens, the question now is how well the current legal setting is actually dealing with those elements. Since space does not allow for a more detailed analysis, only the major shortcomings of international water law will be addressed here.

While the principle of ‘equitable and reasonable utilization’ is a very flexible tool, generally able to incorporate the constantly changing ‘security’

⁸² W. Scholtz, ‘Collective (Environmental) Security: The Yeast for the Refinement of International Law’, 19 *Yearbook of International Environmental Law* (2009) 135, 139.

⁸³ A. Rieu-Clarke, ‘The Role of Treaties in Building International Watercourse Regimes: A Legal Perspective on Existing Knowledge’, 12 *Water Policy* (2010) 6, 822, 829.

⁸⁴ A. Rieu-Clarke & D. Ziganshina, *(Mis-)Understanding the Role of International Law in Transboundary Watercourse Relations: The Need for a Cross-Disciplinary Research Agenda* (forthcoming).

⁸⁵ T. Allan, ‘Global Trade: Balancing Existing and Future Regional Water Resource Deficits’, in H. G. Brauch *et al.* (eds), *Facing Global Environmental Change - Environmental, Human, Energy, Food, Health and Water Security Concepts* (2009), 575; M. Nakayama, ‘The Implications of Domestic Security Policy for International Water Issues in the Context of ‘Virtual’ and ‘Real’ Water: The Aral Sea and Mekong River Basins’, in N. Pachova *et al.* (eds), *International Water Security: Domestic Threats and Opportunities* (2008), 180; M. Palaniappan & P. H. Gleick, ‘Peak Water’, in P. H. Gleick *et al.* (eds), *The World's Water 2008-2009* (2009), 1.

variables, most of the transboundary water agreements, however, try to specify the legal obligations of the riparians. This makes most treaty regimes inherently rigid instruments, as they can only be modified according to their own terms or by mutual agreement.⁸⁶ Hence, if a treaty lacks inbuilt tools of flexibility and a situation of water stress arises, disputes over the shared watercourse are likely in the case where one party to the agreement may find it difficult to reduce its consumption in order to comply with its legal obligations.⁸⁷ If the water stress causes asymmetric harm, the more seriously harmed state may be eager to terminate the agreement, while its co-riparian may find it beneficial to stick to it. In this respect, the International Court of Justice (ICJ) concluded in its *Gabčíkovo-Nagymaros* judgment that “[...] the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases”⁸⁸. Furthermore, the ICJ noted that new developments or changing conditions should be dealt with on the level of implementation of the treaty; not by termination of it.⁸⁹ However, even if the governments agree to renegotiate the treaty – and a number of studies come to the conclusion that they will have to do so rather soon⁹⁰ – in some cases this extremely sensible diplomatic process may be too time consuming to adapt to the rapid changes in the demand for, or availability of, shared freshwater. It is surprising that despite the need to increase the flexibility of water agreements in order to cope with water stress, riparian states find it difficult to do so. The number of flexible mechanisms initially negotiated shows that the current inability of water sharing regimes to address climate-uncertainty is not an issue of awareness; it is rather owing to political obstacles.⁹¹ The perceived threat of losing national sovereignty is increasing the political costs of implementing flexible mechanisms.⁹² However, when excluding these measures, policy makers must necessarily also consider the potential

⁸⁶ S. C. McCaffrey, ‘The Need for Flexibility in Freshwater Treaty Regimes’, 27 *Natural Resources Forum* (2003) 2, 156, 157.

⁸⁷ I. Fischhendler, ‘Legal and Institutional Adaptation to Climate Uncertainty: A Study of International Rivers’, 6 *Water Policy* (2004) 4, 281, 297.

⁸⁸ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* Judgment, ICJ Reports 1998, 7, para. 104.

⁸⁹ *Id.*, para. 112.

⁹⁰ G. Goldenman, ‘Adapting to Climate Change: A Study of International Rivers and Their Legal Arrangements’, 17 *Ecology Law Quarterly* (1990) 4, 741, 747.

⁹¹ I. Fischhendler, ‘Legal and Institutional Adaptation to Climate Uncertainty: A Study of International Rivers’, 6 *Water Policy* (2004) 4, 281, 284.

⁹² *Id.*, 298.

benefits their implementation would have had. In basing decisions on optimistic water-availability scenarios and low resource sensitivity forecasts, the reasons for including flexible mechanisms are reduced, and the non-implementation is justified.⁹³ The bottom line is that by stressing the immediate political costs instead of the future social and environmental benefits, the implementation of climate-uncertainty mechanisms seems unreasonable, and thus they are often excluded. The level of flexibility of water sharing regimes hugely depends on the political will of the co-riparians.

The same is true for another issue of transboundary water management: its rather scattered approach. The fact that many treaties merely focus on quantitative issues and/or not even include all riparians, suggest that most legal frameworks lack full support of the notion of ‘ambit.’ This political short-sighted behavior – focusing on one’s own national interests and security on the cost of international security – will inevitably backfire. Water interaction is still seen as zero-sum conflict with a ‘fixed-pie’ outcome, rather than a perpetual process to achieve the more sustainable ‘common security.’

The reason for this tension between maximizing overall benefit and the ‘relative’ benefits of states is obvious: since water is the source of growth, it is often considered as a strategic resource. This is why states are constantly worried about the relative gains of other states. They are very cautious about the impacts any freshwater-interaction might have with regard to the power interplay of the respective actors. This usually leads to the pursuit of ‘maximized individual benefits’ rather than looking at how to gain the most from the management of the shared resource in absolute terms. States are often reluctant to implement rules that limit their sovereignty. Thus, many international water treaties remain ‘dead letter regimes;’ maybe negotiated with good intentions, but ineffective in reality. This dilemma is even getting worse, the more difficult the policy decisions get, and the less ‘harmonious’ the political relations are between the parties.⁹⁴ While states are obliged to protect their national interests – and will always be – most of what has been a national interest in the past is no longer ‘national’ at all. With the help of international law, the concept of water security has to create a ‘space’ which transcends national boundaries

⁹³ *Id.*, 295.

⁹⁴ N. Ely & A. Wolman, ‘Administration’, in A. H. Garretson *et al.* (eds), *The Law of International Drainage Basins* (1967) 124, 137.

(real and imaginary) and put water high on the agenda.⁹⁵ International water law, then, has to provide a legal environment that fully comprehends the ambit of water security by moving sustainable freshwater management from ‘independence’ to true ‘interdependence.’⁹⁶

E. Water Security as a Regional Common Concern

From the inevitable perspective of ‘collective’ water security, the notion ultimately challenges the supremacy of absolute national sovereignty.⁹⁷ The proposed framework of the ‘4As’ facilitates this development by acknowledging that the best possible management of transboundary freshwater resources can only be achieved with a truly common strategy – bringing together law and politics, and being open-minded for new strategies to tackle the global water crisis. However, the support of international law for such a progressive aspiration is missing as for now. Considering the shortcomings of the current legal regime, the securitization of water seems to be what is needed for transboundary water interaction – as ‘security’ is the move that can take pressing issues beyond the established rules of the game.⁹⁸ Further acknowledging that, in order to achieve global water security, a state-centred take on the water crisis is counterproductive, the question is: what should serve as the normative basis for the needed refinement of international water law?

Communitarianism has been addressed by international law in different ways. In general its role has been to facilitate both the coordination of states’ individual actions regarding a common concern, and the institutionalization of ‘normative communities.’⁹⁹ Two approaches seem rather impractical regarding the global water crisis. First, the concept of ‘common areas’ is limited to areas or resources which are perceived as

⁹⁵ A. Turton, ‘Water and State Sovereignty: The Hydropolitical Challenge for States in Arid Regions’, 5 *MEWREW Occasional Paper* (1999) available at <http://www.soas.ac.uk/water/publications/papers/file38349.pdf> (last visited 28 April 2011), 3.

⁹⁶ See F. X. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (2000).

⁹⁷ R. Falk, ‘The Coming Global Civilisation: Neo-Liberal or Humanist?’, in A. Anghie & G. Sturgess (eds), *Legal Visions of the 21st Century - Essays in Honour of Judge Christopher Weeramantry* (1998), 15.

⁹⁸ B. Buzan *et al.*, *Security: A New Framework for Analysis* (1997), 178.

⁹⁹ J. Brunnée, ‘Common Areas, Common Heritage, and Common Concern’, in D. Bodansky *et al.* (eds), *The Oxford Handbook of International Environmental Law* (2007) 550, 555.

being common and states having, in theory, open access to it. Examples are the high seas and the outer space. Second, the notion of 'common heritage' is focused on the equitable sharing of benefits from the exploitation of resources beyond the limits of national jurisdiction. This concept has found recognition in the Law of the Sea Convention (Art. 136) and the Art. 11 of the 1979 Moon Treaty. While these two approaches are limited to a certain geographical area and its resources, the notion of 'common concern' seems more promising, as it is a much wider concept.

Although, the attention is again on common benefits, it regards the benefits from common action rather than those derived from the mere exploitation of a resource.¹⁰⁰ Furthermore, instead of targeting one area or resource, this concept focuses on what renders a concern as being 'common.' In so doing, it avoids discussions about common property and territorial sovereignty. One example of the implementation of a 'common concern' can be found in the UN FCCC, using it for the 'change in the Earth's climate and its adverse effects'¹⁰¹.

Given the sheer scope of the global water crisis, and recalling the detrimental impacts water disputes have on communities all over the world, it should be rather easy to construct an analogous mind-set for transboundary freshwater management. However, it is still difficult to sufficiently prove international consensus on whether water security is indeed of common concern. Here, scaling one level down by looking at the regional level could be useful, since at this layer, the common concerns relating to water interaction are much more evident. The regional focus, accompanied by a growing number of treaties implementing the notion, could pave the way for the development of customary international law by helping to shape the concept and settle its legal consequences. This is vital, since until treaties specify the 'regional common concern' as *erga omnes partes*, issues of state responsibility will still come up.¹⁰² International agreements would also help constitute the relevant 'community' which shares the regional common concern.

¹⁰⁰ *Id.*, 564.

¹⁰¹ Preamble of the United Nations Framework Convention on Climate Change, UN Doc A/CONF.151/26, adopted 9 May 1992 (entered into force 21 March 1994) reprinted in 31 ILM 849.

¹⁰² J. Brunnée, 'Common Areas, Common Heritage, and Common Concern', in D. Bodansky *et al.* (eds), *The Oxford Handbook of International Environmental Law* (2007) 550, 566.

Considering water security as a 'regional common concern' would certainly strengthen international law in this area and equip it with the needed basis for overcoming state-centrism. Fully embracing the notion of 'ambit,' which does justice to the fact that security can no longer be regarded as a zero sum game between states actors, will permit a take on water security which acknowledges that 'ultimate' (i.e. common and sustainable) security can only be achieved with a truly joint strategy for the benefit of the whole region. However, given the degree of reluctance of some of the main players of the game, this line of thought requires further research and a great deal of convincing – including an examination of the evolving nature of collective security and the role international water law can play here.

F. Conclusion

The challenges we are facing regarding the peaceful management of our shared freshwater resources are bigger than states – bigger than basins. In an increasingly water insecure world, a 'react-and-correct' approach is no longer adequate. What is needed, instead, is one of 'foresee-and-prevent'.¹⁰³ This, however, can only be possible if we overcome the prevailing state-centrism in international water law. Doing so requires fundamental changes to the interpretation of the established paradigms of international law – the concept of sovereignty, above all.

It is exactly this state-centered opposition which places the international community at the tipping point of global water insecurity, as it ignores the growing global interdependence of shared water resources. Recalling the obligation of the global community 'to maintain international peace and security',¹⁰⁴ the lack of collective political will to address the widespread water insecurity with the utmost effort seems astonishing. The looming water crisis, together with the acknowledgement that equitable water-sharing is becoming increasingly important, sets the ground for the powerful notion of 'water security,' which, thoroughly applied, can drive the legal discourse forward. Applying the '4A' legal analytical framework as a template for analyzing the key issues related to water security in the

¹⁰³ A. S. Timoshenko, 'Ecological Security: Response to Global Challenges', in E. Brown Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (1992) 413, 440.

¹⁰⁴ Article 1(1) UN Charter.

context of transboundary water interaction, can serve as a point of departure for the refinement of international (water) law.

It is our responsibility to push the perception forward that as long as we keep focusing on ourselves, pursuing only our own benefits, we will fail in achieving 'ultimate security'. While still in an early stage of development, the notion of water security provides a novel mindset – one which may, if supported by the normative concept of 'common concern,' ultimately be capable of overcoming state-centrism.

Between the Scylla of Water Security and Charybdis of Benefit Sharing:

The Nile Basin Cooperative Framework Agreement – Failed or Just Teetering on the Brink?

Dereje Zeleke Mekonnen *

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Abstract

The threat of water-related conflicts is comparatively more real and serious in the Middle East and North Africa hydrographic region where the Nile is found. Ominous predictions about water being the next *casus belli* in the region abound. There are many conflict determinants in the Nile basin which lend much credence to the predictions and the basin's proneness to conflict is quite evident. The unprecedented positive rapport brought about by the launching of the Nile Basin Initiative (NBI) and the enormous hope and optimism evoked by its lofty Shared Vision explain the unprecedented serenity and cooperative atmosphere the basin has witnessed over the past decade. The decade-long effort to work out and agree on an inclusive legal and institutional framework for the basin has, due to the cunning interpolation of the treacherous, non-legal concept of 'water security', ended up in failure. The subsequent shift to and endorsement of benefit sharing as an alternative, simple and cure-all solution to the Nile waters question has further dimmed the prospect for the realization of the Shared Vision which now sounds more like a pipe dream than a realizable vision. Whether these adverse developments would finally pave the way for the ominous predictions to come to pass is as much unlikely as it is perplexing. It will be argued, in this paper, that the likelihood of violent conflicts over the Nile waters is an unlikely scenario, the more likely turn of events being further continuation of the iniquitous *status quo*.

A. Introduction: Nile – Conflict Determinants

Beginning from its bifurcated sources in humble springs along the Blue¹ and White Nile² sub-basins, the Nile traverses a distance of 6825 kilometers across a vast expanse of land with diverse climatic and natural formations varying from humid mountainous highlands receiving abundant rainfall to semi-arid and arid regions receiving little or no rainfall, draining an area of about 3 million square kilometers, i.e., one-tenth of the African continent.³ Shared by ten riparians,⁴ the world's longest river also ranks first in terms ominous predictions pertaining to its waters which would be the next cause of war in the volatile Middle East region – the scene of merciless war in the third millennium.⁵ Except for some instances of covert operations by Egypt,⁶ the basin has thus far not witnessed any overt and violent water-related conflicts. The absence of such conflicts so far surely not being proof

¹ The Blue Nile has its source in the sacred spring of Sakala in the heart of the Ethiopian highland plateau from where it grows from a stream into a river called Gilgel/Wetet Abbay and flows into Lake Tana contributing, ultimately, about 59 per cent of the annual flow of the Nile. R. O. Collins, *The Nile* (2002), 88-89; T. Tefesse, *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Prospects* (2001), 28.

² The White Nile has its southernmost sources in two small springs, one atop Mount Kikizi in Burundi and another below the summit of Mount Bigugu in Rwanda. The total annual contribution of the White Nile to the flow of the main Nile is only 14 per cent while Ethiopia's contribution is a staggering 86 per cent. Collins, *supra* note 1, 27-29; Tefesse, *supra* note 1, 28.

³ Tefesse, *supra* note 1, 29-30.

⁴ The ten countries riparian to the Nile are Burundi, DR Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda.

⁵ J. Kerisel, *The Nile and its Masters: Past, Present, Future* (2001), xiv. See also N. Kliot, *Water Resources and Conflict in the Middle East* (1994), 3, 9 speaking about the inevitability of conflict over water resources and pointing out the Nile as first among examples of current and potential surface water conflicts. Kliot mentions an ominous prediction by the Center for Strategic and International Studies that "water, not oil, will become the dominant subject of conflict for the Middle East by the year 2000." Making a similar but less certain prediction, Kliot predicted that "conflict over Nile water may arise in the next decade when the other co-riparians, especially Ethiopia, might decide to develop Upper Nile resources for the benefit of their populations.", Kliot, *supra* note 5, 18.

⁶ M. Zeitoun & J. Warner, 'Hydro-hegemony – a Framework for Analysis of Trans-boundary Water Conflicts', 8 *Water Policy* (2006) 435, 446, mention Egypt's support for the Eritrean Liberation Front (ELF) and Somali irredentism as instances of covert action aimed at consolidating the iniquitous hegemonic *status quo* by exerting coercive influence on a potential contender.

of the prevalence of peace, the Nile basin is still the most volatile and conflict prone basin where all the determinants of a potential water-related conflict exist in contradistinction to any other major international basin. The difficult hydrologic environment, the indelible impact of the colonial legacy and the stagnant post-colonial reality which is but an accentuated continuation of the ethos of the colonial era are the trilogy of conflict determinants which, in tandem, cast a dark shadow over the basin's future making it "one of the ten flashpoints in contemporary international relations"⁷.

I. Difficult Hydrologic Environment

The hydrologic environment of a basin is one of the significant determinants shaping the pattern of inter-riparian relationship and, with it, the possibility of equitable, cooperative development and utilization of the water resources. The hydrologic environment, i.e., "the absolute level of water resource availability, its inter- and intra-annual variability and its spatial distribution – which is a natural legacy that a society inherits"⁸ may be "easy" and hence conducive for equitable utilization, or it may be "difficult" and constitute a challenge to such utilization. A hydrologic environment is said to be "easy" where there is "[r]elatively low rainfall variability, with rain distributed throughout the year and perennial river flows sustained by groundwater base flows"⁹. Hydrologies "of absolute water scarcity (i.e. deserts) and, at the other extreme, low-lying lands where there is severe flood risk"¹⁰ are said to be difficult.

The hydrologic environment of the Nile though is even worse and rather epitomizes the category of "more difficult" hydrologies "where rainfall is markedly seasonal – a short season of torrential rain followed by a long dry season [which] requires the storage of water; or where there is high inter-annual climate variability, where extremes of flood and drought create unpredictable risks to individuals and communities and to nations and regions and require over-year water storage"¹¹. By far the most significant

⁷ O. Yohannes, *Water Resources and Inter-Riparian Relationships in the Nile Basin: The Search for an Integrative Discourse* (2008), 1.

⁸ D. Grey & C. Sadoff, 'Sink or Swim? Water Security for Growth and Development', 9 *Water Policy* (2007) 545, 548.

⁹ *Id.*, 548.

¹⁰ *Id.*, 549.

¹¹ *Id.*, 549.

hydrologic challenge in the Nile basin pertains to the river's discharge which is too small to match its reputation as the world's longest river. The fabled Nile "shows the lowest specific discharge of comparable large rivers"¹² as the relatively meager 84 billion cubic meters of water it carries downstream annually constitutes only "a mere cup (2 per cent) of the Amazon, perhaps a glass (15 per cent) of the Mississippi, or at best a pitcher (20 per cent) of the Mekong"¹³.

Yet another challenge pertaining to the peculiar geographical aspect of the Nile is the "great contrast between the riparian state which contributes almost all the water to the Nile but uses almost none (Ethiopia) and that which contributes nothing to the Nile but uses most of its water (Egypt)"¹⁴. The Nile basin thus constitutes a singularly distinct hydrologic environment where the pattern of utilization of the waters is in stark contrast to flow contribution. The anomaly is twofold, as the two downstream riparians – Egypt and Sudan – utilize almost the entire flow despite the fact that their contribution to the water balance is either nil or negative.¹⁵ The extreme variability and erratic nature of the Nile's discharge¹⁶ is another predicament which, apart from straining inter-riparian relationships in the distant past,¹⁷ currently poses a serious challenge to the proper management of the basin's water resources.¹⁸

¹² Kliot, *supra* note 5, 13.

¹³ Collins, *supra* note 1, 11.

¹⁴ Kliot, *supra* note 5, 13. Despite the staggering 86 per cent contribution it makes to the annual flow of the Nile, Ethiopia's utilization stands at a dismal 0.65 billion cubic meters. The pattern of utilization by the White Nile riparians is equally insignificant as the volume collectively used by the six countries is only 0.05 billion cubic meters. Tafesse, *supra* note 1, 44, 50.

¹⁵ Kliot, *supra* note 5, 25. Kliot applies the interesting notion of negative contribution to describe the huge water loss that occurs in the territory of Sudan. Hence, the Sudd Swamp in the Sudan is the greatest source of water loss where between 12 and 30 billion cubic meters of water is lost annually, Kliot, *supra* note 5, 23. The same holds true for Egypt where between 12 and 15 billion cubic meters of Nile water is lost annually due to evaporation from Lake Nasser and another 0.6 to 2 billion is lost annually through seepage, Kliot, *supra* note 5, 39.

¹⁶ The Nile is noted for the great variability of its discharge with a mean discharge flow of 102 billion cubic meters during 1870 – 1959; 88 billion cubic meters during 1899 – 1971; 77 billion cubic meters during 1972 – 1986 and the flow fell dramatically to less than 52 billion cubic meters between 1984 and 1987. *Id.*, 18.

¹⁷ The fact that Egyptian civilization and survival depended significantly on the Nile floods for millennia determined the interruption of the flow to be the greatest fear which haunted political leaders as well as peasants of Egypt. Failure or decline in the Nile floods was, therefore, often believed to be caused by some interference upstream

II. Indelible Impact of the Colonial Legacy

The advent of British colonialism in the Nile basin almost indelibly impacted the future hydro-political and legal contours of the basin as it left, in its wake, a grotesquely iniquitous pattern of utilization supported by a patchwork of lopsided colonial treaties, and a hegemonic hydro-political configuration impervious to change. Hence, British colonial presence in the basin still has a profound negative impact as, indeed, the British did create “a new reality that would have profound implications for inter-riparian relations long after their departure”¹⁹. Domesticating the Nile in a manner that would ensure the continuous flow of its waters downstream by integrating all of its tributaries into a single hydrologic system was a necessity of cardinal importance to the success of the entire colonial project.²⁰ This imperial design for the development and utilization of the Nile waters was then implemented through the construction of hydraulic works in Egypt which laid the foundation for the hegemonic control of the waters and a series of lopsided colonial treaties were concluded thereafter, arraying British imperial design for the basin in the garment of legality.

The abject iniquity of the imperial design and the total disregard it had for the interests of the upstream territories where the headwaters of the Nile originate is evident in the fluvial clause of the 1906 Agreement between Great Britain and the Independent State of the Congo.²¹ The treaty whose essential objective pertained to the spheres of influence of the signatories in

and this apprehension then developed, over time, into a working myth about Ethiopia’s assumed ability to divert the Nile. J. Hultin, ‘The Nile: Source of Life, Source of Conflict’, in L. Ohlsson (ed.), *Hydropolitics: Conflict over Water as a Development Constraint* (1995), 29. The lasting negative impact this wrong perception has had on Ethio-Egyptian relations has been succinctly stated by Collins in the following words: “The vagaries of the Nile flood, particularly its lows, have led to some paranoid belief. Foremost among these is the fear that those who live upstream can command the lives of those downstream, an article of faith that has been inscribed on the soul of Egyptians for millennia. The Ethiopians, who collect the waters from the south Atlantic in their highland sanctuary, have always been thought to represent the greatest threat.” Collins, *supra* note 1, 22.

¹⁸ Yohannes, *supra* note 7, 42.

¹⁹ *Id.*, 35.

²⁰ *Id.*, 36.

²¹ ‘Agreement between Great Britain and the Independent State of the Congo, modifying the Agreement signed at Brussels, May 12, 1894, relating to the Spheres of Influence of Great Britain and the Independent State of the Congo in East and Central Africa, London’ (9 May 1906) available at <http://ocid.nacse.org/tfdd/tfdddocs/40ENG.pdf> (last visited 27 April 2011).

East and Central Africa enjoined, under Article III, the government of the Independent state of the Congo from constructing or allowing the construction of “any work which would diminish the volume of water entering Lake Albert, except in agreement with the Soudanese [sic] Government” which then was under Anglo-Egyptian rule. The real purpose of this provision was, indeed, the subjection to Anglo-Egyptian veto of any consumptive utilization of the Nile waters upstream in the Congo, as any such use, however miniscule, would surely diminish the flow.

The use of treaties as hegemonic colonial instruments designed to ensure control of the Nile waters reached its peak in 1929 with the conclusion of the Agreement for the Utilization of the Nile waters for Irrigation Purposes.²² A legal monstrosity of unparalleled meanness, the Agreement apportioned the then usable flow of the Nile to Egypt and Sudan, which received a respective share of 48 and 4 billion cubic meters as their historic rights.²³ The agreement, furthermore, gave Egypt a sweeping veto over any irrigation or power generation works upstream in the territories under British colonial rule, and a special privilege to carry out in the territory of the Sudan “all the necessary measures required for the complete study and record of the hydrology of the River Nile” and to construct “any works on the river and its branches, or to take any measures with a view to increasing the water supply for the benefit of Egypt”²⁴. Despite its utter irrelevance occasioned, *inter alia*, by the demise of British colonial rule in the basin and its subsequent termination three decades later upon the conclusion of another agreement by Egypt and Sudan, the allegedly continued binding force of the agreement and the resulting obligation of the successor states in the White Nile sub-basin still features as a constant refrain in the official Egyptian rhetoric of non-negotiable historic rights.²⁵ Overcoming this baseless yet obstructively uncompromising claim has proven to be a veritable impossibility which has bedeviled resolution of the Nile waters question.

²² ‘Exchange of Notes Between His Majesty’s Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes [1929 Agreement], Cairo’ (7 May 1929) available at <http://ocid.nacse.org/tfdd/tfdddocs/92ENG.pdf> (last visited 27 April 2011).

²³ Tafesse, *supra* note 1, 74-75.

²⁴ 1929 Agreement, *supra* note 22, para. 4 (b), (c) and (d) of the Egyptian Note.

²⁵ D. Z. Mekonnen, ‘The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a “Water Security” Paradigm: Flight into Obscurity or a Logical Cul-de-sac?’, 21 *European Journal of International Law* (2010) 421, 439.

III. Stagnant Post-Colonial Reality

As far as the East is from the West, so far is, one may say, independent existence from colonial subjugation. This apparently incontrovertible truth though does not apply to the hydro-political and legal reality of the Nile basin as the post-colonial era is but an accentuated continuation, save for change of actors, of the ethos of the colonial era. During the twilight hours of British colonial rule in the basin, it was quite evident that Egypt, with its asymmetric power advantage vis-à-vis the other co-basin states and the imperial ambitions it has long had for complete control of the Nile water resources,²⁶ would become the basin's bogeyman. When Sudan's independence was on the horizon, the campaign for uniting it with Egypt – a conviction birthed out of a traumatic experience which impressed upon Egypt's rulers “that whoever ruled Khartoum could hold Egypt for ransom”²⁷ – became a rallying slogan “viewed by Egyptian nationalists of all political shades as an absolute must”²⁸.

To the shock of Egypt and as a natural nationalist reaction, Sudan challenged, on the eve of its independence, the 1929 Agreement and called for its revision arguing that it “was no longer valid because it had been reached by Britain and Egypt [not involving Sudan] and it had discriminated against Sudan by granting it only one-twenty-second of the total annual flow

²⁶ Precipitated by the ever present fear of the possible interruption of the flow of the Nile by interference upstream, the passionate desire to gain control over the sources of the Nile with a view to ensuring the uninterrupted flow of the river downstream had for long been the major preoccupation of Egyptian rulers. The task was pioneered by Muhammad Ali (1769 – 1849) who drew a grand strategy of uniting the Nile Valley under Egyptian hegemony and unleashed a series of invasions which led to the conquest of Sudan in 1820. Muhammad Ali firmly believed that “the security and prosperity of Egypt could only be assured fully by extending conquests to those Ethiopian provinces from which Egypt received its great reserves of water” and used the conquest of Sudan as a stepping-stone to launch repeated invasions along Ethiopia's western frontier; the campaign of conquest was brought to a halt when, in 1882, Egypt itself fell under British colonial rule. D. Kendie, ‘Egypt and the Hydro-Politics of the Blue Nile’, 6 *Northeast African Studies* (1999) 141, 145; see also Tafesse, *supra* note 1, 60-62; J. Brunnee & S. J. Toope, ‘The Changing Nile Basin Regime: Does Law Matter?’, 43 *Harvard International Law Journal* (2002) 105, 122-123.

²⁷ G. Warbung, ‘The Nile in Egyptian-Sudanese Relations, 1956 – 1995’, in H. Erlich & I. Gershoni (eds), *The Nile: Histories, Cultures and Myths* (2000), 229-230.

²⁸ Warbung, *supra* note 27, 229.

of the Nile water”²⁹. It was quite understandable why the rallying slogan of the day – Unity of the Nile Valley – inspired, before Sudan’s independence, in Egyptians and their Sudanese supporters “emotional and political significance similar to that inspired by ‘Liberty, Equality and Fraternity’ among the French revolutionists; ‘The Union forever’ among the Northern elements of the United States during the Civil War; the doctrine of ‘Laissez-faire’ among capitalists; or ‘Workers of the World, Unite’ among socialists”³⁰.

Upon its independence in 1956, Sudan made it clear that the unfair terms of the 1929 Agreement would not bind it anymore and abrogated it two years later.³¹ The signing of a binding agreement on the utilization of the Nile waters by the two countries was made possible only “after the short-lived Sudanese parliamentary democracy was replaced by a military dictatorship led by General Aboud”³². The Agreement for the Full Utilization of the Nile Waters³³ provides nearly conclusive evidence of the fact that the hydro-political and legal reality in the Nile basin has not changed a bit, notwithstanding the demise of British colonial rule.

The central objective of the agreement was to realize the full utilization by the two parties of the Nile waters by replacing the 1929 agreement which “provided only for the partial use of the Nile waters and did not extend to include a complete control of the River waters”³⁴. The agreement made possible the launching of Nile Control Projects – the Sud el Ali (Aswan) and Roseires dams in Egypt and Sudan, respectively – which availed to the parties a net benefit of 22 billion cubic meters.³⁵ The 22 billion cubic meter net benefit to be obtained from the Sud el Ali reservoir was then allocated to Egypt and Sudan which received further 7.5 and 14.5

²⁹ *Id.*, 230-231.

³⁰ L. A. Fabunmi, *The Sudan in Anglo – Egyptian Relations: A Case Study in Power Politics, 1800-1956* (1960), 147.

³¹ C. O. Okidi, ‘Legal and Policy Regime of Lake Victoria and Nile Basins’, 20 *Indian Journal of International Law* (1980) 395, 423. Kliot, *supra* note 5, at 30, 34 and 72 describes the 1929 Agreement as a culmination of Anglo-Egyptian hegemony over the Sudan which Sudan, thus, did not consider itself bound by and eventually abrogated it in 1958.

³² Kliot, *supra* note 5, 72.

³³ ‘Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters [1959 Agreement], Cairo’ (8 November 1959) available at <http://www.fao.org/docrep/w7414b/w7414b13.htm> (last visited 27 April 2011).

³⁴ *Id.*, preamble.

³⁵ *Id.*, Art. 2 (1), (2) and (4).

billion cubic meters respectively on top of their respective historic rights reaffirmed by the agreement.³⁶ The entire flow of the Nile was thus fully apportioned between Egypt and Sudan which received 55.5 and 18.5 billion cubic meters respectively, thereby entrenching a singularly iniquitous water utilization regime contingent upon zero consumptive water use by upstream riparians.

The history of Nile inter-riparian relationship has since been hallmarked with mutual distrust, aggressive unilateralism and open threats. Punctuated by occasional sabre-rattling in an atmosphere of intense bellicosity, the pattern of inter-riparian relationship has long been a tug of war between the two downstream riparians, which strive to endlessly perpetuate the *status quo*, and the upstream riparians, which call for its demise and replacement by an inclusive, fair and equitable regime. This distinctively discordant pattern, entrenched for nearly half a century, began to change dramatically with the launch of the NBI in February 1999. The decade since has been a historic epoch of optimism and good rapport signifying “a remarkable shift in the tone and substance of state-to-state relationships along the Nile”³⁷. The NBI ushered in a fundamental transformation in the basin’s history through an unprecedented inclusiveness in scope and an equally unprecedented depth in substance evident from the resolve to take up the sensitive issue of equitable reallocation which had consistently been eschewed by previous cooperative schemes.³⁸

B. The Twin Strategies of the NBI

Officially launched in February 1999 by the Council of Ministers of Water Affairs of the Nile basin states (Nile-COM) as “an inclusive transitional mechanism for cooperation until a permanent cooperative framework is established”,³⁹ the NBI adopted two strategies to resolve the intractable Nile waters question. Both strategies are rooted, albeit not equally evidently, in the Shared Vision in which the NBI is anchored. The Shared Vision “to achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water

³⁶ *Id.*, Art. 1 and Art. 2(4).

³⁷ Brunnee & Toope, *supra* note 26, 132.

³⁸ Mekonnen, *supra* note 25, 423-427.

³⁹ Tafesse, *supra* note 1, 109.

resources”⁴⁰ is comprised of two strategies: the conclusion of an inclusive and equitable legal framework and a benefit sharing framework through which the variegated benefits generated from the basin’s shared water resources would be utilized fairly and equitably by all the riparians.

I. The CFA – Development and Stalemate

The history of the CFA⁴¹ is the epitome of a promising and courageous journey began in earnest which, at some point, took a wrong turn and ended up in a blind-alley. Although all the riparians, Egypt and Sudan included, wholeheartedly endorsed the Shared Vision, the very notion of equitable reallocation of the Nile waters was an anathema to Egypt and Sudan. The whole process was accordingly encumbered from the outset by the divergent views of the upstream and downstream riparians over the issue of equitable reallocation. Primarily Egypt and, to a certain degree, Sudan, were opposed to the notion of equitable reallocation; they “were pushed to accept it because of the overwhelming support of the other upstream countries”⁴². This displeasure of the two downstream riparians is obviously one of the reasons for the extremely slow pace of the negotiations which took a decade to produce a draft CFA.

The draft CFA was submitted to and discussed during the 15th Nile-COM meeting held in Entebbe, Uganda from 24-27 June, 2007. Despite extensive discussions on the outstanding issue of “water security”, the meeting could not make any headway and wound up with a decision to refer the outstanding issue for resolution by the Heads of State and Governments of the riparian countries.⁴³ The impasse in the negotiations pertained to Article 14 (b) of the draft CFA which obliges the riparians “not to

⁴⁰ NBI, ‘About the NBI’ (28 October 2010) available at http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=71%3Aabout-the-nbi&catid=34%3Anbi-background-facts&Itemid=74&lang=en (last visited 27 April 2011).

⁴¹ Note that the CFA predates the NBI itself; it was conceived in a previous cooperative effort, the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile (TECCONILE) established in 1992; see Mekonnen, *supra* note 25, 426-428.

⁴² I. Tamrat, ‘Prospects and Problems of the Ongoing Cooperation in the Nile Basin and the Way Forward – A Personal Ethiopian Perspective’, Discussion paper presented at the National Consultative Workshop held in Addis Ababa, Ethiopia, 12-13 February 2009, 9.

⁴³ NBI, Minutes of the 15th Nile Council of Ministers Meeting, 24-25 June 2007, Entebbe, Uganda (on file with the author).

significantly affect the water security of any other Nile Basin State”⁴⁴. Although it was accepted by all the riparians, Egypt and Sudan rejected it while the other riparians rejected, likewise, an Egyptian proposal for a reformulation, so the obligation would instead be “[n]ot to adversely affect the water security and current uses and rights of any other Nile Basin State”⁴⁵.

During the 16th Nile-COM meeting held in July 2008 in Kinshasa, the DRC, the negotiations took a strange turn. In a complete about-face, the meeting convened “to forge a way forward in finalizing the outstanding issue [of water security] of the Draft Cooperative Framework Agreement”⁴⁶ and decided to leave out the controversial Article 14 (b) adopted the CFA deferring, instead, resolution of the controversy surrounding the provision to the Nile River Basin Commission yet to come into being.⁴⁷ The signing of the CFA was postponed to the next Nile-COM meeting to be held in Alexandria, Egypt, from 27 to 28 July 2009. That meeting too did not fare any better in terms of reaching a compromise on the controversial Article 14 (b) and ended, deferring resolution of the issue once more, for “an additional period of six months to enable member states to move forward in concluding an inclusive treaty”⁴⁸. Continuing the downward spiral, the Extraordinary Nile-COM meeting held on 13 April 2010 in the Red Sea resort of Sharm El-Sheikh, with the declared objective of harmonizing the views of the riparian states on the pending issues and reaching agreement on the way forward over the CFA,⁴⁹ ended up in failure. Despite the marathon fifteen hour deliberations, “the only agreement that was reached was on minutiae in order to avoid the pitfalls of the past”⁵⁰.

Frustrated and exasperated by the Sharm El-Sheikh fiasco, the seven riparian countries – Burundi, DR Congo, Ethiopia, Kenya, Rwanda, Tanzania and Uganda – agreed to open the CFA for signature from 14 May

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Mekonnen, *supra* note 25, 428.

⁴⁷ Mekonnen, *supra* note 25, 429.

⁴⁸ *Id.*

⁴⁹ NBI, ‘Ministers of Water Affairs to Meet again over the River Nile Treaty’ available at <http://www.google.de/search?hl=de&client=firefox-a&hs=9Cr&rls=org.mozilla%3Ade%3Aofficial&q=NBI+News%2C+%22Ministers+of+Water+Affairs+to+Meet+again+over+the+River+Nile+Treaty%22&aq=f&aqi=&aql=&oq=> (last visited 21 March 2011).

⁵⁰ G. Nkrumah, ‘Whose Water is It?’ (15-21 April 2010) available at <http://weekly.ahram.org.eg/2010/994/eg10.htm> (last visited 27 April 2011).

2010 and keep it open for not more than one year, whereas Egypt and Sudan rejected this position and proposed, instead, that the River Nile Basin Commission be launched by the basin countries as negotiations proceed to finalize the agreement on the CFA.⁵¹ Much to the chagrin of Egypt, Ethiopia, Uganda, Tanzania and Rwanda signed the agreement the very day it was opened for signature,⁵² and Kenya signed it a week later.⁵³ A journey started with an unprecedented sense of optimism and positive rapport, thus wound up creating a huge chasm separating the two downstream riparians from the seven upstream ones.

II. The Benefit Sharing Framework

Vaguely implied in the Shared Vision which speaks of “the benefits from the common Nile Basin water resources” as the means to achieve sustainable socio-economic development, benefit sharing clearly emerged as the NBI’s second strategy to resolve the Nile waters question with the inclusion of the Socio-economic Development and Benefit Sharing (SDBS) Project among the Shared Vision Programs of the NBI⁵⁴ and the development, there under, of a Benefit Sharing Framework (BSF).⁵⁵

The SDBS Project was launched in 2005 “with the main objective to enhance the process of integration and cooperation to further socio-

⁵¹ NBI, ‘Ministers of Water Affairs End Extraordinary Meeting over the Cooperative Framework Agreement’ (14 April 2010) available at http://www.nilebasin.org/index.php?option=com_content&task=view&id=161&Itemid=70 (last visited 21 March 2011).

⁵² G. Tenywa, ‘Uganda to continue River Nile talks’ (16 May 2010) available at www.newvision.co.ug/D/8/12/719720 (last visited 27 April 2011).

⁵³ D. Miriri, ‘Kenya Signs Nile Basin deal rejected by Egypt’ (19 May 2010), available at <http://af.reuters.com/article/topNews/idAFJJOE64I0EF20100519> (last visited 27 April 2011).

⁵⁴ The Shared Vision Program (SVP) constitutes one of the two complementary programs comprising of the Strategic Action Program of the NBI, and it focuses on basin-wide projects; Tafesse, *supra* note 1, 109. Currently, the SVP includes 8 such projects dealing with applied training, confidence-building and stakeholder involvement, regional power trade, shared vision coordination, socio-economic development and benefit sharing, trans-boundary environmental action, efficient water use for agriculture, and water resource management; NBI, ‘Eastern Nile Subsidiary Action Program (ENSAP)’ (2011) available at www.nilebasin.org/ensap/ (last visited 27 April 2011).

⁵⁵ D. Z. Mekonnen, ‘From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy – the Stumbling Block against Resolution of the Nile Waters Question’, 4 *Mizan Law Review* (2010), 232, 250.

economic development in the Nile Basin”⁵⁶. The BSF, which is to be fully developed by the SDBS Project, is comprised of two phases and three stages. The first phase covers stage one “which provides the concepts and principles behind benefit sharing such that a basis (common understanding) for the steps towards trust and cooperation is established”⁵⁷. Phase two entails stage two “which will give the qualitative significance of a broad range of benefit sharing scenarios in a visual format such that the positive sum of outcomes can be identified and potential “baskets of benefits” proposed”⁵⁸. Stage three will, then, complete the framework by giving “the quantitative magnitude of ‘baskets of benefit scenarios’ (and their related costs) under a range of modeled situations and portfolios”⁵⁹.

Thus, when completed and put into operation, benefit sharing will not only make possible resolution of the intractable Nile waters question but will, as an integrative and positive-sum approach, also provide a firm ground for cooperation which would avail to the riparian countries a wide spectrum of benefits in economic, environmental and political terms.⁶⁰ The crucial question one should ask, however, is whether the BSF is capable, as its proponents claim, of resolving the intractable Nile waters question, or is just another hegemonic ruse to woo the upstream riparians for a time. The author believes the latter to be the case, not out of cynical pessimism but in recognition of the fundamental flaws inherent in the so-called “benefit sharing” approach.

C. The CFA – Prey to the “Water Security” Scylla

The Extraordinary Nile-COM meeting at Sharm El-Sheikh was poised to become the apogee in the decade-long negotiation process as it was hoped that it would mark the last step in the signing of the CFA, thereby bringing the protracted negotiation process to a victorious culmination. For any serious observer though, neither the failure at Sharm El-Sheikh nor the subsequent discord and deterioration in inter-riparian relations should come

⁵⁶ *Id.*, 250.

⁵⁷ *Id.*

⁵⁸ *Id.*.

⁵⁹ *Id.*.

⁶⁰ C. Sadoff & D. Grey, ‘Beyond the river: the benefits of cooperation on international rivers’, 4 *Water Policy* (2002) 389-403. The authors point out four major benefits of cooperation: *Benefits to the river* (393-395); *Benefits from the river* (395-397); *Reducing costs because of the river* (398-399); and *Benefits beyond the river* (399-400).

as a surprise. Both incidents were caused by a fateful measure taken much earlier by the riparians – the introduction of the concept of water security into the CFA.

The decision to include the concept of water security into the CFA was made in February 2002 by the Negotiating Committee⁶¹ as an ingenious solution to the “thorny issue of existing treaties” as, it was maintained, the concept “has the advantage of relegating existing treaties to the background in favor of the more dynamic and progressive principles of international water law”⁶². Water security is now one of the general principles of the agreement in accordance to which “[t]he Nile River Basin and the Nile and the Nile River System shall be protected, used, conserved and developed”⁶³. That decision, one may certainly assert, marked the very unfortunate moment the CFA received the coup de grace, and Sharm El-Sheikh only made manifest the inevitable failure which had long been in the making.

The principal justification for the introduction of water security – the apparently insurmountable hurdle of “existing treaties” – pertains to a phantom, literally non-existent hurdle as the so-called “thorny issue of existing treaties” is but an allusion to the 1929 and 1959 Agreements on the Nile. As pointed out earlier, the spurious claim for the continued binding force of the 1929 Agreement on the former British colonies in the White

⁶¹ Mekonnen, *supra* note 25, 430.

⁶² G. Amare, ‘Contentious Issues in the Negotiation Process of the Cooperative Framework Agreement on the Nile’, paper presented at the National Consultative Workshop on Nile Cooperation, 12-13 February 2009, Addis Ababa, Ethiopia, 5. The author also gives a second justification based on the “constructive ambiguity” mantra and maintains that the concept of water security will serve as a vehicle to transfuse into the CFA a measure of constructive ambiguity which will bring closer the divergent views held by the upper and lower riparians. The justifications and the flawed assumptions underpinning them have been elaborately discussed in Mekonnen, *supra* note 25, 429-439.

⁶³ Draft Cooperative Framework Agreement (on file with the author), Art. 3. The Draft Agreement lists out fifteen general principles under Art. 3: cooperation, sustainable development, subsidiarity, equitable and reasonable utilization, prevention of causing significant harm, the right of the Nile River states to use water within their territories, protection and conservation, information concerning planned measures, community of interest, exchange of data and information, environmental impact assessment and audit, peaceful resolution of disputes, water as a finite and valuable resource, water has social and economic value, and water security. Having seen such an unusually long list of “general principles”, some of which are mere verbatim repetitions of the contents of some of the principles while others are mere elementary facts of common knowledge, one cannot help being baffled by the penury of the expertise that has gone into the formulation of this document.

Nile sub-basin is without any sound legal basis and is negated by the historical facts surrounding the signing of the agreement as well as by the legal position the colonies took with regards to the legal implication of their status as successors to their common predecessor – the British Empire. Hence, the 1929 Agreement which, for Egypt, was “temporary and conditional upon future political developments, especially in the Sudan”⁶⁴ was abrogated by Sudan itself⁶⁵ and the former British colonies had, by endorsing the Nyerere Doctrine of state succession, relieved themselves of any obligations purportedly passed onto them upon independence.⁶⁶

The 1959 Agreement being a typical bilateral agreement entered into by the two independent riparian countries of Egypt and Sudan, its legal force is indubitably limited to the signatories alone and it neither confers any right nor imposes any obligation upon the other riparians which are not party to it. As the agreement itself has effectively replaced the 1929 Agreement, which supposedly had some binding force on the former British colonies⁶⁷ and dealt a severe blow to the tenuous claim for historic rights over nearly the entire flow of the Nile, the spurious justification of circumventing the existing treaties hurdle through the magic wand of water security is but ludicrous. The fact that the country from where nearly 85 per cent of the Nile waters come was neither a British colony and thus not connected in any way to the 1929 agreement nor party to the 1959 agreement further downgrades this ludicrous justification to arrant nonsense.

The shift to water security was, contrary to the flimsy justifications, a cunning hegemonic maneuver designed to derail negotiation of the CFA into a dead end so that the already intractable Nile waters question would become completely securitized. Given the poignantly iniquitous *status quo*

⁶⁴ Klot, *supra* note 5, 67.

⁶⁵ *Id.*, 72.

⁶⁶ The Nyerere Doctrine of state succession represents a position which is the exact opposite of the theory of Universal succession. Also known as the ‘Opting-in Formula’, the doctrine rejects the wholesale transmission of colonial treaties and reserves the right of the successor state to choose from among such treaties and decide which ones it wants to opt-into. For a detailed discussion of the subject and the respective positions of the White Nile riparian countries, see Mekonnen, *supra* note 25, 432- 434.

⁶⁷ That the 1929 Agreement has been replaced by the 1959 Agreement is made manifest in the language of the preamble of the latter. This position is also in consonance with Article 59 of the Vienna Convention on the Law of Treaties; Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331. See also Mekonnen, *supra* note 25, 435.

underpinned with extremely tenuous arguments and the impossibility of resorting to the use or threat of brute force to perpetuate the same, it was only natural for the basin hydro-hegemon to employ the more subtle hegemonic compliance producing mechanism of securitization – a potent yet quite subtle instrument of coercion – to stifle any breakthrough and perpetuate the *status quo* without evoking the wrath or frustration of the non-hegemonic riparians.⁶⁸ It is quite baffling that the other riparians, which had been enthusiastically engaged in the negotiations, had to wait for Sharm El- Sheikh to realize that they had cunningly been lured into the “water security” trap laid in 2002.

The concept of water security is a non-legal, amorphous and potentially disruptive concept alien to international legal instruments dealing with the subject of trans-boundary watercourses. Its inclusion into the CFA is thus quite anomalous. The concept which essentially signifies “[h]arnessing the productive potential of water and limiting its destructive impact”⁶⁹ has been defined as “the availability of an acceptable quantity and quality of water for health, livelihoods, ecosystems and production, coupled with an acceptable level of water related risks to people, environments and economies”⁷⁰. In the CFA, the concept is sanitized by expunging the reference to water related risks and is defined entirely positively as “the right of all Nile Basin States to reliable access to and use of the Nile River System for health, agriculture, livelihoods, production and environment.”⁷¹ In view of the negative hydrologic environment, it is quite ludicrous to expect the already exhausted Nile – a hydrologic dwarf with a meager annual flow constituting only a cup (2%) of that of the Amazon – to provide still more water for all these purposes and the false promise that it would is, indeed, “a cornucopian illusion the realization of which would require an

⁶⁸ The apparently unprecedented positive transformation towards greater cooperation in the basin was, according to Brunnee & Toope, occasioned by “recognition of increasing resource limitations caused by population growth, environmental degradation, and the need to share water more widely; exploration of various modalities for cooperation that are not susceptible to hegemonic control; and understanding the changing normative framework that both renders past positions untenable and promotes positions that are more reflective of the basin states’ collective concerns.”, Brunnee & Toope, *supra* note 26, 143-144.

⁶⁹ Grey & Sadoff, *supra* note 8, 547.

⁷⁰ *Id.*, 548.

⁷¹ Agreement on the Nile River Basin Cooperative Framework (on file with the author), Art. 3.

equally illusory Nile ‘swelled by the rains of Zeus, ... born in paradise’, and thus constituting ‘an inexhaustible manna from heaven’⁷².

The Egyptian proposal at Sharm El-Sheikh to further continue the negotiation under the auspices of the Nile Basin River Commission⁷³ proves that the non-hegemonic riparians are allowed only to endlessly negotiate with and never to win any concessions from the basin bully. To accept this, however, would be a volitional forfeiture by the non-hegemonic riparians of their right to any consumptive use of the Nile waters; hence, the Sharm El-Sheikh fiasco. It should thus be no surprise that what had been said of the Pharaohs millennia ago may validly be said of Egypt’s rulers of today: “Pharaoh king of Egypt, [...] you say, ‘The Nile is Mine; I made it for myself’⁷⁴”.

D. The “Benefit Sharing” Charybdis – a Viable Alternative?

Sharing trans-boundary waters in equity and fairness is understandably quite difficult; it may even tend to be impossible in basins with a negative hydrologic reality hallmarked by worsening scarcity. Even in an ideal situation where the need for sharing is fully espoused, how this would be done is often frustratingly difficult to sort out, and crafting formal rules of allocation and other rights is, thusly, rightly said to be a necessity.⁷⁵ Though indubitably difficult to work out, allocation is one of the fundamental requirements of sound water distribution which ensures secure access to a predictable volume and promotes “equitable sharing of the burdens of water scarcity, restrains the exertion of superior force or political influence, and contributes to the efficient use of available water volumes”⁷⁶. Determination in volumetric terms of the entitlement of every riparian has thus far been the most common approach. The notion of benefit sharing

⁷² Mekonnen, *supra* note 25, 438.

⁷³ Egypt had vehemently argued against the signing of the CFA, insisting instead that the negotiations be further continued under the auspices of the Nile River Basin Commission – a position rejected right away by the upstream riparian countries who decided to go on with the signing of the CFA despite Egyptian and Sudanese opposition to the move.

⁷⁴ Ezekiel 29:3, *NIV*.

⁷⁵ Brunnee & Toope, *supra* note 26, 158.

⁷⁶ F. du Bois, ‘Water Law in the Economy of Nature’, in J. A. Allan & C. Mallat (eds), *Water in the Middle East: Legal, Political and Commercial Implications* (1995), 111.

represents a relatively recent approach focusing on the allocation or sharing of the benefits rather than the water itself; its proponents laud it as a much easier approach entailing incomparably higher advantages especially in terms of efficient and sustainable utilization beneficial to the ecological integrity of the basin.

The enormous and wide-ranging benefits that cooperative development of shared water resources avails to the riparians are incontrovertible. In the case of the Nile basin, for instance, it has been demonstrated that the annual economic value of cooperation involving limited infrastructure development in the Blue Nile would range between US\$ 1.15 and 1.97 billion, whereas the “total (potential) annual direct gross economic benefits of Nile water utilization in irrigation and hydroelectric power generation are on the order of US \$ 7 – 11 billion”⁷⁷. The question here though is whether these enormous potential benefits can be made real and reaped by the impoverished Nile riparians or, given the basin’s unfavorable hydro-political and legal reality, whether they are simply mere pipe dreams.

More importantly, would it still make sense to pin one’s hope on benefit sharing as an alternative framework or modality to resolve the Nile waters question in spite of the fact that the much anticipated signing of the CFA and the inauguration of a permanent legal and institutional framework governing the equitable utilization of the waters has failed to materialize? The writer holds the position that benefit sharing cannot provide an alternative solution for the Nile waters question as it is yet another hegemonic hoax which, apart from being fundamentally flawed in its underpinning assumptions, is starkly incompatible with the foundational principle of international water law and conveniently ignores the hegemonic hydro-political configuration prevalent in the basin.

I. Flawed Assumptions

The flaws of benefit sharing are rooted in the very definition of the notion itself which contains as an integral part the unfounded denigration of the allocation approach as “a zero-sum, rights-based approach” focusing “on water as a commodity to be divided”⁷⁸. By contrast, benefit sharing is

⁷⁷ D. Whittington, X. Wu & C. Sadoff, ‘Water Resources Management in the Nile Basin: The Economic Value of Cooperation’, 7 *Water Policy* (2005), 227, 244, 249.

⁷⁸ M. A. Giordano & A. T. Wolf, ‘Sharing Waters: Post-Rio International Water Management’, 27 *Natural Resources Forum* (2003), 163, 168.

lavishly lauded as an integrative, positive-sum approach “that equitably allocate[s] the benefits derived from water, not the water itself”⁷⁹. As it “concerns the distribution of benefits from water use – whether from hydropower, agriculture, economic development, aesthetics, or the preservation of healthy aquatic ecosystems – not the water itself”⁸⁰, it “allows for a positive-sum agreement, occasionally including even non-water-related gains in a ‘basket of benefits’, whereas dividing the water itself only allows for winners and losers”⁸¹.

The major flaw of this proposition pertains to the derisive misrepresentation of the rights-based allocation or apportionment approach as a zero-sum approach which allows only for winners and losers. Inquiring into the veracity of this erroneous assertion is therefore a matter of necessity. The enormous and wide ranging benefits of cooperative development of any shared water resource, the Nile included, is beyond question. However, denigration of the long practiced rights-based allocation approach in a bid to magnify the advantages of the benefit sharing approach and to make the same more salable is either a naïve commitment to a relatively new and appealing notion or a sinister scheme to deploy another hegemonic coercive tactic⁸² under a convenient camouflage. The assertion is seriously flawed as it draws a false dichotomy between the sharing of water and the benefits thereof as alternative approaches.⁸³ The fact though is that the negotiation of water rights and of benefits are not alternative strategies; rather, “an explicit or implicit recognition or negotiation of property rights is a necessary precondition for the realization of a benefit sharing scheme”⁸⁴. The rights-based allocation approach, far from being a zero-sum game, is rather a necessary precondition for the realization of a benefit sharing scheme.

Allocation or apportionment is an integral part and a necessary outcome of the principle of equitable and reasonable utilization, which is a fundamental principle of international law governing the non-navigational

⁷⁹ *Id.*, 168.

⁸⁰ *Id.*, 170.

⁸¹ *Id.*

⁸² For a discussion of such tactics, of which benefit sharing is one, see Zeitoun & Warner, *supra* note 6, 444-447.

⁸³ Sadoff & Grey, *supra* note 60, 396.

⁸⁴ I. Dombrowsky, ‘Revisiting the Potential for Benefit Sharing in the Management of Trans-boundary Rivers’, 11 *Water Policy* (2009)125, 137.

use of trans-boundary watercourses.⁸⁵ The essence of the principle being the sovereign entitlement of every riparian country “within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international river”⁸⁶, derision of the allocation approach as a zero-sum approach allowing only for winners and losers makes no logical sense.

The principle of equitable and reasonable utilization, of which allocation is an essential attribute, endows every riparian country with a sovereign right to use the waters of an international river. Contrary to the derisive assertion, therefore, the principle itself as well as the resultant allocation never allow for winners and losers. In basins like the Nile where the existing pattern of utilization is distinctly inequitable, reallocation might occasion a big “loss” to those riparians whose utilization is way beyond their equitable share. As such, “factual loss” does not constitute injury to a legal right - it neither constitutes a legal injury which must be stopped or compensated nor does it in any way enjoin other riparians to exercise their sovereign right to use the waters.⁸⁷

The approach is also flawed in respect of its promise to bring forth a “win-win” solution which would accord every riparian country involved in the process its due share of the benefits. Sharing benefits logically presupposes a prior agreed mechanism for the determination of such shares which cannot be but the right of every riparian country to use the waters. Sharing benefits without there being an agreed determination of rights is an oxymoron at best, or, at worst, a cunning hegemonic tactic designed to bewitch the non-hegemonic riparians into believing that some benefits would accrue to them sometime in the future.

⁸⁵ S. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001), 325, 345; P. W. Birnie & A. E. Boyle, *International Law and the Environment*, 2nd ed. (2002), 303; A. Nollkaemper (1996), ‘The Contribution of the International Law Commission to International Water Law: Does it Reverse the Flight from Substance?’, 27 *Netherlands Yearbook of International Law* (1996) 39, 44.

⁸⁶ D. Caponera, ‘The Legal Status of the Shatt-al-Arab (Tigris & Euphrates) River Basin’, 45 *Austrian Journal of Public and International Law* (1993) 147, 156.

⁸⁷ Making a distinction between ‘factual harm’ and ‘legal injury’ is crucially important for understanding the essence of the principle of equitable and reasonable utilization; failure to distinguish between the two may lead to far reaching absurd consequences in such basins as the Nile as the principle might be construed as prohibiting significant ‘factual harm’ and thereby sanctioning extremely inequitable utilization patterns which deny other riparian countries of their sovereign right to consumptive use of an international river. See McCaffrey, *supra* note 85, 325.

II. Incompatibility with International Water Law

Benefit sharing may well be a convenient modality for cooperative development of shared water resources, and the community approach it entails has a huge potential for ensuring optimum and sustainable utilization. Nile riparians should indeed be commended for adopting the community approach which avails to them “the potentially rich returns from cooperative development”⁸⁸. However, it should not be lost on them that cooperative development of the Nile waters with a view to sharing the benefits thereof can become a reality only if an inclusive and equitable legal regime determinative of the rights of the riparians is put in place first. The admittedly difficult yet indispensable allocation approach which benefits sharing purports to bypass is an attribute of the principle of equitable and reasonable utilization⁸⁹ – a fact which renders the approach incompatible with international water law.

The principle of equitable and reasonable utilization primarily governs allocation⁹⁰ and its function is to ensure that “each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin”⁹¹. Allocation of shared water resources, however difficult to work out, is a rather indispensable course which would ensure a predictable volume of water, thereby promoting the “equitable sharing of the burdens of water scarcity, restrain[ing] the exertion of superior force or political influence, and contribut[ing] to the efficient use of available water volumes”⁹². As such, it forms an indispensable feature of the principle which translates the mere

⁸⁸ C. B. Bourne, ‘The Development of International Water Resources: The ‘Drainage Basin Approach’’, in P. Wouters (ed.), *International Water Law: Selected Writings of Professor Charles B. Bourne [Selected Writings]* (1997), 22.

⁸⁹ X. Fuentes, ‘Sustainable Development and the Equitable Utilization of International Watercourses’, 69 *British Yearbook of International Law* (1998) 119, 137; see also U. Kuffner, ‘Contested Waters: Dividing or Sharing?’, in W. Scheumann & M. Schiffler (eds), *Water in the Middle East: Potential for Conflicts and Prospects for Cooperation* (1998), 75 arguing that a volumetric division of the average flow according to percentages of the actual yearly or monthly flows is the most appropriate quantitative principle which would make certain that the parties would receive equitable shares of the available flows.

⁹⁰ McCaffrey, *supra* note 85, 325; X. Fuentes, ‘The Criteria for the Equitable Utilization of International Rivers’, 67 *British Yearbook of International Law* (1996) 337, 341.

⁹¹ Bourne, ‘Canada and the Law of International Drainage Basins’, in P. Wouters (ed.), *Selected Writings*, *supra* note 88, 297.

⁹² Du Bois, *supra* note 76, 111.

generic riparian right “to participate in the sharing of the watercourse ... [into] the specific right to certain volumes of water or the right to undertake certain activities on the watercourse”⁹³.

Any benefit sharing framework which purports to bypass the indispensable prerequisite of a rights-based allocation would thus be a negation of this fundamental principle of international water law. Its proponents who strive to sell it as a panacea for the Nile waters question and the enthusiastic followers enticed by the false promise it gives should all be reminded of the fact that the moderate scarcity they are facing now will surely become “unmanageable scarcity unless some means of allocation is devised which caps what would otherwise be an unbridled and ultimately self-defeating scramble for too little by too many”⁹⁴. Such a framework, it should as well be noted, can only be complementary and not alternative to the unavoidable rights-based allocation approach which is the lynchpin of international water law. The pursuit of benefit sharing as an alternative route which would dispense with the admittedly arduous task of allocation would surely be a futile exercise doomed to failure.

III. Negative Hydro-Hegemony Conveniently Ignored

Cooperative development, without doubt, entails enormous potential benefits including benefits to the river which accrue as a result of cooperation which would ensure a “healthy” river system with, *inter alia*, protected watersheds, conserved wetlands, floodplains and groundwater recharge areas, protected riverine biodiversity, and controlled water abstraction and wastewater discharge;⁹⁵ benefits from the river which pertain to the increased quality, quantity and economic productivity of river flows cooperative management makes possible;⁹⁶ reduction in the costs arising because of the river – political benefits achieved through cooperation which “can ease tensions over shared waters, and provide gains in the form of the savings that can be achieved, or the costs of non-cooperation or dispute that can be averted”⁹⁷ and benefits beyond the river – “broader

⁹³ X. Fuentes, *supra* note 89, 130.

⁹⁴ T. M. Franc, ‘Fairness in the International Legal and Institutional System: General Course on Public International Law’, 240 *Recueil de Cours international* (1993-III) 9, 31-32.

⁹⁵ Sadoff & Grey, *supra* note 60, 393 – 394.

⁹⁶ *Id.*, 395.

⁹⁷ *Id.*, 398.

economic growth and regional integration that can generate benefits even in apparently unrelated sectors”⁹⁸.

Realization of these variegated benefits, however, would require by necessity a far deeper and harmonious inter-riparian relationship than would be requisite to conclude an inclusive water-sharing agreement. Whether inter-riparian relationship in the Nile basin has attained the level and depth requisite for the proper functioning and implementation of the BSF depends, to a large measure, on the hydro-political configuration prevalent in the basin – a crucial variable which cannot simply be ignored.

Undeniably, the launching of the NBI a decade ago has brought about a remarkable improvement in inter-riparian relationship.⁹⁹ The hydro-political configuration prevalent in the basin though still remains to be malignly hegemonic.¹⁰⁰ The hope for a possible transformation towards a benign hydro-hegemonic configuration was dashed by the uncompromising claims of Egypt and Sudan for a veritable ownership of the entire flow of the Nile and a veto over any upstream developments thereon.¹⁰¹ With its uncompromising stance to exert, as a matter of policy, its “relative power to indefinitely keep the 55.5 bcm allotment [of the Nile waters]”¹⁰², Egypt has, once again, unabashedly affirmed the role it has chosen to play in the basin to be the exact opposite of that of South Africa which, “[i]n choosing to play the leadership role at the river basin level, [...] has attempted to create a positive-sum hydro-hegemonic configuration through the incentive of benefits-sharing”¹⁰³. Being the only basin-hegemon which has signed and ratified the UN Watercourses Convention,¹⁰⁴ South Africa has chosen to be

⁹⁸ *Id.*, 399.

⁹⁹ Mekonnen, *supra* note 25, 423-427.

¹⁰⁰ M. Woodhouse & M. Zeitoun, ‘Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law’, 10 *Water Policy* (2008), 103, 113. Hydro-hegemony could assume a positive/leadership form where control of the resource is shared among the riparians on the basis of a water-sharing agreement agreed upon and perceived positively by all, or it may, on the contrary, take a negative/dominative, exploitative form where the hegemon, through unilateral action, seeks to attain and consolidate maximum control of the resource as is the case with Egypt in the Nile basin; Zeitoun & Warner, *supra* note 6, 452. Woodhouse & Zeitoun, *supra* note 99, 112 further stratify the forms of hydro-hegemony into benign, neutral, restrictive, obstructive, dominative, and oppressive.

¹⁰¹ Mekonnen, *supra* note 25, 439.

¹⁰² Yohannes, *supra* note 7, 42.

¹⁰³ Zeitoun & Warner, *supra* note 6, 452.

¹⁰⁴ M. Daoudy, ‘Hydro-hegemony and International Water Law: Laying Claims to Water Rights’, 10 *Water Policy* (2008), 89, 94.

a benign hegemon willing to act rather like a “gentle giant” than a “basin bully”¹⁰⁵. Egypt has yet to make such a constructive transformation.

E. Conclusion and Prospects

The Sharm El-Sheikh fiasco is, indeed, far more tragic than the failure of a meeting as it rather signifies the culmination, in failure, of a decade-long strenuous effort to cut a lasting deal which would bring forth the desperately needed legal and institutional framework for the equitable and reasonable utilization of the Nile waters. It is equally tragic that with the signing, by the five upstream riparian countries, of the CFA containing the treacherous concept of water security as one of its general principles, a golden opportunity to extricate the Nile waters question out of the morass of securitization was irreversibly lost. The so-called benefit sharing framework is, as demonstrated in the preceding section, incapable of resolving the Nile waters question. It is just another hegemonic bait, a complete hoax which will crumble in due course. What then does the future hold for the basin’s impoverished inhabitants who hope to somehow fend off the fangs of drought and famine by breaking the curse of mortal dependence on the fickle seasonal rains which determine their life and death, one should query.

The prospect of inter-state conflict and the possibility of the Nile basin becoming “the scene of a merciless war over water”¹⁰⁶ is a very unlikely, remote scenario. Given the extremely asymmetric power relationship the basin hydro-hegemon has vis-à-vis the other riparians, the likelihood of violent conflict is quite improbable. None of the other riparians is capable of facing up to the behemoth in a military showdown; it surely takes two to fight, one may thus say, as it does to tango. The prospect of reallocation and equitable utilization of the Nile waters is, likewise, equally elusive and far beyond the horizon as the political diagnosis of all the actors as afflicted with a congenital political deficiency which renders them incapable of achieving this lofty objective¹⁰⁷ is, though frustrating, convincing and hard to refute.

¹⁰⁵ Woodhouse & Zeitoun, *supra* note 100, 113.

¹⁰⁶ Kerisel, *supra* note 5, xiv.

¹⁰⁷ Yohannes, *supra* note 7, 25 forcefully argues questioning the ability of the Nile riparians to properly handle and resolve the intractable Nile waters question as they are represented by “governments that are internationally known for their repression of their peoples, gross violation of human rights and civil liberties, wanton corruption, and their limitless contempt for political dialogue and political pluralism”.

The more likely turn of events would be the continuation of the *status quo*, and with it an iniquitous hegemonic stability which may be given a facelift through continued dialogue and rhetorical cooperation. Given the precarious nature of the *status quo*, it would be quite naïve to assume that the basin's hydro-hegemon would lean back and hope the current state of affairs to continue forever. It would, rather, work ceaselessly to further consolidate its vested interests through co-optation and such other hegemonic tactics as land grabbing, of which there is some evidence already.¹⁰⁸ Though ironic, a "great land grab" in the trans-boundary context may well be the more likely future path towards the "peaceful" utilization of the Nile waters as this would conveniently sideline the "national interest" thorn in the neck paving, thereby, the way for the ultimate marriage between

¹⁰⁸ See, for example, R. Leila, 'Seeking Mutual Benefits', (15-21 July 2010) available at <http://weekly.ahram.org.eg/2010/1007/eg2.htm> (last visited 27 April 2011), reporting about aid and investment projects Egypt is offering to upstream countries as part of its political and diplomatic efforts to woo Nile Basin states. An Egyptian delegation led by foreign minister Ahmed Abu-Gheit and minister for international Cooperation Fayza Abul Naga met with the Ethiopian premier and the minister of foreign affairs. The Egyptian delegation repeatedly stressed that Nile Basin countries must cooperate fully in order to maximize the mutual benefits of the Nile. During the meeting, the signing of the CFA was high on the agenda of talks and the Ethiopian premier told reporters that "Ethiopia had never sought a reduction in the Egyptian quota of Nile water and the agreement signed by the five riparian countries did not represent a threat to Egypt." Abu-Gheit reportedly reciprocated by insisting that "Egypt has no problems with Ethiopia using Nile waters to generate electricity" as "[s]uch projects will not affect water flow in the river, though they should be implemented within the framework of the joint cooperation plan between the eastern basin countries of Egypt, Sudan and Ethiopia." The phenomenon of land grab which is spreading like wild fire in the poor countries across the globe is yet another disastrous development whose impact on the already intractable Nile waters question deserves a closer examination. That the Nile basin states are the leading actors in this new venture, and that Ethiopia, with about 7.5 million acres of its most fertile land up for grab, is at the forefront of the 'leasing/selling out' spree is quite worrisome. According to the 2010 report by the Oakland Institute, the Ethiopian government has offered up "vast chunks of fertile farmland to local and foreign investors at giveaway rates." S. Daniel & A. Mittal, '(Mis)investment in Agriculture: The Role of the International Finance Corporation in Global Land Grabs' (2010) available at http://www.oaklandinstitute.org/pdfs/misinvestment_web.pdf (last visited 27 April 2011), 28. The report describes what it calls a paradox in the following terms: "Ethiopia is one of the hungriest countries in the world with more than 13 million people in need of food aid, but paradoxically the government is offering at least 7.5 million acres of its most fertile land to rich countries and some of the world's most wealthy individuals to export food back to their own countries".

the ruling elites in the agro-industrial sector.¹⁰⁹ This would surely bring a short term peace in the basin and may even bring forth an economic boom aggravating, however, the misery and woe of the millions of impoverished inhabitants of the basin. Inevitably, this would shift the epicenter of potential conflict from inter- to intra-state level which would equally inevitably lead to violent explosions or implosions the consequences of which are hard to fathom.

Heralding despair not being the intention of the author, pointing out a possible way out of this quagmire is however in order. This truly arduous task involves the un-signing of the CFA, its complete de-securitization through the removal of the concept of 'water security', and return of the Nile waters question into the framework of international water law with due recognition of the fact that 'benefit sharing' can only be complementary to, and not a substitute for, the admittedly difficult yet indispensable rights-based allocation approach.

¹⁰⁹ For a lucid discussion of the consequences and implications of land grab by state elites and foreign investors see, in this volume, A. Telesetsky, 'Resource Conflicts over Arable Land in Food Insecure States: Creating an United Nations Ombudsman Institution to Review Foreign Agricultural Land Leases', 3 *Goettingen Journal of International Law* (2011) 1, 283.

Information Warfare and Civilian Populations: How the Law of War Addresses a Fear of the Unknown

Lucian Dervan*

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Abstract

Imagine a civilian communications system is being temporarily relied upon by an opposing military force for vital operations. If one launches a computer network attack against the communications system, the operation may disable the opposing force's ability to function adequately and, as a result, prompt their surrender. The alternative course of action is to launch a traditional kinetic weapons attack in the hopes of inflicting enough casualties on the troops to induce surrender. Given these options, the law of war would encourage the utilization of the computer network attack because it would result in less unnecessary suffering. But is the same true if we are unsure of the collateral consequences of the computer network attack on a large civilian population that also relies on this communications system? For instance, because civilians use the same communications system to gather critical information, disabling the system might result in rioting, civil disorder, serious injuries, and deaths. Further, civilians may be unable to call for help, seek out medical assistance, or locate emergency response centers. Given these unknown yet potentially severe collateral consequences to civilians, it becomes less clear that a proportionality analysis under the law of war would favor the computer network attack over the traditional kinetic operation. In this article, Professor Lucian E. Dervan examines the application of the law of war to information operations and analyses the role of the Geneva Convention's utilitarian goals in determining the validity of computer network attacks against dual-use civilian objectives.

A. Introduction

Mobile telephones are vital military instrument for the Taliban in Afghanistan.¹ The devices are used to detonate bombs, coordinate military movements, and communicate with leadership regarding future operations.² Despite their usefulness, mobile telephones also pose a significant risk to the Taliban.³ Over twelve million civilians in Afghanistan have mobile telephones and their use is not limited to communicating with family and friends or calling for medical or police assistance in times of need.⁴ For many Afghani civilians, mobile telephones serve as a weapon with which to provide information regarding the Taliban to coalition forces.⁵ Of course, because the civilians are often under the watchful eyes of Taliban forces during the day, most tips are provided at night, under the cover of darkness.⁶

In 2008, in response to the growing nighttime flow of information between civilians and coalition forces, the Taliban ordered the mobile telephone industry to shut down some cell-towers from 5:00 p.m. to 6:30 a.m.⁷ According to the Taliban, this trial program to stop civilians from informing on Taliban movements was a success and, as a result, they

¹ Y. Trofimov, 'Cell Barriers Bow to Taliban Threat' (22 March 2010) available at <http://online.wsj.com/article/SB10001424052748704117304575137541465235972.html> (last visited 28 April 2011); ("The Taliban are using the cellphone system as an instrument of war against the Afghan government and the U.S.-led coalition.").

² *Id.* ("Cellphones are a powerful tool for the Taliban: They offer a cheap and effective means to direct insurgent activities or pass intelligence... Militants all over the world use mobile phones to trigger explosions.").

³ *Id.*

⁴ *Id.* ("Sardar Wali, a 19-year-old student from the Khwaja Mulk village north of Kandahar city, said that, when his father became suddenly sick one night last year, the cellphone blackout prevented the family from calling a taxi to ferry the man to the hospital."); M. Pueschel, 'Cell Phones May Have Potential in Global Health Arena', (26 August 2010) available at <http://fhp.osd.mil/new.jsp?newsID=180> (last visited 28 April 2011), discussing the "potential use of cell phones as innovative, cheap and efficient tools for public health".

⁵ Trofimov, *supra* note 1.

⁶ *Id.* ("American troops, meanwhile, had painted phone tip-line signs on walls outside U.S. bases. Informers are usually reluctant to call in tips during daytime, when they can be spotted by Taliban sympathizers, military officers say.").

⁷ *Id.*

ordered a nationwide shutdown of all cell-towers during the night.⁸ At first, mobile telephone phone companies resisted these demands, unwilling to deprive their twelve million Afghan customers a vital service.⁹ In response, however, the Taliban destroyed over forty cell-towers, valued at sixteen million dollars.¹⁰ As might be expected, the mobile telephone providers then acquiesced.¹¹ Today, millions of Afghans are thrust into isolation during the night as cell-tower after cell-tower goes dark.¹²

While the Taliban gained control over a vital communications network using kinetic force, many militaries around the world have begun to utilize sophisticated information operations to achieve similar results without firing a single bullet and without the cooperation of civilian leaders or private business organizations. The term “information operations” refers to operations that involve the use of “electronic means to gain access to or change information in a targeted information system without necessarily damaging its physical components”¹³. Though there are various types of information operations, the most common is the use of computer network attacks to gain access to, disrupt and/or assert control over vital computer systems.¹⁴ As an example, rather than destroying mobile telephone towers in

⁸ *Id.* (“[T]he Taliban noted that “the trial implementation of the decision has yielded positive results,” and decreed a sweeping national ban on night-time calls to “protect the Afghan people.””).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (““We understand that in some areas, unfortunately, there is no other way,” Mr. Sangin [Afghan Communications Minister] says, “We don’t have security to protect the towers.””).

¹² *Id.*

¹³ Department of Defense, Office of General Counsel, ‘An Assessment of International Legal Issues in Information Operations’ (May 1999), 5 [Assessment of International Legal Issues]; ‘War in the Fifth Domain’, *The Economist* (1 July 2010) 25, 25-27.

¹⁴ *Id.* (Assessment of International Legal Issues), 5 (“The proliferation of global electronic communications systems and the increased interoperability of computer equipment and operating systems have greatly improved the utility of all kinds of information systems. At the same time, these developments have made information systems that are connected to any kind of network, whether it be the Internet or some other radio or hard-wired communications system, vulnerable to computer network attacks.”); D. B. Hollis, ‘Why States need an International Law for Information Operations’, 11 *Lewis & Clark Law Review* (2007) 4, 1023, 1030 (“Much IO, however, centers on employing computers themselves in previously unavailable methods through the concept of ‘computer network operations.’”); According to the United States Department of Defense, information operations can be broken down into six component parts: Psychological Operations, Electronic Warfare, Computer

Afghanistan, the Taliban could have hacked into the mobile telephone companies' computer networks and seized control of the programs that regulate the cell-towers' operations. Such an attack, which could have been executed from anywhere in the world, would have allowed the Taliban to dictate the times during which civilians could utilize their mobile telephones without using kinetic weapons to permanently destroy the cell-towers.¹⁵ Information operations, therefore, are less expensive to execute than traditional military operations and allow for a more targeted and less destructive result.¹⁶ A real-world example of an information operation occurred during the 2008 Russian intervention in South Ossetia, a separatist region of the former Soviet Republic of Georgia.¹⁷ As traditional kinetic military operations were undertaken against Georgian targets, computer network attacks were simultaneously launched.¹⁸ These attacks defaced government websites and prevented communication between the Georgian President and the civilian population.¹⁹ The attack also disabled certain

Network Operations, Military Deception, and Operational Security: W. E. Richter, 'The Future of information Operations', *Military Review* (2009) 1, 103, 103-104. This article focuses on computer network attacks.

¹⁵ Department of Defense, *supra* note 13, 5 ("[G]lobal communications are almost seamlessly interconnected and virtually instantaneous, as a result of which distance and geographical boundaries have become essentially irrelevant to the conduct of computer network attacks.").

¹⁶ J. Markoff, 'Before the Gunfire, Cyberattacks' (12 August 2008) available at <http://www.nytimes.com/2008/08/13/technology/13cyber.html> (last visited 28 April 2011). ("It costs about 4 cents per machine [...] You could fund an entire cyberwarfare campaign for the cost of replacing a tank tread, so you would be foolish not to.").

¹⁷ S. Watts, 'Combatant Status and Computer Network Attack', 50 *Virginia Journal of International Law* (2010) 2, 391, 397; M. Schwartz, A. Barnard & C. J. Chivers, 'Russia and Georgia Clash over Separatist Region' (8 August 2008) available at <http://www.nytimes.com/2008/08/09/world/europe/09georgia.html> (last visited 28 April 2011); M. Schwartz, A. Barnard & A. E. Kramer, 'Russian Forces Capture Military base in Georgia' (11 August 2008) available at <http://www.nytimes.com/2008/08/12/world/europe/12georgia.html> (last visited 28 April 2011).

¹⁸ *Id.* (Watts), 397; Markoff, *supra* note 16, detailing the computer network attacks by Russia against Georgia during the conflict over South Ossetia. To date, the Russian government has denied involvement in the information warfare operations against Georgia and, as is the case with many such computer network attacks, there is little evidence to link the Russian government to the operations.

¹⁹ Watts, *supra* note 17, 397.

government, news, transportation, and banking websites, creating disorder and panic amongst the civilian population.²⁰

Of course, information operations and computer network attacks extend well beyond communication networks and government websites. Such computer network attacks can cripple all manner of vital infrastructure, including electric power grids, water supply stations, food distribution networks, air traffic control systems, and emergency services apparatus, including evacuation notices and coordination of medical response teams.²¹ The importance of controlling computer networks through information operations has become so vital to modern warfare that nations around the world are currently engaging in limited computer network attacks in preparation for possible future armed conflicts.²² In 2009, U.S.

²⁰ *Id.* (“Later reports revealed that the CAN campaign had preceded the physical invasion by as much as twenty-four hours and that hackers may have launched computer network probing operations as early as July 20th.”); Markoff, *supra* note 16 (“Weeks before bombs started falling on Georgia, a security researcher in suburban Massachusetts was watching an attack against the country in cyberspace.”).

²¹ The USA Patriot Act of 2001 defines critical infrastructures as the “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” USA Patriot Act of 2001 section 1016, text available at <http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.3162.ENR>: (last visited 28 April 2011), 42 U.S.C., § 5195c. Included within this definition are the following: agriculture, food, water, public health, emergency services, government, defense industrial base, information and telecommunications, energy, transportation, banking and finance, chemical industry, and postal and shipping. S. M. Condrón, ‘Getting it Right: Protecting American Critical Infrastructure in Cyberspace’, 20 *Harvard Journal of Law & Technology* (2007) 2, 403, 406, National Strategy for Homeland Security: The President of the United States, ‘National Strategy for Homeland Security’ (16 July 2002) available at http://www.dhs.gov/xlibrary/assets/nat_strat_hls.pdf (last visited 28 April 2011), 30.

²² S. Gorman, ‘Electricity Grid in U.S. Penetrated by Spies’ (8 April 2009) available at <http://online.wsj.com/article/SB123914805204099085.html> (last visited 28 April 2011). (“Cyberspies have penetrated the U.S. electrical grid and left behind software programs that could be used to disrupt the system, according to current and former national-security officials.”). Eric Jensen quotes a passage from a Chinese army publication entitled “Unrestricted Warfare.”

“[I]f attacking side secretly musters large amounts of capital without the enemy nation being aware of this at all and launches a sneak attack against its financial markets, then after causing a financial crisis, buries a computer virus and hacker detachment in the opponent’s computer

intelligence officials revealed that cyber operatives from China and Russia had infiltrated American electric power grid computer networks and planted malicious computer software programs to disrupt power supply in the event of a future military conflict.²³ Along with targeting the U.S. power supply, these cyber operations targeted computer networks controlling water, sewer, and other vital infrastructure systems.²⁴ As the world's appreciation and contemplation of the importance of information operations grows, these undertakings are likely to continue to increase in sophistication and prominence.

While information operations offer concrete advantages to militaries, they also pose two significant dangers to civilians. First, because militaries often utilize information systems and infrastructure resources that are primarily civilian in nature, a growth in information operations will result in increased targeting of civilian objectives. Second, various unpredictable collateral consequences can result to a civilian population from the infiltration and manipulation of vital computer networks. Given these dangers, this article will examine the lawfulness of computer network attacks under international law. In particular, this article will analyze whether traditional international legal principles regarding the law of war can adequately adapt to the utilitarian advantages of this new generation of warfare.

system in advance, while at the same time carrying out a network attack against the enemy so that the civilians electricity network, traffic dispatch network, financial transaction network, telephone communications network, and mass media network are completely paralyzed, this will cause the enemy nation to fall into social panic, street riots and a political crisis. There is finally the forceful bearing down by the army, and military means are utilized in gradual stages until the enemy is forced to sign a dishonorable peace treaty.”, E. T. Jensen, ‘Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense’, 38 *Stanford Journal of International Law* (2002) 2, 207, 207 [Computer Attacks on Critical National Infrastructure].

²³ Gorman, *supra* note 22.

²⁴ *Id.* In 2000, a computer network attack in Australia resulted in the release of 200,000 gallons of sewage into parks, rivers, and the grounds of a hotel.

B. Computer Network Operations and International Law

Imagine it is the year 2015, and the nation of Agnia has been closely monitoring a developing situation in the neighboring state of Centuria, with whom it has been engaged in cross-border skirmishes for five years. According to satellite imagery, ten-thousand troops from the Centurian military have begun massing on the outskirts of one of Centuria's largest cities, Atlantis. Atlantis is located only one mile inside Centuria, has a population of one million, and contains many ethnic Agnians. According to intelligence reports, the mayor of Atlantis, an ethnic Agnian, has lead large anti-government protests during the past two weeks, which have included calls for the city and the surrounding region to become an independent country or be subsumed by Agnia. Leaders in Agnia fear that the Centurian military is preparing to attack the city and regain control of its population through force. Sympathetic to the desires of the citizens of Atlantis, the President of Agnia asks her military commanders to prepare a computer network attack directed against Centurian troops with the objective of preventing or limiting their intended military operations.

The Agnian military commanders quickly return with a plan that recommends two separate operations to disrupt the Centurian military.

(1) First, the Centurian military is relying on electric power for operation of much of its equipment. Therefore, the Agnian military commanders recommend use of a computer network attack to temporarily cut off power to the specific power grid being utilized by the Centurian military. While this directed attack will not result in power loss to the entire city of Atlantis, it will result in a loss of power for civilians who rely on the same power grid currently being utilized by the Centurian military. It is estimated this attack will negatively impact approximately twenty-thousand civilians. Further, the Agnia military commanders have warned the President that there is a possibility that the computer network attack will inadvertently cause a total power failure in Atlantis, thus depriving all one million citizens of power.

(2) Second, the Agnian military commanders recommend targeting the Atlantis civilian communications infrastructure, which controls the dissemination of all satellite, internet, broadband, and mobile communication services in the region. This communications system is currently being utilized by the Centurian military for its own vital information gathering and communications purposes. According to the Agnian military commanders, a computer network attack will temporarily disable all civilian and military information gathering and communications in the region. The commanders are unsure what collateral consequences might result from depriving the civilians of Atlantis use of the communications system.

Before these attacks are launched, a determination must be made regarding whether these non-kinetic operations are permitted under international law. Should these operations be deemed impermissible, the Agnian military commanders will recommend a traditional kinetic weapons attack against the Centurian military. The commanders believe that this attack will result in the deaths of at least one-thousand Centurian troops, but will result in few, if any, civilian casualties.

I. The Applicability of International Humanitarian Law to Information Operations

While outside the scope of this article, the initial question for consideration in this hypothetical situation is whether the proposed computer network attacks are a “use of force” as described by the United Nations Charter. The United Nations Charter states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”²⁵. If Agnia’s actions are considered a “use of force”, the computer network attacks may constitute a violation of the United Nations’ mandate against breaches of the peace.²⁶

Much debate has occurred in academia regarding whether computer network attacks constitute a “use of force.” Some scholars argue that

²⁵ Art. 2(4) Charter of the United Nations.

²⁶ See Arts 23-32 and 51 Charter of the United Nations.

information operations directed at critical national infrastructures are by definition “uses of force” that permit the aggrieved nation to respond with proportional self-defense pursuant to the United Nation’s Charter.²⁷ Other scholars have argued that computer network attacks that result in damage that otherwise would require kinetic weaponry constitute a “use of force”²⁸. Finally, some scholars contend that a determination regarding whether a computer network attack is a “use of force” depends on the particular circumstances of the operation and whether the results of the attack are sufficiently severe.²⁹

While the debate regarding whether computer network attacks are “uses of force” under the United Nations Charter is a fascinating topic and significant to the future regulation of information warfare, this article’s focus is on the ramifications of such operations to civilians under the framework of *jus in bello*. As such, the more important question for consideration is whether international humanitarian law applies to this

²⁷ Jensen, ‘Computer Attacks on Critical National Infrastructure’, *supra* note 22, 208-209 (“[A]ttacks against a nation’s critical national infrastructure from *any* source constitutes a use of force. Such attacks, therefore, give the victim state the right to proportional self-defense – including anticipatory self-defense.”).

²⁸ D. Brown, ‘A Proposal for an International Convention to Regulate the use of Information Systems in Armed Conflict’, 47 *Harvard International Law Journal* (2006) 1, 179, 187-88.

²⁹ M. N. Schmitt, ‘Computer Network Attack and the Sue of Force in International Law: Thoughts on A Normative Framework’, 37 *Columbia Journal of Transnational Law* (1999) 3, 885, 914-915. In his 1999 article Michael Schmitt argues for this later proposition and proposes six criteria for such an analysis – (a) the severity of the attack, (b) the immediacy of the negative consequences, (c) the directness of the negative consequences, (d) the invasiveness of the harm into the state, (e) the ease of measurability of the harm, and (f) the ability to recognize the action as presumptively impermissible unless falling within one of the two United Nations exceptions to use of force. Using these factors, Schmitt argues one can ascertain whether the characteristics of a particular computer network attack are similar to traditional forms of armed conflict or whether the acts are more appropriately outside this international wartime regulatory regime.; see also J. Barkham, ‘Information Warfare and International Law on the Use of Force’, 34 *New York University Journal of International Law & Politics* (2001) 1, 57, 58 (“Applying these criteria determines whether the attack is ‘armed force’ or political or economic coercion [...] Once the IW attack is deemed to be a use of force, the extent of the attack can be measured to determine whether there has been an armed attack, which would trigger Article 51.”).

situation.³⁰ As the information operations proposed in this article are significant and would occur within the context of existing border skirmishes, we will assume that the parties are engaged in an “armed conflict” in which the law of war applies.³¹

II. The Three Pillars of the Law of War

Over many centuries the international community has established laws of war based on the guiding principle of *jus in bello*, which means justice in war.³² During the last century, these principles were codified into various international agreements, each of which serve to promote the ideal that civilians must be protected in times of war.³³ This ideal is contained within the Geneva Convention through the adoption of the requirement that all military operations governed by the law of war satisfy three key criteria.³⁴ Military operations must be militarily necessary, a distinction must be made

³⁰ The “laws of armed conflicts” establish the bounds governing the manner in which hostilities are conducted. B. Van Schaack & R. C. Slye, *International Criminal Law and Its Enforcement: Cases and Materials*, 2nd ed. (2010), 214.

³¹ The law of war only applies where there is an “armed conflict”, see Art. 2, Geneva Convention Relative to the protection of Civilian Persons in Time of War of August 12, 1949 (GC IV), 75 U.N.T.S. 287; E. T. Jensen, ‘Unexpected Consequences from Knock-Out Effects: A Different Standard for Computer Network Operations?’ 18 *American University International Law Review* (2002-2003) 5, 1145, 1150 [Unexpected Consequences from Knock-Out Effects] (“Once two nations are in armed conflict with each other, the law of war applies.”). Information operations may be sufficient to constitute an armed conflict, see M. N. Schmitt, ‘The Principle of Discrimination in 21st Century Warfare’, 2 *Yale Human Rights & Development Law Journal* (1999), 144-145 [Computer Network Attacks] (“Humanitarian law does not apply in situations not amounting to armed conflict, such as riots, strikes, demonstrations, isolated acts of violence, or traditional criminal activity, even if military forces are employed to address them. In such cases, domestic and international human rights law tempers the violence.”); R. W. Aldrich, ‘How Do You Know You Are at War in the Information Age’, 22 *Houston Journal of International Law* (2000), 223, 232; Watts, *supra* note 17, 411-412 (“Despite lingering ambiguity concerning states’ CAN capabilities, a broad range of commentators accepts that CNAs between states could constitute armed conflict of sufficient scale and intensity to trigger the law of war generally and, specifically, the 1949 Geneva Conventions and their 1977 Protocols.”).

³² Schmitt, ‘Discrimination’, *supra* note 29, 143, 145.

³³ *Id.*, 144. (“The protection of civilians and civilian objects during armed conflict is a core purpose of humanitarian law, a branch of international law also known as the law of armed conflict and the law of war.”).

³⁴ Discussed in detail *infra* section A.II.1 through A.II.3.

between military and civilian targets, and the attacks must be proportional.³⁵ Though the law of war has witnessed many advances in technology and weaponry, it has remained relevant because of its adaptability³⁶, an adaptability that is vital when considering its application to the proposed information warfare operations by Agnia.

1. Necessity

While information operations may represent a new type of weaponry, the law of war still requires consideration of the principles of necessity, distinction, and proportionality. As described above, therefore, the first question Agnia must consider is whether a military necessity exists to strike the proposed targets.³⁷ In this regard, Protocol I to the Geneva Conventions requires that the attacks be directed at military targets with the objective of defeating the opponent military.³⁸

³⁵ Art. 48, 51, 52(2), and 57 Protocol Additional to the General Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), 12 December 1977, 1125 U.N.T.S. 3 (1979); B. Van Schaack & R. Slye, *International Criminal Law and Its Enforcement: Cases and materials*, 2nd ed. (2010), 266.

³⁶ Schmitt, 'Discrimination', *supra* note 29, 145-46 ("Because evolution in the conduct of warfare affects the individuals and objects which humanitarian law seeks to shelter, it is not surprising that law has proven responsive, both proactively and reactively, to warfare's changing nature.").

"In the aftermath of World War II, bipolarity and wars of national liberation dominated by inter-State conflict, while new technologies and sensibilities led to heightened concerns over the methods and means of warfare. The Additional Protocols to the Geneva Conventions, Environmental Modification Convention, Biological Weapons Convention, Conventional Weapons Convention, and Landmines Convention resulted. So too did numerous arms control treaties designed to limit the testing, possession, and spread of nuclear weapons, the unprecedented power of which had been so dramatically illustrated at Nagasaki and Hiroshima.", *Id.*

³⁷ Department of Defense, *supra* note 13, 8 ("Targeting analysis must be conducted for computer network attacks just as it traditionally has been conducted for attacks using traditional weapons.).

³⁸ J. R. Heaton, 'Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces', *57 Air Force Law Review* (2005), 155, 180-81 ("The purpose of this principle is to ensure that every military action is driven by a military requirement and is intended to subjugate the enemy in the shortest amount of time and at the least possible expense of men and materiel. Under this principle, acts which lack any direct

“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”³⁹

Pursuant to this paragraph, a selected target is valid if (a) it makes an effective contribution to the military action and (b) its destruction will offer a definite military advantage.⁴⁰ Where the selected target is part of the opponent’s military infrastructure, such as weapons depositories or military communications centers, attacking the target will almost always satisfy the requirement of necessity.⁴¹ The analysis of the proposed attacks by Agnia is complicated by the fact that each operation focuses not on purely military targets, but on dual-use civilian facilities and networks.⁴²

military purpose, such as indiscriminate bombing of civilian dwellings or food supplies, are prohibited.”).

³⁹ Art. 52(2) Protocol Additional to the General Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), 12 December 1977, 1125 U.N.T.S. 3 (1979) [Protocol I] (emphasis added); Article 51(4) Protocol I also contains relevant restrictions regarding the targeting of military objectives rather than civilian objectives:

“Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 (a) those which are not directed at a specific military objective;
 (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”

⁴⁰ *Id.*; D. E. Graham, ‘Cyber Threats and the Law of War’, 4 *Journal of National Security Law & Policy* (2010), 87, 98 (“‘Military necessity’ authorizes the use of force required to accomplish the mission. It does not authorize acts otherwise prohibited by the [laws of war].”).

⁴¹ Department of Defense, *supra* note 13, 8 (“During an armed conflict virtually all military infrastructures will be lawful targets, but purely civilian infrastructures must not be attacked unless the attacking force can demonstrate that a definite military advantage is expected from the attack.”).

⁴² Where it is unclear whether an object which is normally dedicated to civilian purposes is being utilized for a military purpose, the Geneva Convention requires the party presume the target is not making an effective military contribution. Protocol I, *supra* note 39, Art. 52(3). In the hypothetical examined herein, however, it is clear that the

“Dual-use” targets are ones that “simultaneously serve both civilian and military objectives,” including facilities and networks that are primarily for civilian utilization but which are being temporarily used by the military.⁴³ The Atlantis power station and civilian communications system are both dual-use targets because, while they primarily serve the civilian population, they are currently also being utilized by the Centurian military. While dual-use objectives complicate a necessity analysis, they do not enjoy absolute protection from attack. Rather, the two prong analysis for necessity remains applicable in determining whether these are permissible targets.

First, do the Atlantis dual-use targets make an effective contribution to the Centurian military? This determination is influenced by consideration of the targets’ nature, location, purpose, and use.⁴⁴ Each dual-use target provides a vital resource to the region and is within the area in which the Centurian military is massing. Further, though originally intended to solely support the needs of the civilian population of Atlantis, these facilities and networks are currently being utilized by the Centurian military for significant information gathering, communications, and support functions. Finally, just as electric power and communications capabilities are vital to the effective subsistence of the civilian population, they are vital to the continued and successful completion of Centuria’s military endeavors. As such, these targets do make an effective and, in fact, significant contribution to the military actions of the opposing force. Second, will disabling these facilities and networks offer a definite military advantage? As described above, these facilities and networks are vital to the Centurian military operation. As such, a strong argument exists that targeting these objectives will offer a significant and definite military advantage to Agnia. Based on this analysis, it appears that these proposed targets, though dual-use, satisfy the requirement of military necessity.

power station and civilian communications systems are both being utilized for military purposes.

⁴³ Jensen, ‘Unexpected Consequences from Knock-Out Effects’, *supra* note 31, 1157; J. M. Meyer, ‘Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine’, 51 *Air Force Law Review* (2001) 143, 178 (discussing dual-use objectives).

⁴⁴ Protocol I, *supra* note 39, Art. 52(2).

2. Distinction

A concept related to necessity under the law of war is the requirement that military operations utilize weaponry that can distinguish between civilian and military targets and that when attacks are carried out an effort is made to distinguish between civilian and military objectives.

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁴⁵

Just as occurred with the necessity analysis, the presence of dual-use targets complicates satisfaction of the distinction requirement.

With regard to the power station attack, the use of an information operation permits the specific targeting of only that power grid being utilized by the Centurian military. As a result, the operation is designed to utilize available weaponry that distinguishes between power grids serving only civilian customers and those being utilized by the Centurian military. Had Agnia decided to target the entire power station, despite its ability to more precisely target only the power grid that was properly classified as a military target, such an act would constitute a violation of the tenet of distinction.⁴⁶ In this scenario, therefore, the availability of an information

⁴⁵ Protocol I, *supra* note 39, Art. 48; see also Protocol I, *supra* note 39, Art. 51(4): “Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objectives without distinction.”

⁴⁶ M. N. Schmitt, ‘Wire Warfare: Computer Network Attack and *Jus in Bello*’, 84 *International Review of the Red Cross* (2002), 365, 390 [Wired Warfare] (analogizing the failure to specifically direct an information operation when possible to the use of SCUD missiles by Iraq in the first Gulf War:

“The SCUD is not an inherently indiscriminate weapon. Indeed, it is easily capable of being aimed with sufficient accuracy against, for instance, military formations in the desert. However, the use of SCUDS against population centres was indiscriminate even if the Iraqi intent was to strike military objectives situated therein; the likelihood of striking

operation actually assists the civilian population by limiting this attack to military objectives.

The analysis is more complex when one considers the proposed operation against the civilian communications network. Currently, it is estimated that 98 percent of all classified governmental communications and 95 percent of all military communications in the United States flow through civilian communication systems, not dedicated military networks.⁴⁷ As a result, the composition of modern information systems makes it much more likely that civilian assets will be targeted during times of war. This is particularly true because, unlike the power station example above, the interconnected nature of civilian communications systems makes it almost impossible to isolate military communications for attack. As a result, operations directed against civilian communications systems must disrupt or disable the entire network, shutting down not only military operations but also all civilian information gathering and communication functions. Given these operational realities, Agnia's proposed computer network attack is troubling because of its potential significant impact on civilians who are likely highly dependent on this communications system for important information, particularly during times of unrest and conflict. Further, these concerns regarding potential civilian collateral consequences are more acute when one considers that the utilization of the Atlantis communications system by the Centurian military is likely limited when compared with the total usage by the civilian population. Though these are significant concerns which will be addressed again during the proportionality analysis under the law of war, these issues do not prevent this operation proceeding under the tent of distinction. Rather, if the Atlantis civilian communications system is properly considered a target of military necessity and there is no existing information warfare mechanism by which to disrupt only the military communications, this proposed attack is permissible.⁴⁸

protected persons and objects so outweighed that of hitting legitimate targets that the use was inadmissible.”).

⁴⁷ E. T. Jensen, 'Cyber Warfare and Precautions Against the Effects of Attacks', 88 *Texas Law Review* (2010) 7, 1533, 1534 [Cyber Warfare]; Jensen, 'Computer Attacks on Critical National Infrastructure', *supra* note 22, 211.

⁴⁸ Others considering this issue have reached similar conclusions: Schmitt, 'Wire Warfare', *supra* note 48, 384 (“[I]f an object is being used for military purposes, it is a military objective vulnerable to attack, including computer network attack. This is true even if the military purposes are secondary to the civilian ones.”).

3. Proportionality and Unnecessary Suffering

The final prong of analysis to determine the legitimacy of the proposed computer network attacks is proportionality, an analysis that will highlight the uniqueness of information operations and the need for flexibility in determining the permissibility of such military operations. Proportionality conveys the centuries old notion that during war “the right of the parties to the conflict to choose methods or means of warfare is not unlimited... It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”⁴⁹ This limitation on the methods and means of warfare is intended to protect both combatants and civilians. As such, along with the above general prohibition, the Geneva Convention contains a specific requirement that consideration be given to the impact of proposed operations on civilians.

“[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁵⁰

Pursuant to the above sections of the Geneva Convention, even where a target is of military necessity and, to the extent possible, a distinction has been made between the military and civilian components of the target, the proposed operation may still violate the law of war if it would result or may be expected to result in unnecessary suffering by either combatants or

⁴⁹ Art. 35(1)-(2) Protocol I, *supra* note 40; see also Article 22 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, available at: <http://www.unhcr.org/refworld/docid/4374cae64.html> (last visited 28 April 2011) [Hague Convention IV], (“The right of belligerents to adopt means of injuring the enemy is not unlimited.”); and Art. 23(e) (prohibiting the use of “arms, projectiles, or material calculated to cause unnecessary suffering”).

⁵⁰ Art. 57(2)(b) Protocol I, *supra* note 40; *see also* Art. 51(5) Protocol I, *supra* 37: “Among others, the following types of attacks are to be considered as indiscriminate: (...) (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.

civilians. At its core, therefore, the proportionality analysis is an examination of the utilitarian ramifications of an operation. Importantly, it is this core utilitarian aspect of the law of war that allows it the flexibility to adapt to new and evolving weaponry, including information warfare.

With regard to the directed attack on the power grid providing energy to the Centurian military, satisfying the proportionality requirement is assisted, in part, by the advent of information operations. First, rather than disabling the power supply to the entire city of Atlantis, a computer network attack in this situation allows for directed targeting of only the power grid within which the Centurian military is operating. This significantly limits the attack's impact on the civilian population and, although civilians living within the same power grid will be impacted, a strong argument exists that these collateral consequences do not amount to unnecessary suffering, particularly given the significant military advantage to be gained through the attack. Second, an information operation is distinct from a traditional kinetic attack because it does not destroy the asset being targeted. As a result, once the military advantage is secured or the reason for the operation dissipates, power to the grid can be restored. With traditional kinetic weaponry, such quick remediation is impossible. As an example, kinetic attacks against Iraqi power stations during the first Gulf War lead to decades of power supply problems for the civilian population.⁵¹ By comparison, the proposed attack by Agnia is both specifically directed at a limited portion of the total power supply and can be reversed once the military necessity of the operation has passed.

While the above proposed directed attack on the Atlantis power station appears to satisfy the proportionality requirements of the law of war, there remains a hidden danger in undertaking this operation that must be considered.⁵² As admitted by the Agnian military commanders, though

⁵¹ Department of Defense, 'Assessment of International Legal Issues', *supra* note 14, 8-9 (discussing the bombing of Iraq's power grids during the first Gulf War); see also Associated Press, 'Iraq suffers hot summer amid power problems' (7 September 2009) available at <http://www.msnbc.msn.com/id/32726457/> (last visited 28 April 2011): "During the 1991 Gulf War, U.S. warplanes targeted the power grid. It was further damaged in the 2003 invasion, the looting that followed and finally by insurgent attacks designed to cripple the country".

⁵² Schmitt, 'Discrimination', *supra* note 32, 168. ("If first-tier collateral damage and incidental injury (i.e., damage and injury directly caused by the kinetic force of the

information operations offer the ability to more precisely target certain objectives, interfering with computer networks can result in significant unintended consequences. In some situations, an information operation might be directed at a single network believed to control a precise system, but which might unexpectedly also control other vital portions of the civilian infrastructure. Further, where a virus or other malicious program is utilized to disable a specific computer network, it is possible that the virus might spread to other unintended computer systems.⁵³ Such secondary effects are called “knock-out effects”⁵⁴. As an example, consider again the proposed computer network attack on the Atlantis power station’s computer network. The intended goal of the operation is to disable only the power grid that supplies the region being occupied by the Centurian military. It is possible, however, that while launching this attack an error in the computer program might shut down the entire power station and deprive the whole city of Atlantis of energy. This lack of power might in turn result in the city’s water treatment plant and other vital pieces of infrastructure becoming inoperable. Further, unknown to the Agnian military, the same computer network that controls the power station might also control other vital portions of the infrastructure, including portions of the infrastructure vital to the survival of the civilian population.⁵⁵ For these reasons, “knock-out

attack) become rarer, it is probable that humanitarian attention will increasingly dwell on subsequent-tier, or reverberating, effects.”).

⁵³ Schmitt, ‘Wired Warfare’, *supra* note 48, 389.

“In many cases, once a vital code is launched against a target computer or network, the attacker will have no way to limit its subsequent retransmission. This may be true even in a closed network, for the virus could, for instance, be transferred into it by diskette. Simply put, a malicious code likely to be uncontrollably spread throughout civilian systems is prohibited as an indiscriminate weapon.”

⁵⁴ *Id.*, 392-93 (“The most cited example is that of the attack on the Iraqi electrical grid during the 1990-91 Gulf War. Although it successfully disrupted Iraqi command and control, the attack also denied electricity to the civilian population (a ‘first-tier’ effect), thereby affecting hospitals, refrigeration, emergency response, etc.”) Both the terms “knock-on effects” and “knock-out effects” are used to describe these secondary collateral impacts.

⁵⁵ Art. 54(2) Protocol I, *supra* note 37, specifically prohibits attacks directed at infrastructure that is vital the survival of civilians:

“It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.”

effects” can be devastating to the civilian population. How, therefore, should the possibility of such unexpected and unpredictable collateral consequences flowing from information operations be addressed by the law of war? Should these potential ramifications to the civilian population result in our rejecting this information operation in favor of the assured, yet limited destructive results of the alternative kinetic attack against the Centurian forces?

While the possible collateral impact on civilians from “knock-out effects” are significant, information operations offer discernable concrete benefits and allow for the remedying of unforeseen consequences. These advantages to this modern form of warfare strongly support the favoring of information operations over traditional kinetic attacks on utilitarian grounds. First, and perhaps most significant, along with being less expensive, computer network attacks are bloodless as compared to traditional kinetic weaponry.⁵⁶ As a result, instead of causing significant long term damage and inflicting large numbers of casualties, a computer network attack advances the Geneva Convention’s goal of minimizing suffering.⁵⁷ Second, computer network attacks offer a distinct advantage not previously available in war because they can be reversed. As an example, should the proposed information operation against the power station result in a larger impact on the civilian population than predicted, the operation may be remediated by launching a second computer infiltration to place the power station back online.⁵⁸ Importantly, countries that rely on information operations should

⁵⁶ Jensen, ‘Unexpected Consequences from Knock-Out Effects, *supra* note 32, 1161 (“Given the bloodless nature of CAN and its ability to affect armed conflict, it can and should be a readily available weapon in the commander’s arsenal.”); J. T. G. Kelsey, ‘Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare.’, 106 *Michigan Law Review* 2008) 7, 1427, 1445 (“[W]ar via the Internet is potentially cheaper than waging a conventional campaign.”).

⁵⁷ *Id.*(Kelsey), 1447 (arguing that the law of war should permit information operation that might otherwise be considered unlawful where they have the advantage of “dealing blows to an enemy with a low cost in human life and possibly little physical damage to civilian objects.”); R. G. Hanseman, ‘The Realities and Legalities of Information Warfare’, 42 *Air Force Law Review* (1997), 173, 198 (“to an extent the new technology holds the promise of enabling destructive acts that are not really “violent.” Such weapons will be less dependent on big explosions. Few explosions means less property destroyed and fewer unplanned human casualties.”).

⁵⁸ This article does not purport to argue that reversing information operations is easy or reliable. Nevertheless, in considering the utilitarian advantages of information

be required to prepare such remedial operations in advance and in anticipation of the possibility of knock-out effects.⁵⁹ Such remediation would not be possible with traditional kinetic weaponry, which would inflict irreversible devastation once unleashed. As a result, though the proposed computer network attack holds the possibility of causing significant unintended collateral damage, because of the concrete humanitarian benefits of such operations and the likelihood of remediating any unintended consequences before they result in disproportionate suffering, engaging in this operation, despite the dangers, appears consistent with the goals of the law of war.⁶⁰

operations as compared to kinetic weaponry, the ability to reverse an attack should be considered. Further, if militaries rely on utilitarian arguments in proposing computer network attacks, they should be obligated to prepare strategies for responding to any unforeseen consequences in advance of initiating the operation to minimize any delay in remediating unexpected collateral consequences. See J. P. Terry, 'The Lawfulness of Attacking Computer Networks in Armed Conflicts and in Self-Defense in Periods Short of Armed Conflict: What are the Targeting Constraints?' 169 *Military Law Review* (2001), 70, 86-87.

⁵⁹ *Id.*, 86-87.

"[A]ny weapon developed to provide [computer network attack] capability must be both predictable and capable of being armed and disarmed; otherwise they will unduly threaten innocent civilians in the target state *and* the user state. Downs is correct when he suggests that weaponeers should, in general, co-develop a detection and immunization program for all viruses they intend to use. In this way, a [digital data warfare] attack gone wrong cannot inadvertently do harm to the attacker."

⁶⁰ An argument also exists that where the collateral consequences are speculative they do not violate the proportionality doctrine because they were not "expected" to occur. See Protocol I, *supra* note 37, Art. 57(2).

"With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

see E. T. Jensen, 'Unexpected Consequences from Knock-Out Effects', *supra* note 32, 1179-81 (arguing that only those consequences that are expected to occur are considered indiscriminate and, therefore, computer network attacks that lead to

In examining the proposed attack on the Atlantis civilian communications system, the same types of considerations regarding utilitarianism must be made to determine the operation's legitimacy. As discussed above, civilian communication systems are interconnected in such a manner as to make it nearly impossible to isolate specific military communications from general civilian utilization of the networks. As a result, the entire system must be targeted and disabled. Just as the collateral consequences of the attack on the power station are unclear, so too are the ramifications from disabling a city's communications network. Here, however, the analysis is slightly different. Unlike the power station example, it is clear that this operation will impact the entire city of Atlantis. What remains uncertain, however, is whether the resulting detriment to civilians will be severe enough to warrant abandoning this information operation in favor of a traditional kinetic attack on Centurian forces. It is possible the proposed attack will result in the civilian population being inconvenienced, but not subjected to unnecessary suffering or deprived of necessities vital to its existence.⁶¹ It is also possible, however, that the attack may result in severe consequences for the civilian population. For instance, the city may experience riots or other civil unrest due to a breakdown in emergency response systems. This alone might result in significant civilian casualties. Further, civilians may have difficulty gathering information regarding food and water distribution centers, where to receive medical treatment or other assistance, or where to take shelter or evacuate the city should armed conflict ensue. Given the possible direct and significant impact on civilians resulting from a disruption of the Atlantis civilian communications system and the limited use of the system by the military, does this proposed attack satisfy the requirement of proportionality?

Once again, if one focuses on the utilitarian goals of the Geneva Convention, it appears that the ascertainable benefits of information operations and the remedial abilities of computer network attacks outweigh

unexpected collateral consequences do not violate the law of war). Where the possible impact on a civilian population from a knock-out effect is contemplated, however, particularly based on past experience, and the consequences are severe, reliance on this doctrine alone may be insufficient.

⁶¹ Schmitt, 'Wired Warfare', *supra* note 48, 397 ("For instance, turning off the electricity to a city to disrupt enemy command, control and communications may be acceptable if doing so does not cause excessive civilian suffering.").

the speculative dangers of these undertakings to civilians.⁶² First, as discussed above, while the possible collateral consequences to the civilian population are uncertain, it is clear that choosing to launch an information operation rather than engage in traditional kinetic attacks offers significant benefits. Information operations are more cost effective and can result in less loss of life. Further, they do not require the destruction of the objective. Rather, information operations can seek only to disable a target for a specific period of time, a fundamental advantage as dual-use civilian targets grow in prominence. Second, because computer network attacks are often reversible, if the speculative dangers of the operation come to pass the attack can be reversed. In this example, should the lack of a communications system result in significant negative consequence for the civilian population of Atlantis, the Agnian military could execute an operation to restore the system to full functionality. Again, this would require certain anticipatory planning on the part of the Agnian military, thus allowing them to respond quickly should such events transpire. Requiring such anticipatory planning seems a small cost, however, in return for the significant benefits to both civilians and military personnel from favoring information operations over traditional kinetic attacks.⁶³

C. Conclusion

The law of war has evolved as battlefields and weapons have changed. Today, warfare has drifted into the ether and is taking place within computer networks and information systems. As a result, the law of war must adapt as it has in the past to take advantage of the benefits of this new type of

⁶² Hollis, *supra* note 15, 1055: "Perhaps states should allow [Information Operations] a wider, albeit virtual, impact on civilian populations if the result is less physical harm overall, or even on an individual basis, than traditional warfare."

⁶³ It is important to note that this article is advancing the theory that unintended and unexpected collateral consequences should not prohibit the utilization of modern weaponry that holds the potential to significantly reduce the amount of death and suffering during war. This does not mean, however, that where the collateral consequences of a proposed computer network attack are probable that the analysis is the same. In such situations, the risks associated with a computer network attack, particularly where assurance could not be provided regarding the reversibility of the mission, may lead to a determination that the operation does not satisfy the proportionality requirements of the law of war. As with all proposed military operations, the application of the law of war must be conducted in a case by case manner applying all ascertainable facts.

weaponry, including the unique ability to remediate unexpected consequences. Though war will never be without tragedy or loss, if information warfare holds the possibility that war might be more humane for civilians and militaries alike the law of war should seize these advantages and not reject these utilitarian advancements for fear of the unknown.

Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina

Eszter Kirs*

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The author gratefully acknowledges the support of the Postdoctoral Eötvös Scholarship of the State of Hungary (Magyar Állami Posztdoktori Eötvös Ösztöndíj).

Abstract

Information is a fundamental resource in post-conflict societies. However, information-sharing may lead to both advantages and disadvantages. The main focus of the present paper is the flow of information and knowledge from the International Criminal Tribunal for the Former Yugoslavia (ICTY) to the domestic judicial system of Bosnia and Herzegovina. Following a brief introduction of the dynamics of the changing relationship of the Tribunal and the Bosnian judiciary, the paper aims to outline the positive achievements and the practical barriers of the international intervention into the management of war crime cases in Bosnia and Herzegovina. The paper introduces the practical problems that came forth with the introduction of the adversarial procedure in the domestic judicial system, by which measure international intervention might have gone too far resulting also in negative consequences with regard to the management of domestic war crime trials.

A. The Changing Relationship of the ICTY and the Bosnian Judicial System

I. International Primacy

In the early years of the existence of the ICTY from 1993 on, the conflict was still ongoing in the affected states. Even in the first decade after Dayton, the domestic judiciary was clearly not able to conduct impartial and effective investigations and prosecutions. Numerous actors in the judiciary were politically biased and aimed for reprisals. While Bosnian courts undertook a limited number of war crimes prosecutions in this period, these were widely and strongly criticized by independent observers.¹ Only 54 domestic war crimes prosecutions were documented to have reached trial stage before January 2005.² Therefore, domestic courts of Bosnia and

¹ D. Orentlicher, 'That Someone Guilty Be Punished – The Impact of the ICTY in Bosnia' (Open Society Justice Initiative, International Center for Transitional Justice, 2010) available at http://www.ictj.org/static/Publications/Orentlicher_BiH_OSJI-ICTJ_ThatSomeoneGuilty_pb2010.pdf (last visited 29 April 2011), 109.

² W. Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina', 46 *Columbia Journal of Transnational Law* (2008) 1, 279, 287

Herzegovina were not seen as credible partners for the ICTY in ensuring accountability for the most serious crimes committed during the armed conflict.

The Statute of the ICTY accordingly established a relation of international primacy:

The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.³

In 1996, the relationship between the ICTY and the judiciary of Bosnia and Herzegovina was transformed into the state of absolute international primacy,⁴ where the main aim became to hinder arbitrary arrests in the region by the supervision of the ICTY within the framework of the newly established Rules of the Road program.⁵ The Bosnian, Serbian

For a more detailed report about the early prosecutions and initial problems in Bosnia and Herzegovina see Organization of Security and Cooperation in Europe, 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles', Report 3 (March 2005) available at http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf (last visited 29 April 2011).

³ Statute of the International Criminal Tribunal for the former Yugoslavia, Art 9.

⁴ The author adopted the categorization of Professor William Burke-White. According to his interpretation, the simultaneous existence of international and domestic criminal judicial bodies, four significant types of jurisdictional relations can be identified. The first type is domestic primacy where the relevant international tribunal can proceed only if domestic authorities refer a case to it. The second type is simple international primacy where domestic courts have jurisdiction only above cases which the international tribunal has not dealt with. In case of the third type of relation, the international tribunal is entitled to authorize the domestic court to proceed, and without this approval the domestic courts do not have jurisdiction. This relation was called by Professor Burke-White absolute international primacy. The fourth category is complementarity which came into the focus mainly by the establishment of the International Criminal Court. In case of this relation, one of the conditions of the jurisdiction of the International Criminal Court is that the domestic authorities do not conduct genuine investigations. Concerning the possible incentives for the improvement of the domestic judicial system, the relation of complementarity is clearly the most beneficial solution. Burke-White, *supra* note 2, 297-301.

⁵ Office of the High Representative, 'The Rome Statement. Agreed Measures', , February 18, 1996. Art 5.

and Croatian parties agreed that local authorities would not arrest anyone on war crimes charges without first obtaining approval from the ICTY prosecutor.⁶

In this way, local prosecutors could obtain a better insight into international standards. The staff of the Office of the Prosecutor (hereinafter OTP) of the ICTY reviewed 1,419 files involving 4,985 suspects. Approval was granted for the prosecution of 848 persons.⁷ At the same time, a number of problems appeared in the implementation of the strategy. More than 2,300 cases (40%) sent to the ICTY were never reviewed and no response was sent to the Government of Bosnia and Herzegovina.⁸ According to research conducted by Professor Diane F. Orentlicher, ICTY officials failed to keep their Bosnian colleagues informed about the status of the Rules of the Road investigations, even in response to direct inquiries.⁹

According to the evaluation of Professor Burke-White concerning this period, the close supervision of the ICTY together with the lack of involvement of domestic actors created strong disincentives for domestic prosecutions in Bosnia and Herzegovina. Even if national courts chose to initiate proceedings, the ICTY could assert primacy and preempt national action. The Rules of the Road Agreement essentially hardened the ICTY's jurisdictional relationship with national governments into a form of absolute international primacy. This relationship did not encourage domestic actors to improve the quality of domestic institutions or to look into the practice of the ICTY.¹⁰

For a more detailed introduction of the Rules of the Road program see M. Ellis, 'Bringing Justice to an Embattled Region – Creating and Implementing the „Rules of the Road” for Bosnia-Herzegovina', 17 *Berkeley Journal of International Law* (1999) 1, 1.

⁶ Orentlicher, *supra* note 1, 110.

⁷ *Id.*, 111.

⁸ Burke-White, *supra* note 2, 317.

⁹ The interviews conducted by Professor Orentlicher demonstrate that the lack of proper information-sharing with the domestic stakeholders was a serious problem:

„A judge reported that after having submitted twenty-five case and waiting eight months, the ICTY had not responded. Other judges and prosecutors stated that they too had submitted files several years before and had received no communication [...] These professionals viewed the ICTY as unresponsive and detrimental to the ability of Bosnian courts to conduct national war crimes trials.”, Orentlicher, *supra* note 1, 112.

¹⁰ Burke-White, *supra* note 2, 312-318.

II. Establishment of the State Court: Efforts for Reaching Uniformity

With the completion strategies of the ICTY of 2002 and 2003,¹¹ the relationship with the domestic courts got to the next stage. The main aim was to transfer cases not yet tried by the Tribunal back to domestic courts. The question became which domestic institution would be a proper and reliable forum for conducting such trials in Bosnia and Herzegovina.¹² A precondition was the thorough reform of the Bosnian judicial system.

In 2002, the Office of the High Representative launched a project of judicial streamlining within the constituent entities, focusing on the number of courts, their location, jurisdiction and ethnic balance. Vetting was conducted within the judiciary between 2002-2004 in order to avoid bias and corruption. As a consequence, about 30 percent of first instance courts were closed and 30 percent of the judiciary had to leave their offices. Furthermore, prosecutors and judges were subjected to a process of reappointment by the High Judicial and Prosecutorial Council.¹³ Efforts were also undertaken to improve court administration and management.¹⁴ In 2003, a new Criminal Code and Criminal Procedural Code was adopted that created a legal basis for internationally acceptable proceedings. The new

¹¹ United Nations General Assembly, 'The ninth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) since 1991' (4 September 2002) available at http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2002_en.pdf (last visited 29 April 2011), para. 37.

United Nations General Assembly, 'The tenth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) since 1991' (20 August 2003) available at http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2003_en.pdf (last visited 29 April 2011), para. 13-14.

¹² Concerning the early problematic issues see, D. Mundis, 'The Judicial Effects of the „Completion Strategies” on the Ad Hoc International Criminal Tribunals', 99 *American Journal of International Law* (2005) 1, 142.

¹³ A. Mayer-Rieckh, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Office in Bosnia and Herzegovina', in A. Mayer-Rieckh & P. De Greiff (eds) *Justice and Prevention: Vetting Public Employees in Transitional Societies* (2007), 197.

¹⁴ Burke-White, *supra* note 2, 288.

Criminal Code introduced crimes against humanity, genocide and war crimes into the domestic criminal law of the Federation of Bosnia and Herzegovina, and the legal concept of command responsibility as well.¹⁵ In addition, the new Criminal Procedural Code introduced the combination of the adversarial and inquisitorial procedural system following the model of the procedural rules applicable at the ICTY.

The ICTY and the Office of the High Representative adopted a joint plan of action for the establishment of a new Court of Bosnia and Herzegovina that could receive cases transferred from the Tribunal for further selection and delegation to local courts.¹⁶ This was a clear message from the Tribunal about the international acknowledgment of the Bosnian judiciary.¹⁷ According to Professor Burke-White, in this way, the new relationship of the ICTY and the Bosnian domestic courts involved incentives similar to those of complementarity.¹⁸ However, the adoption of a new Criminal and Criminal Procedural Code can be qualified as efforts for reaching uniformity rather than complementarity.

Following the approval of the Peace Implementation Council, the State Court of Bosnia was established in 2003. Its First Section became responsible for the war crime cases, which was launched in 2005.¹⁹ At the same time, a Special Department for War Crimes was created within the Prosecutor's Office of Bosnia and Herzegovina.²⁰ Meanwhile, the Rules of

¹⁵ Criminal Code of Bosnia and Herzegovina, (27 June 2003) available at http://www.sudbih.gov.ba/files/docs/zakoni/en/Criminal_Code_of_BH_-_Consolidated_text.pdf (last visited 29 April 2011), Arts 117-184.

Prior to 2003, genocide and war crimes were included in criminal codes only at the entity levels.

¹⁶ Orentlicher, *supra* note 1, 116.

For a detailed introduction of the process of establishment of the State Court see, F. Donlon, 'Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina', in D. Haynes (ed.), *Deconstructing the Reconstruction – Human Rights and the Rule of Law in Postwar Bosnia and Herzegovina* (2008), 257-284.

¹⁷ Burke-White, *supra* note 2, 328.

¹⁸ *Id.*, 320.

¹⁹ For a brief overview about the structure of the State Court of Bosnia see, 'Jurisdiction, Organization, and Structure of the Court of Bosnia and Herzegovina' available at <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e> (last visited 29 April 2011).

²⁰ Orentlicher, *supra* note 1, 117.

Procedure and Evidence of the ICTY were amended, and the new Rule 11 *bis* regulated the transfer of cases to the State Court, as follows:

“After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the “Referral Bench”), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.”²¹

Following the launch of the War Crime Section of the State Court, the ICTY prosecutors were entitled to designate observers to monitor domestic trials that originated in an ICTY indictment. The Tribunal could recall any transferred case if local proceedings fell short of international standards. The monitoring role was mandated to the OSCE mission.²² The ICTY referred a total of six Rule 11 *bis* cases to the War Crime Section of the State Court, involving ten defendants. The OSCE Mission has submitted to the Office of the Prosecutor of the ICTY regular reports on these cases, which have been compiled on a quarterly basis.²³ Today the Milorad Trbic case is the only one left where the appeal is still pending.

Beyond the cases transferred by the ICTY under Rule 11 *bis*, the caseload of the State Court of Bosnia and Herzegovina includes cases belonging to three further categories: those cases which were investigated but not prosecuted by the Office of the Prosecutor of the ICTY (“Category II cases”²⁴); new investigations commenced by the Bosnian Special

²¹ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 11 *bis*, A.

²² Orentlicher, *supra* note 1, 119.

²³ For the reports see ‘Monitoring and Reporting on Rule 11 *bis* Cases’ available at: <http://www.oscebih.org/Default.aspx?id=70&lang=EN> (last visited 30. April 2011).

²⁴ ICTY prosecutors transferred fourteen Category II cases to the State Court involving approximately 40 suspects. Orentlicher, *supra* note 1, 122.

Department for War Crimes; and those Rules of the Road cases which were not processed by local authorities to the point of indictment.²⁵

B. Positive Impact of the International Assistance

In addition to the establishment of the State Court, the impact of the ICTY on the system of domestic criminal justice has appeared in the field of the usage of adjudicated facts, evidences and procedural decisions adopted by the Tribunal, monitoring of trials and the transfer of expertise.²⁶

I. Transfer of Evidence

The prompt management of war crime cases was facilitated by the transfer of evidence from the ICTY. Rule 11 *bis* cases were transferred to the prosecutors of the State Court together with the evidence gathered by the OTP of the Tribunal which made it needless for the domestic office of the prosecutor to undertake extensive investigations before going to trial. Furthermore, in October 2004, the Prosecutor of the ICTY transferred all the Rules of the Road files to the Bosnian authorities. The contribution of these files to the work of the State Court, however, should not be overestimated. In many cases these were not complete materials, far from trial-ready case files.²⁷

The Evidence Disclosure Suite and Judicial Database is a major benefit for the domestic courts as well as for the Tribunal. Access to the database is provided at the State Court and any courts equipped with networked computers can reach the Court Records which are available at the website of the Tribunal. Today the most significant problem in this regard is the lack of official B/C/S translation of the transcripts of the ICTY. This means in numbers that the Tribunal has to face the challenge of translating 400,000 pages of documents in order to make them available for the institutions and the people of the region. This shortcoming could have been

²⁵ T. Abdulhak, 'Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina', 9 *International Criminal Law Review* (2009) 2, 333, 341.

²⁶ See B. Ivanišević, 'The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court' (2008) available at <http://www.ictj.org/images/content/1/0/1088.pdf> (last visited 29 April 2011), 25-26.

²⁷ Orentlicher, *supra* note 1, 120-123.

prevented by better and earlier planning of a strategy on the transfer of transcripts.

II. Transfer of Expertise

There are five judicial panels allocated to the first Section of the State Court. Initially, panels were comprised of two international judges and one local judge, who was the presiding judge of the panel. In 2008, the balance of composition was reversed. National judges were in a majority, the panels included two nationals and one international.²⁸ It was anticipated that by the end of 2009 there would no longer be any international judges within the Court.²⁹ Nevertheless, the mandate of international staff was prolonged and for the time being, the remaining international judges are supposed to keep their position in the panels until 2012.³⁰ The Office of the Prosecutor of the War Crimes Section, which consists of five mixed national and international trial teams assigned to different geographical areas, has a designated liaison, responsible for the cooperation with the ICTY and with other States in the region. The independent institution of the Criminal Defense Section (Odsjek krivične odbrane, hereinafter OKO) was initially headed by an international director. The defense support of the OKO is organized into five regional groups, each consisting of one Bosnian lawyer, one Bosnian intern and one international intern.³¹ It has trained Bosnian lawyers on criminal defense and international law, facilitating the transition to an adversarial judicial model, and developing an accreditation program for Bosnian lawyers. ICTY officials have provided far reaching assistance with training and support for this program.³²

In order to contribute to capacity building by the transfer of knowledge, the ICTY has organized a number of training sessions for judges, prosecutors, and judicial officials not only in Bosnia, but in Croatia

²⁸ Ivanišević, *supra* note 26, 7.

²⁹ Human Rights Watch, 'Looking for Justice – The War Crimes Chamber in Bosnia and Herzegovina' (2006) available at <http://www.hrw.org/en/reports/2006/02/07/looking-justice-0> (last visited 29 April 2011), 7-8.

³⁰ On December 14, 2009, the High Representative for Bosnia and Herzegovina extended the mandate of international judges and prosecutors working on war crimes cases for a further three years. Orentlicher, *supra* note 1, 132.

³¹ Human Rights Watch, *supra* note 29, 22-23.

³² Burke-White, *supra* note 2, 340.

and Serbia as well.³³ The Office of the Prosecutor of the ICTY established a Transition Team within the office in order to facilitate cooperation with local prosecutors concerning 11 *bis* and Category II transfers. Local judges and prosecutors of Bosnia and Herzegovina traveled to The Hague in order to participate in trainings and professional dialogue with their colleagues working at the ICTY. Workshops have been held by the Office on prosecutorial skills such as cross-examination, the use of electronic databases and the procedure to gain access to confidential material according to the Rules of Procedure and Evidence of the ICTY. Visits have allowed OTP staff and their national colleagues to work together on real case files. According to Serge Brammertz, the Chief Prosecutor of the ICTY, the relationship was transformed from the earlier vertical relationship into a rather horizontal one.³⁴ Practitioners working at the Tribunal have contributed to the trainings of judges, prosecutors and defense lawyers in Bosnia and Herzegovina by occasional lecturing.³⁵

In 2009, the OTP launched a new program for young professionals, whereby 10 young legal assistants from the region of the former Yugoslavia are given the possibility to work at the Tribunal for a period of 6 months. This is an excellent possibility to improve their skills and expertise that contributes to capacity building on a long term basis. At the same time, the program can be successful only if the young professionals participating in the program return to their respective country following the 6 months and continue working on war crime cases at the domestic courts. Currently, there is no program in Bosnia and Herzegovina to create incentives for these young lawyers to return.³⁶ However, it might not be a real problem in practice. Legal officers from the State Court usually leave for the young professional program to improve their skills in order to go back later on to their stable position at the State Court. Their perspectives lead them back to Bosnia and there is not a high probability that they would try to build up a career abroad. Following their return they generate lively legal debates that contribute significantly to the improvement of the judicial practice.³⁷

³³ Burke-White, *supra* note 2, 307.

³⁴ Speech given by Serge Brammertz, Prosecutor of the ICTY at the conference *Assessing the Legacy of the ICTY*, The Hague, February 23-24, 2010.

³⁵ Orentlicher, *supra* note 1, 123.

³⁶ Interview with Jusuf Halilagić, Secretary of Ministry of Justice, September 1, 2010.

³⁷ Interview with Judge Patricia Whalen, Court of Bosnia and Herzegovina, September 2, 2010.

Judges of the State Court have found guidance for many of the complex issues of international humanitarian law in the jurisprudence of the ICTY. A practical guideline, namely the ICTY Manual on Developed Practices, which facilitates the smooth management of trials, was published by the Tribunal and the UNICRI (United Nations Crime and Justice Research Institute) in 2009. This manual has been disseminated in Bosnia and Herzegovina in local languages and it is available on the website of the Tribunal. The publication of the Manual was a great achievement; however, its applicability by the Bosnian judiciary is still problematic due to differences between the two relevant legal systems.³⁸

III. Evaluation of the Impact of the ICTY on the Practice of the State Court

While the non-governmental organization of the International Center for Transitional Justice, the OSCE Mission to Bosnia and Herzegovina and others have identified a number of concerns relating to the work of the War Crimes Section of the State Court of Bosnia, its general performance has been evaluated as a positive achievement.³⁹ The progressive improvement of both the institution itself and lawyers practicing before the Court has been impressive especially considering the facts that prosecutors, judges and defense attorneys have to deal with new subject matter and work according to a new procedural code of an adversarial character.⁴⁰

The indirect impact of the ICTY is clearly demonstrated by the changes in the drafting of judgments conducted by the panels of the State Court. While analytical legal reasoning was formerly not a characteristic strength of the judiciary of Bosnia and Herzegovina, today most of the judgments of the State Court have a thorough annex and footnoting system referring to the evidence, a clearly build-up structure and detailed

³⁸ Interview with Aida Trožić, Senior Professional Associate of the Centre for Judicial and Prosecutorial Training (Centar za Edukaciju Sudija i Tužilaca u Federaciji Bosne i Hercegovine), 31 August 2010.

The Manual is available at http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf (last visited 29 April 2011)

³⁹ Orentlicher, *supra* note 1, 118.

⁴⁰ For similar positive acknowledgement from Mr Abdulhak concerning the work of the State Court see Abdulhak, *supra* note 25, 342.

reasoning.⁴¹ This improvement was achieved largely by the international judges who had worked previously at the ICTY or had gained long-term experiences as practitioners in well-developed legal systems and who were appointed later on as judges of the State Court. Their work and improvement has been facilitated by international judges practicing at the State Court to a large extent. Three of the international judges who have worked at the State Court worked earlier as prosecutors at the ICTY,⁴² and one of them was earlier a judge of the Tribunal.⁴³ Their support has made possible the fact that those judges who saw the need for changes in the prior system could adapt to the new requirements smoothly.⁴⁴ Bosnian officials practicing at the State Court have made an effort to embrace, where possible, the work and experience of the ICTY. The library of the Court includes a complete collection of the jurisprudence of the Tribunal, and all

⁴¹ Compare the judgment adopted in the Lazarević Sreten *et al.* case (X-KRŽ-06/243) on September 29, 2008 with the one adopted in the Milorad Trbić case (X-KR-07/386) on October 16, 2009, available at <http://www.sudbih.gov.ba/?jezik=e> (last visited 29 April 2011).

The improvement is acknowledged by the comments of the OSCE on the Trbić judgment, as follows:

“The Mission is pleased to note several improvements in the clarity of Trial Panel’s reasoning, as well as in certain technical aspects of the written verdict. First, the Panel’s analysis is well structured and easy to follow. After explaining the relevant legal provisions, the Panel applies the law to the specific facts in the case, rather than simply recount the evidence. Second, throughout the Judgment, the Panel makes frequent references to the jurisprudence of the ICTY, ICTR and the Court of BiH and incorporates the legal reasoning from these decisions into its analysis. Particularly positive is the fact that, when discussing certain procedural aspects of the trial affecting the rights of the Accused, such as the admissibility of the Defendant’s prior statements, the Trial Panel takes into account the requirements of the European Convention on Human Rights (ECHR) and provides a detailed analysis of the relevant ECtHR decisions.

Furthermore, unlike other written judgments of the Court of BiH, the present Judgment contains an Annex with the important procedural decisions, a list of injured parties who filed compensation claims, a list of evidence, as well as a list of cases cited. This contributes to the clarity of the Judgment and represents a positive new practice.”

OSCE Mission to Bosnia and Herzegovina, ‘Twelfth Report in the *Milorad Trbic* Case Transferred to the Court of BiH pursuant to Rule 11*bis*’ (July 2010), available at http://www.oscebih.org/documents/osce_bih_doc_2010092009084172eng.pdf (last visited 29 April 2011), 4.

⁴² Judge Weiner Phillip is still working at the War Crimes Section of the State Court.

⁴³ Judge Almiro Rodrigues. Orentlicher, *supra* note 1, 124.

⁴⁴ Interview with Patricia Whalen, *supra* note 37.

of the judges in the War Crimes Section of the State Court have been briefed on that jurisprudence.⁴⁵

C. The Limits of the Impact: Entity Level Courts

I. The Role of Cantonal and District Courts

The State Court, just as other ad hoc international, hybrid or internationalized criminal courts, plays an essential role in prosecuting war crimes, but its capacity is limited. Although its improvement has been a great success, in itself the Court is not able to handle the high caseload that the Bosnian domestic judicial system has to face. Here the lower level courts come into play. Within the judicial system of the Federation of Bosnia and Herzegovina ten cantonal courts, the Basic Court of Brčko District and the five district courts of the Republika Srpska are competent in war crimes cases.⁴⁶

The National War Crime Strategy of Bosnia and Herzegovina issued in 2008 defined the aim to conclude highly complex war crime trials within seven, and all the other, less complex cases within 15 years. The above detailed problems indicate that these deadlines might not be realistic. Although there have been proposals that all the war crime trials should be proceeded by the State Court, as a number of cantonal and district prosecutors expressed a preference in this as well, due to the pressing time limits, broad involvement of cantonal courts is part of the strategy. The State Court is clearly well-prepared for conducting war crime trials meeting international standards. At the same time, the Court in itself would not have the capacity to overcome the challenge of the present caseload. This is the point where the fact has a great significance that the direct impact of the ICTY has appeared at the level of the State Court but has not reached the level of entity courts.

All war crimes cases have been reported first to the War Crimes Section of the State Court where the categorization of cases was the subject of prosecutorial decision. Initially, the “highly sensitive” cases fell under the jurisdiction of the State Court and all the other cases were referred to entity,

⁴⁵ Burke-White, *supra* note 2, 342.

⁴⁶ Organization of Security and Cooperation in Europe, *supra* note 2, 9.

cantonal or district courts.⁴⁷ The guideline for determining the sensitivity of a case was to be found in the “Orientation Criteria for Sensitive Rules of the Road Cases”. The most significant factor was whether there was a prospect for witness intimidation or whether local political conditions hindered fair trials.⁴⁸

A significant step forward to manage war crimes cases was the creation of the national database for unresolved and reported war crime cases. To date, it indicates that approximately 1,400 cases with 10-16,000 suspects are to be proceeded by domestic courts. All the cases have to be submitted to the State Court which then decides whether to delegate any of them to the entity level courts.⁴⁹ The main factor in making such decisions is the complexity of the case. Highly complicated cases will be commenced by the State Court itself, while the less complicated ones will be dealt by the entity level courts.

II. Fragmentation within the Domestic Judiciary

Discrepancies have appeared with regard to the implemented law within the Bosnian judicial system due to the fact that the criminal code of the former Socialist Federal Republic of Yugoslavia remained in force. The implementation of different codes leads to significant differences between the sentencing policy of the State Court and the entity level courts.⁵⁰

According to a 2008 report of the Human Rights Watch, trials at cantonal and district courts in cases of crimes committed during the war, were generally conducted under the old criminal code of the former

⁴⁷ Human Rights Watch, *supra* note 29, 6.

⁴⁸ Human Rights Watch, ‘Still Waiting – Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts’ (2008) available at <http://www.hrw.org/en/reports/2008/07/09/still-waiting-0> (last visited 29 April 2011), 10.

⁴⁹ Interview with Jusuf Halilagić, *supra* note 36.

⁵⁰ “For instance, an entity court has sentenced a defendant convicted of cruel treatment of prisoners to a term of one year and eight months’ imprisonment even as the State Court has sentenced another defendant charged with a comparable act to imprisonment for a period of ten-and-a half years.”

Organization of Security and Cooperation in Europe, ‘Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina’ (2008) available at http://www.oscebih.org/documents/osce_bih_doc_2_010122311504393eng.pdf (last visited 29 April 2011), 8.

Yugoslavia.⁵¹ The High Representative and the Parliamentary Assembly of the Council of Europe have expressed their concerns about the lack of harmonization of the law applicable to war crimes.⁵² In addition, the Constitutional Court of Bosnia and Herzegovina also declared in the Maktouf case that the implementation of different criminal sanctions to similar crimes by the state and entity courts may constitute illegal discrimination. Moreover, the Court urged the entity level courts to apply the new Criminal Code of Bosnia.⁵³

The question is how to implement the decision of the Constitutional Court in judicial practice. The initial proposals for a possible mandate of the State Court to issue specific directives to the entity level courts with orders to implement the new Criminal Code of Bosnia and Herzegovina was abandoned due to the argument that it would violate the fundamental principle of the independence of the judiciary. According to the statement of Milorad Novkovic, the President of the High Judicial and Prosecutorial Council, judges must be given the discretionary power to decide which code to implement in a specific case. There are intense efforts to harmonize the practice of courts, but the only one institutional tool for coordination of judicial work is the organization of regular meetings with officials practicing at the State Court and the entity level courts. His firm opinion is that harmonization issues should be solved in the way of case law and the power to decide about which law to implement should remain basically in the hand of judges. Nevertheless, he stated, cantonal courts recently prefer implementing the new Criminal Code to the one of the former Yugoslavia. Implementation of the old code is a real problem and a more frequent phenomenon rather in the practice of the district courts of the Republika Srpska. He emphasized that a much more significant issue is how to accomplish the aims of the National War Crime Strategy, how to commence trials as quickly as possible, and this task should be given the highest priority.⁵⁴ This stance is understandable from the point of view of the political circumstances, namely, that one of the preconditions for the closure

⁵¹ Human Rights Watch, *supra* note 48, 52.

⁵² Organization of Security and Cooperation in Europe, *supra* note 50, 6.

⁵³ Constitutional Court of Bosnia and Herzegovina, Case of Abduladhim Maktouf, Decision on Admissibility and Merits, AP-1785/06, available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=73135 (last visited 29 April 2011), paras 80-92.

⁵⁴ Interview with Milorad Novković, President of the High Judicial and Prosecutorial Council, 31 August 2010.

of the Office of the High Representative and the assistance of the European Union is the proper and effective enforcement of the war crime strategy.⁵⁵ At the same time, from a legal point of view it raises serious concerns with regard to the principle of legality.

III. Challenges Faced by the Entity Level Courts

In addition to the concerns related to the principle of legality, the caseload of the entity level courts is reaching high numbers that they cannot cope with. There are fundamental problems that hinder their ability to face this challenge. Opposed to the State Court which is well-improved in logistics and expertise, they have limited financial and technical resources, in certain entities there is a lack of specialization and expertise among judges, prosecutors and defense attorneys, and the system of support and protection of witnesses is too weak to conduct proceedings that would meet international standards ensuring fair and safe proceedings in war crimes cases.⁵⁶

In 2008, the High Judicial and Prosecutorial Council itself concluded that the staffing levels of prosecutor's offices, as well as the technical facilities and the level of specialization and expertise are inadequate to handle the loads of war crime cases.⁵⁷ This seems to be the greatest challenge hindering the proper management of war crime trials. The borderline between the State Court and entity level courts seems to create the limits of the possible direct and indirect impact of the ICTY.

The possible impact of training programs of the ICTY organized in The Hague for the transfer of knowledge is limited by the simple fact that cantonal courts do not employ legal officers who could be sent to participate

⁵⁵ Interview with Stephanie Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, OSCE Mission to Bosnia and Herzegovina, 30 July 2010.

⁵⁶ Human Rights Watch, *supra* note 48, 3.
For a more detailed report about the problems concerning witness protection see Organization of Security and Cooperation in Europe, 'Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing' (2010) available at http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf (last visited 29 April 2011).

⁵⁷ Human Rights Watch, *supra* note 48, 21.

in these trainings.⁵⁸ Therefore, the benefits of the program can reach mainly the State Court as an institution and cannot reach cantonal courts. Milorad Novkovic, President of the High Judicial and Prosecutorial Council did not qualify the 3-4 days visits and the young professional program as having a significant effect on the work of the judiciary. In his opinion, it would be much more useful to send practicing prosecutors to the ICTY for 3-4 months so that they would be able to contribute immediately to the prompt management of war crimes cases. This view is clearly determined by the pressing need for getting over the war crime trials. This kind of program could be clearly as beneficial as the young professional program, but currently there are no financial resources reserved for this aim.

The involvement of entity level judges and prosecutors in local training on the practice of the ICTY currently seems to occur randomly. Training is held in accordance with the annual program of the Centers for Judicial and Prosecutorial Training or occasionally by various other organizations. Most participants in the audience of judicial trainings on the management of war crime cases are judges from the State Court and prosecutors from the Office of the Prosecutor of Bosnia and Herzegovina. Judges, in general, are obliged to participate in training four days per year, but this training does not need to be held on the topic of international criminal law even if it is about judges dealing with war crimes cases. At the same time, although three judges are needed for the hearing of a war crime case, at most of the entity level courts three judges with expertise in international criminal law cannot be found. In these cases judges express their interest to the Centers for Judicial and Prosecutorial Training to attend trainings on international humanitarian law and international criminal law. Training is not facilitated by the fact that there is no local commentary on international criminal law (understandably it takes time for academic actors as well to explain the applicability of these rules in the Bosnian legal system) therefore, training is held on the basis of materials prepared by the lecturers.⁵⁹

⁵⁸ The problem was specifically indicated in the National War Crimes Strategy. At the time of its adoption, beside the State Court only the cantonal court of Sarajevo employed 2 legal officers, 'National War Crimes Strategy of Bosnia and Herzegovina' (December 2008).

⁵⁹ Interview with Aida Trožić, *supra* note 38.

With regard to the perspectives of defense lawyers, it must be emphasized that the OKO provides training and support to defense attorneys working at the State Court. Unfortunately, no similar body exists to support attorneys who represent defendants at cantonal and district courts. OKO trainings are theoretically open to any interested attorney, but in practice, they would most likely only be known to attorneys who practice at the State Court.⁶⁰ However, there is one official who is employed by the OKO specifically for training defense attorneys practicing before cantonal courts.⁶¹

D. Concluding Remarks

Conclusions can be drawn first concerning the recent state of the Bosnian judicial system and secondly with regard to the international intervention into the domestic criminal legal procedures, in general.

The introduction of the adversarial system into the Bosnian criminal legal procedure led to the need for well-trained advocates prepared for a more active role in the proceedings. Through the training of the OKO the access to the expertise and knowledge about the practice of the ICTY is ensured. On the other hand, the training and qualification is not sufficiently systematic. An official and uniform certificate system could be beneficial for ensuring the best representation of the accused in war crimes cases where the role of well-trained defense counsel is especially significant for the enforcement of the principle of equality of arms due to the eventual complexity of cases.

In order to open up the possibility of the trainings managed or assisted by the personnel of the ICTY for the judges and prosecutors of the entity level courts as well as for the lawyers practicing at the State Court, legal officers should be appointed for the assistance of judges and prosecutors of the cantonal and district courts. However, this is again a clearly internal affair of the State of Bosnia and Herzegovina.

⁶⁰ Human Rights Watch, *supra* note 48, 48-49.

Further concern was emphasized by the report with regard to equality of arms, namely that defense attorneys seem to be in general at a disadvantage compared to prosecutors.

⁶¹ Interview with Stephanie Barbour, *supra* note 55.

The locally organized training play a central role in the improvement of the judicial and prosecutorial practice, and the involvement of entity level judges and prosecutors is essential for the proper management of war crime trials. This issue has been addressed by two projects that provide assistance to the Centers for Judicial and Prosecutorial Training for the organization of trainings. One of them called “Support of war crimes cases in Bosnia and Herzegovina” is organized by the UNDP and the “War crimes justice project” is managed by the OSCE/ODIHR, ICTY and UNICRI. The projects will be concluded at the end of 2011. Also entity level judges and prosecutors have been involved in the program, and another important focus of the project is to train future trainers which will hopefully contribute to future capacity building to a large extent.⁶² A broad involvement and contribution of international experts is needed for the success of these programs.

The overall monitoring of war crime trials rests today in the hand of domestic actors. The Supervisory Board of Implementation of the War Crimes Strategy submits regular reports to the Council of Ministers. To date, thirteen such meetings took place.⁶³ The close international monitoring disappears, since the proceeding in the last Rule 11*bis* case is at the appeals stage. Therefore, the attention of academic researchers became more significant than ever. It is the responsibility of those academic stakeholders who have conducted in-depth research in the practice of the Bosnian judiciary to return to the country with the results of their analysis, translate their papers and conclusions into the local language in order to strengthen the awareness of the local judiciary that the attention of the international community is still present.⁶⁴

At last, a general conclusion can be drawn as well based on the example of Bosnia and Herzegovina. The characteristics of the domestic legal system should be taken into consideration and be paid more respect in

⁶² Interview with Jusuf Halilagić, *supra* note 36.

⁶³ *Id.*

⁶⁴ For example, it would be extremely useful, if the results of the excellent research conducted within the framework of the DOMAC project were translated into B/C/S and published in the region so that these states which were - among others - the subject of case-studies, could benefit from the project. See the reports issued by the DOMAC project available at <http://www.domac.is/reports/> (last visited 29 April 2011).

the case of the international intervention, which might have gone too far in this specific case. The introduction of the adversarial system led to a number of challenges which have been detailed above in the present paper. On the other hand, local judges and prosecutors had strong expertise and experience in the inquisitorial procedure. This has led the author to the conclusion that although the Bosnian legal system was in need of improvement for the proper management of war crime trials in order to meet international standards, the already existing inquisitorial system of the criminal procedure could have been a stronger basis for progressive changes. At the same time, with regard to substantive criminal law one may conclude that the adoption of the new Criminal Code and the lack of harmonization of domestic judicial activity led to the violation of the principle of legality that is a too high prize to pay for uniformity between international and national criminal law.

The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?

Freya Baetens & Rumiana Yotova*

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Abstract

In 2009, the Permanent Court of Arbitration administered a unique case: the *Abyei Arbitration* between the Government of Sudan and the Sudan People's Liberation Movement/Army. This case is unique in several aspects: first, it is an example of intra-state dispute settlement in a conflict zone rich in natural resources, second, it was conducted under a fast-track procedure, and third, it was fully transparent, with all documents and full webcast of the proceedings still available on the PCA website. Currently there is a large number of outstanding intra-state disputes, not limited to Africa, so this paper assesses why the Parties in the *Abyei Arbitration* chose arbitration in the first place and whether this model could be successfully applied to other similar disputes.

A. Introduction

In 2009, the Permanent Court of Arbitration administered a unique case: the *Abyei Arbitration* between the Government of Sudan and the Sudan People's Liberation Movement/Army.¹ This case is unique in several aspects: first, it is an example of intra-state dispute settlement in a conflict zone rich in natural resources, second, it was conducted under a fast-track procedure, and third, it was fully transparent, with all documents and full webcast of the proceedings still available on the PCA website. Currently there is a large number of outstanding intra-state disputes, not limited to Africa, so it is interesting to assess why the Parties in the *Abyei Arbitration* chose arbitration in the first place and whether this model could be successfully applied to other similar disputes.

As this topic encompasses an award of 270 pages, a dissenting opinion and over 20,000 pages of pleadings, the scope of the first part of this study is limited to its procedural aspects and the challenges they posed to the five-member arbitral tribunal, comprised of Prof. Pierre-Marie Dupuy (Presiding Arbitrator), H.E. Judge Awn Al-Khasawneh, Prof. Dr. Gerhard Hafner,

¹ In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area (*Government of Sudan v. Sudan People's Liberation Movement/Army*), Final Award, PCA No. GOS-SPLM/A, 22 July 2009, [hereinafter *Abyei-Arbitration*].

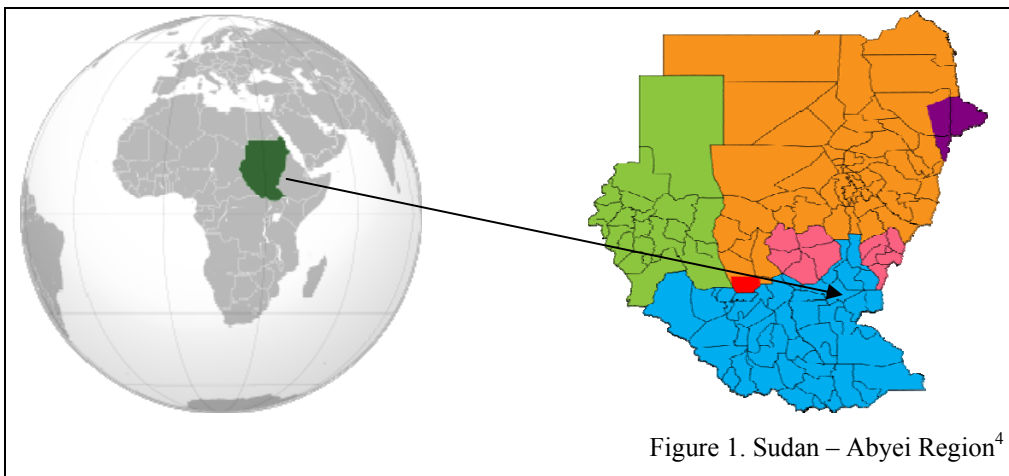
Prof. W. Michael Reisman and Judge Stephen W. Schwebel. In particular, this paper will analyze the effectiveness of the fast-track proceedings enshrined in the Arbitration Agreement between the Parties, requiring the tribunal to render its award only 90 days after the end of the hearings. Attention will also be paid to the transparency of the proceedings as a model for involving not just the interested stake holders but also the civil society interested in the dispute in the proceedings as part of the peace and reconciliation process.

The second part of this study will assess the viability of arbitration as a method of peaceful settlement of intra-State disputes over land and natural resources, particularly where one of the Parties is invoking its right to self-determination, as recognized by the international community.² A typology of cases will be devised to determine the target group of conflicts for which this type of dispute settlement could form a solution. What parties perceive to be a fair and efficient method of dispute resolution in such politically sensitive and economically relevant instances will also be examined. The final section of this paper will address the importance of awareness and participation of both the local and the international community, implementation of the award by both the Parties to this dispute and the actual impact of the award on the ground.

² On the recognition of self-determination as a people's right in general, see UN GA Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) adopted by 89 votes to 0 with 9 abstentions; Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights; see the International Court of Justice affirming the right to self-determination in its advisory opinions on *Namibia*, *ICJ Reports 1971*, p. 16 and in *Western Sahara*, *ICJ Reports 1975*, p.12. Finally, see on the *erga omnes* character of self-determination, *East Timor (Portugal v. Australia)*, *ICJ Reports 1995*, p. 90, at 102. On the recognition of the right to self-determination of Southern Sudan, see the Comprehensive Peace Agreement, concluded in 2005, between the Parties to this dispute and the numerous references in the Abyei Award (paras 109; 253; 255; 266; 269; 473; 587; 588; 601; 610; 706).

B. Background of the Abyei Dispute

The Abyei area is located in the region of South Kordofan (Sudan) situated on the border between Northern and Southern Sudan (see Figure 1 below). The Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) disagreed on the boundaries of the Abyei Area which they defined as “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”³.



³ Protocol between the Government of the Republic of Sudan (GOS) and the Sudan People's Liberation Movement/Army (SPLM/A) on the Resolution of Abyei Conflict, 26 May 2004, section 1.1.2 [Abyei Protocol].

⁴ The image is a derivative work by the authors. It is based upon [http://en.wikipedia.org/wiki/File:Sudan_\(orthographic_projection\)_highlighted.svg](http://en.wikipedia.org/wiki/File:Sudan_(orthographic_projection)_highlighted.svg), originally created by Dinamik, licensed under the Creative Commons Attribution-Share Alike 3.0 Unported license (<http://creativecommons.org/licenses/by-sa/3.0/deed.en>) and upon http://en.wikipedia.org/wiki/File:Political_Regions_of_Sudan,_July_2006.svg, originally created by Lokal_Profil and Wiz9999, licensed under the Creative Commons Attribution-Share Alike 2.5 Generic license (<http://creativecommons.org/licenses/by-sa/2.5/deed.en>). The resulting image therefore is licensed under the Creative Commons Attribution-Share Alike 2.5 Generic license.

I. Historic Background

As is the case with many (or even most) current disputes, the roots of the conflict can be traced to the past. In the eighteenth century, Abyei was inhabited by the sedentary Ngok Dinka and the nomadic Misseriya.⁵ At the time of the establishment of the Anglo-Egyptian Condominium in 1899, the Misseriya could be predominantly situated in “northern” Kordofan, while the Ngok Dinka inhabited “southern” Bahr el Ghazal. However, in 1905 the British redistricted all nine Ngok Dinka chiefdoms into Kordofan – which explains the above formulation of the definition of the Abyei area.

The First Sudanese Civil War (1956–1972) – in which the Misseriya and the Ngok Dinka found themselves on opposite sides – was ended by the 1972 Addis Ababa Agreement which included a clause that provided for a referendum to allow Abyei to choose to remain in the North or join the autonomous South.⁶ This referendum was never held and renewed conflicts “about power, resources, religion and self-determination led in 1983 to a second civil war”.⁷ In particular, the discovery of oil in the region led to many ‘initiatives’ on both sides to consolidate oil-rich areas into the northern, respectively the southern administration.⁸ Many Ngok Dinka supported the rebels and rose to leadership positions in the Sudan People’s

⁵ Abyei Arbitration, *supra* note 1, 32–37; D. Bekoe *et al.*, ‘Resolving the Boundary Dispute in Sudan’s Abyei Region’ (October 2005) available at <http://www.usip.org/publications/resolving-boundary-dispute-sudans-abyei-region> (last visited 9 March 2011).

⁶ SPLM/A Memorial, PCA No. GOS-SPLM 53,391, 18 December 2008, paras 381-405.

⁷ Abyei Arbitration, *supra* note 1, para. 109.

⁸ Abyei is located within the Muglad Basin, a large rift basin which contains a number of hydrocarbon accumulations. Following intensive oil exploration in the 1970s and 1980s, a period of significant investment in Sudan’s oil industry occurred in the 1990s and by 2003 Abyei contributed more than one quarter of Sudan’s total crude oil output. Production volumes have since declined and reports suggest that Abyei’s reserves are nearing depletion. An important oil pipeline, the Greater Nile Oil Pipeline, travels through the Abyei area from the Heglig and Unity oil fields to Port Sudan on the Red Sea via Khartoum. The pipeline is vital to Sudan’s oil exports which have boomed since the pipeline commenced operation in 1999. (APS Review Downstream Trends, ‘SUDAN: The oil sector’ (29 October 2007) available at <http://www.entrepreneur.com/tradejournals/article/170592332.html> (last visited 11 March 2011); USAID 2001, ‘Sudan: Oil and gas concession holders’ (map), University of Texas Library, available at http://www.lib.utexas.edu/maps/africa/sudan_oil_usaid_2001.pdf (last visited 14 March 2011).

Liberation Movement/Army (SPLM/A). In contrast, the Misseriya opted to side the northern government in the 1980s. By the time of conclusion of the Comprehensive Peace Agreement,⁹ ending the Second Sudanese Civil War in 2005, most Ngok Dinka had moved out of Abyei, a fact on which the Misseriya partially base their claim for ownership of the area.

II. Legal Background

One of the cornerstones of a successful peace agreement had to be the determination of the status of Abyei. The first step towards such peace agreement was the 2002 *Machakos Protocol*, which defined Southern Sudan as the area as of independence in 1956,¹⁰ thus excluding the SPLM/A strongholds in Abyei, the Nuba Mountains and Blue Nile, known collectively during the talks as the Three Areas. It also provided for an internationally monitored referendum entitling the Southern Sudanese to vote on whether to secede from Sudan.¹¹

The 2004 Protocol on the Resolution of the Abyei Conflict accorded Abyei special administrative status, governed by a local executive council elected by the Abyei Area residents.¹² This Protocol also provided for the establishment of the Abyei Borders Commission (ABC) which would have to define and demarcate the precise borders of the area.¹³ The Abyei Appendix, signed later in the same year, elaborated on the 15-member composition of the ABC: five members were to be appointed by the government, five by the SPLM/A and five impartial experts by the Intergovernmental Authority on Development, the United States and the United Kingdom.¹⁴ Finally, in 2005, the Comprehensive Peace Agreement

⁹ 'The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/ Sudan People's Army' (9 January 2005) available at <http://www.aec-sudan.org/docs/cpa/cpa-en.pdf> (last visited 9 March 2011).

¹⁰ The Machakos Protocol (20 July 2002) available at <http://www.aec-sudan.org/docs/cpa/cpa-en.pdf> (last visited 9 March 2011).

¹¹ *Id.*, Article 2.5.

¹² Abyei Protocol, *supra* note 3, sections 2.1-2.2.

¹³ Abyei Protocol, *supra* note 3, section 5.1-5.3.

¹⁴ Abyei Appendix, 'Understanding on Abyei Boundary Commission' available at http://www.sslagoss.org/documents/Implementation_Modalities_of_the_Protocol_on_the_Resolution_of_the_Abyei_Conflict.pdf (last visited 9 March 2011), section 2.

was signed which integrated the aforementioned and other instruments under one overarching umbrella.

III. The ABC Report and the Subsequent Arbitration Agreement

The ABC Experts studied the arguments of the Government of Sudan and the SPLM/A, heard testimony from a large number of witnesses and examined archives and sources in Sudan, the United Kingdom, South Africa and Ethiopia. The ABC Experts officially presented their report to the Sudanese president on 14 July 2005, determining that the Ngok “have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10’N” while recognizing that the two Parties have shared rights to the remaining area.¹⁵ The latter conclusion led the ABC Experts to decide that it was “reasonable and equitable to divide [this remaining area] between them”, leaving the precise identification and demarcation of the northern and eastern boundaries to a survey team.¹⁶

Upon delivery of this Report, disagreements arose between the Parties as to whether the Experts had exceeded their mandate and sufficiently reasoned their decision.¹⁷ By 2007, armed violence between Ngok Dinka and Misseriya was again widespread and the SPLM/A had withdrawn from the Government of National Unity, amidst rising tensions allegedly fuelled by foreign pressures.¹⁸ To avoid a return to a full-blown civil war, the

¹⁵ ABC Experts’ Report to the Sudanese Presidency, 14 July 2005, Part 1, 20-21.

¹⁶ *Id.*, 21-22.

¹⁷ Abyei Arbitration, *supra* note 1, para. 133.

¹⁸ Z. Ochieng ‘Sudan: CPA Was Doomed - None of the Signatories Had Any Conviction’ (20 October 2007) available at <http://allafrica.com/stories/200710230704.html> (last visited 11 March 2011); D. Kilner, ‘Clashes on Sudan’s North-South border threaten Peace Deal’ (10 March 2008) available at <http://www.voanews.com/english/news/a-13-2008-03-10-voa49-66809837.html?rss=africa> (last visited 11 March 2011); S. Wheeler., ‘Armed Sudanese nomads block key north-south route’ (12 February 2008); IRIN, ‘SUDAN: War of words after scores killed in Abyei’ (3 March 2008) <http://www.irinnews.org/Report.aspx?ReportId=77072> (last visited 11 March 2011), BBC, ‘Arab nomads dead in Sudan clashes’ (2 March 2008) available at <http://news.bbc.co.uk/2/hi/africa/7273838.stm> (last visited 11 March 2011); A. Shahine., ‘Sudan nomads clash with ex-rebels, dozens killed’ (2 March 2008) available at http://www.reuters.com/article/2008/03/02/idUSL02440386.CH_2400 (last visited 11 March 2011); Sudan Tribune, ‘Fresh fighting breaks out in Sudan North-South border region’ (21 March 2008) available at http://www.sudantribune.com/spip.php?page=imprimable&id_article=26451; IRIN,

Sudanese President, Omar al-Bashir, and the President of the autonomous Government of Southern Sudan, Salva Kiir Mayardit, agreed in June 2008 upon The Road Map for Return of IDPs and Implementation of Abyei Protocol which provided, among other matters, for the referral of the *Abyei* dispute to arbitration.¹⁹ This agreement was implemented a month later through the conclusion of the Arbitration Agreement between the Government of Sudan and SPLM/A.²⁰ The arbitral procedures were to take place at the Permanent Court of Arbitration (PCA) under the PCA's Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State. Both Parties to the dispute committed to abide by and implement the resulting arbitral award.

Following an extensive exchange of written submissions, the Parties presented their oral submissions to the arbitral tribunal from 18 to 23 April 2009 during the hearings at the Peace Palace in The Hague. Contrary to the highly confidential atmosphere which usually surrounds such proceedings, the Parties to this dispute agreed to broadcast the hearings via the internet, which allowed the public in Sudan and elsewhere to watch how and which arguments were put forward. After the conclusion of the oral hearings, the arbitral tribunal commenced its deliberations and, less than ninety days later, on 22 July 2009, a final and binding decision was rendered concerning the validity of the Abyei Area boundaries identified and delimited by the ABC Expert Report.²¹ Announcements by both – the Government of Sudan and the SPLM/A, that they would accept the arbitral decision were

'SUDAN: Rising tension in Abyei as clashes displace hundreds' (24 March 2008) available at <http://www.irinnews.org/Report.aspx?ReportID=77419> (last visited 11 March 2011).

¹⁹ 'The Road Map for Return of Internationally Displaced Persons and Implementation of Abyei Protocol' (8 June 2008) available at <http://www.cmi.no/sudan/doc/?id=976> (last visited 9 March 2011), section 4.

²⁰ *Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area*, PCA No. GOS-SPLM-53,004, 7 July 2008.

²¹ The Award was rendered by a majority of 4 to 5 (Judge Awn Al-Khasawneh dissented because he found the majority opinion "very similar to the ABC Experts' Report itself and like it as far in excess of mandate as it is removed from historical (and contemporary) reality". Dissenting Opinion of His Excellency Judge Awn Shawkat Al-Khasawneh Member of the International Court of Justice, 1.

welcomed by the United Nations, the European Union and the United States.²²

The award partially annulled the conclusions of the ABC Report based on the finding that the Experts had exceeded their mandate in certain respects. The re-delimitation of the northern, eastern and western boundaries was ordered, while the arbitral panel endorsed the experts' conclusions with respect to the southern boundaries and the grazing and other traditional rights.²³ The re-defined borders accord control over the richest oil fields in the Abyei region to the government of (northern) Sudan, but not without assigning several oil fields to the south and reaffirming the status of the town of Abyei as the heartland of the Ngok Dinka (see Figure 2 below). As a result, the size of the Abyei Area has been decreased which might prove to be of crucial influence on the outcome of the referendum on 9 January 2011. In this referendum, the residents of the Abyei Area were able to vote on whether to become part of northern or southern Sudan. Most members of the Misseriya tribe are located outside the redefined borders, making it presumably more likely that the region will vote to join the south. The stakes here are considerable as through this choice, the residents of the Abyei Area might in fact be opting to become nationals of an entirely different country – if, as expected, South Sudan secedes from the North on the basis of the recognized right of self-determination of its inhabitants.²⁴

²² S. Ottermann, 'Court Redraws Disputed Area in Sudan' (22 July 2009) available at <http://www.nytimes.com/2009/07/23/world/africa/23sudan.html> (last visited 11 March 2011).

²³ Abyei Arbitration, *supra* note 1, para. 770.

²⁴ Abyei Arbitration, *supra* note 1, paras 594-601; see also 'New borders for Sudan oil region', *BBC News* (22 July 2009).

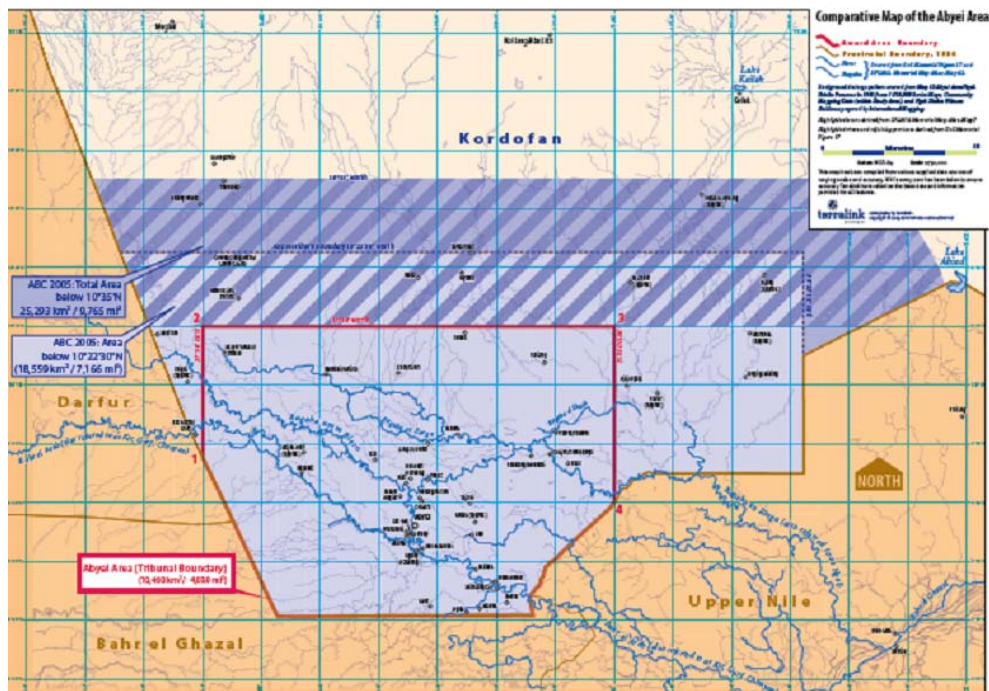


Figure 2. Comparative Map of the Abyei Area²⁵

C. Special Procedural Features of the Abyei Arbitration

This part aims to focus on the most specific procedural features of the *Abyei* proceedings, which distinguish it from other mixed arbitrations, so as to analyze whether they could serve as a model or as a lesson for future instances of intra-State dispute resolution. Three points will be assessed in particular: first, the choice by the Parties of the 1993 PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State as a governing procedural framework and their utility therein; second, the underlying needs prompting the modification of the so-chosen procedural rules, in particular the unique fast-track time lines set out in the Arbitration Agreement between the Parties, requiring *inter alia* the tribunal to render its award within 90 days after the end of the hearings; and third, the transparency of the proceedings as a model for involving the interested stake holders and the affected civil society in the proceedings as part of the peace

²⁵ *The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Final Award, PCA, 22 July 2009, Appendix 2, 272.

and reconciliation process; and finally the way the Parties dealt with the costs of the arbitration.

The most obvious procedural specificity of the *Abyei* Arbitration is the involvement as a party to it of a non-State actor, *i.e.*, a self-determination unit of people, represented in the proceedings by the Sudan People's Liberation Movement/Army. This unique instance of procedural standing in a contentious case would have been unfeasible under the governing rules of any standing international court or tribunal as they stand today. This was surely an underlying consideration in choosing arbitration to resolve the dispute. Another interesting feature in terms of procedural standing was that the Parties did not fall under the most typical opposition "applicant" v. "respondent" but were placed on the exact same procedural footing. Last but not least, it is specific to this arbitration that its underlying subject matter remains yet to be qualified as being an internal or an international boundary, depending on the results of the 2011 referendum.²⁶

I. The Choice of the PCA Optional Rules for Arbitrating Disputes between two Parties of Which Only one is a State

The Parties to the Arbitration Agreement chose as suitable rules of procedure the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State in their latest 1993 edition and introduced specific modifications therein, tailored to meet their needs.

The PCA Optional Rules are a flexible set designed by the institution specifically for mixed arbitration and are unique in that sense. Their roots can be traced back to the 1935 case of *Radio Corporation of America v. the National Government of the Republic of China*,²⁷ which was the first arbitration involving a non-State party administered under the auspices of the PCA. Back then, such a situation was unusual and not expressly contemplated under the 1899 and 1907 founding Hague Conventions for the

²⁶ See e.g. P. Muhlendahl, 'International tribunal Redraws Boundaries of Sudanese Abyei Region: a Chance for Peace?' (10 December 2009) available at <http://www.haguejusticeportal.net/eCache/DEF/11/256.html> (last visited 9 March 2011), 1.

²⁷ 'Radio Corporation of America v. the National Government of the Republic of China', Award of the Tribunal (13 April 1935) available at <http://www.pca-cpa.org/upload/files/RCA%20v.%20China.pdf> (last visited 9 March 2011).

Pacific Settlement of International Disputes, so the International Bureau of the PCA had to inform the Member States through the Administrative Council that it considered itself having the power to administer the case, having been requested to do so by the Presiding Arbitrator in that case, Professor van Hamel.²⁸ In 1960, the Administrative Council gave its authoritative broad interpretation of Article 47 of the 1907 Hague Convention, so as to authorize the development of the first 1962 Optional Rules for Arbitrating Disputes between two Parties of which Only One is a State.²⁹ The provision was used as a basis for allowing the administration of mixed arbitrations provides in the relevant part,

“The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration”.

The PCA Member States endorsed the interpretation of “special Board of Arbitration” as encompassing mixed arbitrations in addition to the traditional inter-State ones, given the absence of specific wording to the contrary, following the precedent already set in 1935.³⁰

The underlying reason for the drafting of these rules was not unrelated to the diminishing amount of inter-State disputes referred to arbitration after the establishment of the World Court. There was a need to search for a different procedural mandate, identified expressly in 1960 by the Secretary-General of the PCA when informing the Administrative Council that the International Bureau was studying the possibility of facilitating arbitration between a State and private corporations, requesting the Council to charge him to continue these studies.³¹ Unlike the current 1993 Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, which are open to States not members of the PCA, the 1962 set provided that the State concerned had to be a Party to one of the two Hague Conventions.

²⁸ Conseil Administratif de la Cour Permanente D'Arbitrage, *Annuaire*, 1 April 1935.

²⁹ Bureau International de la Cour Permanente D'Arbitrage, *Annuaire*, 29 November 1960.

³⁰ Conseil Administratif de la Cour Permanente D'Arbitrage, *Annuaire*, 1 April 1935.

³¹ Bureau International de la Cour Permanente D'Arbitrage, *Annuaire*, 29 November 1960. Note du Secetaire General No. 9980 C.A. regardant les conflits entre les Etats et les corporations privées.

It is noteworthy that the current rules are largely based on the UNCITRAL Arbitration Rules of 1976, which were created to meet the need of an *ad hoc* procedure acceptable for disputing private parties coming from different legal, social and economic systems, to enhance their economic relations.³² The Rules from the States' perspective represent a mutually acceptable international standard.³³ The UNCITRAL Rules were a success as they are still widely used, very often by States themselves in their disputes with private parties arising under contracts and multilateral treaties. States also chose the UNCITRAL Rules as applicable procedure for mass-claim dispute settlement within the Iran-US Claims Tribunal and the UN Compensation Commission.

From a procedural point of view, all sets of the PCA Optional Rules are adopted by its Administrative Council acting pursuant to its mandate under Article 49 of the 1907 Hague Convention and its 1900 Rules of Procedure, setting out its power to adopt "its rules of procedure and *all other necessary regulations*" (emphasis added) making them an act of a recommendatory nature,³⁴ adopted by an organ of an international organization.³⁵ They are model rules, formally endorsed by the organization and made available not only to its Member States pursuant to Art. 51 of the 1907 Hague Convention, but also to other States, international organizations and private entities to agree upon, e.g., by a reference in their arbitration agreement. These Rules are optional, e.g., they need to be expressly agreed upon in writing by the Parties and furthermore, are flexible as they can be modified by a written agreement between the parties to Article 1(1) of the Optional Rules.

The PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, contain themselves a few

³² GA Res. 31/98, 15 December 1976.

³³ D. Caron, L. Caplan & M. Pellonp, *The UNCITRAL Arbitration Rules: A Commentary* (2006), 1-2.

³⁴ "Les résolutions d'un organe internationale adressées à un ou plusieurs destinataires qui lui sont extérieurs et impliquant une invitation à adopter un comportement déterminé, action ou abstention.", M. Virally, 'La valeur juridique des recommandations des organisations internationales', 2 *Annuaire français de droit international* (1956) 66, 68.

³⁵ H. Schemers & N. Blokker, *International Institutional Law*, 4th ed. (2003), 769, para. 1244.

modifications to the UNCITRAL Rules, so as to reflect some of the special procedural considerations in arbitration involving a State. For instance, they provide for time periods which are twice as long with respect to (1) the timeline for constituting the arbitral tribunal, (2) for bringing challenges against arbitrators, (3) for providing witness evidence and (4) for requesting an additional award.³⁶ However, given the fast-track timeline adopted by the Parties to the *Abyei Arbitration*, these time periods could not have been a consideration for choosing the set of Optional Rules.

The PCA Rules do provide expressly though that the agreement to arbitrate under them constitutes a waiver of any sovereign immunity from jurisdiction.³⁷ This solution, despite the nearly settled jurisprudence on the matter is a useful consideration, worth explicit incorporation in an arbitration involving a State. The provision also sets out that the waiver of immunity from execution cannot be implied and has to be explicit. The Parties to the *Abyei Arbitration* did include a clause to that effect in Article 9(5) of their Agreement.

Another modification to the UNCITRAL Rules is set out in Article 1(4), providing for a possible role of the PCA as secretariat of the proceedings if agreed by all the parties. The Parties to the *Abyei* did make use of this option. They left without modification Article 16 of the Rules providing for The Hague as place of arbitration. This deliberate choice can be seen as a way of bringing the proceedings outside the area of conflict to a place traditionally perceived as neutral and arbitration-friendly in terms of its arbitration laws, as well as the non-interference approach adopted consistently by its national courts. The latter can constitute an important consideration in arbitral proceedings involving a sovereign.

³⁶ Arts 5, 11(1), 25 and 37(1) PCA Optional Rules for Arbitrating Disputes between two Parties of Which Only One is a State [PCA Optional Rules].

³⁷ *Id.*, Article 1(2).

II. The Modifications to the PCA Rules Introduced by the Parties

1. The Fast-Track Procedure

The Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting the Abyei Area was deposited with the PCA on 11 July 2008, four days after its signature by the Parties on 7 July. The Agreement itself however stipulated in Article 4(1) that the arbitration process was deemed to have commenced prior to that date – on 8 June 2008. This is an indication of the underlying urgency of the proceedings. The contextual element of the ongoing conflict and ethnic tensions discussed above, prompted the Parties to conduct the probably fastest delimitation arbitration in modern history.

Illustrative of the unusual speed of the proceedings is not only the 'retroactive' commencement of the arbitration, but more importantly the tight timelines set by the Parties. Namely, pursuant to Article 4(3) of the Agreement, the Tribunal had to endeavor to complete the entire arbitration within six months of its commencement, subject to the possibility of an extension for three months, if necessary. Furthermore, the procedure for the appointment of arbitrators (set out in great detail in Article 5), unlike other procedural rules imposes specific deadlines not only on both Parties, but also on the Appointing Authority and the Party-appointed arbitrators, with no previewed possibility for their extension. The formation of the five-member Arbitral Tribunal was completed on 27 October 2008 with the appointment of the fifth, Presiding Arbitrator by the Secretary-General of the PCA pursuant to Article 5(12) of the Arbitration Agreement. The Tribunal started to work as soon as it was constituted in accordance with Article 4(2) of the Agreement, *i.e.* on 30 October 2008, when the fifth Presiding Arbitrator signed his declaration of independence and communicated it to the Parties. In fact, the first two arbitrators were appointed by the Government of Sudan on 14 August, followed on the very next day by the two appointments by the SPLM/A and the appointment of the President of the Tribunal filing the agreement of the four arbitrators on 27 October 2008 by the Appointing Authority. The entire process took 95 days.

The conduct of the proceedings themselves was also specifically defined as fast-track, in accordance with Article 8(3) of the Agreement. The

two phases of the written pleadings consisted of simultaneous exchanges of memorials and counter-memorials within two six-week periods, followed only 30 days later by the oral pleadings. The written submissions exceeded 20,000 pages in volume and the hearings went on for six days. In the definition of the timelines for the proceedings, in contrast to those regarding the appointment of arbitrators, the Tribunal was given the discretion of extension 'for good cause' and up to a maximum of 30 days for each party.³⁸ This provision was used by the Tribunal in the course of the proceedings to grant a 14-day extension to the Government of Sudan at its request.

Another specific characteristic of the Arbitration Agreement was the incorporation of multiple safeguards to prevent any possible obstruction or delay of the fast-track proceedings by either the parties or the arbitrators. These were set out for instance in Article 4(8), providing for the continuation of the proceedings if either party defaults in submitting written pleadings or in appearing at the oral stage. Article 5(5) safeguards against a default of any of the parties in appointing their respective arbitrators by empowering the appointing authority to act on their behalf. Last but not least Article 5(14) previews a situation of a truncated tribunal, giving discretion to the remaining at a minimum of three arbitrators to continue the proceedings and to issue an award. It can be observed that the Arbitration Agreement was successfully complied with by the arbitrators and the Registry and the ambitious fast-track procedure previewed therein was adhered to. The proceedings were completed within a year of their commencement with the issuing of a 269-page award on 22 July 2008, accompanied by a 67-page dissenting opinion. The 90-day post the closure of submissions requirement was also met as the hearings were closed on 23 April and the award followed exactly on the 90th day.

The unprecedented expediency of the *Abyei* proceedings demonstrates the freedom of parties to arbitration to tailor its procedure so as to meet their political and other contextual needs, making it particularly suitable for dispute resolution in the context of post-conflict situations. It is remarkable that there were no outbreaks of hostilities during the proceedings, which were broadcasted publicly in Sudan and the Abyei region. It can be

³⁸ Arbitration Agreement, *supra* note 20, Article 8(7).

observed therefore, that the fast-track proceedings met not only the formal deadlines imposed, but also the broader practical objectives of the Parties.

2. The Transparency of the Proceedings

It is very rare in instances of mixed arbitration that parties agree to make the very existence of the proceedings, let alone each of their stages public. In the record of the PCA, this has happened only in a few instances, including the 1935 case between the Radio Corporation of America and China, the 2003 *Eurotunnel* arbitration,³⁹ three NAFTA proceedings and a few investment arbitrations.⁴⁰ Confidentiality remains the overall rule.

In this context, transparency was a procedural feature specific to the *Abyei Arbitration*. It was set out in the Arbitration Agreement itself and later reinforced by specific requests of the Parties. It should be noted that the PCA Optional Rules follow the UNCITRAL Rules on the issue of confidentiality, providing e.g. in Article 25(4) that in the absence of an agreement to the contrary, hearings shall be held *in camera* and that the award shall not be made public without the consent of both parties pursuant to Article 32(5). However, the Parties to the *Abyei Arbitration* did expressly agree otherwise, providing specifically that the oral pleadings were to be open to the media and that the PCA ought to issue periodic press releases regarding the progress of the proceedings, as well as to make publicly available on its website the submissions of the Parties and the final award.⁴¹ An additional requirement imposed by the Parties was the translation of the award into Arabic.

In addition to these very strong guarantees of transparency, the Parties agreed to the proposal of the PCA to make a live webcast of the proceedings, available on its website, which, together with the broadcast of the award ceremony, was accessed by over 3000 spectators from more than 50 countries. Furthermore, the Parties specifically requested the Registry to

³⁹ 1. *The Channel Tunnel Group Limited 2. France-Manche S.A. v. 1. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland 2. Le ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*, 2003.

⁴⁰ Available at http://www.pca-cpa.org/showpage.asp?pag_id=1029 (last visited 9 March 2011).

⁴¹ Arbitration Agreement, *supra* note 20, Arts 8(6) and 9(3).

organize a special ceremony for the rendering of the arbitral award, another act not typical for arbitration where copies of the awards are usually communicated to the parties.⁴² The ceremony attracted 200 attendees from the Parties, broad media coverage, as well as representatives from the 13 witness States and from the EU. Both Parties expressed publicly their satisfaction after the rendering of the award, as well as their readiness to comply with it.

It seems that the underlying reason that prompted the Parties to choose transparency as opposed to confidentiality despite the high political sensitivity of the subject matter of the dispute was the bringing the process of justice closer to the people whose lives it directly affected as a matter of confidence-building and legitimacy and as a measure for counteracting the tension in the region. Given the absence of hostile outbreaks during the proceedings and the rendering ceremony, despite the fears to the contrary, it can be concluded that transparency served its purpose. It also contributed to the raising of awareness and the engagement of the international community in the peace process, of which the arbitration itself was only a part. Transparency served as a channel of communication both ways, from justice to the people and the other way round, keeping the Tribunal conscious of the people's livelihoods at stake. As stated by the President of the Tribunal,

“[t]he presence of party representatives from all of Sudan, many of whom have a direct stake in the outcome of these proceedings, has been particularly significant to us, and truly fulfils the very purpose for which this peace palace was built”⁴³.

Last, but not least, transparency enhanced the widespread support of the award by observers and interested Parties, as well as the academic community, manifested in the increasing numbers of journal articles analyzing it.⁴⁴

⁴² See e.g. 1976 UNCITRAL Arbitration Rules, Art. 32(6); and PCA Optional Rules, *supra* note 36, Art. 32(6).

⁴³ P.-M. Dupuy, Presiding Arbitrator of the Tribunal, Award Rendering Ceremony, 22 July 2009.

⁴⁴ See e.g., J. R. Crook, ‘Abyei Arbitration – Final Award’, 13 *American Society of International Law Insights* (2009) 15; W. J. Miles & D. Mallett, ‘The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts’, 1 *Journal of International Dispute Settlement* (2010) 2, 313; B. W. Daly, ‘The Abyei

3. The Costs of the Arbitration

Costs of the proceedings are a feature of international arbitration often referred to as one of its disadvantages compared to court proceedings, the latter being described as ‘free’. What is not mentioned often is that the biggest part of the costs, in both instances, tends to be the one spent on legal representation, rather than on the administration of justice itself. The Parties to the *Abyei Arbitration* were clearly in an unequal position as between each other, as well as in an overall weak position in terms of meeting the costs of the proceedings. The latter observation shows why they provided in Article 11 of the Arbitration Agreement that it is for the Government of Sudan to direct the payment of the costs of the arbitration regardless of the outcome of the proceedings, whereas their comparatively low financial possibilities motivated them to apply to the PCA Financial Assistance Fund and seek assistance by the international community.

The PCA Financial Assistance Fund for the Settlement of International Disputes was established in 1995 at the initiative of the Secretary-General and with the approval of the Administrative Council. In accordance with its Terms of Reference and Guidelines, it has as an objective the “making [of] funds available to meet costs of this nature [to] facilitate recourse to arbitration or other means of settlement, thus advancing the aims and purposes of the Conventions, and promoting friendly relations and cooperation among States”⁴⁵. It is open to “qualifying” Member States e.g. those listed in the OECD list of developing countries and consists of voluntary contributions by States, international organizations and other members of the international community.⁴⁶ For the *Abyei Arbitration*, 500,000 EUR were contributed to the Fund by The Netherlands, France and Norway and allotted respectively to the Parties to meet what amounted to 20% of the overall costs of the arbitration.

This experience is indicative of the interest and readiness of the international community to facilitate the resolution of intra-State disputes in

Arbitration: Procedural Aspects of an Intra-State Border Arbitration’, 23 *Leiden Journal of International Law* (2010) 4, 801.

⁴⁵ Permanent Court of Arbitration, Terms of Reference and Guidelines of the Permanent Court of Arbitration Financial Assistance Fund (11 December 1995), available at: <http://www.pca-cpa.org/upload/files/FUNDENG.pdf> (last visited 12 March 2011), para. 2.

⁴⁶ *Id.*, paras 4 and 5.

conflict areas by supporting the Parties in their recourse to peaceful third-party settlement where they cannot afford covering the expenses. It is a rare instance of communitarian action at the international level. Notably, in the *Abyei Arbitration*, the private sector contributed to the cost efficiency too, e.g. the SPLM/A was represented *pro bono* by Wilmer Cutler Pickering Hale and Dorr LLP, London and by the Public International Law Policy Group (“PILPG”).

D. Arbitration: The Future for Intra-State Conflicts?

The situation in Abyei is not unique: many conflicts on the African continent and beyond consist of an explosive mix of disputed boundaries, contentious ownership of natural resources, self-determination claims, absence of access to dispute settlement for non-State entities, lack of conclusive historical evidence, non-transparency of pending legal procedures (if any). There are numerous examples in this regard, to name just a few: the civil war in Chad, the conflicts in the aftermath of the war in the Democratic Republic of Congo, the ongoing violence in Nigeria and the most recent power shifts and challenges in the Arab States. These conflicts are evidently not identical to the Abyei Area dispute, but they contain all or most of the factors enumerated above.

In the following paragraphs, this study will address the viability of arbitration as a method of peaceful settlement of intra-state disputes over land and natural resources, particularly where one of the Parties is invoking its right to self-determination, as recognized by the international community. The question of what the Parties perceive to be a fair and efficient procedural framework in such politically sensitive and financially relevant instances will also be touched upon. Finally, the implementation by both Parties to the dispute and the actual impact of the award on the ground will be assessed.

I. Disputes Concerning (Non-)Tangible Matters Involving Non-State Actors

International law traditionally was seen as the law regulating relations between States.⁴⁷ Innovative developments, especially in the 20th century,

⁴⁷ E.g. L. Oppenheim, *International Law: A Treatise*, Vol. 1, 3rd ed. (2005), 25.

have established the role of the individual in the international legal system, both as the holder of rights, for example, in human rights law, or more rarely, even as the holder of duties, for example, in international criminal law. Even companies have, if the required investment treaties are in force, access to international arbitration if they wish to bring a claim against the State hosting their investment. However, entities which do not fit within the human rights or investment framework on the one hand, but which are not States or international organizations on the other hand, may fall in a procedural legal void. Such entities include most prominently ‘rebel’ or secessionist movements, which either wish to take over control of the mother State (for example, in cases where the outcome of an election is not recognized by the previous government) or which wish to rely on self-determination to establish their own independent State.

This study does not elaborate on whether such claims are well-founded under the international rules on self-determination, but rather, the focus is on the options available to non-State entities to have their disputes settled by peaceful means. Arbitration seems to be a good means for this purpose, when negotiation and national legal remedies have failed, as States are understandably unwilling to allow such disputes to be brought before the International Court of Justice since doing so might be interpreted as an implicit recognition of the statehood of their secessionist adversary. One of the core tasks which arbitral panels have fulfilled in the past has been territorial and maritime delimitations, in other words, the solution of boundary disputes, often entailing a division of natural resources.⁴⁸ As many current conflicts center around this issue (albeit not necessarily the delimitation of boundaries between States, but also of internal boundaries, *i.e.* within one State), the only new element would be that there is a non-State actor participating in the arbitral process.

⁴⁸ E.g., *Dutch-Portuguese Boundaries on the Island of Timor*, *The Netherlands v. Portugal*, PCA Award, 25 June 1914; *The Island of Palmas Case (or Miangas)*, *United States of America v. The Netherlands*, PCA Award, 4 April 1928; *Eritrea/Yemen – Sovereignty of Various Red Sea Islands*, *State of Eritrea v. Republic of Yemen*, PCA Award, on Sovereignty, 9 October 1998; *Eritrea v. Yemen*, PCA Award on Maritime Delimitation, 17 December 1999; *Proceedings Pursuant to the Law of the Sea Convention (UNCLOS)*, *Barbados v. Trinidad and Tobago*, PCA Award, 11 April 2006; *Proceedings Pursuant to the Law of the Sea Convention (UNCLOS)*, *Guyana v. Suriname*, PCA Award, 17 September 2007.

The solution of conflicts about ‘intangible issues’, such as violations of human rights or the return of internally displaced persons (IDPs), is more difficult than the drawing of a boundary, but even then, devising such a solution is not impossible. A compensation formula could possibly be worked out for the assessment of mass claims, similar to the Eritrea–Ethiopia Claims Commission⁴⁹ or the Iran–United States Claims Tribunal.⁵⁰ This could imply that a system with a transparent evidence threshold would be devised: victims would have to prove ‘x, y and z’ in order to fall in a certain compensation category. This compensation could then be paid from funds transferred by the parties into a blocked account.

II. Fair and Efficient Dispute Resolution

1. Arbitration v. Litigation

It is often asked why the Government of Sudan and the SPLM/A opted for arbitration. Clearly there was more than one underlying consideration, including but not limited to the legal personality of one of the disputing Parties and the absence of an appropriate international court, giving procedural standing to non-State parties like the SPLM/A e.g., Article 34(1) of the Statute of the ICJ unequivocally sets out that: “Only States may be parties in cases before the Court”. Cases of such caliber often do not fall in the narrow competence of specialized courts and tribunals, many of which are not open to non-State parties, too.

⁴⁹ The Eritrea-Ethiopia Claims Commission was established and operated pursuant to the ‘Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea’, 12 December 2000. The Commission rendered its Final Awards on Damages in each Party’s Claims on 17 August 2009; see also H. Van Houtte, ‘Arbitration to Settle Private War-Damage Claims? The Eritrea-Ethiopia Claims Commission Revisited’, in T. Weiler & F. Baetens, *New Directions in International Economic Law – In Memoriam Thomas Wälde* (forthcoming – manuscript on file with author).

⁵⁰ The Iran-United States Claims Tribunal was established on 19 January 1981 by the Islamic Republic of Iran and the United States of America as recorded in two Declarations made on 19 January 1981: the “General Declaration” and the “Claims Settlement Declaration” (the “Algiers Declarations”). To date, the Tribunal has finalized over 3,900 cases; see also C. R. Drahozal & C. S. Gibson, ‘The Iran-U.S. Claims Tribunal at 25 – The Cases Everyone Needs to Know for Investor-State & International Arbitration’ (2007).

Therefore, the only possibility for peaceful 3rd party dispute settlement left to non-state actors, including self-determination units and other distinct groups or movements, with regard to their disputes with the State or among each other is through arbitration. However, even if this reason is an important one, it cannot have been the only reason to resort to arbitration. There were other procedural advantages in the dispute settlement process, which are also relevant to future similar cases.

2. An Arbitration Agreement Tailored to the Needs of the Parties

Certain considerations cannot and should not be automatically ‘copied’ from the *Abyei* to other cases, although the main underlying principles such as a final and binding award, would remain the same. Setting up arbitrations for other conflicts might even be easier as certain ‘unique’ factors in the *Abyei* case, such as the issues relating to the partial annulment of the ABC Report, are not likely to feature in other intra-State cases. Hence, it would be advisable that parties to this type of disputes would separately conclude an arbitration agreement for each dispute, identifying the applicable law and the mandate of the arbitral tribunal among other matters.

In addition, the PCA’s *Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State* seem well-suited for the purpose as shown by the *Abyei* case. These Rules emphasize flexibility and party autonomy, but moreover provide that agreement to arbitrate under the Rules constitutes a waiver of any sovereign immunity from jurisdiction. Particularly for some conflicts, it is relevant that these Rules are also appropriate for use in connection with multiparty agreements, provided that appropriate changes are made in the procedures for choosing arbitrators and sharing costs.

3. Neutrality

The perceived neutrality of binding dispute settlement by an independent third party was politically more viable for both sides than accepting a negotiated settlement, inevitably involving concessions by the two parties. This was even more so against the background of their historical opposition while the prior expert determination set out in the ABC Report on both fact and law could not outweigh the persisting differences.

Furthermore, the choice of The Hague, “the capital of justice” as a place of the arbitration was surely not coincidental, but contributed further to the perception of neutrality. However, parties to similar conflicts in the future might wish to avoid any allegations of real or perceived ‘euro-centricity’ and therefore consider choosing a location within or closer to their region as seat of the arbitration, depending on the scale of the conflict at hand. Such choice is perfectly possible within the remit of the PCA Optional Rules⁵¹ and should certainly not automatically be seen as negatively affecting the neutrality of the whole procedure.

4. Fast-Track?

The speed of the proceedings was a major consideration for the Parties as the arbitration was only a part, even if an important one indeed, of the larger peace process and the flexibility of arbitration allowed the parties to adjust it to their specific needs. The question is whether the *Abyei* procedure, which was specifically tailored to meet the needs of the Parties to this longstanding dispute, involving the use of force and very particular political considerations, could be a viable model for other intra-State disputes. The tight timeline might not always be the optimal procedural model except where an underlying urgency and upcoming political event like a referendum so require. Even though feasible, fast track proceedings in delimitations and disputes of such complexity pose a substantial challenge to both parties and arbitrators.

As a result, a similar fast-track procedure might be seen as not advisable unless unavoidable *i.e.*, in the face of outbreak of hostilities, civil war, or a situation requiring a particularly urgent need of justice for the sake of maintaining or restoring peace. It is important to keep the option open in the light of new developments and changing circumstances, such as those currently witnessed in the Arab world. One might even raise the question, hypothetically, who would be the legitimate representative of a State in an arbitration/mediation/conciliation procedure when a Government is being challenged and overthrown. Another potential complication is that by entering into an international agreement, even if only a dispute settlement one, a Government is endowing the other entity with recognition under international law. However, in most cases, the advantages of such fast-track

⁵¹ PCA Optional Rules, *supra* note 36, Art. 16.

procedure are outweighed by its disadvantages, such as too much pressure on Parties, counsel and arbitrators; an extremely - restrictive time frame to develop normal-length arguments of substantial complexity; and, insufficient time to produce all necessary evidence and documents. These disadvantages could be especially burdening on the Respondent who is being brought to arbitration and has to organize its defense in a very short time.

5. Transparency

The transparency of dispute settlement proceedings which directly affect the lives of the peoples enhances the legitimacy, as well as the acceptance of the award. The publicity of the documents pertaining to the pending proceedings, the online webcasting of the hearings and the rendering of the award were a *sui generis* testimony of the Parties' reiterated commitments to respect it. At the award ceremony, the Parties spoke before the award was rendered, confirming that they would accept themselves to be bound by the decision, whatever it was, in front of the international community and society. The transparency of this arbitration was also an important confidence-building measure, aiming at bringing the Sudanese people closer to the administration of justice, as opposed to alienating them from the intra-state affairs that concern them directly. To this end, after authorization by the Tribunal, the PCA published the Press Release summarizing the final award in Arabic and English simultaneously on 22 July 2010. In sum, the transparency of the proceedings is definitely a positive model to be followed in future instances – its example was already followed by the ICJ, which opted to provide a webcast of the reading of the Kosovo Advisory Opinion.⁵²

⁵² 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion' (22 July 2010) available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited 9 March 2011).

III. Building Blocks Towards Long-Term Peace

1. Awareness and Participation

This arbitration succeeded in raising the awareness of the Sudanese people, the international community as a whole and the international civil society, including NGOs and other non-State actors in similar situations. Particularly through its transparency, local shareholders obtained a form of 'local ownership of the claim', which will hopefully in turn contribute towards an actual implementation on the ground. The sheer local interest in following or even participating in the arbitral procedures have made clear that a decision to rely on arbitration is supported by the real stakeholders in this type of dispute. Raising awareness among the international community created an atmosphere of 'international co-responsibility', involvement and support, culminating in a substantial financial contribution. The PCA Financial Assistance Fund which served to cover 20 % of the costs of the arbitration can surely be called a success, which could hopefully establish a precedent for future instances. In sum, the *Abyei* precedent of transparency and bringing international justice to the people could add to the legitimacy of future arbitrations, which have a similar significant public interest. The transparency provided by the application of information technology, which is a drastic departure of the classic creed of confidentiality, has certainly increased the legitimacy of this form of international dispute settlement in the eyes of the broader public.

2. Implementation

The goal of any type of international dispute settlement is precisely that: to settle, once and for all, an international dispute. Hence, one of the most important yardsticks to measure the success of the *Abyei* case and thereby its usefulness as a model for future intra-State dispute settlement is whether the *Abyei* award actually put an end to the violence (or is likely to do so in the foreseeable future). As explained above, the case was followed with great interest and approval by local stakeholders, many of which actually travelled to The Hague to witness the procedures in person. The award was well-received by both Parties and representatives of both the Government of Sudan and the SPLM/A expressed their firm intention to implement the ruling. Since then, the record has remained silent and there is very little data on what is currently happening in the Abyei Area. All actors

seem to be waiting with any demarcation until after the referendum of 9 January 2011.

However, in July 2010, Salah Abdullah, who is a senior (north) Sudanese official and former director of national security Gosh, already claimed that the Abyei issue should not be regarded as settled: "The [PCA] ruling did not resolve the dispute and was not adequate or fulfilling to the needs of both sides"⁵³. Moreover, the government of Sudan seems to be suggesting that migratory Misseriya from northern Sudan are "residents" of Abyei who must be allowed to vote in the referendum. This might affect the relative homogeneity of the region, resulting from the PCA award which decreased the size of the Abyei Area to its Ngok Dinka concentrated core. If the Misseriya are allowed to vote, this could potentially tip the voting balance in favour of joining the north. On 15 and 16 November 2010, Ngok Dinka leaders convened in an Abyei Referendum Forum opened by Government of South Sudan (GOSS) President Salva Kiir Mayardit. The final conference resolution was that, if no referendum is held on 9 January 2011, the Ngok Dinka will resort to 'other means' to join the South.⁵⁴ At the time of writing, the government of Sudan was refusing to allow the Abyei Referendum Commission to be established, which in turn prevented solutions of residency issues, voter registration, border demarcation (as opposed to delineation), wealth sharing, citizenship, and security.⁵⁵ International protest so far, including from the US and the EU, does not seem to resort any effect.

What does this tell us for future intra-State conflicts? While the *Abyei* dispute was pending in The Hague, violence in the region did not entirely come to a halt, where the deployment of military force (the Joint Integrated Units of the Sudanese army) and the eruption of violence, caused continued

⁵³ E. Reeves, 'Compromising with Khartoum: Abyei and the Perils of Accommodation' (26 November 2010) available at <http://www.dissentmagazine.org/atw.php?id=318> (last visited 12 March 2011), 'Southern Sudan rejects ruling party's proposal on Abyei', *Sudan Tribune website* (17 September 2010); 'Oil-rich Abyei region "likely" to ignite full-scale war in Sudan' – commentary, *Sudan Tribune website* (17 September 2010); 'Sudanese Official Hopes Abyei meeting will achieve "just peace" for area tribes', *Sudan Tribune website* (4 October 2010).

⁵⁴ 'Abyei waits', 51 *Africa Confidential* (19 November 2010) 23, 6-7.

⁵⁵ Reeves, *supra* note 53; 'Abyei waits', *supra* note 54.

displacement of residents.⁵⁶ Peaceful and violent attempts to settle disputes are not *per se* mutually exclusive. However, it can be expected that the more peaceful settlement is resorted to, the more use of force will decrease – but good will is required by both Parties. It would be dangerously naive to assume that as soon as parties agree to bring their dispute before an arbitral panel, violence will automatically stop. Moreover, as a worst-case scenario, the danger exists that unimplemented awards, although legally binding, become irrelevant in practice through lack of enforcement. For future cases, it could be worth considering to develop some form of implementation strategy already in the arbitration agreement, rather than merely issuing general promises that an award will be complied with ‘regardless of the outcome’, e.g., by assuring more involvement of the international community.

E. Conclusion

While scholars and journalists nowadays often seem focused on presenting these cases as a necessary choice between either peace or justice in the context of the post-conflict reconciliation and rebuilding in Africa and other internal-conflict regions in the world, the *Abyei Arbitration* may serve as an integrating illustration that peace and justice are not mutually exclusive but instead complementary objectives. Parties must be made aware of the choice and given the means to settle their disputes peacefully through a neutral judicial process of their own choosing, including but not limited to arbitration. In this context, the possibility to initiate arbitration may not so much prevent the emergence of a conflict, but it could contribute to prevent further escalation and resolve existing conflicts.

Arbitration has some important advantages, first and foremost that it is a peaceful form of dispute settlement (as opposed to armed conflict). It is flexible, allowing access to international procedures for non-State parties to a dispute (as opposed to the litigation before the International Court of Justice). Arbitration enables structural peace building for the future (as opposed to e.g., the International Criminal Court which establishes only post-fact individual criminal liability, hoping to deter individuals from adopting certain conduct). Arbitration provides for a legal solution in the

⁵⁶ BBC News, ‘Sudan army quits town after death’ (14 December 2008) available at <http://news.bbc.co.uk/2/hi/7782867.stm> (last visited 12 March 2011).

form of a final and binding decision (as opposed to diplomatic pressure and continuous re-negotiation). It promotes predictability and stability of the legal system while still being acceptable to warring parties as they maintain an important say in the resolution of the dispute (as opposed to ‘traditional litigation’) which in turn leads to a higher legitimacy of the decision and (hopefully) makes it easier to implement and enforce the decision on the ground. When justice is not only done, but also seen and recognized to be done, international dispute settlement truly fulfills its purpose.

Adjudicating Conflicts Over Resources:

The ICJ's Treatment of Technical Evidence in the Pulp Mills Case

Juan Guillermo Sandoval Coustasse & Emily Sweeney-
Samuelson*

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Abstract

Conflicts over resources and the consequences of utilizing those resources can ignite social and political demonstrations, especially when the conflict is over a shared resource. Solving those conflicts requires both an institution and a procedure that are not just binding but also legitimate in the eyes of the constituencies. An important aspect of a legitimate procedure is that it correctly establishes the facts.

The International Court of Justice is successful in many ways, but it has fallen short in complex fact-finding on occasion, as scholars have noted. The recent *Case Concerning Pulp Mills on the River Uruguay* is an example of this shortfall. The case involved concerns over the environmental consequences of installing two pulp mills on the Uruguayan shore of the river that separates Argentina from Uruguay. A controversial point of the decision, as highlighted by the separate opinions of various judges, is how the Court established the facts of the case; in particular, the role of experts. The separate opinions raised fundamental questions as to the fitness, capacity and even will of the Court to decide a controversy based on complex evidence.

The criticism points to an evident risk: The Court might not be properly equipped to solve disputes that require deeper technical analysis. However, should it refrain from deciding such disputes, the authoritative status of the Court may be threatened. As a result, a disruption in the evolution of international law could occur. The ICJ is the preeminent contributor to international jurisprudence, and the interplay of several specialized tribunals, for instance, could result in inconsistent decisions on the same principles and forum shopping.

To lessen these risks, an effort towards transparency and legitimacy is needed. In particular, international conflicts over shared resources, as in the *Pulp Mills* case, or over actions of a State affecting resources located in another, can have serious domestic ramifications and affect the global environment. Transparency in the handling of evidence can promote legitimacy for the Court as a venue for these types of disputes, and for governments when facing domestic enforcement of an ICJ decision.

A. Introduction

Conflicts over resources and the consequences of utilizing those resources can ignite social and political demonstrations, especially when the conflict is over a shared resource. Solving those conflicts requires both an institution and a procedure that are not just binding but also legitimate in front of the constituencies. An important aspect of a legitimate procedure is that it correctly establishes the facts. This process must achieve transparency and technical adequacy.

The recent *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [*Pulp Mills* case] involved concerns over the environmental consequences of installing two pulp mills on the Uruguayan shore of the river that separates Argentina from Uruguay. These concerns led not only to political and diplomatic activity but also to strong demonstrations including barricading bridges that connect the two countries, with the economic consequences that the blockade of trade routes entails. Pursuant to the conflict resolution clause in a treaty regarding the rights and duties of each country on conservation, utilization and development of the river, the controversy was submitted to the International Court of Justice (ICJ). The Court passed judgment on 20 April 2010.

A controversial point of the decision, as highlighted by different judges in their dissenting and separate opinions and declarations, is how the Court established the facts of the case; in particular, the role of experts. Those judges raised fundamental questions as to the ability of the Court to decide a controversy based on complex evidence. The criticism points to an evident risk: The Court might not be properly equipped to solve disputes that require deeper technical analysis. We submit that the Court can adjudicate these disputes, but that some cases require the Court to solicit expert opinions about complex evidence. We specifically focus on international environmental disputes, which tend to involve such evidence.

Should the Court refrain from facing the challenges posed by addressing scientific and technical evidence, countries might refer these kinds of disputes to other courts or tribunals. This is problematic in the context of international conflicts over resources, because an effort towards uniformity, transparency, and legitimacy is in the interests of states. Conflicts over shared resources, as in the *Pulp Mills* case, or over actions of a State affecting resources located in another, can affect a State's economic viability and its long-term environmental health. A number of judicial fora have jurisdiction over international environmental disputes, and there are no rules of coordination between them. As a result, a variety of interpretations of the same principles could impede the goal of uniformity in international environmental law (IEL).

This paper explores how the ICJ, in the *Pulp Mills* case and others, has shown reluctance to adequately consider complex technical and scientific knowledge, and some of the potential consequences of this tendency. Part B presents the *Pulp Mills* case in its political and economic contexts. Part C first reviews the Court's faculties to call experts according to its statute, then describes how it has used such faculties in prior cases, explores the Court's treatment of technical evidence in the *Pulp Mills* case, and relates how other international adjudicative bodies treat cases that require interpreting complex evidence. Finally, part D discusses potential consequences of the Court's reluctance to use its faculty to appoint experts in such cases: fragmentation of the developing legal field of International Environmental Law, extreme proposals to improve international environmental dispute resolution, and lack of transparency and legitimacy of the Court's judgments in the public eye.

B. History of the Conflict

According to the Treaty on Borderlines in the Uruguay River, signed on April 7, 1961, Argentina and Uruguay share a border that runs down the Uruguay River, as described in Article 1 of the treaty.¹ The treaty provided that the parties would execute a statute to arrange mechanisms for the best and most rational means of joint exploitation of the river.² The Statute, known as the Statute of 1975, regulates, among other matters, the utilization of the water, the preservation, utilization, and exploitation of further natural resources, and pollution.³

After decades of peaceful relations, in 2003 Uruguay authorized a Spanish company to construct and operate a pulp mill on its side of the River Uruguay.⁴ In February of 2005, Uruguay authorized a Finnish company to proceed with a similar project in a nearby area.⁵ These mills were part of the largest capital investment in

¹ 'Treaty on Borderlines in the Uruguay River, Argentina - Uruguay, 7 Apr. 1961' available at <http://www.parlamento.gub.uy/htmlstat/pl/tratados/trat13462.htm> (last visited 14 March 2011), Art. 1.

² *Id.*, Art. 7; 'Statute of the River Uruguay, Argentina - Uruguay, 19 Nov. 1973' available at <http://www.caru.org.uy/publicaciones/publicaciones.html> (last visited 14 March 2011), Art. 1.

³ *Id.*; See also E. J. de Arechaga, 'Argentina v. Uruguay at the International Court of Justice: Pulp Mills on the River Uruguay', 21 *International Law Practicum* (2008), 58.

⁴ B. Spiegel, 'River of Discontent: Argentina and Uruguay Before the International Court of Justice', 14 *Law and Business Review of the Americas* (2008), 797, 797.

⁵ A. Alvarez-Jimenez, 'Inter-State Environmental Disputes, Provisional Measures and the International Court of Justice's Order in the Case Concerning Pulp Mills on the River Uruguay', 25 *Temple Journal of Science. Technology and Environmental Law* (2006), 161, 163, (citing *Request for the Indication of Provisional Measures*, ICJ

Uruguay's history,⁶ expected to increase Uruguay's gross domestic product by two percent and to directly or indirectly create approximately 2,500 new jobs.⁷ The pulp mills were part of Uruguay's attempt to recover from the devastating consequences of the 2001 economic crisis in Argentina.⁸ Argentina's government and citizens, however, were incensed by Uruguay's actions, as the pulp mills discharge effluents into the shared River Uruguay near Argentine population centers, and Uruguay's proposed measures to reduce the environmental impact were perceived as inadequate.⁹

In 2005,¹⁰ over 40,000 citizens of Argentina and members of environmental groups blocked the San Martin Bridge over the river in an attempt to halt construction of the mills.¹¹ After diplomatic efforts to resolve the dispute between the two governments failed,¹² Argentina filed a request for provisional measures with the International Court of Justice in May 2006.¹³ Argentina claimed Uruguay had violated the Statute of 1975 on two grounds. It claimed a violation of Uruguay's obligation to adopt all necessary measures for the optimum and rational utilization of the river, including preserving the environment and preventing pollution. Additionally, Argentina claimed that Uruguay had violated its obligation to provide prior notice of any proposed project that might affect the river in order to allow assessment of any potential harm.¹⁴ Thus, according to Argentina, by

Order (13 July 2006) available at <http://www.icj-cij.org/docket/files/135/11235.pdf?PHPSESSID=8003f66f4687531c17fb12e76c8c494d> (quoting Argentina's arguments in its claim) (last visited 28 April 2011)).

⁶ V. Lee, 'Enforcing the Equator Principles: an NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay', 6 *Northwestern University Journal Of International Human Rights* (2008), 354, 359.

⁷ *Id.* 360; Spiegel, *supra* note 4, 799.

⁸ Lee, *supra* note 6, 359.

⁹ Lee, *supra* note 6, 360.

¹⁰ Buenos Aires Herald 'Pulp Mills Case: a Chronology' (20 April 2010) available at <http://www.buenosairesherald.com/BreakingNews/View/31197> (last visited 14 March 2011).

¹¹ Spiegel, *supra* note 4, 814.

¹² Spiegel, *supra* note 4, 802.

¹³ 'Pulp Mills on the River Uruguay (Argentina v. Uruguay), Application Instituting Proceedings' (4 May 2006) available at <http://www.icj-cij.org/docket/files/135/10779.pdf?PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 20 April 2011).

¹⁴ *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSESSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011), para. 22 [*Pulp Mills* judgment].

authorizing the construction and future commissioning of two pulp mills on the River Uruguay, Uruguay should be found liable under international law.¹⁵

Locals on both sides of the river¹⁶ and environmentalists continued their demonstrations in different forms and intensities during the course of the conflict and its judicial developments.¹⁷ During the four years after the Court received the *Pulp Mills* case, there were protests and blockades,¹⁸ a failed attempt to resolve the dispute under the auspices of the King of Spain,¹⁹ and each party's requests for provisional measures were denied.²⁰ Finally, the International Court of Justice

¹⁵ *Id.*, 1, 22.

¹⁶ R. Pierri, 'Uruguay: Pulp Factions: Uruguay's Environmentalists v. Big Paper' (16 January 2006) available at <http://www.corpwatch.org/article.php?id=13111> (last visited 22 April 2011).

¹⁷ See, e.g., L. Vales, 'Una Ciudad que Tiene a su Rio al Frente' (8 January 2006) available at <http://www.pagina12.com.ar/diario/elpais/1-61444-2006-01-08.html> (last visited 22 April 2011); Clarin.com, 'Los Ambientalistas Redoblan la Presion y Cortan Dos de los Pasos a Uruguay' (16 February 2006) available at <http://edant.clarin.com/diario/2006/02/16/um/m-01143037.htm> (last visited 22 April 2011); La Nacion, 'Volvieron a Cortar la Ruta Hacia Uruguay' (5 April 2006) available at http://www.lanacion.com.ar/nota.asp?nota_id=794842 (last visited 22 April 2011); Helsing Sanomat, 'Pulp Mill Dispute Between Argentina and Uruguay Intensifies', (12 April 2006) available at <http://www.hs.fi/english/article/Pulp+mill+dispute+between+Argentina+and+Uruguay+intensifies/1135219507760> (last visited 22 April 2011); La Nacion, 'Gualeguaychu Retomo sus Protestas Contra las Papeleras' (14 July 2006) http://www.lanacion.com.ar/nota.asp?nota_id=823281 (last visited 14 March 2011); D. T. Florotto, 'Nueva Campaña Contra las Papeleras' (7 August 2006) available at http://www.lanacion.com.ar/nota.asp?nota_id=829558 (last visited 22 April 2011); Center for Human Rights and Environment, 'Tens of Thousands March ... Again to Oppose Botnia Pulp Mill' (27 April 2008) available at http://www.cedha.org.ar/en/more_information/tens.php (last visited 22 April 2011).

¹⁸ M. K. Lee, 'The Uruguay Paper Pulp Mill dispute: Highlighting the Growing Importance of NGOs and Public Protest in the Enforcement of International Environmental Law', 7 *Sustainable Development Law & Policy* (2006) 1, 71, 72, (arguing that the "large-scale protests were essential in speeding diplomatic and litigation efforts surrounding the paper mills.").

¹⁹ M. Valente & D. Montero, 'Another Stab at Resolving Pulp Mill Conflict' (17 April 2007) available at <http://ipsnews.net/news.asp?idnews=37384> (last visited 22 April 2011).

²⁰ Alvarez-Jimenez, *supra* note 5, 161; Spiegel, *supra* note 4, 800-813; E. Jimenez de Arechaga, 'Argentina v. Uruguay at the International Court of Justice: Pulp Mills on the River Uruguay', 21 *International Law Practicum* (2008), 58, 60-61.

issued its judgment on 20 April 2010.²¹ Local residents and protesters had gathered overnight to await the public reading of the judgment.²²

Not gathered, but dispersed around the world, the international environmental legal community had also eagerly awaited the decision. The *Pulp Mills* case was recognized as an ideal opportunity for the Court to continue developing and strengthening rules and concepts of international environmental law.²³ It was a moment in which the Court was also expected to demonstrate its capacity to adjudicate this type of conflict. Some scholars were not optimistic on this point; one wrote, “[The Court’s] actions thus far invite doubts about the ICJ’s efficacy in adjudicating transboundary water pollution disputes.”²⁴

C. The International Court of Justice’s Treatment of Scientific and Technical Evidence

The particular challenges associated with understanding and evaluating scientific and technical evidence require the legal system to adopt tools and mechanisms designed to confront and overcome these challenges. In the context of dispute settlement, these challenges require courts to have access to experts and expertise in subjects outside the courts’ core competency. The Statute of the International Court of Justice has two mechanisms designed to address scientific and technical evidence: the capacity to create specialized chambers on particular matters and the capacity to appoint experts. While the Court has yet to receive a case in the Chamber for Environmental Matters, it has previously appointed experts to assist with complex evidence, although not as often as it has been requested to. Other international dispute settlement bodies, most of which were created after the Court, recognize and take advantage of their capacity to engage subject matter experts. This willingness to engage acknowledges that the expertise of the courts is not unlimited, but it supplements and focuses that expertise by relying on other individuals or entities better suited to evaluate scientific data.

²¹ *Pulp Mills* judgment, *supra* note 14.

²² Buenos Aires Herald, ‘ICJ rules Uruguay breached River Treaty; Botnia to Continue Operating for no pollution detected’ (21 April 2010) available at <http://www.buenosairesherald.com/BreakingNews/View/31195> (last visited 14 March 2011).

²³ L. Trevisan, ‘The International Court of Justice’s Treatment of “Sustainable Development” and Implications for Argentina v. Uruguay’, 10 *Sustainable Development Law & Policy* (2009) 1, 40.

²⁴ K. Halloran, ‘Is the International Court of Justice the Right Forum for Transboundary Water Pollution Disputes?’, 10 *Sustainable Development Law & Policy* (2009) 1, 39 (internal citations omitted).

I. The Court's Options under its Statute

The ICJ is not immune to the difficulties of adjudicating environmental disputes in general. There are significant scientific uncertainties in many environmental disputes, and these create evidentiary difficulties that often require input from outside experts.²⁵ The Statute of the Court provides for two mechanisms to aid the Court in its evidentiary determinations. The Court can create chambers to foster a better understanding of certain matters, or simply solicit expert opinions when necessary.

1. The ICJ Chamber for Environmental Matters

The Court recognized the importance and particularity of environmental disputes by creating a permanent Chamber for Environmental Matters in 1993, with seven judges including the ICJ President and the Vice President and five other judges elected periodically.²⁶ This was possible because Article 26(1) of the Statute of the Court allows the creation of chambers for specific categories of cases. Parties are free to refer their cases to this chamber, but none have done so to date.²⁷ If parties continue to bring environmental disputes to the full Court, the Court must be willing to consider the scientific evidence and to base judgments on such evidence when appropriate. As environmental science and technology continues to advance, it may be more difficult to avoid such issues. Scholars have asserted that in future disputes, "the relative merits of the competing scientific views advanced by the parties will likely be a major point to be decided by the tribunal."²⁸ Regardless of whether future cases are referred to the Chamber for Environmental Matters or not, the Court has an excellent tool for evaluating complex scientific or technical evidence in Article 50 of its Statute.

²⁵ See, e.g., L. Savadogo, 'Le Recours des Juridictions Internationales à des Experts', 50 *Annuaire Français de Droit International* (2004), 231.

²⁶ P. H. F. Bekker, 'Practice Before the International Court of Justice', in B. Legum (ed.), *International Litigation Strategies and Practice* (2005), 224, fn. 10.

²⁷ "Under Article 26(1) of the Statute the Court may form one or more chambers of at least three judges to deal with particular categories of cases, such as cases relating to labour, transit, and communication.", A. Riddell & B. Plant, *Evidence Before the International Court of Justice* (2009), 15.

²⁸ J. E. Vinuales, 'Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law', 43 *Vanderbilt Journal of Transnational Law* (2010) 2, 437, 476-478.

2. Article 50 Experts

Article 50 of the Statute of the Court establishes that “[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion”²⁹. The expert opinion can adopt different forms, “be it an investigation, a written report, or oral testimony”³⁰. The procedures by which the Court can exercise this power are regulated in Article 51 of the Statute of the Court and Article 67 of the Rules of the Court, which establish the appointment, process, and publicity considerations to be given to such expert opinions when they have been requested on the Court’s own initiative.³¹

The Court itself and the judges sitting on her bench are not in an adequate position to value, assess and weigh all the complex technical and scientific evidence, particularly of the type and amount presented by the parties in the *Pulp*

²⁹ ‘Statute of the International Court of Justice’ available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 22 April 2011), Art. 50 [ICJ Statute].

³⁰ Riddell & Plant, *supra* note 27, 64.

³¹ ICJ Statute, *supra* note 29, Art. 51: During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

‘Rules of the Court’ (1978) available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011), Art. 67:

1. If the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed. Where appropriate, the Court shall require persons appointed to carry out an enquiry, or to give an expert opinion, to make a solemn declaration.

2. Every report or record of an enquiry and every expert opinion shall be communicated to the parties, which shall be given the opportunity of commenting upon it.

Mills case.³² It is for this type of case that the broad powers granted in Article 50 were conceived.³³

II. ICJ Treatment of Complex Scientific Evidence Prior to the Pulp Mills Case

Prior to the *Pulp Mills* case, to decide environmental disputes that involve significant scientific or technical evaluation, the ICJ has either called on experts to gather or evaluate evidence, or avoided coming to a conclusion about any matters that would require such reports.³⁴

Despite the broad powers granted to it in the Statute and the Rules, the Court has only chosen of its own accord to appoint experts in two cases: the *Corfu Channel* case and the *Gulf of Maine* case.³⁵ The Court documents in the different cases show various attitudes toward the proper use of expert reports. In *Corfu Channel*, the Court specified:

“VI. Experts shall bear in mind that their task is not to prepare a scientific or technical statement of the problems involved, but to give to the Court a precise and concrete opinion upon the points submitted to them.

VII. Experts shall not limit themselves to stating their findings; they will also, as far as possible, give the reasons for these findings in order to

³² ‘Pulp Mills on the River Uruguay (Argentina v. Uruguay)’, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma 2, 4 (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSESSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011) [*Pulp Mills* Simma dissent].

³³ ‘Pulp Mills on the River Uruguay (Argentina v. Uruguay)’, Joint Dissenting Opinion of Judge ad hoc Vinuesa 20, 95 (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSESSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011) [*Pulp Mills* Vinuesa dissent].

³⁴ See, e.g., ‘Gabcikovo-Nagymaros Project (Hungary v. Slovakia)’, ICJ Judgment (25 September 1997) available at <http://www.icj-cij.org/docket/files/92/7375.pdf?PHPSESSID=28603ba2fcd80708f3e139f144b510a4> (last visited 6 April 2011), para. 54.

³⁵ G. White, ‘The Use of Experts by the International Court of Justice’, in V. Lowe & M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996), 528, 528-530.

make their true significance apparent to the Court. If need be, they will mention any doubts or differences of opinion amongst them.”³⁶

This directive instructs the experts to advise the Court rather than to simply provide information. It seems to show a desire to cautiously appraise all possible points of view.

“Judge E?er [sic] noted in his Dissenting Opinion [...]: ‘According to a quite general rule of procedure, the Court is not bound by the opinion of experts. The Court may accept or reject it; but it must always give sufficient reasons.’³⁷”³⁸ This perspective on freedom to reject an expert opinion would reduce any perceived risk in appointing experts to inform the Court in complex cases. Moreover, should the Court use its faculties under Article 50 of the Statute of the Court, the parties would be granted an opportunity to participate by commenting on the conclusions reached by the experts, as well.

In the *Gulf of Maine* case, the disputing parties gave the Court little choice but to appoint an expert for assistance in charting a maritime boundary. The Special Agreement between the parties directly requested the appointment, and the expert’s task was clearly defined and his report informative and precise.³⁹ Other cases with Special Agreements⁴⁰ between the parties required the Court to appoint experts, due to mandatory language in the agreements.⁴¹ In other cases, when a party requested that the Court obtain an expert opinion, the Court rejected these requests either by declaring further evidence to be unnecessary or declining to reach the issues for which expert testimony was contemplated.⁴² In the *Gabcikovo-Nagymaros* case, for example, the Court simply avoided ruling on the complex

³⁶ *Corfu Channel*, Order of 17 December, ICJ Reports 1948, 126-127. Riddell & Plant, *supra* note 27, 330, interpret the Order as a deferral to the experts’ judgment: “It is interesting to note that on this occasion the Court appeared to want the opinions of the experts on what the correct answer should be, rather than assistance with clarifying the issues so that the Court could decide the conclusions for itself.”

³⁷ *Corfu Channel Assessment of the Amount of Compensation Due from the People’s Republic of Albania*, ICJ Reports 1949, 253.

³⁸ Riddell & Plant, *supra* note 27, 330.

³⁹ White, *supra* note 35, 531-532.

⁴⁰ Special Agreements between the parties to a dispute are the mechanisms by which some cases are submitted to the ICJ. ‘Statute of the International Court of Justice’ (2010) available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 22 April 2011), Art. 40(1); Rules of Court, *supra* note 31, Art. 39(1).

⁴¹ ‘Case Concerning Delimitation of Maritime Areas between Canada and the French Republic’, 31 *International Legal Materials* (1992) 5, 1145; ‘Guinea/Guinea-Bissau Arbitration’, 25 *International Legal Materials* (1986) 2, 251, 255.

⁴² White, *supra* note 35, 534-538.

scientific issues, despite the abundance of evidence provided by the disputing parties. The Court concluded that “it [was] not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded”⁴³.

In a few cases requiring technical determinations where the Court has chosen not to consult experts using its Article 50 power, technical errors are apparent in the judgments.⁴⁴ Border lines were seemingly charted or detailed incorrectly both in the *Cameroon-Nigeria* case (2002) and the *Qatar-Bahrain* case (1994).⁴⁵ These missteps effectively highlight the potential benefits of expert input for the Court.

III. The Court’s Treatment of Complex Evidence in the Pulp Mills Case

In the *Pulp Mills* case, the International Court of Justice was called to decide on whether Uruguay had breached its procedural obligations under the Statute of 1975 and on whether Uruguay had breached its substantive obligations under the same instrument.⁴⁶ The second of these questions required the Court to assess complex technical evidence in order to make a determination on whether Uruguay had breached its obligations to contribute to the optimum and rational utilization of the river,⁴⁷ to ensure that the management of the soil and woodland does not impair the regime of the river or the quality of its waters,⁴⁸ co-ordinate measures to avoid changes in the ecological balance,⁴⁹ and, in particular, to prevent pollution and preserve the aquatic environment, assessing the effects of the discharges on the quality of the waters of the river, on biodiversity, and on air pollution.⁵⁰

Both parties submitted copious amounts of factual and scientific material in support of their claims,⁵¹ including reports and studies prepared by experts that

⁴³ Gabčíkovo-Nagymaros Project, *supra* note 34.

⁴⁴ ‘Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)’, ICJ Judgment (10 October 2002) available at <http://www.icj-cij.org/docket/files/94/7453.pdf> (last visited 8 April 2011) [Cameroon-Nigeria-case]; ‘Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)’, ICJ Judgment (1 July 1994) available at <http://www.icj-cij.org/docket/files/87/6995.pdf> (last visited 8 April 2011) [Qatar-Bahrain-case].

⁴⁵ Riddell & Plant, *supra* note 27, 348-349.

⁴⁶ *Pulp Mills* judgment, *supra* note 14, 67-158.

⁴⁷ *Id.*, 169-266.

⁴⁸ *Id.*, 178-180.

⁴⁹ *Id.*, 181-189.

⁵⁰ *Id.*, 190-264.

⁵¹ ‘Pulp Mills on the River Uruguay (Argentina v. Uruguay)’, Separate Opinion of Judge Keith (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3>

contained conflicting claims and conclusions.⁵² The Court disregarded a discussion on the authority of the expert evidence presented by the parties and proceeded to draw its own conclusions on the facts that it considered relevant.⁵³ To make this determination over the disputed facts, the Court did not appoint its own experts.

In its judgment, the International Court of Justice found that Uruguay had breached its procedural obligations under the Statute of 1975 for not providing prior notice of the planned pulp mills,⁵⁴ but that Uruguay had not breached any substantive obligations under the Statute.⁵⁵ Press coverage of the judgment focused on what was considered the authorization of the Court for the pulp mills' operations to continue, because the river was not being polluted in violation of the Statute.⁵⁶

Probably the most controversial point of the decision, as highlighted by different judges in their dissenting and separate opinions and declarations, is how the Court established the facts of the case to make the determination that Uruguay was not in breach of its substantive obligations, especially its environmental obligations; in particular, the role of experts. Judges Al-Khasawneh, Simma, Cançado Trindade, Yusuf, and Vinuesa raised fundamental questions as to the fitness, capacity, and even will of the Court to decide a controversy based on complex evidence.

As Judge Vinuesa recalls from the language that the Court used in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn,”⁵⁷ and thus it is not surprising that other members of the bench express that “exceptionally fact-intensive” cases, like the one at hand, “raise serious questions as to the role that scientific evidence can play in an international judicial institution,”⁵⁸ calling for a critical review of the Court's practices and capacity when dealing with complex evidence.

&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSESSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSESSID=943a133bed0fec9e626e825f8852f259 (last visited 14 March 2011), para. 3-6 (listing and describing the evidence presented by the parties) [*Pulp Mills* Keith opinion].

⁵² *Pulp Mills* judgment, *supra* note 14, 165-166.

⁵³ *Id.*, 168.

⁵⁴ *Id.*, 282.

⁵⁵ *Id.*, 282.

⁵⁶ BBC News, ‘Uruguay Can Continue Pulp Mill Operations, Court Rules’ (20 April 2010) available at <http://news.bbc.co.uk/2/hi/8632933.stm> (last visited 22 April 2011).

⁵⁷ *Pulp Mills* Vinuesa dissent, *supra* note 33, 20, 99.

⁵⁸ *Pulp Mills* Simma dissent, *supra* note 32, 2, 3.

In their joint dissenting opinion, Judges Al-Khasawneh and Simma are categorical in asserting that the Court “has had before it a case on international environmental law of an exemplary nature – a ‘textbook example’, so to speak, of alleged transfrontier pollution – yet, the Court has approached it in a way that will increase doubts in the international legal community whether it, as an institution, is well-placed to tackle complex scientific questions”⁵⁹.

For sound judicial practice and to fulfill its responsibilities, the Court should be in a position to assess the value and scientific import of evidence presented, whatever the volume and level of complexity.⁶⁰ The *Pulp Mills* case was particularly laden with complex and conflicting evidence presented by the parties,⁶¹ and Judges Al-Khasawneh and Simma assert that the Court evaluated the case’s evidence in a methodologically flawed manner.⁶²

It would be unreasonable to expect a judge to independently evaluate, for example, “claims as to whether two or three-dimensional modeling is the best or even appropriate practice in evaluating the hydrodynamics of a river, or what role an Acoustic Doppler Current Profiler can play in such an evaluation. Nor is the Court, indeed any court save a specialized one, well-placed, without expert assistance, to consider the effects of the breakdown of nonylphenoethoxylates, the binding of sediments to phosphorus, the possible chain of causation which can lead to an algal bloom, or the implications of various substances for the health of various organisms which exist in the River Uruguay”⁶³. Adjudicating disputes like the *Pulp Mills* case, in which referring technical or scientific questions is fundamental, demands expert assistance.⁶⁴ The judges of the Court are to evaluate if the parties’ claims are well-founded, and not to perform a technical or scientific determination of the facts.⁶⁵

The main concern of the judges writing separately in the *Pulp Mills* case is that by overlooking the possibility of calling experts under the faculties that Article 50 of the Statute of the Court provides, the Court “willingly deprives itself of the

⁵⁹ *Id.* (internal citations omitted).

⁶⁰ *Pulp Mills* judgment, *supra* note 14, 52, 168.

⁶¹ ‘Pulp Mills on the River Uruguay (Argentina v. Uruguay)’, Separate Opinion of Judge Cançado Trindade (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011), para. 148; *Pulp Mills* Keith opinion, *supra* note 51, 3-6 (noting the conflicting interpretations of the copious scientific and technical data submitted to the Court by the parties’ experts).

⁶² *Pulp Mills* Simma dissent, *supra* note 32, 1, 2.

⁶³ *Id.*, 2, 4.

⁶⁴ *Id.*, 2, 3.

⁶⁵ *Id.*, 2, 4.

ability to fully consider the facts submitted to it,”⁶⁶ and does not benefit from the advantages of using its faculty by letting the parties participate in the process from the selection of the experts to the possibility of commenting on their conclusions.⁶⁷

The decision of the Court not to call experts under Article 50 of its Statute shows that the Court did not address facts and evidence in a “convincing manner to establish the verity or falsehood of the Parties’ claims,” and the resulting judgment is of precarious legitimacy.⁶⁸ The frustration of the international legal community with how the Court handled the factual determinations of this case comes from what it seems to be: “a wasted opportunity for the Court, in its ‘unfettered discretion’ to avail itself of the procedures in Article 50 of its Statute and Article 67 of its Rules, *and establish itself as a careful, systematic court which can be entrusted with complex scientific evidence [...]*”⁶⁹.

IV. Treatment of Scientific or Technical Evidence in Other International Tribunals

The faculty that Article 50 of the Statute of the Court grants to the judges of the International Court of Justice is not only previously invoked by the ICJ, but it is also part of other international tribunals’ faculties and practice. Several international dispute resolution entities have the capacity to appoint their own experts to ensure the necessary scientific support in resolving environmental disputes. Examples include the following:⁷⁰

The International Tribunal for the Law of the Sea (ITLOS) may appoint at least two scientific or technical experts chosen in consultation with the disputing parties, to sit with the tribunal but without the right to vote.⁷¹

A tribunal of the Permanent Court of Arbitration may upon notice to the parties appoint one or more experts to report to it on specific issues.⁷² The same ability is granted in the United Nations Commission on International Trade Law

⁶⁶ *Id.*, 4-5, 13.

⁶⁷ *Id.*, 4-5, 13.

⁶⁸ *Id.*, 6, 17.

⁶⁹ *Id.*, 6, 17 (emphasis added).

⁷⁰ *Vinales*, *supra* note 28, 478-479 (emphasis added).

⁷¹ United Nations Convention on the Law of the Sea (10 December 1982), Art. 289, 1833 U.N.T.S. 397.

⁷² Permanent Court of Arbitration, ‘Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment’ (19 June 2001) available at <http://www.pca-cpa.org/upload/files/ENV%20CONC.pdf> (last visited 14 March 2011), Art. 27(1).

(UNCITRAL) Arbitration Rules⁷³ and the International Bar Association Rules on the Taking of Evidence in International Arbitration,⁷⁴ and a similar procedure that explicitly includes environmental expertise is available to North American Free Trade Agreement (NAFTA) Tribunals, with slightly more deference to the disputing parties' wishes.⁷⁵

The World Trade Organization (WTO) dispute settlement panels have options similar to the ICJ's. Article 13(2) of the Dispute Settlement Understanding states, "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4."⁷⁶ Experts have been vital resources in WTO cases involving scientific knowledge,⁷⁷ and are held to high standards of independence and impartiality.⁷⁸ Judges Al-Khasawneh and Simma suggest that the ICJ could call on experts more often, as some WTO panels do to their benefit.⁷⁹

Recognizing the importance of the needs of courts and tribunals to resort to experts for technical and scientific assistance highlights the courts' and tribunals' specific role in dispute resolution. The freedom to appoint experts is codified for a broad variety of international tribunals, indicating that the judges may focus on applying legal principles rather than attempt to make determinations outside their area of expertise or avoid evaluating complex evidence altogether.

⁷³ UNCITRAL Arbitration Rules, GA Res. 31/98, 15 December 1976, Art. 27(1); UN GAOR, 31st Session, Supplement No. 17, UN Doc A/31/17, 15 December 1976.

⁷⁴ International Bar Association [IBA], 'IBA Rules on the Taking of Evidence in International Arbitration' (29 May 2010) available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444> DC (last visited 8 April 2011), Art. 6(1).

⁷⁵ 'Canada-Mexico-United States: North American Free Trade Agreement Ch. 11, Art. 1133, 17 December 1992', 32 *International Legal Materials* (1993) 2, 289.

⁷⁶ 'Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round, Art. 13(2)', 33 *International Legal Materials* (1994) 5, 1125.

⁷⁷ M. T. Grando, *Evidence, Proof, and Fact-finding in WTO Dispute Settlement* (2009), 340.

⁷⁸ *Id.*, 341-342.

⁷⁹ *Pulp Mills* Simma dissent, *supra* note 32, 15.

D. The Case for Greater ICJ Engagement with Scientific and Technical Evidence

The Court's reluctance to resort to its ability to appoint experts under Article 50 of the Statute may affect its reputation as an entity well equipped to resolve evidentiarily complex international disputes, such as conflicts involving environmental science. Disengaging the Court from international environmental disputes could increase uncertainty and lack of uniformity in the developing field of international environmental law. Even if the Court does begin to engage scientific expertise, a failure to do so in a manner that allows for transparency will injure the Court's legitimacy and further undermine the political and normative aims that led to the Court's creation in the first place.

I. The Specter of Fragmentation in International Environmental Dispute Resolution

Despite their similar abilities to summon experts, highlighted above, the group of coexisting international adjudicative bodies that have jurisdiction to decide environmental disputes differ widely in procedure, scope for remedy, and primary purpose. They include permanent and ad hoc courts, arbitral tribunals, regional and global courts, and judicial bodies with general or with highly specialized subject matter jurisdiction.⁸⁰ Different tribunals could treat identical disputes differently, and the ICJ is not an appeals court from all of the others. The international judicial system, as a collection of international and transnational adjudicative bodies, is not yet a mature system with highly articulated rules that regulate the relationships among them.⁸¹ The relationships are ambiguous and the lack of precedential rules makes it possible for different courts to decide similar matters differently or to base their judgments on different rules in similar disputes.⁸² While this is not indisputably an undesirable situation, it does counter the formation of a unified body of law in a freshly developing field like international environmental law. Adjudication in these international dispute resolution bodies affects more than the particular controversy; by adjudicating a dispute, judges contribute to the development of the international legal field in question.⁸³

⁸⁰ Tim Stephens, *International Courts and Environmental Protection* (2009), 304.

⁸¹ J. S. Martinez, 'Towards an International Judicial System', 56 *Stanford Law Review* (2003) 2, 429, 431.

⁸² *Id.*

⁸³ C. P. R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *New York University Journal of International Law and Politics* (1999) 4, 709, 751.

A proliferation of courts with jurisdiction over international environmental disputes can counter the desired uniformity of any international legal field by adopting approaches from their respective competencies that might not advance accepted international environmental rules and principles.⁸⁴ Without a chance to stabilize the emerging international law rules with a consistent jurisprudence, this situation presages uncertain results; the wide selection of methods and fora to resolve IEL disputes could delay the consolidation of a uniform body of law.⁸⁵ IEL is a fairly young discipline, and its rules are still being formed.⁸⁶ Reinforcing and clarifying those rules through litigation in a respected forum as authoritative as the ICJ could have the advantage of promoting consistency and cohesiveness, so that rules are disseminated, accepted and followed to the greatest possible extent.⁸⁷ The Court should embrace opportunities to contribute to this process, even when an environmentally significant case includes technical aspects.

The Pulp Mills case was a missed opportunity for the ICJ to further IEL jurisprudence with a unified voice. Instead, the Judges recognized that inadequate use of experts decreased the legitimacy of this judgment, and drew attention to this in their dissenting and separate opinions. Without public or even internal confidence in the ICJ's fact finding processes, pressure may increase to create a separate world environmental court or to bring disputes to other courts when possible. Both results would add to the fragmentation of the field.

II. Extreme Proposals to Improve IEL Dispute Resolution: A World Environmental Court and an ICJ Scientific Advisory Body

The ICJ, as the foremost world court, is best positioned to be the most authoritative voice in international environmental law.⁸⁸ It plays an important role in recognizing and articulating customary international law, which is essential to

⁸⁴ Stephens, *supra* note 80, 304.

⁸⁵ S. M. Hinde, 'The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw', 32 *Hofstra Law Review* (2003) 2, 727, 748-749.

⁸⁶ "[...] a few years from now the body of case law will probably require us to address how to maintain coherence among the various fora at which international environmental issues are litigated.", P. Sands, 'International Environmental Litigation and its Future', 32 *University of Richmond Law Review* (1999) 5, 1619, 1641.

⁸⁷ Enforcement of international environmental law is another issue, outside the scope of this paper.

⁸⁸ P-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 *New York University Journal of International Law and Politics* (1999) 4, 791, 798-799.

the development of any international law discipline.⁸⁹ It is longstanding and respected; in the *Honduras-Nicaragua* case, for example, “the ICJ’s credibility with all parties, based on the ICJ’s track record, provided the needed assurance that the dispute would be settled fairly”⁹⁰. Creating a specialized separate court exclusively for the resolution of international environmental disputes has been proposed,⁹¹ but it would be a lengthy and unnecessary undertaking. It would not have the trusted history of the ICJ, nor its established authoritative position. Disputing parties have never used the ICJ Chamber for Environmental Matters, so the demand for a dedicated environmental court is not apparent.⁹² For the same reasons that some criticize the fragmentation of international environmental law, an exclusively environmental world court may be a less efficient and no more effective way forward in IEL dispute settlement.⁹³

An internal Scientific Advisory Body is a potential tool for the ICJ that could discourage fragmentation and decrease the frequency with which the Court would need to seek out experts or form *ad hoc* commissions to provide expertise in complex environmental cases. Advisory scientific bodies have been established under environmental treaties, most prominently as part of the United Nations Framework Convention on Climate Change [UNFCCC], to provide information and advice on scientific and technological matters relating to the Convention.⁹⁴ This type of permanent body could be formed for the ICJ, either under the framework of its existing Rules or by amendment to them,⁹⁵ and such a body could lead the Court to consult experts more often. However, this solution does not seem advisable for the ICJ. It is uncertain whether enough cases would emerge to justify the administrative burden of creating and operating a permanent advisory body, and such a body would dilute the purely adjudicatory character of the Court. The

⁸⁹ J. E. Vinuales, ‘The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment’, 32 *Fordham International Law Journal* (2008) 1, 232, 257-258.

⁹⁰ C. Leah Granger, ‘The Role of International Tribunals in Natural Resource Disputes in Latin America’, 34 *Ecology Law Quarterly* (2007) 4, 1297, 1317.

⁹¹ J. Pauwelyn, ‘Judicial Mechanisms: Is there a Need for a World Environment Court?’, in W. B. Chambers & J. F. Green (eds), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (2005), 150.

⁹² Riddell & Plant, *supra* note 27, 15.

⁹³ International Tribunal for the Law of the Sea [ITLOS], ‘Proceedings and Cases – List of Cases’ available at http://www.itlos.org/cgi-bin/cases/list_of_cases.pl?language=en (last visited 22 April 2011) (ITLOS is a tribunal created to resolve disputes in a single field of international law that has had only 18 cases submitted to it in its 14 years of existence).

⁹⁴ Vinuales, *supra* note 28, 454-456; United Nations Framework Convention on Climate Change, 24 March 1994, Art. 9(1), 1771 U.N.T.S. 107.

⁹⁵ Rules of the Court, Arts 9, 21(2); White, *supra* note 35, 540.

Court may also lose flexibility to seek more specialized outside experts for particular cases. The precedent set by creating one advisory body could suggest a need for additional ones for other fields of expertise, which would likely overwhelm the Court's resources.

The least radical solution to the Court's deficient fact finding is an increased use of its ability to consult experts under Article 50 of its Statute. Others have suggested instituting a mechanism similar to the Special Masters of the United States Supreme Court,⁹⁶ whereby a Master could be appointed to investigate a case and recommend findings of fact before the Court considers the case, but we suggest that of all the possibilities, the initial step of consulting experts more frequently may be the Court's only necessary adjustment.

III. The Benefits of Greater Transparency in Adjudicating Conflicts Over Resources

The legitimacy of international courts cannot be sufficiently drawn from the fact that they form part of the legitimation of public authority exercised by other institutions, be it States or international bureaucracies.⁹⁷ Even if international courts have a *per se* legitimacy attributable to the fact that they are not domestic courts, thus presumptively free from nationalistic bias,⁹⁸ that does not seem enough for the exercise of its adjudicative power. Among other considerations, transparency is one of the main factors that enhance the legitimacy of international courts.⁹⁹

It has been argued that oral proceedings provide the transparency that legitimates the adjudicative function of international courts.¹⁰⁰ However, this assessment is rather narrow as it does not cover the entire adjudicative process. Transparency is also required after the parties' proceedings before the court have

⁹⁶ C. Peck & R. S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1996), 416; K. Highet, 'Evidence and Proof of Facts', in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 8th ed. (1987), 355, 372. The Special Masters are similar to trial judges, appointed by the Supreme Court to perform fact-finding, gather evidence if necessary, and submit reports and recommendations to the Supreme Court on a particular case. Their input is advisory only. R. L. Stern & E. Gressman, *Supreme Court Practice* (2002), 576-578.

⁹⁷ A. von Bogdandy & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (21 April 2010) available at <http://ssrn.com/abstract=1593543> (last visited 22 April 2011).

⁹⁸ E. A. Young, 'Institutional Settlement in a Globalizing Judicial System', 54 *Duke Law Journal* (2005), 1143, 1207.

⁹⁹ Bogdandy & Venzke, *supra* note 97, 27.

¹⁰⁰ *Id.*

concluded, while the court is deliberating and assessing the merits of the evidence provided by the parties. The faculties established in Article 50 enable the ICJ to make its evidence assessment public and transparent, for should it need further clarifications on the evidence the Court may call its own experts, involving the parties in the process and allowing them to review the experts' reports and conclusions.

The questionable handling of evidence in the *Pulp Mills* case undermines the legitimacy of both the Court and the decision. This is particularly true in light of the Court's willingness to use experts in other cases that require technical expertise, while consigning their testimony to unpublished reports shared only with the Court. Sir Robert Jennings, a former President of the Court, has claimed that "the Court has not infrequently employed cartographers, hydrographers, geographers, linguists, and even specialized legal experts to assist in the understanding of the issue in a case before it; and has not on the whole felt any need to make this public knowledge or even to apprise the parties."¹⁰¹ Also, "[t]he Court's Registrar, Philippe Couvreur, has defined the role of experts retained by the Court for purely internal consultation as that of temporary Registry staff members, entrusted with the giving of internal scientific opinions under the oath of confidentiality demanded of full-time Registry staff. As he explains, their conclusions would never be made public"¹⁰². Such secretive use of experts raises significant issues related to transparency and fairness:¹⁰³

"While such consultation of "invisible" experts may be pardonable if the input they provide relates to the scientific margins of a case, the situation is quite different in complex scientific disputes, as is the case here. Under circumstances such as in the present case, adopting such a practice would deprive the Court of the above-mentioned advantages of transparency, openness, procedural fairness, and the ability for the Parties to comment upon or otherwise assist the Court in understanding the evidence before it. These are concerns based not purely on abstract principle, but on the good administration of justice."¹⁰⁴

The use of invisible experts also creates problems where the Court has made technical errors in previous judgments, as noted above.¹⁰⁵ Had they used Article 50

¹⁰¹ *Pulp Mills* Simma dissent, *supra* note 32, 5, 14 (internal citations omitted).

¹⁰² *Id.*

¹⁰³ See generally A. K. Schneider, 'Democracy and Dispute Resolution: Individual Rights in International Trade Organizations', 19 *University of Pennsylvania Journal of International Economic Law* (1998) 2, 587, 613.

¹⁰⁴ *Pulp Mills* Simma dissent, *supra* note 32, 5, 14 (internal citations omitted).

¹⁰⁵ ICJ Treatment of Complex Scientific Evidence Prior to the *Pulp Mills* Case, *supra*.

experts in formulating those judgments, such errors could have potentially been corrected, or at least the parties would have had a chance to comment on the expert reports. If the errors did survive, the blame would fall on the experts instead of the Court, and criticism would be limited to their choice of experts rather than perceived general incompetence or perceived bias. Greater use of Article 50 experts would quell doubts about the Court's ability to handle cases with complex scientific evidence and further encourage the use of the Court in the resolution of disputes.

If the Court were to change its existing practice and consult experts publicly, it is possible that it would be open to criticism that the experts will play too great a role in judicial decision or perhaps usurp the decision making authority of the Court itself. However, while acknowledging this criticism, it is important to note that, while experts would indeed influence the Court's judgments, the Judges are not likely to blindly accept an expert's opinion in the absence of any support. A public and transparent process such as the one in Article 50 would allow the parties to refute the erroneous assertion before the final decision, likely limiting the possibility that a judge would follow an expert into an obviously misguided judgment.¹⁰⁶ It is also possible that the dialogue between experts would make scientific errors more unlikely, but if an error survived to the judgment stage, the role of experts would at least be discernible rather than unknown and undisclosed. In addition, the public use of experts would encourage trust in ICJ decisions involving complex scientific evidence, as Judges Al-Khasawneh and Simma imply in their *Pulp Mills* dissenting opinion.¹⁰⁷

E. Conclusion

The *Pulp Mills* case was a complicated dispute on multiple levels. It was never possible to produce an outcome that would be satisfying to outraged local communities, at a diplomatic level, and in its repercussions for Argentine-Uruguayan bilateral trade. The attempts to unravel this Gordian knot throw into relief the problems associated with conflicts over resources.

In circumstances where ordinary citizens are directly affected by judicial determinations, but where these determinations require advanced technical expertise, the ICJ risks ill-formed and problematic decisions when the case proceeds without the input of experts. These decisions can then have significant negative impact on the way citizens and governments view the competency and legitimacy of the Court's decisions and even of the Court itself. Such a negative

¹⁰⁶ Rules of the Court Art. 67(2).

¹⁰⁷ *Pulp Mills* Simma dissent, *supra* note 32, 17.

impression would raise practical problems, as States may hesitate to bring cases involving scientific evidence to the ICJ when they have a choice of fora, as well as portend negative consequences for broader notions of international justice: its greatest symbol would be tarnished unnecessarily.

In this paper we have examined the complexities that the case presented for the International Court of Justice, both in its internal operations and the transparency and legitimacy repercussions. In doing so, we have noted that Article 50 of the Statute of the Court provides the judges with a powerful tool to appoint independent experts to evaluate opposed evidence. In the case at hand the parties submitted copious amounts of evidence that conflicted with the evidence presented by the other party. The Court, however, did not resort to its Article 50 faculty, and thus seriously undermined the credibility of its judgment by failing to attempt rigorous factual accuracy.

Reviewing the Court's jurisprudence, we found that Article 50 experts have been called upon voluntarily only in two cases, despite the potential for expert assistance recognized in many other cases by the disputing parties, scholars and dissenting Judges. The ICJ's practice of rarely using its Article 50 power to obtain expert evidence,¹⁰⁸ and of often rejecting requests from disputing parties to do so,¹⁰⁹ is troubling. The Court has significant responsibility for shaping international law, and their decisions in environmental cases involving complex scientific or technical information are as influential as other ICJ judgments and should be investigated with care. Expert testimony is an accepted tool for judges, sanctioned in the rules of many international tribunals. There is no need for the Court to be reluctant to call for experts, particularly when it could minimize controversy over their judgments as they shape the jurisprudence of international environmental law.¹¹⁰

Contrast this reluctance with the willingness of other international adjudicative bodies to call upon experts more readily than the ICJ. Some international environmental treaties have also created advisory scientific bodies, and the ICJ could do the same, but such resource-heavy solutions as an advisory

¹⁰⁸ White, *supra* note 35.

¹⁰⁹ See, e.g., 'Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)', ICJ Judgment (11 September 1992) available at <http://www.icj-cij.org/docket/files/75/6671.pdf> (last visited 21 April 2011), 361 para. 22, 400 para. 65; 'Award of the Arbitral Tribunal of 17 September 2007 in the Matter of an Arbitration between Guyana and Suriname [UNCLOS Annex VII]' available at http://www.pca-cpa.org/showpage.asp?pag_id=1147 (last visited 28 April 2011).

¹¹⁰ Calling experts could also minimize the risk of embarrassing technical errors such as those the Court seems to have made in the *Cameroon-Nigeria* case (2002) and the *Qatar-Bahrain* case (1994), *supra* note 44.

body or an entirely new environmental world court are unnecessary and inadvisable. The simplest way for the Court to improve fact finding is to call for expert reports in individual cases. While there are those who criticize the use of experts on the basis that involving more technical experts risks having the Court's decision-making ability usurped, the openness of other adjudicative bodies would suggest that this is not the case.

In continuing to adjudicate conflicts over resources without resolving the central factual disputes, the International Court of Justice risks affecting the legitimacy of the judgment and the status of the Court as one called upon to solve those disputes. The Court can ill afford to take such risks with its technical acumen. Several international bodies are currently equipped to call on experts to assist with technically or factually complex disputes. However, this array of tribunals deciding international environmental matters could result in a fragmentation of substantive law. The lack of binding precedent between the different courts and tribunals could result in different, or even contradictory, rules; thus, the standards for environmental protection would not be certain, with the consequent adverse result for international environmental law overall in lowered certainty and, therefore, enforceability.

The ICJ is far too important as both a symbol and as a practical means for defusing and resolving complex international disputes to risk its legitimacy in this area. Were the ICJ to be gradually lowered in status, it would cause a great increase in the number of conflicts being resolved with no public knowledge. Our goal is not simply to criticize the Court; we would like to contribute to the larger objectives of raised awareness and trust of public international law among the global population, and to continue to promote the best possible adjudicative process in international dispute resolution.

From Riches to Rags – the Paradox of Plenty and its Linkage to Violent Conflict

Pelin Ekmen*

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Abstract

The article addresses the economic phenomenon of the so called Dutch Disease, also known as the Paradox of Plenty, as faced by countries rich in natural resources. Rendering a rough definition of this occurrence, the article continues to dwell on the linkage between violent conflict and illicit resource trade in the Democratic Republic of Congo (DRC).

Using the example of coltan, which is a rare metallic ore essential to the power-storing parts of consumer electronic products, the article explores why the DRC has so far failed to benefit from its large deposits in this highly demanded resource. While in the case of illicit diamond trade the establishment of a certificate of origin scheme has already increased awareness for the matter, a similar certification scheme for coltan is not in place yet. The article thus reviews past experiences made with the Kimberly Certification Scheme against blood diamonds, to find whether its regulatory structures could be applied to coltan trade as well. Identifying the role of law and the Security Council within this debate, the author finally argues in favor of a model akin to the scheme for coltan, which obligates participant states to pass implementing legislation while operating on the basis of voluntariness. However the article also concludes that a certification scheme alone will not be sufficient to combat the resource curse and thus offers a brief insight into possible assisting mechanisms.

A. Introduction

Having analyzed factors that lead to internal armed conflicts in resource dependent states, economists, as well as NGO's, have found reason to believe that states rich in resources are more likely to find themselves faced with internal violent conflicts than other states.¹ In these states it is said that local rebel forces finance arms purchases by trading natural resources such that the international community and their private actors deal with so called "conflict resources". Conflict resources originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments. These resources are mostly used to finance military action in opposition to those legitimate governments, or in contravention of the decisions of the Security Council.²

While the role of law in addressing conflict generally has been debated many times, this article aims at focusing on the intersection of trade regulation and the prevention or abatement of internal conflict. Due to the currently less than systematic debate on the subject, this article seeks to ascertain how legal scholars currently evaluate the ability of international initiatives to relieve resource curses and improve resource management.

As case studies have demonstrated, providing an analytical framework for the grounds that lead to resource curse requires an individual approach from country to country. Different dynamics apply to different countries depending on the resources involved and their characteristics. Therefore, this article focuses only on the policy responses to the Democratic Republic of Congo (DRC) in the case of its deposits of the rare natural resource "coltan".

¹ 'The Sinews of War' report of Global Witness estimates a higher probability of 23%. 'The Sinews of War' (November 2006) available at http://www.globalwitness.org/sites/default/files/import/the_sinews_of_war.pdf (last visited 26 April 2011). See R. M. Auty (ed.), *Resource Abundance and Economic development* (2001); I. de Soysa, 'Resource Curse: Are Civil Wars driven by Rapacity or Pacity?', in M. R. Berdal & D. Malone (eds), *Greed and Grievance: Economic Agendas in Civil War* (2000).

² United Nations Department of Public Information, 'General Assembly Adopts Resolution on 'Conflict Diamonds'' (21 March 2001) available at <http://www.un.org/peace/africa/Diamond.html> (last visited 26 April 2011).

B. The Paradox of Plenty in the Case of the DRC

The ‘paradox of plenty’ is a term that refers to the situation in which some countries, despite the plentitude of natural resources in their domain, have the unfortunate experience of underperforming in virtually every other area of national endeavor.³ Countries that have deposits of natural resources in abundant quantities have exhibited a gnawing tendency to perform worse on economic indicators than those that are less well endowed with resources.⁴ Their natural resource endowments may put them in the paradoxical position of suffering from underdevelopment precisely because of their riches, a phenomenon generally referred to as the Dutch Disease.⁵

In combination with ethnic divisions and governance structures, the abundance of natural resources brought about that nearly “[fifty] armed conflicts active in 2001 had a strong link to natural resource exploitation, in which either licit or illicit exploitation helped to trigger, intensify, or sustain a violent conflict”⁶.

At the same time some of these most common hypothesis on how resources may influence a conflict, do not always withstand case study data.

³ E. Duruigbo, ‘The global energy challenge and Nigeria’s emergence as a major gas power: promise, peril or paradox of plenty?’, 21 *Georgetown International Environmental Law Review* (2009), 423. R. M. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993), 1-7.

E. Duruigbo, ‘The World Bank, multinational oil cooperations, and the resource curse in Africa’, 26 *University of Pennsylvania Journal of International Economic Law* (2005) 1, 5; see generally: A. Gelb & Associates, *Oil Windfalls: Blessing or Curse?* (1988).

⁵ J. J. M. Kremers, ‘The Dutch Disease in the Netherlands’, in J. P. Neary & S. van Wijnbergen (eds), *Natural Resources and the Macroeconomy* (1986), 96-136; The term was coined in 1977 by *The Economist* to describe the decline of the manufacturing sector in the Netherlands after the discovery of a large natural gas field in 1959.

⁶ I. Bannon & P. Collier, ‘Natural Resources and Conflict: What We Can Do’, in I. Bannon & P. Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003), 1,7; General empirical review see: M. Ross, ‘What do we know about resources and civil war’, 41 *Journal of Peace Research* (2004), 337-56 and the same author ‘How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases’, 58 *International Organization* (2004) 1, 36; The relationship with preexisting grievances is also stressed by C-P. David & J-F. Gagné, ‘Natural Resources: A Source of Conflict?’, 62 *International Journal* (2006/2007) 1, 7.

The number of correlations and mechanisms attributed as causal by writers appears endless.⁷

They satisfy the demand for quick compelling evidence by linking most of the problems to domestic affairs and the behavior of rebel forces.⁸ In fact, from a statistical point of view the prominent thesis cited most frequently by academics, which investigates the subject of resource curse, laid down in a paper by participants in the World Bank's economics project Paul Collier and Anke Hoeffler, which also takes that approach, could not gain support in all its aspects.⁹

For instance, many scholars explore the connection between the onset of war with the presence of resource wealth. They believe that rebels use looted resource wealth to fund the initial costs to incite a rebellion, including the purchase of arms and hiring of soldiers. This subsequently allows them to challenge government forces strongly enough, to generate at least one thousand battle-related deaths, thus producing a conflict large enough to be classified as a civil war.¹⁰

Responding to this and other common hypotheses on the link between resource abundance and conflict, Michael Ross, who has published widely on the political and economic problems of resource-rich countries, evaluated thirteen cases on the onset, duration, and intensity of civil war.¹¹ He found that in these thirteen cases selected, rebel groups never gained funding from the extraction or sale of natural resources or from the extortion of others who extract, transport, or market resources before the war broke out.¹² Another example is the wide spread idea among, mainly, journalists that resource extraction creates grievances among the local population, because resource extraction companies expropriate the land, force the population to leave the area since they do not provide sufficient job opportunities, such that these social disruptions and grievances provoke civil war. But this aspect could not be validated by the cases examined and the favoring of rebel oriented explanations appears arbitrary.¹³

⁷ M. Humphreys, 'Natural Resources, Conflict, and Conflict Resolution - uncovering the mechanisms', 49 *Journal of Conflict Resolution* (2005) 4, 508-537.

⁸ *Id.*, 511-518

⁹ P. Collier & A. Hoeffler, 'Greed and grievance in civil war', 56 *Oxford Economic Papers* (2004), 563-95.

¹⁰ *Id.*

¹¹ M. L. Ross, 'How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases', 58 *International Organization* (2004) 1, 35-67.

¹² *Id.*, 50.

¹³ *Id.*, 51.

Furthermore it is held that the logic of the resource curse theories is wrongly presented as an economic necessity, when actually resource revenue may allow for higher savings.¹⁴ This may facilitate capital accumulation and generate a more propitious economic environment for growth.¹⁵

However in the case of the DRC it is not only particularly evident that this volatile region did not benefit from such effects, but also in 2006 Security Council Resolution 1698 officially recognized the linkage between illegal exploitation of natural resources, the illicit trade of them and the proliferation of arms which fuel local conflicts.¹⁶ Prior to that, a United Nations (UN) Panel of Experts had repeatedly found a link between the exploitation of natural resources, arms trafficking, and armed conflict in the Great Lakes region, in particular in the DRC. The UN Panel of Experts had also identified individuals and companies from all parts of the world who conducted business with these armed groups and intended to extract and trade natural resources or to provide the armed groups with weapons or ammunition. These activities resulted in the foreign individuals and companies fueling the conflict in the region. Armed groups controlling areas rich in natural resources, have built a self-financing economy centered on the trade of natural resources, one of them being the highly sought after ore “coltan”.¹⁷ “Coltan” is short for columbite-tantalite, a metallic ore. It is a combination of two rare ores, columbium and tantalum, which when refined become metallic tantalum.¹⁸ Eighty percent of the world's coltan deposits

¹⁴ A. Bryant Banat, ‘Solving the problem of conflict diamond in Sierra Leone: proposed market theories and international legal requirements for certification of origin’, 19 *Arizona Journal of International & Comparative Law* (2002) 3, 970.

¹⁵ R. Hausmann & R. Rigobon, ‘An Alternative Interpretation of the ‘Resource Curse’: Theory and Policy Implications’, 9 *National Bureau of Economic Research* (2003) Working Paper 9424.

¹⁶ SC Res. 1689, 31 July 2006, para. 3; see also UN Security Council on Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo in the following resolutions: Res. 1385, 19 December 2001e; Res. 1408, 6 May 2002; Res. 1478, 6 May 2003a; Res. 1459, 28 January 2003b.

¹⁷ UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (UN Experts Panel): UN Doc. S/ 2003/1027, 23 October 2003, in particular para. 43-47; UN Doc. S/2002/1146, 16 October 2002, in particular para. 12-21, and UN Doc. S/2008/773, 12 December 2008.

¹⁸ See British Columbia Institute of Technology – BCIT Chemistry Resource Center, ‘Tantalum’ available at <http://nobel.scas.bcit.ca/resource/ptable/ta.htm> (last visited 26 April 2011).

are located in eastern DRC.¹⁹ Coltan is collected off the ground then mined heavily and sold to processing companies to get broken down into tantalum. Tantalum is one of the hardest metals and can tolerate the highest heating levels.²⁰ The high reliability, low failure rates, and capacity to withstand great changes of temperatures, make coltan a crucial element in the production of tantalum capacitors, which provide electrical storage. Tantalum, derived from coltan, is essential for the power-storing parts, semi-conductors and capacitors of cellular phones, nuclear reactors, PlayStations, and computer chips.²¹ Between 1990 and 1999, sales of tantalum capacitors used in the electronics industry for cellular phones, PCs, and automotive electronics increased by 300 percent.²²

The supply chain of coltan from the DRC passes through about ten intermediaries from supply to consumption.²³ The three main phases after the ore has been mined include firstly the processing phase. Three key processors consume eighty per cent of the ore: the U.S. based Cabot Corporation, German based H. C. Starck and the Chinese state-owned Ningxia Non-ferrous Metals Smeltery.²⁴ These companies export the processed tantalum mainly to capacitor producers. In the second phase the capacitors are assembled into circuit boards. These are then sold to

¹⁹ J. Cuvelier & T. Raeymaekers, 'Supporting the War Economy in the DRC: European companies and the coltan trade' (January 2002), available at <http://www.grandslacs.net/doc/2343.pdf> (last visited 26 April 2011), paras 7-8; however Australia is the largest producer of tantalum where production costs are double the price.

²⁰ A. M. Helmenstine, 'Chemistry: Tantalum Facts' available at <http://chemistry.about.com/od/elementfacts/a/tantalum.htm> (last visited 26 April 2011).

²¹ N. D. Ware, 'Congo War and the Role of Coltan' available at <http://www1.american.edu/ted/ice/congo-coltan.htm> (last visited 26 April 2011), part I, para. 2.

The former US Government is known to have classified the ore as strategic mineral, see N. Laljii, 'The Resource Curse Revised: Conflict and Coltan in the Congo', 29 *Harvard International Review* (2007) 3, 34-38.

²² D. Montague, 'Stolen Goods: Coltan and the Conflict in the Democratic Republic of Congo', 22 *SAIS Review* (2002) 1, 103-118; Coltan is also needed for the manufacture of night vision goggles, camera lenses, fiber optics, CB radios, smoke detectors, nuclear reactors, and airbags. It is also used in surgical equipment for bone repair, internal stitching to connect torn nerves, and woven gauze to bind abdominal muscles.

²³ K. Essick, 'Guns, Money and Cell Phones' (11 June 2001) available at <http://www.globalissues.org/article/442/guns-money-and-cell-phones> (last visited 26 April 2011).

²⁴ T. Ma, 'China and Congo's coltan connection' (2009) available at http://project2049.net/documents/china_and_congos_coltan_connection.pdf (last visited 26 April 2011), 3.

electronics manufacturers like Apple, Nokia, Dell, IBM, Motorola, Canon and Samsung.

C. Desirability of a Certification Mechanism for Coltan

Although most coltan is found in the DRC, the supply chain for coltan-derived tantalum is complex. The mined coltan is passes through many middle men before it reaches the international market. Once the coltan is sold onto that market, it is nearly impossible to trace its origins from the end product back to the mines.²⁵

In accordance with the Protocol Against Illegal Exploitation of Natural Resources, the International Conference on the Great Lakes agreed on putting a regional certification mechanism in place, for the monitoring and verification of natural resources within the Great Lakes Region in Africa. There are, thus, two questions this section would like to address. The first is whether a well-structured ‘certificate of origin’ regime could be an effective means, of ensuring that only resources from government-controlled areas reach markets. The second and related question is whether such a regime would be a desirable approach?

The Protocol Against Illegal Exploitation of Natural Resources cited the widely known commodity tracking system with regard to diamond trade – the so called Kimberley Process Certification Scheme (KPCS) – as its inspiration.²⁶ Countries in Southern Africa, the corporate entity De Beers, and human rights NGOs formed a coalition to undertake systematic action in form of a certification scheme to intercede with the trade of “blood diamonds” that financed rebel forces and deadly conflicts in Liberia, Sierra Leone, and the DRC.²⁷ As the General Assembly put it, all other Member States were to be encouraged to participate in the Process.²⁸

The Participants were to (1) establish a system of internal controls; (2) utilize tamper resistant containers; (3) enact implementing and enforcement legislation, including “dissuasive and proportional penalties for

²⁵ D. Montague, ‘Stolen Goods: Coltan and the Conflict in the Democratic Republic of Congo’, 22 *SAIS Review* (2002) 1, 103-118.

²⁶ ‘Kimberley Process Certification Scheme’ (November 2002) available at <http://www.kimberleyprocess.com/download/getfile/4> (last visited 26 April 2011), preamble.

²⁷ I. Smillie, ‘The Kimberley Process Certification Scheme for Rough Diamonds’ (October 2005) available at http://www.pacweb.org/Documents/diamonds_KP/kimberley-process.pdf (last visited 26 April 2011), 2.

²⁸ GA Res. 55/56, 29 January 2001.

transgressions”; and (4) “collect and maintain relevant official production, import and export data, and collate and exchange such data”²⁹.

Since it is suggested that the Kimberley Process serves an example for managing conflicts regarding other commodities, it needs to be examined if its regulatory structures could be applied to the coltan trade as well.

I. Scope of a Certification Scheme: the Structural Approach of Voluntariness

Usually, state participants of the KPCS strive to fulfill the above mentioned obligations by adapting adequate national legislation and instructing their domestic authorities. Similarly the scheme includes voluntary self-regulation initiatives both for the diamond industry and organizations within their capacity as participants. The participants individually provide for information on the measures taken to obtain a degree of compliance and for statistical data on the effects of those measures.

As a voluntary system, however, the KPCS is only as effective as the participants’ own internal control mechanisms.³⁰ But does the structural approach of voluntariness also deprive the initiative of its legal value? Membership with the KPSC requires the establishment of regulations regarding the export and import of the conflict resource, as well as a coherent certificate design and the existence of domestic penalties. Hence the KPCS did not decide to operate without hard law but rather shifted the highly legalized obligations onto the domestic level. In spite of the discretion left to states as to how the national laws will be adapted, eventually they have to prove the implementation of binding law to become a member. States have been attracted by the voluntary, rather than mandatory, agreement and have had a vital interest in proving these efforts. For instance when Liberia initially failed to do so it took the state several,

²⁹ Kimberley Process Certification Scheme, *supra* note 26, para. IV (see also for further obligations that are not mentioned here).

³⁰ M. Kaplan, ‘Carats and Sticks: Pursuing War and Peace Through the Diamond Trade’, 35 *New York University Journal of International Law & Politics* (2003) 3, 604; see S. A. Malamut, ‘A band-aid on a machete wound: the failures of the Kimberley Process and diamond-caused bloodshed in the DRC’, 29 *Suffolk Transnational Law Review* (2005) 1, 48.

petitions to enter the KPCS, until it demonstrated the presence of sufficient internal controls.³¹

Interestingly, many states were attracted to the KPCS including those that either had a vital interest in continuing trading their resource or those that anticipated jeopardy to the bargaining position of their companies if the KPCS was not implemented. Apparently governments were aware that effective chain of custody schemes for natural resources can help, for instance, in building confidence with potential investors.³² But the KPCS was faced with members that struggled to implement their obligations under the scheme into their domestic systems. Also, country visits to monitor compliance with the KPCS standards could only be carried out with the consent of that country.

Having established the KPC as a widely recognized scheme, in these events the international community remained wary of maintaining the stability of the system. This is illustrated by the following cases when the community responded actively to some members' failures to comply with their obligations.

In 2004, Brazil had been accused that its loose internal regulations led to many certificates being issued fraudulently. It later became evident that this was the case concerning at least 30 percent of KP certificates issued by the domestic authorities.³³ Nevertheless, it was interesting to observe that Brazil's own internal review cooperated in finding these figures. The authorities went on to work together with the KPCS Peer Review team that was sent to Brazil to investigate the accusations.³⁴

After a report to the UN Security Council in 2006 had found that significant volumes of conflict diamonds from the rebel-held area of the

³¹ U.N. News Service, 'UN Hands Over Control of Diamond Certification Office to Government' (2 May 2007) available at <http://unmil.org/1article.asp?id=2187&zdoc=1> (last visited 26 April 2011).

³² L. A. Whitmore, 'Intervention and post -conflict natural resource governance: lessons from Liberia', 17 *Minnesota Journal of International Law* (2008) 2, 428.

³³ L. Truong, 'The Greatest Story Ever Sold Is a Fantasy Covered in Blood' (4 January 2007) available at <http://www.wisebread.com/the-greatest-story-ever-sold-is-a-fantasy-covered-in-blood> (last visited 26 April 2011).

³⁴ Summary of Kimberley Process Review Visit to Brazil 1: (24-29 April 2006) available at p. 40 of the 2006 KPCS review submitted by the Ad Hoc Working Group: [http://www.worlddiamondcouncil.org/download/resources/documents/Kimbeley%20Process%20Third%20Year%20Review%20\(1-11-2006\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Kimbeley%20Process%20Third%20Year%20Review%20(1-11-2006).pdf) (last visited 28 April 2011).

Côte d'Ivoire were entering the market,³⁵ many NGOs expressed concern about those diamonds being smuggled to Ghana to be then sold as legitimate stones, in an open letter to the Kimberley Process Chairman Kago Moshashan.³⁶ As a result, the Final Communique from the Kimberley Process Plenary in Botswana investigated in the case and confirmed the concerns expressed, resulting in Ghana agreeing to tighten its internal controls so as to not endanger its further membership in the KPCS.³⁷

Apparently, the KPCS lacked adequate controls to ensure that its certificates were only issued for rough diamonds mined in or legitimately imported into the country.³⁸ This was one of the reasons why the Republic of Congo, after joining the initiative, could continue to engage in illicit trade of diamonds and was consequently expelled in 2004. Once it was accepted by the review team that the Republic of Congo made “very serious domestic effort to put their house in order and to get their domestic systems to the level required” the country was readmitted in November 2007.³⁹ A similar story happened with Turkey where readmission was possible but equally tied to the proof of sufficient effort made by the country to comply with the standards.

Additional evidence for this constant activity of the project is reflected in the fact that once the KP had proven to be a widely respected scheme its participants gradually agreed to more regulations.⁴⁰ The Working Group on

³⁵ The Diamond Registry, ‘United Nations: Ivory Coast Diamond Smuggling a Concern’ (November 2006) available at <http://www.diamondregistry.com/News/2006/un.htm> (last visited 26 April 2011).

³⁶ Letter from Shane Kelleher, Amnesty International *et al.*, to Kago Moshashane, Chair, Kimberley Process (3 November 2006)

³⁷ Kimberley Process Plenary, ‘Final Communique’ (6-9 November 2006) available at www.kimberleyprocess.com/download/getfile/324 (last visited 26 April 2011), para.1.

³⁸ It should be stressed that initially the KPCS struggled in many fields which author Tracey Michelle Price explains with: “Diamonds are the centerpiece of a multi-national, multi -billion dollar industry that has thrived on tradition, elitism, and secrecy for hundreds of years. The legal diamond business operates behind closed doors, on handshakes and trust[...].The industry's initial reluctance to embrace the KP as a new way of doing business is not surprising”, see, T. M. Price, ‘The Kimberley Process: conflict diamonds, WTO obligations, and the universality debate’, *12 Minnesota Journal of Global Trade* (winter 2003) 1, 29.

³⁹ M. Deibert, ‘Trade: Blood Diamonds No Longer Congo-Brazzaville's Best Friend’ (30 November 2007) available at <http://ipsnews.net/news.asp?idnews=40296> (last visited 26 April 2011).

⁴⁰ European Commission, ‘Kimberley Process: Commission Welcomes Boost to Diamond Scheme Transparency’ (2 April 2007) available at <http://europa.eu/>

Statistics reviewed that the KPCS “monitored \$37.6 billion in rough diamonds exports representing more than 500 million carats of rough diamonds”. “Participants issued 59,000 certificates to accompany those shipments”⁴¹.

Surely the KP could have introduced a non-voluntary system to agree to this degree of openness right from the beginning in 2002, when it established only a minimal set of enforcement mechanisms. But it is highly questionable whether this could have resulted in the same amount of acceptance and legitimacy that the project can rely on today, as the mentioned figures indicate that most of the participants believe in the authority of the Kimberley Process.

Since one of the main challenges in establishing trade regulation in a market benefiting from political conflict consists of aligning different interests of different actors with different degrees of power, the structural approach of voluntariness facilitates the cooperation between them and appears preferable to be adapted by a probable future certification scheme for coltan.

II. Limits of a Certification Scheme: Economic Consequences of Government Control

The KP regulations are designed to cut off rebels’ access to diamond rents and the certifications enable trade via government control only.

But is a certification scheme fostering this policy adequate and sufficient to combat the resource curse?

The process of resource curse is often accompanied and marked by human rights violations suffered by the civilian population.⁴² For instance, in 2001 a sudden increase in coltan demand led firstly to the violent

rapid/pressReleasesAction.do?reference=IP/07/456&format=html&aged=0&language=EN&guiLanguage=en (last visited 26 April 2011).

This has also been heavily criticized, for the Republic of Congo allegedly managed to evade KPCS controls and continue to serve as a hub for the smuggling of conflict and illicit diamonds at the time of readmission, see, H. B. Goldman, ‘Between a hard ROC and a hard place: The Republic of Congo’s illicit trade in diamonds and efforts to break the cycle of corruption’, 30 *University of Pennsylvania Journal of International Law* (2008) 1, 359.

⁴¹ Kimberley Process Plenary, *supra* note 37, para. 5.

⁴² I. J. Tamm, ‘Dangerous Appetites: Human Rights Activism and Conflict Commodities’, 26 *Human Rights Quarterly* (2004) 3, 687, 702; J. Graff, ‘Corporate war criminals and the International Criminal Court and profits in the DRC’, 11 *Human Rights Brief* (2004) 2, 23.

expulsion of many farmers and their families from their land at the hands of rebel groups and businessmen and, second to the use of slave labor.⁴³ Many scholars criticized the KPCS's restriction to trade regulation as not desirable, for that would only end access of rebels to the commodity but not necessarily terminate human rights violations. They consider the initiative to be a means for the state to regain its hegemony over the use of force without requiring it to improve its human rights or governance practices.⁴⁴ The KPCS is reproached for not bearing in mind the probability of a state not being willing or capable to invest in the improvement of such standards. Against the backdrop of the aforementioned active process within the KPCS, however, even the implementation and acceptance of mere trade regulations took time and was a gradual process. Overloading an economically focused scheme with these expectations will not help towards reaching prosperity for countries suffering from resource curse. At the same time economic wealth serves as a firm basis for the implementation of human rights. A certification scheme not claiming competence over this matter shall therefore not be regarded as compromising human rights goals, but rather as a chance to prepare a foundation for them. Therefore the following analysis shall only review from an economic perspective, as to whether a low-income, resource-exporting country really prospers, if all resource revenues are managed by the state.

Assessing the way government officials have dealt with the amount of resources that were officially traded, figures from 2003 analyzing revenues collected by the government in the DRC under the tax regime then claim, that 96 percent of them went directly to the government officials or to employees who collected the money.⁴⁵ But even a government that has no such issues might instigate rebellion within society for the mere fact that economies which depend on natural resource exports tie their revenues to the highly volatile global commodity prices. If prices drop, governments

⁴³ Letter dated 23 October 2003 from the Secretary-General addressed to the President of the Security Council, para.10, U.N. Doc. S/2003/1027 (23 October 2003).

⁴⁴ L. Wexler, 'Regulating resource curses: Institutional design and evolution of the blood diamond regime', 31 *Cardozo Law Review* (2010) 5, 1717, 1736.

⁴⁵ In 2005-2006, between 60 and 80 percent of customs revenue was estimated to have been embezzled, see, Freedom House, 'Country Report: The Democratic Republic of the Congo' (2010) available at <http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7954> (last visited 26 April 2011); see also N. Cahn, 'Corporate governance divergence and sub-Saharan Africa: lessons from out here in the fields', 33 *Stetson Law Review* (2004) 3, 908.

with bad saving policies might raise taxes without offering the benefits of government services in return, creating widespread dissatisfaction which results in a strengthening of opposition movements.⁴⁶

According to the 2001 UNSC Panel of Experts' report on the illegal exploitation of natural resources, the DRC government, in its efforts to defend its territory and secure the supply of weapons, signed mining contracts worth several millions of US dollars with different countries including Zimbabwe, China and South Korea.⁴⁷ At the same time the Human Development Index of the United Nations ranks the DRC on 168 out of 169 countries.⁴⁸ So apparently many issues governments are faced with cannot be addressed by a certification scheme.⁴⁹

Firstly in countries where rebel forces reigned over resource revenues, governments will tend to have less information than an experienced resource extraction company as to the likely value of extraction rights.⁵⁰ It would need the government to acquire geological data to strengthen their basis of negotiation and prevent the underestimation of value. At the same time, in a post-conflict environment like in the DRC, no code or recommendation can serve as a substitute for the government to actually be committed to gain the best price for the extraction rights.⁵¹ This can secondly form a problem in the course of negotiations, if a government wary of its transitional character anticipates not being in power anymore in the future. Thus it might tend to design contracts in a way, which will increase

⁴⁶ C-P. David & J-F. Gagné, 'Natural Resources: A Source of Conflict?', 62 *International Journal* (2006/2007) 1, 14.

⁴⁷ United Nations Panel of Experts, Addendum to the Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2001/1072, 2001.

⁴⁸ United Nations Development Programme, 'Human Development Index (HDI) – 2010 Rankings' available at <http://hdr.undp.org/en/statistics/> (last visited 2 May 2011).

⁴⁹ Amongst other economists Paul Collier recently pointed out the fields in which specifically designed codes and laws to improve the economic governance of resource rents for resource exporting countries. The section in this article refers to his suggestions mostly. See P. Collier, 'Laws and codes for the resource curse', 9 *Yale Human Rights & Development Law Journal* (2008) 1, 11.

⁵⁰ *Id.*, 15.

⁵¹ See for an overview of the DRC'S history and current post conflict status: G. S. Gordon, 'An African Marshall Plan: changing US Policy to promote the rule of law and prevent mass atrocity in the DRC', 32 *Fordham International Law Journal* (2009) 5, 1361; B. Todd, 'Congo, Coltan, Conflict', 3 *The Heinz Journal* (2006), 1.

current revenues, but at the expense of revenues in the future and consequently risk the country's overall prosperity.⁵²

This goes together with the above-mentioned problem of revenue capture by political elites.

But, even if presuming a more stable political leadership, decisions will need to be made, as to at which level saving rates for resource revenues is recommended. So the third issue is that first, a significant proportion of revenues from resource extraction will need to be saved in order to avoid overall depletion of assets and second, constitutional provision establishing basic principles of the savings decision must be introduced limiting the freedom of a future government in charge to deplete assets.⁵³

It is suggested that governments failing to amend their overall economic strategies will fuel the ongoing conflicts and are one of the reasons for rebels to exploit resources themselves - with or without the existence of a certification scheme.⁵⁴ There are therefore a number of issues that cannot be solved by such a scheme and might require separate approaches so that remedy from resource curse can only be accomplished with an overall set of codes.

III. Limits of a Certification Scheme: the Need of Assisting Mechanisms

Finally the efficiency and success of a regional certification scheme for coltan will not only require the incorporation of structural and economic aspects mentioned so far but also as illustrated by the KPCS the integration of the consumers plays a vital role in establishing international awareness of the project which results in new participants being attracted to becoming members.

Consumers nowadays are aware that the globalization of trade forges certain interconnections. Interest in resource-based conflicts is higher as it can affect every individual more directly. The KPCS could benefit from this. Especially having the De Beers company as a highly outstanding

⁵² In fact in the case of Congo this has occurred in 2006 see, Collier, *supra* note 49, 17.

⁵³ *Id.*, 20, the author furthermore suggests codes dealing with how extraction rights need to be sold in professional auctions, the time horizon of extraction rights and a code covering the procedures for public investment.

⁵⁴ N. Cahn & A. Gambino, 'Towards a typology of corporate responsibility in different governance contexts: what to do in the absence of responsible country governance?', 39 *Georgetown Journal of International Law* (2008) 4, 655, 671.

participant from the diamond industry made it easy for the awareness campaign to focus responsibility and attention that would potentially damage a company and demand immediate action. In comparison to that, there is not one single mining company or tantalum processing company with the same stature as a De Beers to focus attention on. Furthermore, diamonds are easier for people to conceptualize than coltan, a mineral that looks like piece of lava rock, hardly as appealing as diamonds. An international awareness campaign will face the challenge of making coltan visually perceivable so that the relationship of the consumer's role and the violent conflicts is portrayed in a tangible way. The DRC's former colonial ruler Belgium is one of the coltan trading centers of the world. In 2001, 18 Belgian NGO's made an attempt to launch such a campaign under the slogan "No blood on my mobile! Stop the plundering of the Congo!"⁵⁵. The campaign was able to exercise pressure on international corporations like Apple, Intel or Sony who requested their retailers to not supply any "blood coltan". However it was not feasible for these major companies to control their subcontractors and they left it to them to control their external suppliers in Africa. In the same year, the aforementioned UN Expert Panel investigated those foreign companies who drew coltan from the DRC. As a result those manufacturing companies took the initiative to supervise their suppliers who collect the coltan from the source. When most of their suppliers failed to prove that the coltan did not originate from conflict areas the German company HC Starck, which refines coltan into tantalum, decided to no longer draw coltan from the DRC.⁵⁶ Due to the accusations, which became public, the reputation of the company suffered and led it to decide to separate from former retailers. At the same time, the company has expressed interest in reviving its business with the DRC once a technical device is invented that can mark the good and guarantee its origin.⁵⁷ Following the path a piece of coltan ventures on before reaching a tantalum processing plant is not a tangible feasible option for coltan suppliers. Thus for instance a certificate of origin regime cannot fully guarantee a clean supply chain that prevents illicit minerals being mixed into fairly traded

⁵⁵ IPIS, 'Supporting the War Economy in the DRC: European companies and the coltan trade' (January 2002) available at <http://www.grandslacs.net/doc/2343.pdf> (last visited 26 April 2011), 7.

⁵⁶ Ma, *supra* note 24, 3.

⁵⁷ J. Lublinski, M. Griebeler & C. Farivar, 'Coltan mines to be 'fingerprinted', German scientists say' (13 August 2010) available at <http://www.dwworld.de/dw/article/0,,5907446,00.html> (last visited 26 April 2011).

shipments. A certificate of origin regime therefore needs to work hand in hand with separate efforts put into the invention of assisting needs to be more specific this is only an introductory phrase to the next bit which specifies the technology.

Only recently the Federal Institute for Geosciences and Natural Resources in Hannover, Germany, invented a so called “fingerprinting” technique based on reference samples from 75 percent of the world’s coltan mines.⁵⁸ To determine which coltan samples are conflict free, color print-outs of pictures taken with an electron microscope are compared with the reference samples. Depending on its origin every raw material has a different mineralogy comparable to an individual human fingerprint. On top of that the geologists use a so called electron microprobe that hits the sample with an electron beam. The emerging x-rays indicate which chemical elements are contained in the sample.⁵⁹ The chemical composition of each mine is unique and can therefore be traced. If a legitimate mine registers its fingerprint with the authorities’ beforehand field samples can be compared to what is already known about that mine. Thus, the geochemical fingerprinting for coltan is one way to enhance transparency of the mineral’s trade and attract companies to draw the raw mineral from the suppliers at the mines directly and not through a number of devious middle men.

The example given illustrates how companies will not be interested in trafficking in the mineral without rebel groups from whom they can buy the same good cheaper than from any government, if certificate of origin regimes are not accompanied by public awareness, forcing companies to protect their reputation. It also illustrates that adequate fingerprinting systems will help both companies and retailers in Africa, to benefit from the rich deposits of coltan in a non-abusive way.

Therefore as a third conclusion of this section, a certificate of origin regime can only be as strong as the public awareness it brings about and as the advanced technologies developed to support its motives.

⁵⁸ Federal Institute for Geosciences and Natural Resources (Bundesanstalt für Geowissenschaften und Rohstoffe), “Coltan-Fingerprint’ der BGR macht Zertifizierung von Handelsketten möglich’ (10 March 2010) available at http://www.bgr.bund.de/cln_116/nn_322882/DE/Themen/Min__rohstoffe/Projekte/Rohstoff-Forschung/LF__Herkunftsnachweis__COLTAN__Newsletter01-2010.html?__nnn=true (last visited 26 April 2011).

⁵⁹ Lublinski, Griebeler & Farivar, *supra* note 57.

D. Role of the Security Council

What is the role of the United Nations Security Council (UNSC) actions under Chapter VII including military capture of resource regions from rebel forces and secondly economic sanctions?⁶⁰

Military capture has not proven effective in cases of resources that are difficult to control by the government in the first place. Since coltan is a mineral, it is easier for rebels to handle it than resources like oil that fall more easily under government control.⁶¹ But even if rebels can be forced into agreements and settlements by military means, this rarely develops into steady peace.⁶² Therefore the main question would be how UNSC resolutions on economic measures would succeed.

Pursuant to Art. 103 of the UN Charter, Security Council resolutions trump other inconsistent legal instruments. Art. 103 has broad implications: Chapter VII resolutions will trump international agreements on trade, investment, and commerce.⁶³ But does the matter of controlling resource flows to rebels lie within the Council's competence?

In 2007, when Belgium organized a session on how natural resources fuel and prolong conflict since "illicit trade in natural resources has become a principal source of revenue" for rebels, governments, and organizations fueling conflict, this brought about an open debate within the Security Council.⁶⁴ The matter was not regarded as an extraordinary occurrence, since the Council started to consider economic affairs as part of its

⁶⁰ In the aforementioned report issued in 2001 by the UN Panel of Experts also recommended an immediate, temporary embargo on the import or export of coltan, timber, gold, and diamonds from or to Burundi, Rwanda, and Uganda and sanctions against any country breaking this embargo, for the proceeds from the sale of coltan are fueling the forces of those three neighboring countries, see Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2001/357, 12 April 2001, para. 42.

⁶¹ P. Le Billon, 'Securing Transparency: Armed Conflict and the Management of Natural Resources Revenues', 62 *International Journal* (2007) 1, 93, 103; UN Panel of Experts on Liberia, Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1395, UN Doc. S/2002/470, 19 April 2002, 142.

⁶² *Id.*, 101.

⁶³ R. Bernhardt, 'Article 103', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), 1292, 1298.

⁶⁴ Security Council, Security Council Underscores Need for Peacekeeping Mandates to Consider Helping States Prevent Illegal Exploitation of Natural Resources from Fueling Conflict, UN Doc. SC/9060, 25 June 2007.

jurisdiction over the maintenance of international peace and security a long time ago. As Art. 39 of the Charter already regards threats to international peace as a basis for action, the economic dimension of a conflict can be a reason to ground jurisdiction, to prevent the outbreak or intensification of violence.⁶⁵ Evidently, the Council's involvement in economic issues grew when, in 1992, the President of the Security Council emphasized new emerging threats: "[T]he absence of war and military conflict amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic [...] and ecological fields have become threats to peace and security"⁶⁶. Also, in post-conflict environments the Council's peace-building strategies include the motivation to stabilize the ownership of natural resources.

At the same time, the integration of economic factors into the terms "peace and security" has sometimes provoked suggestion that where economic and security issues overlap, the Security Council should not exercise its Art. 39 jurisdiction, but should instead defer to specialized institutions like the IMF, the World Bank, and ECOSOC.⁶⁷ However, independent of the desirability of this more political than legal argumentation on jurisdiction,⁶⁸ an in-depth discussion on whether the Security Council has jurisdiction in conflicts involving resources appears redundant, if economic enforcement measures that were resolved in the past have not been capable of terminating the threat to peace and security. A brief retrospective on the Security Council resolutions attempting to fight illicit diamond trade mirrors the minor success.

In 1998, the Security Council put an embargo on the trade of unofficial Angolan diamonds through Resolutions 1173 and 1176, but it did

⁶⁵ C. Willson, 'Changing the Charter: The United Nations Prepares for the Twenty -First Century', 90 *American Journal of International Law* (1996) 1, 115, 118.

⁶⁶ President of the Security Council, Note by the President of the Security Council delivered to the Security Council, UN Doc. S/23500, 1 January 1992, 3.

⁶⁷ G. del Castillo, *Rebuilding War-Torn States: The Challenge of Post-Conflict Economic Reconstruction* (2008), 55; it has also been doubted if the expansion of jurisdiction to the current extend has been originally envisioned by the drafters of the Charter, see, K. E. Boon, 'Coining a new jurisdiction: the Security Council as economic peacekeeper', 41 *Vanderbilt Journal of Transnational Law* (2008) 4, 991, 1001.

⁶⁸ This argumentation is questioned by those who do not believe in the World Bank's policies so far to establish peace, see article in the case of coltan in the DRC: K. Horta, 'Rhetoric and reality: human rights and the World Bank', 15 *Harvard Human Rights Journal* (2002), 227, 233.

not end the trade which went on to continue through neighboring countries.⁶⁹ Stressing the linkage between the civil war and the diamond trade in Sierra Leone in 2000 the Security Council ruled through Resolution 1306 that all states should take necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone into their territory, which was not respected as well.⁷⁰

UNSC embargoes were not very successful in curtailing the trade in conflict diamonds, in fact diamond-trading companies and individuals continued to deal in illicit diamonds in defiance of the UNSC Resolutions. The inadequacy of tracking systems among countries to monitor the diamond trade made it difficult for the UN to identify non-compliant companies and individuals. Thus, the implementation and enforcement of a global diamond certification and verification system became necessary in the first place. But even after the KPCS was established the Security Council continued to struggle with the implementation of resolutions in this field. In November 2006, a report to the UNSC found that significant volumes of conflict diamonds from the rebel-held area of the Côte d'Ivoire were entering the legitimate diamond trade.⁷¹ Though the UNSC imposed a diamond embargo on the Côte d'Ivoire the report stated that between “\$9 and \$23 million worth of stones were entering the [diamond] market”⁷².

Also with the experience made especially with the Iraq sanctions from 1990, resulting in a high number of civilian deaths, an erosion of support for the economic embargo took place.⁷³ Thus the Security Council has crucial

⁶⁹ M. Koyame, ‘United Nations Resolutions and the struggle to curb the illicit trade in conflict diamonds in sub-Saharan Africa’, *1 African Journal of Legal Studies* (2005), 84.

⁷⁰ *Id.*, 88-89 explains certain positive effects the Council’s involvement brought about but also draws an overall negative conclusion.

⁷¹ The Diamond Registry, ‘United Nations: Ivory Coast Diamond Smuggling a Concern’ (November 2006) available at <http://www.diamondregistry.com/News/2006/un.htm> (last visited 26 April 2011).

⁷² SC Res. 1643, 15 December 2005.

⁷³ The general concern stemming from that experience that embargoes tend to be more detrimental to the interests of the local communities than a help for them need be considered in the case of coltan as well since the average Congolese worker earns around ten dollars a month whereas a good coltan miner can make up to fifty dollars a week, see, J. Parkinson, ‘Black gold: On the Coltan trail’ (23 September 2006) available at <http://greatreporter.com/mambo/content/view/1322/2/> (last visited 26 April 2011); see also, Mvemba Phezo Dizolele suggesting that taking away the income proceeding from the coltan industry may seriously jeopardize the future of poor local communities highly dependent on the coltan trade: M. P. Dizolele,

image and legitimacy problems arising out of its past interventions in economic and financial matters. Unlike international arms embargos or sanctions, which typically are created by states without the express involvement of the arms industry, the Kimberley Process's legitimacy lies in large part with the fact that it is a product of the global diamond industry itself.⁷⁴ If the UN continues to support certifications schemes as it has done in the case of illicit diamond trade and also in recommending a scheme for coltan trade, this will certainly assist the enforceability of such regimes. However emphasis should be placed on specialized, private agreements like the KPCS rather than on the role of the Security Council.

E. Conclusions

The KPCS illustrates how International Law incorporates more than traditional treaty arrangements.⁷⁵ A model akin to it for coltan, which obligates participant states to pass implementing legislation, contemplating a system of national laws and operating as a system of common minimum international standards for national certification regimes, appears favorable. If the system proves itself, states will gradually agree to more regulation and work towards transparent supply chains. However there are limits as to the changes certification schemes can bring about. In respect of these limits, this article has firstly pointed out economic difficulties governments need to work on separately in order to benefit from certification regimes. Secondly the article contended that public awareness of the subject needs to be regarded as a significant factor in establishing wide recognition of the authority of such a regime. Thirdly adequate technical “fingerprinting” methods will attract participants and should therefore accompany a prospective coltan certification regime.

⁷⁴ ‘Millions have Died for Our Cell Phones (8 August 2007) available at <http://www.pulitzercenter.org/openitem.cfm?id=276> (last visited 26 April 2011).

An interesting article enumerating available legal alternatives to UN embargos mainly revolving around a possible accountability of companies and enterprises involved can be found in: M. M. Molango, ‘From “Blood Diamond” to “Blood Coltan”’: should international cooperations pay the price for the rape of the DRC?’, 12 *Gonzaga Journal of International Law* (2008-2009), 1, IV.

⁷⁵ Wexler, *supra* note 44, 1779.

