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A System of Collective Defense of Democracy: The Case of the Inter-American Democratic Charter

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Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem

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Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants

*Julian M. Lehmann*

Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights

*Vladislava Stoyanova*



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**Vol. 3, No. 2 (2011)**

## **Editorial**

Since our last issue in May 2011 several events with global impact have filled the newspapers and confronted us with the need for new judicial and political solutions. In the meantime, Hosni Mubarak's trial has begun and it raises again important questions on how to handle trials of ex-dictators. The trial may foreshadow the future stance to the rule of law of Egypt's new politic system. The events in Libya and also Syria sparked a new discussion about the concept of responsibility to protect.

But major change did not limit itself to North Africa and the Middle East: The ongoing financial crisis shook the faith in the monetary systems worldwide. In a recent *Foreign Policy* article David Bosco, assistant Professor at the American University's School of International Service, discussed the impact of the financial crisis on international institutions.<sup>1</sup> He argued that – against widespread fears – the current financial crises might strengthen the international institutions rather than weakening them. According to David Bosco, States' behavior becomes more “centripetal” as the States come together to solve the ongoing international crises. Despite pessimistic “realistic” estimations, the Security Council and the United Nations played a decisive role in conflicts such as Sudan, the Ivory Coast or Haiti. However, if this strengthening of international institutions helps to solve current and upcoming policy dilemmas, remains to be seen.

<sup>1</sup> D. Bosco, ‘Come Together. Leaders struggling to fix a world spiraling out of control are turning to international institutions. Are they up to the task?’, *Foreign Policy* (23 August 2011) available at [http://www.foreignpolicy.com/articles/2011/08/18/come\\_together](http://www.foreignpolicy.com/articles/2011/08/18/come_together) (last visited 2 September 2011)



Underlining the importance of international organizations, the article “A System of Collective Defense of Democracy: The Case of the Inter-American Democratic Charter” by *Vasiliki Saranti* highlights the role of the Organization of American States in the process of democratization in Middle and South America. A close look is taken on the recent developments especially in Honduras and therefore the article displays how the defense of democracy can be a part of the responsibility to protect.

Taking a more theoretical approach in their articles, *Christopher Peters* and *Ranieri Lima Resende* examine the impacts and references of international organizations’ and general public international law. In his article “Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same coin?” Peters highlights the importance of distinguishing between subsequent practice of the parties according to Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties and the established practice amounting to rules of an international organization (Art. 5 Vienna Convention on the Law of Treaties) – they are not two sides of the same coin. He shows in detail how both serve different purposes: subsequent practice primarily serves interpretation, whereas established practice amounting to a rule of the organization is quasi-customary law specific to the respective organization. Resende, on the other hand, addresses in his article “Normative Heterogeneity and International Responsibility: Another View on the World Trade Organization and its System of Countermeasures” the relationship between the WTO Law and the law of international responsibility. He reaches the conclusion that it is impossible to deal with the legal framework of the WTO as a self-contained regime. In relation to countermeasures authorized and monitored by the Dispute Settlement Body of the WTO Resende concludes that they may generate international responsibility shared between the WTO and the Member executing the retaliatory action.

In “The Politics of Deformalization in International Law” *Jean d’Aspremont* analyzes the current debate on deformalization which endorses a higher flexibility of international law materials. He shows the problematic consequences of deformalization, e.g. the decline of normative standards, the loss of a common scientific language and the higher difficulty in distinguishing between norms and other material. He shows that it is important and possible to find alternatives to this process: He finds those alternatives in the Global Administrative Law, the Heidelberg project on exercise of international public authority, Martti Koskenniemi’s culture of

formalism and postmodern legal positivism. D'Aspremont concludes that deformalization and formalization need to go hand in hand in order to avoid negative outcomes.

In contrast to international organizations' law, *Mayeul Hiéramente* and *Alexander R. J. Murray* have examined international criminal law. Whereas Hiéramente's article "The Myth of 'International Crimes: Dialectics and International Criminal Law'", questions the widely accepted categories of 'international', 'national' and 'ordinary' crimes and points out the influence labeling and discourse can have on the evolution of the normative order as well as how repeated references to the presupposed 'international nature' influence the evolution of international law, Murray focuses on the necessity of the crime 'genocide' in Art. 6 Rome-Statute. In his article "Does International Criminal Law Still Require a 'Crime of Crimes'? A Comparative Review of Genocide and Crimes against Humanity" he discusses and compares the role of genocide and crimes against humanity in international criminal law. By examining three different crimes against humanity (persecution, extermination and torture), the author argues that 'crimes against humanity' are better positioned than the 'crime of genocide' to prevent criminal acts in the future as the former personalizes the violence and brings the individual's responsibility back into the focus of international criminal law. Thus, 'crimes against humanity' is an adequate alternative to prosecuting individuals for acts of genocide. In general, the author argues for a pragmatic rather than a philosophical approach to international justice.

Focusing on one of the consequences of international crimes, the articles by *Vladislava Stoyanova*, *Killian S. O'Brien* and *Julian M. Lehmann* examine the judicial treatment of refugees and irregular migrants. Stoyanova's article "Complimentary Protection for Victims of Human Trafficking" deals with the possible rights granted by the European Convention on Human Rights (ECHR) to victims of human trafficking with legitimate reasons for not wanting to go back to their countries of origin, e.g. in case of dangers of re-trafficking and rejection by family or in case of developed social ties within the receiving State. Concentrating on the high seas as an escape route, O'Brien examines the extent to which International Law of the Sea and International Refugee Law can contribute to the protection of the so called 'Boat People' in his article "Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem". Lehmann instead explores the human rights protection of

irregular migrants in relation to irregular migrants' entry/admission and expulsion/deportation. In his article, entitled "Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants", he clarifies the term 'migrant' and analyses the international human rights law framework applying to individuals with and without need for international protection, when their claims have a socio-economic dimension. Throughout the text, particular attention is given to the principle of non-refoulement.

We hope that all these articles in this issue provide – in their diversity – a worthwhile read to our readership.

The Editors

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## The Politics of Deformalization in International Law

Jean d'Aspremont\*

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## Abstract

Confronted with the pluralization of the exercise of public authority at the international level and the retreat of international law as a regulatory instrument, international legal scholars have engaged in two survival strategies. On the one hand, there are international legal scholars who have tried to constitutionalize traditional international law with a view to enhancing its appeal and promoting its use by global actors. On the other hand, there are scholars who, considering any charm offensive to induce global actors to cast their norms under the aegis of classical international law a lost battle, have embarked on a deformalization of international law that has led them to loosen the meshed fabric through which they make sense of reality. This deformalization of international law has sometimes materialized in a radical abandonment of theories of sources. The constitutionalist strategy has already been extensively discussed in the literature. The second approach has thrived almost unnoticed. It is this second scholarly strategy to the pluralization of the exercise of public authority that this article seeks to critically evaluate. After describing the most prominent manifestations of deformalization in the theory of international law and examining its agenda, the paper considers some of the hazards of deformalization. This paper simultaneously demonstrates that formalism has not entirely vanished, as it has continued to enjoy some support, albeit in different forms. These variations between deformalization and the persistence of formalism, this paper concludes, are the result of political choices which international legal scholars are not always fully aware of.

## A. Introduction

International lawyers have found deformalization an elixir for many of the problems inherent in the current pluralization of the exercises of public authority at the international level. Indeed, deformalization has turned to be perceived as the antidote for many of the anxieties of international lawyers who, in an era where exercise of public authority manifests itself more heterogeneously outside traditional international law-making, have been witnessing the retreat of international law and the proportionally growing



resort to other regulatory instruments. It is not that the pluralization of the exercise of public authority is a new phenomenon; international relations specialists defined it and initiated its study some time ago.<sup>1</sup> It is simply that, amidst the explosion of new manifestations of global governance, international law is playing an incrementally reduced role, thereby placing international lawyers on the defensive. In particular, international lawyers have begun to fret about the shrinking importance of their primary material of study and responded with two main, diverging survival strategies. On the one hand, there are international legal scholars who have tried to constitutionalize traditional international law<sup>2</sup> in hopes of enhancing its appeal and promoting its use by global actors.<sup>3</sup> On the other hand, there are scholars who, considering any charm offensive to induce global actors to cast their norms under the aegis of classical international a lost battle, have embarked on a deformalization of international law that has reshaped the lens through which they make sense of reality. For the latter group, legal pluralism has become the key mantra whilst formalism is castigated as the roots of many of the pains of an embattled profession for “constrain[ing] creative thinking within the discipline for generations”<sup>4</sup>.

<sup>1</sup> One of the first studies on Transnational regulatory networks (TRNs), see A.-M. Slaughter, *A New World Order* (2004). More recently, see P.-H. Verdier, ‘Transnational Regulatory Networks and Their Limits’, 34 *Yale Journal of International Law* (2009) 1, 113.

<sup>2</sup> For some e.g. B. Fassbender, ‘The Meaning of International Constitutional Law’, in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007) 307, 311. C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 *Collected Courses* 9 (1999), 89. It should be noted, however, that constitutionalists do not reject the fragmentation associated with the multiplication of international judicial bodies, for this can constitute a step towards a more systemic implementation of the international rule of law. See A. Peters, ‘Global Constitutionalism Revisited’, 11 *International Legal Theory* (2005), 39, 65.

<sup>3</sup> On the Agenda of constitutionalism, see W. Werner, ‘The never-ending closure: constitutionalism and international law’, in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007), 329; see also J. Klabbbers, ‘Setting the Scene’, in J. Klabbbers, A. Peters & G. Ulfstein (eds) *The Constitutionalization of International Law* (2009) 1, 18; M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’, 70 *Modern Law Review* (2007) 1, 1.

<sup>4</sup> J. Brunnée & S. J. Toope, ‘International Law and Constructivism, Elements of an International Theory of International Law’, 39 *Columbia Journal of Transnational Law* (2000-2001) 1, 19, 65.

The constitutionalist attitude has already been extensively discussed in the literature.<sup>5</sup> Deformalization, on the contrary, and despite its current success, has thrived almost unnoticed. This article seeks to critically evaluate this second scholarly strategy to the pluralization of the exercise of public authority.

After sketching a definition of deformalization for the sake of this article (I) and providing some contemporary examples (II), the paper elaborates on the agenda in the international legal scholarship behind deformalization (III). It then argues that, while providing some welcome relief in an era of pluralized normativity, deformalization does not come without some serious costs (IV). The article subsequently shows that these costs explain why most of the deformalization strategies in the contemporary legal scholarship always preserve some elementary formalism, in one way or another (V). This will be illustrated by Global Administrative Law, the Heidelberg Project on the Exercise of Public Authority, Martti Koskenniemi's culture of formalism as well as new streams of international legal positivism. The paper ends with a few critical remarks on the political choice for deformalization (VI).

## B. The Concept of Deformalization

### I. Deformalization of Law-Ascertainment

For the sake of this article, the concept of deformalization means the move away from formal law-ascertainment and the resort to non-formal indicators to ascertainment legal rules. Deformalization is thus an attitude whereby rules of international law are not identified by virtue of formal criteria. More specifically, it boils down to a rejection of the idea that rules

<sup>5</sup> See e.g. N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007); A. von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization and International Law', 15 *European Journal of International Law* (2004) 5, 885. I have myself discussed it as well. See J. d'Aspremont & F. Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders', 68 *Heidelberg Journal of International Law* (2009) 4, 939, or see J. d'Aspremont, 'The Foundations of the International Legal Order' 18 *Finnish Yearbook of International Law* (2007), 219-255.

must meet predefined formal standards to qualify as a rule of law. This is tantamount to an abandonment of pedigree as the core benchmark of their ascertainment. Traditionally, the definition of such formal indicators – that is the *ex ante* definition of the pedigree of legal rules – has been a task entrusted to the theory of sources. This is why this deformalization often manifests itself in a movement away from formal theory of sources. Alternatively, deformalization can materialize itself in a radical rejection of questions of law-ascertainment, law being exclusively seen as a process or a *continuum*.<sup>6</sup> A process-based representation of law – which bears uncontested descriptive virtues, far more than than static conceptions<sup>7</sup> – only generates deformalization to the extent of the accompanying rejection of formal criteria that distinguish between law and non-law or the total rejection of the necessity to ascertain legal rules, as has been advocated by some scholars affiliated with the New Haven Law School.<sup>8</sup>

The concept of deformalization employed here is thus restrictive and is centered around on a rather limited phenomenon: the embrace of informal law-ascertainment criteria or an utter abandonment of a pedigree-based ascertainment theory of law. So defined, deformalization is not used here to refer to norm-making by informal non-territorial networks as is sometimes

<sup>6</sup> For some famous support to the idea of normative continuum, see R. Baxter, 'International Law and Her Infinite Variety', 29 *International and Comparative Law Quarterly* (1980) 4, 549, 563; O. Schachter, 'The Twilight Existence of Non binding International Agreements', 71 *American Journal of International Law* (1977) 2, 296; A. E. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', 48 *International Law and Comparative Law Quarterly* (1999) 4, 901, 913; C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *International Law and Comparative Quarterly* (1989) 4, 850, 866. A. Pellet, 'Complementarity of International Treaty Law, Customary Law and Non-Contractual Law-Making', in R. Wolfrum & V. Röben (eds), *Developments of International Law in Treaty Making* (2005), 409, 415.

<sup>7</sup> J. d'Aspremont, 'Non-State Actors in International Law: Oscillating Between Concepts and Dynamics', in J. d'Aspremont (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011), 1.

<sup>8</sup> In the same vein, see G. J. H. Van Hoof, *Rethinking the Sources of International Law* (1983), 283. See also one of the grounds of the criticisms of F. Kratochwil, *Rules Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989), 194-200.

the case in the literature.<sup>9</sup> That said, while not constituting a catch phrase for these informal non-territorial networks, deformalization of law-ascertainment is not entirely alien to them as this concept is used in this paper to designate one of these scholarly attitudes that allow the normative practice of these non-territorial networks to be captured by the abstract categories of international lawyers. Likewise, deformalization here does not refer to the attempts to lay bare of the formal camouflage of legal rationality.<sup>10</sup> Indeed, the legal realist critique<sup>11</sup> – which has raised objections against the “abuse of logic”<sup>12</sup>, the “abuse of deduction”<sup>13</sup> and the “mechanical jurisprudence”<sup>14</sup> – and the amplification thereof brought about by approaches affiliated with deconstructivism and critical legal studies<sup>15</sup>

<sup>9</sup> M. Koskenniemi, ‘Constitutionalism as a mindset: Reflections on Kantian Themes about International Law and Globalization’, 8 *Theoretical Inquiries in Law* (2007) 1, 9, 13.

<sup>10</sup> This is how formalism is most commonly understood. See e.g. C. C. Goetsch, ‘The Future of Legal Formalism’, 24 *American Journal of Legal History* (1980) 3, 221. See also E. J. Weinrib, ‘Legal Formalism’, in D. Patterson (eds) *A Companion to Philosophy of Law and Legal Theory* (1999), 332-342. See also the remarks of O. Corten, *Méthodologie du droit international public* (2009), 57.

<sup>11</sup> On the realist criticisms of formalism as a theory of legal reasoning in adjudication, see gen. A. J. Sebok, ‘Misunderstanding Positivism’, 93 *Michigan Law Review* (1995) 7, 2054, esp. 2071.

<sup>12</sup> *Id.*, 2093

<sup>13</sup> D. Kennedy, *The Rise and Fall of Classical Legal Thoughts* (2006), xviii.

<sup>14</sup> This is the famous expression of Roscoe Pound, see. R. Pound, ‘Mechanical Jurisprudence’, 8 *Columbia Law Review* (1908) 8, 605.

<sup>15</sup> See e.g. D. Kennedy, ‘The Disciplines of International Law and Policy’, 12 *Leiden Journal of International Law* (1999) 9, 84; D. Kennedy, ‘When Renewal Repeats: Thinking Against the Box’, 32 *New York University Journal of International Law & Politics* (2000) 2, 335; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002), 502 [Koskenniemi, *Gentle Civilizer*]; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 306, [Koskenniemi, *Apology to Utopia*]; N. Purvis, ‘Critical Legal Studies in Public International Law’, 32 *Harvard Journal of International Law* (1991) 1, 81, 81; T. Skouteris, ‘Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship’, 10 *Leiden Journal of International Law* (1997) 3, 415-420; T. Skouteris, *The Notion of Progress in International Law Discourse* (2008), chapter 3, later published as *The Notion of Progress in International Law Discourse* (2010), [Skouteris, *Notion of Progress*]; For a similar interpretation of formalism from the vantage point of critical legal studies, see I. Scobbie, ‘Towards the Elimination of International Law: Some Radical

have long exposed formal legal argumentation as an illusion and thwarted the idea that a formal immanent rationality actually exists. It is under their influence that international lawyers, although not denying its bearing upon legitimacy and authority of judicial decisions,<sup>16</sup> have lost faith in the mathematic formal predictability in the behavior of law-applying authorities. If it were simply to recall this move away from the faith in the immanent rationality of formal legal reasoning, deformalization would be a very banal concept. It is thus not as a forsaking of formal reasoning in legal argumentation that deformalization is associated with here. Furthermore, deformalization does not express the belated recognition by international lawyers that the identification of the subjects of international law is nothing of a formal certification. This type of deformalization is practically a given, for we cannot be lured any longer by a “Montevideo mirage”<sup>17</sup> as well theories that convey the illusion that States are a formal creation by virtue of international law. In this article, deformalization is also not to be understood as the anti-Kantian moveshift in the discipline’s vocabulary as famously depicted by Martti Koskenniemi: from institutions to regimes, from rules to regulation, from government to governance, from responsibility to compliance, from legality to legitimacy, from legal expertise to international relations expertise.<sup>18</sup> Albeit the deformalization of the vocabulary of the discipline will often be the reflection of a deformalization of law-identification, deformalization, for the sake of the argument made here, is more simply construed as the rejection of formal indicators to identify international legal rules.

Scepticism about Sceptical Radicalism’, 61 *British Yearbook of International Law* (1990), 339, 345.

<sup>16</sup> See E. J. Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’, 97 *Yale Law Journal* (1988) 6, 949; S.V. Scott, ‘International Law as Ideology: Theorizing the Relationship between International Law and International Politics’, 5 *European Journal of International Law* (1994) 3, 313, esp. 322. See also the remarks of Koskenniemi, ‘What is International Law For?’, in M. Evans (ed.), *International Law*, 2nd ed. (2006), 57, 69.

<sup>17</sup> This is what I have argued in J. d’Aspremont, ‘Non-State Actors in International Law: Oscillating Between Concepts and Dynamics’, in J. d’Aspremont (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011) 1. See also J. d’Aspremont, ‘Regulating Statehood: The Kosovo Status Settlement’, 20 *Leiden Journal of International Law* (2007) 3, 649.

<sup>18</sup> M. Koskenniemi, ‘Formalism, Fragmentation, Freedom’, Speech given on Kantian Themes in Today’s International Law given in Frankfurt 25 November 2005, 7-17, available at [http://www.helsinki.fi/eci/Publications/talks\\_papers\\_MK.html](http://www.helsinki.fi/eci/Publications/talks_papers_MK.html) (last visited 29 August 2011).

## II. Deformalization and Traditional Theory of Sources of International Law

It is necessary to spell out how the traditional theory of international law accommodates deformalization defined above. The following paragraphs make the somewhat iconoclast argument that the traditional theory of international law's sources has long encompassed informal law-ascertainment mechanisms. In that sense, contrary to mainstream understanding, they argue that the traditional theory of sources already encapsulates some forms of deformalization. Thus, the contemporary deformalization that this article depicts should not be seen as a radical rupture from traditional sources theory.

The idea that international law is grounded in a theory of formal sources is an achievement of 20<sup>th</sup> century scholars. Indeed, to a great majority, 20<sup>th</sup> century scholars shared their 19<sup>th</sup> century predecessors' belief that international law rests on the consent of states.<sup>19</sup> They posited the theory that the will of the state is the most obvious *material source* of law,<sup>20</sup> and, subject to a few exceptions,<sup>21</sup> agreed that natural law does not constitute a source of law *per se*, even if the content of rules may reflect principles of morality.<sup>22</sup> The main difference between 19<sup>th</sup> century and 20<sup>th</sup>

<sup>19</sup> One of the first most complete expressions of this formal consensual understanding of international law has been offered by D. Anzilotti, *Corso di diritto internazionale* (1923), 27. For a more recent manifestation of the voluntary nature of international law, see P. Weil, 'Vers une normativité relative en droit international', 87 *Revue Générale de Droit International Public* (1982) 1, 5.

<sup>20</sup> On the distinction between material and formal sources, see gen. L. Oppenheim, *International Law*, Vol. 1, (1955), 24; G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in M. Nijhoff (ed.), *Symbolae Verzijl*, (1958), 153.

<sup>21</sup> See e.g. L. Le Fur, 'La théorie du droit naturel depuis le XVII<sup>ème</sup> siècle et la doctrine moderne', 18 *Collected Courses* (1927) 3, 259-442.

<sup>22</sup> C. Rousseau, *Principes généraux du droit international public* (1944), 32-33; J. Basdevant, 'Règles générales du droit de la paix', 58 *Collected Courses* (1936) 4, 477-478. See also A. D'Amato, 'What 'Counts' as Law?', in N. G. Onuf (ed.), *Law-Making in the Global Community* (1982) 83, 90. This idea was not fundamentally challenged in the early 21<sup>st</sup> century. See P.-M. Dupuy, 'L'unité de l'ordre juridique international: cours général de droit international public', 297 *Collected Courses* (2002) 9, 31-32 and 200-202. See J. Verhoeven, 'Considérations sur ce qui est commun', 334 *Collected Courses* (2008), 15, 110. A. Orakhelashvili, *The*

century international legal scholars lies in the fact that the latter tried to devise formal law-ascertainment criteria with which to capture State consent.<sup>23</sup> This is precisely how 20<sup>th</sup> century scholars ended up basing the recognition of international legal rules in a theory of allegedly formal sources<sup>24</sup> – a construction that continues to enjoy a strong support among 21<sup>st</sup> century scholars.<sup>25</sup> It is true that the terminology of “source” is not always considered adequate to describe how international legal rules are ascertained<sup>26</sup> and a varying terminology – sources *stricto sensu*,<sup>27</sup> formal validation<sup>28</sup> or formal law-creating processes<sup>29</sup> – is found in the literature. Regardless of the terminology’s variations, there is little dispute that, despite some occasional but significant exceptions, a great majority of 20<sup>th</sup> century scholars adhered to a formal law-ascertainment blueprint.

*Interpretation of Acts and Rules in Public International Law* (2008), 51 [Orakhelashvili, *International Law*]; A. Orakhelashvili, ‘Natural Law and Justice’, *Max Planck Encyclopedia of Public International Law*, para. 33, available at [http://www.mpepil.com/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690-e730&recno=1&searchType=Quick&query=Orakhelashvili+Natural+Law+and+Justice](http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e730&recno=1&searchType=Quick&query=Orakhelashvili+Natural+Law+and+Justice) (last visited 11 August 2011).

<sup>23</sup> See the refinement of the theory of consent by Elias and Lim, O. A. Elias & C. H. Lim, *The Paradox of Consensualism in International Law* (1998).

<sup>24</sup> See gen. A. Pellet, ‘Cours Général: le Droit International entre souveraineté et communauté internationale’, 2 *Anuário Brasileiro de Direito Internacional* (2007) 1, 12, esp. 15, 19 and 31; G. Buzzini, ‘La Théorie des sources face au droit international général’, 106 *Revue générale de droit international public* (2002), 581, esp. 584-590.

<sup>25</sup> See e.g. Orakhelashvili, *International Law*, *supra* note 22, 51-60.

<sup>26</sup> See e.g. Buzzini, *supra* note 24, 581; R. Quadri, *Diritto internazionale pubblico* (1968), 107, referred to by H. W. Thirlway, *International Customary Law and codification: an examining of the continuing role of custom in the present period of codification of international law* (1972), 40; A. D’Amato, *The Concept of Custom in International Law* (1971), 264; G. Schwarzenberger, *International Law*, Vol. 1, 3rd ed. (1957), 26.

<sup>27</sup> For Condorelli, the term sources remains appropriate even with respect to customary international law. See L. Condorelli, ‘Custom’, in M. Bedjaoui (ed.) *International Law: Achievements and Prospects* (1991), 179, 186; see also G. Abi-Saab, ‘La Coutume dans tous ses Etats’, in *Essays in honor of Roberto Ago*, Vol. I (1987), 58; Rousseau, *supra* note 22, 108.

<sup>28</sup> See D’Amato, *supra* note 22, 83.

<sup>29</sup> See D. P. O’Connell, *International Law*, Vol. 1, 2nd ed. (1970), 7-8; see Schwarzenberger, *supra* note 26, 25-27; R. Jennings, ‘Law-Making and Package Deal’, in D. Bardonnet (ed.), *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (1981), 347, 348.

Yet, as explained elsewhere in further detail,<sup>30</sup> the idea that international law-ascertainment can be exclusively attributed to formal sources is, to a large extent, fallacious and misleading. Indeed, the theory of customary international law and the law-ascertainment criteria concerning international treaties, unilateral promises and other international legal acts give way to deformalization. In other words, it can be argued that the identification of customary rule as well as that of treaties is ultimately dependent entirely upon informal mechanisms. As a result, it can be said that the mainstream theory of sources has long accommodated some form of deformalization.

In the particular case of customary international law, it seems difficult to deny that the conceptualization of the ascertainment of customary international law within mainstream scholarship has always rested on informal criteria. Indeed, in the mainstream theory of the sources of international law, the ascertainment of customary international law is viewed as *process-based*.<sup>31</sup> More specifically, according to traditional views, customary international rules are identified on the basis of a *bottom-up crystallization process* that rests on a consistent acquiescence by a significant number of states, accompanied by the belief (or intent) that such a process corresponds to an obligation under international law.<sup>32</sup> Yet, it has not been possible to formalize that process's recognition. Neither the behavior of states nor their beliefs can be captured or identified by formal criteria.<sup>33</sup> As a result, ascertainment of customary international law does not

<sup>30</sup> See J. d'Aspremont, *Formalism and the Sources of International Law* (2011).

<sup>31</sup> For a classical example, see P. Daillier & A. Pellet, *Droit international Public*, 6th ed. (1999), 318. On the various conceptualizations of customary international law as a process, see the remarks of R. Kolb, 'Selected Problems in the Theory of Customary International Law', 50 *Netherlands International Law Review* (2003) 2, 119, 119-150.

<sup>32</sup> On the emergence of the subjective element in the theory of custom in the 19<sup>th</sup> century, see P. Guggenheim, 'Contribution à l'Histoire des Sources du Droit des Gens', 94 *Collected Courses* (1958), 1, 36-59; D'Amato, *supra* note 26, 44-50.

<sup>33</sup> In the same vein, Koskenniemi, *Apology to Utopia*, *supra* note 15, 388. See also S. Zamora, 'Is There Customary International Economic Law?', 32 *German Yearbook of International Law* (1989), 9, 38; For a classical example of the difficulty to capture the practice, see ICJ, Case concerning the *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), 13 July 2009, ICJ Reports 2009, para. 141. On the particular difficulty to establish practice of abstention, see PCIJ, *Lotus*, Series A, No. 10 (1927), 28 or ICJ, *Military and Paramilitary Activities in and against*



hinge on any standardized and formal pedigree. Like other process-based models of law-identification, custom-identification eschews formal criteria and follows a fundamentally informal pattern of identification.<sup>34</sup> This is why custom-identification has often been deemed an “art”<sup>35</sup> and why some authors have been loath to qualify customary law as a proper “source” of international law.<sup>36</sup> Nonetheless, ambitious attempts to endow custom-ascertainment with formal trappings have resulted in spectacular scholarly efforts to elaborate and streamline the above-mentioned subjective and objective elements of constituting a custom.<sup>37</sup> A fair number of these scholarly attempts have asserted that custom is a formal source of law whose rules are identified on the basis of formal criteria.<sup>38</sup> It is argued here that the extreme refinement of these two custom ascertainment criteria is insufficient to ensure formal-custom-identification<sup>39</sup> and has not transformed custom-ascertainment into a formal process.<sup>40</sup>

*Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Reports (1986), para. 188.

<sup>34</sup> M. H. Mendelson, ‘The Formation of Customary International Law’, 272 *Collected Courses* (1998), 159, 172; G. Buzzini, ‘La Théorie des sources face au droit international général’, 106 *Revue générale de droit international public* (2002), 581; this also is what leads R. Kolb to contend that Article 38 does not lay down an entirely formal system of sources. See R. Kolb, *Réflexions de philosophie du droit international Problèmes fondamentaux du droit international public: Théorie et Philosophie du droit international* (2003), 51.

<sup>35</sup> M. W. Janis, *An Introduction to International Law*, 2nd ed. (1993), 44.

<sup>36</sup> See the discussion in H. Thirlway, *International Customary Law and Codification* (1972), 25-30. See also the remarks by Condorelli, *supra* note 27, 179-211, 186.

<sup>37</sup> G. Abi-Saab has compared the formalization through the 2 elements to a genealogy on a new born on his state of health. See G. Abi-Saab, ‘La Coutume dans tous ses Etats’, in *Essays in honor of Roberto Ago*, Vol. I, (1987), 59.

<sup>38</sup> On the idea that customary international law is a formal source of law, see E. Suy, *Les actes juridiques unilatéraux en droit international public* (1962), 5; see G. M. Danilenko, *Law-Making in the International Community* (1993), 30. It is interesting to note that P. Daillier, M. Forteau and A. Pellet, for their part, argue that customary international law is a formal source of law because it originates in a law-creating process which is governed by international law and is itself formal. See P. Daillier, M. Forteau & A. Pellet, *Droit international public*, 8th ed. (2009), 353 and 355.

<sup>39</sup> One of the most famous objections to this formal conception of customary international law has been offered by R. Ago who has construed custom as “spontaneous law”. See R. Ago, ‘Science Juridique et Droit International’, 90 *Collected Courses* (1956) 2, 851, 936-941; Some support for Ago’s conception of custom has been expressed by B. Stern, ‘La Coutume au Coeur du droit international,

The conclusion that the theory of customary international law rests on the deformalization of custom-identification also holds for the ascertainment of written treaties. Indeed, although written treaties are grounded in a formal instrument, the identification of “treaty status” ultimately remains dependent on the informal criterion in the mainstream theory of the sources of international law.<sup>41</sup> Written treaties’ ascertainment is exclusively dependent upon the intent of the authors of these acts. Although the Vienna Convention is silent as to the decisive treaty-ascertainment criterion,<sup>42</sup> the International Law Commission found that the legal nature of an act hinges on the intent of the parties,<sup>43</sup> an opinion shared by most international legal scholars.<sup>44</sup> The same is true with respect to unilateral written declarations, considered to enshrine an international legal obligation where the author’s

quelques réflexions’, in D. Bardonnet (ed.), *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (1981), 479, 484.

<sup>40</sup> In the same vein, see Dupuy, *supra* note 22, 166-167; P.-M. Dupuy, ‘Théorie des sources et coutume en droit international contemporain’, in M. Rama-Montaldo (ed.), *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (1994), 51, 61-63; See R. Jennings, ‘The Identification of International Law’ in B. Cheng (ed.), *International Law: Teaching and Practice* (1982), 3, 9.

<sup>41</sup> On the regime governing international treaties, see the Vienna Conventions on the Law of Treaties of 1969 and 1986 and the commentary of P. Klein & O. Corten (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article* (2006). On the unsuccessful codification of the legal regime of unilateral acts, see the work of the International Law Commission and the comments of J. d’Aspremont, ‘Les travaux de la Commission du droit international relatifs aux actes unilatéraux’, 109 *Revue générale de droit international public* (2005), 163-189.

<sup>42</sup> Fitzmaurice had explicitly made a distinction between the law-ascertainment criterion and the consequence of an agreement being ascertained as a treaty. See ILC Report, A/3159 (F) (A/11/9), 1956, chp. III(I), para. 34.

<sup>43</sup> ILC Report A/6309/Rev.1 (F) (A/21/9), 1966, part I (E), paras 11-12, and part II, chp. II, paras 9-38; see however Fitzmaurice who sought to make it an explicit criterion: ILC Report, A/3159 (F) (A/11/9), 1956, chp. III (I), para. 34.

<sup>44</sup> Among others, see A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (2007), 20; R. Jennings & A. Watts (eds), *Oppenheim’s International Law*, Vol. I (1992), 1202. J. Klabbbers, *The Concept of Treaty in International Law* (1996), 68; M. Fitzmaurice, ‘The Identification and Character of Treaties and Treaty Obligations Between States in International Law’, 73 *British Yearbook of International Law* (2003), 141, 145 and 165-166; Orakhelashvili, *International Law*, *supra* note 22, 59; J.-P. Jacqué, *Elements pour une théorie de l’acte juridique en Droit international public* (1972), 121.

intent to be bound can be evidenced.<sup>45</sup> This means that, although law-ascertainment remains, on the surface, formal because it hinges on the existence of a written instrument, the legal nature of that instrument is itself determined on the basis of an informal criterion: *intent*.<sup>46</sup> Nothing could be more at odds with formal law-identification. Indeed such a criterion ultimately bases the identification of international legal acts on a fickle and indiscernible psychological element and inevitably brings about the same difficulties as those encountered in the ascertainment of oral promises and oral treaties. It can thus be said that the identification of a written treaty – and other legal acts – has remained a deeply speculative operation aimed at reconstructing the author(s)' intent.<sup>47</sup>

In the light of the mainstream theories of customary international law and treaties, the argument can be made that deformalization is certainly not unknown in the traditional theory of sources. Deformalization has been with us for quite some time. The new development on which this article seeks to shed some light is however that these traditional non-formal law-ascertainment models have now been amplified by new types of deformalization. The following section attempts to describe the latest incarnations of deformalization.

### C. Contemporary Manifestations of Deformalization

Deformalization, be it the rejection of formal law-ascertainment and the embrace of informal law-identification criteria or the utter abandonment of law-ascertainment, has grown more diverse and complex in the international legal scholarship. A comprehensive description of all the forms of deformalization of international law-ascertainment would certainly exceed the scope of this article. This article is only concerned with the most common expressions of deformalization in the theory of the sources of international law. The article will turn upon the remnants of substantive

<sup>45</sup> ICJ, *Nuclear Tests* case (Australia v. France), 20 December 1974, para. 43: “When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking”. See Suy, *supra* note 38, 28.

<sup>46</sup> See e.g. Orakhelashvili, *International Law*, *supra* note 22, 59-60.

<sup>47</sup> In the same vein see Klabbers, *supra* note 44, 11. See also the remarks of Danilenko, *supra* note 38, 57 (who pleads for the necessity of a formal act of acceptance).

validity theories which brings about a deformalization of law-identification (I) as well as effect-based (II) and process-based (III) conceptions of international law. A few words will also be said about the general acceptance of the notion that law is inherently “soft” (IV).

## I. Contemporary Persistence of Substantive Validity

Despite being the object – like formal legal argumentation – of compelling objections from international legal scholars associated with deconstructivism and critical legal studies, the application of substantive validity has not vanished completely from the theory of sources of international law. Substantive validity’s persistence is illustrated by the work of those scholars who, faced with the impossibility to resort to formal identification criteria of customary international law, have designed a theory of customary international law that is informed by moral or ethical criteria.<sup>48</sup> According to this view, customary international rules ought to be ascertained by virtue of some fundamental ethical principles; a theory of custom-ascertainment based on substantive criteria that despite admitting the fluid nature of these criteria, is reminiscent<sup>49</sup> of the theory of substantive validity.<sup>49</sup>

The work of some radical contemporary liberal scholars,<sup>50</sup> especially those who have been labeled as “anti-pluralists”,<sup>51</sup> warrants mention.

<sup>48</sup> See J. Tasioulas, ‘Customary International Law and the Quest for Global Justice’, in A. Perreau-Saussine & J.-B. Murphy (eds), *The Nature of Customary Law* (2007), 307; J. Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’, 16 *Oxford Journal of Legal Studies* (1996) 1, 85; See also B. D. Lepard, *Customary International Law, A New Theory with Practical Applications* (2010), esp.77. This echoes some isolated proposals made at the time of the drafting of Article 38. See e.g. the Argentinean amendment to draft article 38 according to which customary international should be construed as ‘evidence of a practice founded on principles of humanity and justice, and accepted as law’, League of Nations, Documents Concerning the Action Taken by the Council of the League of Nations under article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court (1921), 50. For a criticism of this understanding of custom, see J. Beckett, ‘Behind Relative Normativity: Rules and Process as Prerequisite of Law’, 12 *European Journal of International Law* (2001) 4, 627.

<sup>49</sup> *Id.*, 648

<sup>50</sup> Liberalism in American legal scholarship is often associated with the exodus of the German legal science which enriched the expanding US legal scholarship. In that

Indeed, the Kantian foundations of their understanding of international law have led some to revive the classical kinship between morality and international law.<sup>52</sup> It is fair to say that, in doing so, these scholars have embraced a law-identification blueprint based on substantive validity.<sup>53</sup>

International case-law is occasionally informed by naturalist approaches of law-ascertainment as well. A good illustration is provided by the conception of customary international law advocated by the International Tribunal for the Former Yugoslavia. Although its case-law on this point is admittedly inconsistent, the tribunal deemed the “demands of humanity or the dictates of public conscience” could be conducive to the creation of a new rule of customary international law, even when such practice is scant or non-existent.<sup>54</sup>

Although formal criteria are not entirely absent from Brunnée and Toope’s approach, their transposition of Fuller’s theory to international law can also be viewed as an expression of a substantive validity theory leading to a deformalization of law-ascertainment.<sup>55</sup> Although modern natural law theory of international law, like most modern natural law theories, has been more concerned with the authority of law than the identification of international legal rules, these two authors have made use of Fuller’s eight

sense, the Kantian-grounded liberal cosmopolitan views of many of the most important educational institutions of US elites was considerably reinforced by this influx of scholars: S. Oeter, ‘The German Influence on Public International Law’, in *Société française pour le droit international, Droit international et diversité des cultures juridiques* (2008), 29, 38.

<sup>51</sup> G. Simpson, ‘Two Liberalisms’, 12 *European Journal of International Law* (2001) 3, 537.

<sup>52</sup> The most famous example is F. Tesón, ‘The Kantian Theory of International Law’, 92 *Columbia Law Review* (1992) 1, 53. See also F. Tésón, *A Philosophy of International Law* (1998). On Tesón understanding of international law, see G. J. Simpson, ‘Imagined Consent: Democratic Liberalism in International Legal Theory’, 15 *Australian Yearbook of International Law* (1994), 103, 116. For a criticism of Tésón from a natural law standpoint, see A. Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (2007), 17-18.

<sup>53</sup> For a criticism see P. Capps, ‘The Kantian Project in Modern International Legal Theory’, 12 *European Journal of International Law* (2001) 5, 1003.

<sup>54</sup> *Prosecutor v Kupreskic*, Case No.IT-95-16-T, 14 January 2000, para. 527.

<sup>55</sup> See J. Brunnée & S. J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (2010).

procedural criteria in a way that leads them to elevate the ‘fidelity to law’ into a law-ascertainment criterion. Indeed, Fuller’s eight criteria of legality, in their view, ‘are not merely signals, but are conditions for the existence of law’<sup>56</sup>. They ‘create legal obligation’<sup>57</sup>. Yet, it must be emphasized that, in the eyes of these authors, Fuller’s criteria of legality are not themselves the direct law-ascertaining criteria. They are solely “crucial to generating a distinctive legal legitimacy and a sense of commitment [...] among those to whom law is addressed”<sup>58</sup>. In that sense, it is rather the ‘adherence to law’ that is the central indicator by which international legal rules ought to be identified. Accordingly, Brunnée and Toope’s theory comes down to a mix of the substantive validity and effect-based concepts of international law. The deformalization of law-ascertainment conveyed by their theory is thus as much the result of their resort to substantive validity as to a theory of international law whereby law is restricted to what generates a sense of obligation among the addressees of its rules.

The few remnants of substantive validity discussed here contribute to the contemporary deformalization of law-ascertainment, as the ethical or moral law-identification criteria that they employ are informal law-identification indicators.

## II. Effect- or Impact-Based Conceptions of International Law-Ascertainment

The most common informal law-ascertainment framework is found in *effect- (or impact-) based* approaches of international law which have been embraced by a growing number of international legal scholars.<sup>59</sup> For these

<sup>56</sup> *Id.*, 41.

<sup>57</sup> *Id.*, 7.

<sup>58</sup> *Id.*, 7.

<sup>59</sup> For a few examples see, J. E. Alvarez, *International Organizations as Law-makers* (2005); J. Brunnée & S. J. Toope, ‘International Law and Constructivism, Elements of an International Theory of International Law’, 39 *Columbia Journal of Transnational Law* (2000-2001), 19, 65. These effect-based approaches must be distinguished from the subtle conception defended by Kratochwil based on the *principled rule-application* of a norm which refers to the explicitness and contextual variation in the reasoning process and the application of rules in “like” situations in the future. See Kratochwil, *supra* note 4, 206-208. See also F. Kratochwil, ‘Legal Theory and

scholars, what matters is “whether and how the subjects of norms, rules, and standards come to accept those norms, rules and standards [...] [and] if they treat them as authoritative, then those norms can be treated as [...] law”<sup>60</sup>. In their view, any normative effort to influence international actors’ behavior, if it materializes in the adoption of an international instrument, should be viewed as part of international law. Such an effect- (or impact-) based conception of international law – which entails a shift from the perspective of the norm-maker to that of the norm-user – has itself taken various forms. For instance, it has led to conceptions whereby compliance is elevated to the law-ascertaining yardstick.<sup>61</sup> It has also resulted in behaviorist approaches to law where only the “normative ripples” that norms can produce seem to be crucial.<sup>62</sup> Whatever its actual manifestation, effect- (or impact-) based

International Law’, in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009) 1, 58.

<sup>60</sup> On that approach, see the remarks of J. Klabbbers, ‘Law-making and Constitutionalism’, in J. Klabbbers, A. Peters & G. Ulfstein (eds), *The Constitutionalization of International Law* (2009).

<sup>61</sup> See e.g. Brunnée & Toope, *supra* note 4, 68: “We should stop looking for the structural distinctions that identify law, and examine instead the processes that constitute a normative continuum bridging from predictable patterns of practice to legally required behavior”. The same authors argue: “Once it is recognized that law’s existence is best measured by the influence it exerts, and not by formal tests of validity rooted in normative hierarchies, international lawyers can finally eschew the preoccupation with legal pedigree (sources) that has constrained creative thinking within the discipline for generations”, Brunnée & Toope, *supra* note 4, 65. As has been argued above, their interactional account of international law is nonetheless based on both substantive validity and the impact of rules on actors. For a more elaborated presentation of their interaction theory, see Brunnée & Toope, *supra* note 56.

<sup>62</sup> Alvarez, *supra* note 59. Alvarez argues: “Although we have turned to such institutions for the making of much of today’s international law, the lawyers most familiar with such rules remain in the grip of a positivist preoccupation with an ostensibly sacrosanct doctrine of sources, now codified in article 38 of the Statute of the International Court of Justice, which originated before most modern IOs were established and which, not surprisingly, does not mention them”, Alvarez, *supra* note 59, Preface x. He adds, “we continue to pour an increasingly rich normative output into old bottles labeled treaty, custom, or (much more rarely) general principles. Few bother to ask whether these state-centric sources of international law, designed for the use of judges engaged in a particular task, remain a viable or exhaustive description of the types of international obligations that matter to a variety of actors in the age of modern IOs”, Alvarez, *supra* note 59, Preface x-xi. He exclusively focuses on the normative impact and “the ripples” of norms, see Alvarez, *supra* note 59, Preface xiii, 63, 122. A similar account can be found in D. J. Bederman, ‘The Souls of

approaches to law-ascertainment have proliferated throughout in the contemporary international legal scholarship.

The use of the effect or impact of norms to identify rules has not only been observed in studies about the traditional forms of international law-making. Attention must be paid here to two well-known research projects which, although not directly centered on international law but on the new forms of contemporary norm-making, show how international norms are being ascertained by virtue of their effect or impact: the Heidelberg research project on the Exercise of Public Authority by International Institutions and – the previously discussed – Global Administrative Law project. It is true that, because of the specificities of the normative phenomenon with which these two projects deal, the use of informal benchmark of norm-identification in their studies is absolutely crucial. They nevertheless illustrate how, outside the classical realm of international law, effect- (or impact-) based approaches of norm-ascertainment are thriving.

Some very subtle and elaborate forms of effect- (or impact-) based norm-ascertainment models informed by the need to continuously ensure the legitimacy of the exercise of public authority at the international level have been defended by Armin von Bogdandy, Philipp Dann and Matthias Goldmann within the framework of the Heidelberg research project on the Exercise of Public Authority by International Institutions. Their model of norm-ascertainment is not strictly based upon the impact of the examined norms but rather the expected impact thereof.<sup>63</sup> Drawing on such an expectations-based conception to capture normative production outside the traditional international law-making blueprint, these scholars have attempted to devise “general principles of international public authority”<sup>64</sup>

International Organizations: Legal Personality and the Lighthouse at Cape Spartel’, 36 *Virginia Journal of International Law* (1996) 2, 275, 372; N. White, ‘Separate but Connected: Inter-Governmental Organizations and International Law’, 5 *International Organizations Law Review* (2008) 1, 175, esp. 181-186.

<sup>63</sup> See also M. Goldmann, ‘Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority’, 9 *German Law Journal* (2008) 11, 1865 and A. von Bogdandy, P. Dann & M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, 9 *German Law Journal* (2008) 11, 1375.

<sup>64</sup> Bogdandy, Dann & Goldmann, *supra* note 63, 1375. With respect to the development of “standard instruments”, see A. von Bogdandy, ‘General Principles of International



with a view to fostering both the effectiveness and the legitimacy of international public authority.<sup>65</sup> These endeavors have not gone so far as to claim that any exercise of international public authority should be construed as law. The use of informal criterion – like the impact of norms – is designed to capture expressions of normative activity which do not strictly speaking constitute international legal rules and are unidentifiable as such under formal criteria. However, their “legal conceptualization”<sup>66</sup> reflects a deformalization of norm-identification<sup>67</sup> necessary to ensure the legitimacy of the exercise of international public authority.<sup>68</sup> Interestingly, the deformalization of law-identification that inevitably accompanies the conceptualization at the heart of this project is only meant to be temporary, since these scholars’ ultimate aim is to re-formalize the identification of those “alternative instruments”<sup>69</sup>.

Global Administrative Law is also significant enough to warrant mention. Although it is primarily focused on alternative modes of norm-making and not on international law, it captures the normative product of these processes through an effect- (or impact-) based conception of norm-ascertainment. In particular, Global Administrative Law is premised on the idea that, regarding these alternative modes of norm-making, problems of law-ascertainment cannot be fully resolved.<sup>70</sup> This is unsurprising since the norms created through the relevant processes cannot be ascertained under

Public Authority: Sketching a Research field’, 9 *German Law Journal* (2008) 11, 1909. See Goldmann, *supra* note 63, 1865.

<sup>65</sup> Goldmann, *supra* note 63, 1867.

<sup>66</sup> *Id.*, 1865.

<sup>67</sup> Bogdandy, Dann & Goldmann, *supra* note 63, 1376.

<sup>68</sup> Goldmann, *supra* note 63, 1866-1868.

<sup>69</sup> *Id.*, 1867-1868.

<sup>70</sup> See B. Kingsbury, N. Krisch & R. Steward, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 3 & 4, 15-61, 29; C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *European Journal of International Law* (2006) 1, 187, 197-214. According to Kingsbury, global administrative law rests on an “extended Hartian conception of law” which elevates publicness to a constitutive element of law. According to that view, publicness is a necessary element in the concept of law under modern democratic conditions. By publicness, Kingsbury means the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concerns to the society as such. See Kingsbury, ‘The concept of ‘Law’ in Global Administrative Law’, 20 *European Journal of International Law* (2009) 1, 23, 29-31 [Kingsbury, Concept of Law].

the classical theory of the sources.<sup>71</sup> Global Administrative Law accordingly resorts to informal benchmarks, particularly effect- (or impact-) based criteria, to identify what it considers a normative product.<sup>72</sup> Interestingly, the applicable principles of Global Administrative Law are, for their part, identified through substance-based criteria, especially under the principle of publicness.<sup>73</sup> Although some of its leading figures have curiously professed that Global Administrative Law bespeaks a Hartian conception of law,<sup>74</sup> Global Administrative Law can be understood as resting on a subtle use of both effect- (or impact-) and substance-based norm-ascertainment indicators.

I shall return to this and the Heidelberg research project in section V to show that, despite their reliance on some preliminary deformalization to define new forms of normative exercises, these undertakings ultimately seek to develop formal procedures and standards for regulatory decision-making outside traditional domestic and international frameworks in order to promote a formalization of global processes.<sup>75</sup> That said, it is noteworthy that they rely on a preliminary two-fold deformalization of norm-ascertainment in order to define their object of study. Firstly, the impact that the normative activities they capture is not subject to formal identification for it necessitates that one looks at the behavior of actors – an approach which Judge Ago had famously criticized in its famous separate opinion in the *Nicaragua Case* at the stage of jurisdiction.<sup>76</sup> Secondly, the actors whose

<sup>71</sup> Kingsbury, Krisch & Steward, *supra* note 71, 25-26.

<sup>72</sup> “The legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality and by providing effective review of the rules and decisions these bodies make”, Kingsbury, *supra* note 70, 25.

<sup>73</sup> Kingsbury, Krisch & Steward, *supra* note 70, 30-31.

<sup>74</sup> *Id.*, 23-57; see also B. Kingsbury & L. Casini, ‘Global Administrative Law Dimensions of International Organizations Law’, 6 *International Organizations Law Review* (2009) 2, 319.

<sup>75</sup> In the same vein, see S. Chesterman, ‘Global Administrative Law (Working Paper for the S.T. Lee Project on Global Governance) (September 2009) available at [http://lsr.nellco.org/nyu\\_plltwp/152](http://lsr.nellco.org/nyu_plltwp/152) (last visited 29 August 2011), 3-4.

<sup>76</sup> See *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Separate Opinion of Judge Ago, ICJ Reports 1984, 514, 527 (“A ce sujet je dois faire [...] une réserve expresse quant à l’admissibilité de l’idée même que l’exigence

behavior is impacted have also remained free of any formal definition – which is hardly surprising for even the State in mainstream theory has proven to be indefinable through formal criteria. All-in-all, effect- (or impact-) based identification of international law has thus been synonymous with deformalization.

Interestingly, and somewhat paradoxically, all the abovementioned effect- (or impact-) based approaches to law-ascertainment resemble the compliance-based approaches of international law found in realist theories according to which law only exists to the extent with which it is complied.<sup>77</sup> It is equally noteworthy that the success of these effect- (or impact-) based approaches to law-ascertainment in contemporary legal scholarship has not been without consequence for the general research agenda of international legal scholars, since effect- (or impact-) based conceptions have revived interest in the theory of the fairness of law. Indeed, it is uncontested that the fairness or the justness of a rule encourages compliance by those subject to it<sup>78</sup> – an assertion also at the heart of modern natural law theories. For this reason, effect- (or impact-) based studies have also spurred a need to bolster the legitimacy of international legal rules. The newly-devoted attention to the question of the legitimacy of international law – which was directly shored up by effect- (or impact-) based law-ascertainment theories – has further drawn the attention of international legal scholars away from the inherent problems of effect- (or impact-) based conceptions of law, especially in the context of law-ascertainment.

### III. Process-Based Approaches of International Law- Identification and Other Manifestations of the Deformalization of International Law-Ascertainment

The effect- (or impact-) based approaches of international law are not the exclusive manifestation of the deformalization of law-ascertainment in contemporary legal scholarship. Indeed, the general skepticism against

indéniable d'un acte forme l d'acceptation puisse être remplacée [...] par une simple conduite de fait").

<sup>77</sup> J. L. Goldsmith & E. A. Posner, *The Limits of International Law* (2005). For a criticism of their conception of law, see the very interesting contribution of A. Somek, 'Kelsen lives', 18 *European Journal of International Law* (2007) 3, 409.

<sup>78</sup> See the famous account made by T. Frank, *The Power of Legitimacy Among Nations* (1990), 25.

formal law-ascertaining criteria has also led to a revival of *process-based* law-identification. In particular, the New Haven School has advocated for a revival of the deformalization of law-ascertainment.<sup>79</sup> A resuscitation of New Haven has occasionally been expressed in functionalist terms.<sup>80</sup> Whatever its ultimate manifestation, process-based approaches involve a significant deformalization of law-ascertainment, for it has proved very difficult to formally ascertain the process by which international legal rules are identified.<sup>81</sup>

There are other, more marginal, expressions of the deformalization of law-ascertainment in contemporary international legal scholarship.<sup>82</sup> For instance, it has sometimes been argued that a rule's purpose should be turned into a law-ascertaining criterion.<sup>83</sup> While these – more isolated – approaches are not discussed here, they deserve some attention as they further illustrate the general deformalization of law-ascertainment in contemporary international legal scholarship.

<sup>79</sup> For a classical example of this type of deformalization, see R. Higgins, *Problems and Process: International Law and How We Use It* (1995), 8-10. For another illustration of the contemporary tendency to identify the law through processes, see P. S. Berman, 'A Pluralist Approach to International Law', 32 *The Yale Journal of International Law* (2007) 2, 301. For a hybrid law-ascertainment approach based on both effect and processes, see H. G. Cohen, 'Finding International Law: Rethinking the Doctrine of Sources', 93 *Iowa Law Review* (2007) 1, 65. The New Haven approach to law-ascertainment has been examined above.

<sup>80</sup> See Johnston's hybrid theory which is both outcome- and process-based. See D. M. Johnston, 'Functionalism in the Theory of International Law', 26 *Canadian Yearbook of International Law* (1988), 3, esp. 30-31.

<sup>81</sup> On the difficulty to formally ascertain processes, see G. Abi-Saab, 'Cours général de droit international public', 207 *Collected Courses of the Hague Academy of International Law* (1987) 7, 9, 39-49; I. Brownlie 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law', 255 *Collected Courses of the Hague Academy of International Law* (1995), 9, 29; Van Hoof, *supra* note 8, 283.

<sup>82</sup> For a more precise and systematic taxonomy of these other approaches, see Klabbers, *supra* note 60.

<sup>83</sup> This is what J. Klabbers has described the "Functionalist turn". For examples, see Klabbers, *supra* note 60, 99.

#### IV. The Softness of International Law

Irrespective of deformalization of law identification's manifestation, the rejection of formal law-ascertainment has prompted international legal scholars to acknowledge the existence of a grey zone where distinguishing law from non-law is impossible. More particularly, international law is increasingly viewed as a *continuum* between law and non-law, and formal law-ascertainment is viewed as no longer being capable of defining legal phenomena in the international arena. This occurred hand-in-hand with a conflation between legal acts and "legal facts" (*faits juridiques*)<sup>84</sup> in the theory of the sources of international law,<sup>85</sup> and the embrace of the general softness of legal concepts.<sup>86</sup> Indeed, the theory of the softness of international law has gained acceptance in international legal scholarship. It has been argued that not only has law become soft, but that governance,<sup>87</sup> lawmaking,<sup>88</sup> international organizations,<sup>89</sup> enforcement,<sup>90</sup> and even – from

<sup>84</sup> The term "legal fact" is probably not the most adequate to translate a concept found in other languages. It however seems better than "juridical fact". I have used the former in earlier studies about this distinction. See J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', 19 *European Journal of International Law* (2008) 5, 1075.

<sup>85</sup> For an early systematization of the distinction between legal acts & legal facts, see D. Anzilotti, *Cours de droit international, premier volume: introduction – theories générales* (1929). See also G. Morelli, 'Cours général de droit international public', 89 *Collected Courses of the Hague Academy of International Law* (1956) 1, 437, 589. J.-P. Jacqué, 'Acte et norme en droit international public', 227 *Collected Courses of the Hague Academy of International Law* (1991) 2, 357, 372. See also, M. Virally, *La pensée juridique* (1960), 93; G. Abi-Saab, 'Les sources du droit international. Essai de déconstruction', in M. Rama-Montaldo (ed.), *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (1994), 29, 40.

<sup>86</sup> I have studied that phenomenon in greater depth elsewhere. See d'Aspremont, *supra* note 84, 1075.

<sup>87</sup> K. W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 3, 421.

<sup>88</sup> P.-M. Dupuy, 'Soft Law and the International Law of the Environment', 12 *Michigan Journal of International Law* (1990-1991), 420, esp. 424.

<sup>89</sup> J. Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law', 70 *Nordic Journal of International Law* (2001) 3, 403.

<sup>90</sup> O. Yoshida, 'Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions', 95 *Colorado Journal of Environmental Law & Policy* (1999) 1, 95; Boyle, *supra* note 4, esp. 909.

a critical legal perspective – international legal arguments have too.<sup>91</sup> The general concept of softness – especially the softness of the instrument (*instrumentum*) in which international legal rules are contained – originated in the above-mentioned presupposition that law’s binary nature is ill-suited to accommodate the growing complexity of contemporary international relations and that international law contains a very large grey zone where there is no need to define law and non-law.<sup>92</sup> Norms enshrined in soft instruments, e.g. political declarations, codes of conducts and gentlemen’s agreements, are considered as part of this continuum between law and non-law. In the traditional theory of the sources of international law, norms enshrined in a non-legal instrument (i.e. those norms with soft *instrumentum*) can still have legal effect. For instance, they can partake in the *internationalization of the subject-matter*,<sup>93</sup> provide guidelines for the interpretation of other legal acts<sup>94</sup> or pave the way for further subsequent practice that may one day be taken into account for the emergence of a norm of customary international law.<sup>95</sup> Yet, if formal pedigree were to be the only law-ascertainment criterion, they would simply be legal facts. Nonetheless,

<sup>91</sup> D. Kennedy, ‘The Sources of International Law’, 2 *American University Journal of International Law and Policy* (*American University International Law Review*) (1987) 1, 1, esp. 20-22.

<sup>92</sup> On this point see particularly L. Blutman, ‘In the Trap of a Legal Metaphor: International Soft Law’, 59 *International and Comparative Law Quarterly* (2010) 3, 605, 613-614.

<sup>93</sup> On this question, see J. Verhoeven, ‘Non-intervention: affaires intérieures ou ‘vie privée’?’, in *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du développement* (1991), 493-500; R. Kolb, ‘Du domaine réservé – Réflexions sur la théorie de la compétence nationale’, 110 *Revue Générale de Droit International Public* (2006) 3, 597, 609-610; B. Sloan, ‘General Assembly Resolutions Revisited (Forty Years Later)’, 58 *British Yearbook of International Law* (1987) 39, 124.

<sup>94</sup> See A. Aust, ‘The Theory and Practice of Informal International Instruments’, 35 *International and Comparative Law Quarterly* (1986) 4, 787; R. J. Dupuy, ‘Declaratory Law and Programmatic Law: From Revolutionary Custom to ‘Soft Law’’, in R. J. Akkerman *et al.* (eds), *Declarations of Principles. A Quest for Universal Peace* (1977), 247, 255. U. Fastenrath, ‘Relative Normativity in International Law’, 4 *European Journal of International Law* (1993) 1, 305. See Schachter, *supra* note 6, 296.

<sup>95</sup> This is, for instance, the intention of Article 19 of the ILC articles on Diplomatic Protection on the “recommended practice” by States, see General Assembly, Report of the International Law Commission, UN Doc. Supplement No. 10 (A/61/10), 1 May-9 June and 3 July-11 August 2006.

the international legal scholarship has adopted a strong tendency to construe these legal facts as law.<sup>96</sup> The softness inherent in the growingly accepted idea of a grey zone and the elevation of the norms enshrined in non-legal instruments – which are at best legal facts – into international legal rules reinforce the current deformalization of the ascertainment of international legal rules described in the previous section.<sup>97</sup> Softness can thus be seen as constituting an integral part of the contemporary deformalization of international law-ascertainment.<sup>98</sup>

#### D. Multiple Agendas of Deformalization

This section seeks to demonstrate that the abovementioned manifestations of the deformalization of law-ascertainment are informed by very different agendas.<sup>99</sup> Interestingly, similar conceptions of law-ascertainment sometimes serve contradictory agendas. This is well-

<sup>96</sup> A. Boyle & C. Chinkin, *The Making of International Law* (2007), 211-229; V. Lowe, *International Law* (2007), 96-97; A. T. Guzman, 'The Design of International Agreements', 16 *European Journal of International Law* (2005) 4, 579. Pellet has hinted at the idea of a "degrade normatif", A. Pellet, 'Le 'bon droit' et l'ivraie – plaidoyer pour l'ivraie' in *Mélanges offerts à Charles Chaumont, Le droit des peuples à disposer d'eux-mêmes. Méthodes d'analyse du droit international* (1984), 465, esp. 488. See also G. Abi-Saab, 'Eloge du 'droit assourdi'', in E. Bruylant, *Nouveaux itinéraires en droit: Hommage à François Rigaux* (1998) 59, 62-63; Baxter, *supra* note 6, 549; R. Ida, 'Formation des norms internationaux dans un monde en mutation. Critique de la notion de Soft Law', in *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du développement* (1991), 333, 336; M. Virally, 'La distinction entre texts internationaux de portée juridique et texts internationaux dépourvus de portée juridique, Rapport provisoire à l'Institut de droit international', 60 *Annuaire de L'Institut de Droit International* (1983), 166, 244; O. Elias & C. Lim, 'General principles of law', 'soft' law and the identification of international law', 28 *Netherlands Yearbook of International Law* (1997), 3, 45.

<sup>97</sup> C. M. Chinkin, 'The Challenge to Soft Law, Development and Change in International Law', 38 *International and Comparative Law Quarterly* (1989) 4, 850, 865.

<sup>98</sup> I have expounded on the idea of softness of international law elsewhere. See d'Aspremont, *supra* note 84, 1075. See also J. d'Aspremont, 'Les dispositions nonnormatives des actes juridiques conventionnels à la lumière de la jurisprudence de la cour internationale de justice', 36 *Revue Belge de Droit International* (2003) 2, 496.

<sup>99</sup> I have mentioned some of these agendas in previous works, d'Aspremont, *supra* note 84, 1075. See also J. d'Aspremont, 'La doctrine du droit international et la tentation d'une juridicisation sans limite', 112 *Revue Générale de Droit International Public* (2008) 4, 849.

illustrated by the use of effect- (or impact-) based approaches by some of the abovementioned scholars and behavioral approaches defended by (neo-) realists who, although resorting to somewhat comparable approaches to law-identification, pursue radically different aims. The following paragraphs do not seek to identify the motive behind the various understandings of law-ascertainment and mentioned in this chapter. I only sketch some of the main objectives that scholars may be – sometimes unconsciously – pursuing by deformalizing the ascertainment of international legal rules.

Although both ideas share some common characteristics, presentation of the deformalization's agenda of law-ascertainment attempted in the following paragraph takes an external point of view. It does not deal with the motives influencing the behavior of international actors engaged in international norm-making processes and those behind their choices regarding the nature of the norm which they seek to create.<sup>100</sup> Mention is made here of the attempts to programme the future development of international law (I), expand international law (II), promote accountability mechanisms (III), unearth new legal materials worth of legal studies (IV), devise innovative legal arguments for adjudicative purposes (V) as well as promote legal pluralism (VI).

## I. Programming the Future Development of International Law

The most common driving force behind the deformalization of law-ascertainment is probably what could be called the *programmatic* character of the use of informal law-ascertainment criteria.<sup>101</sup> I hereby refer to international lawyers' use of informal criteria for law-identification with the hope of contributing to the subsequent emergence of new rules in the *lex*

<sup>100</sup> On the reasons why international actors prefer soft law to hard law and vice-versa, see gen. H. Hillgenberg, 'A Fresh Look at Soft Law', 10 *European Journal of International Law* (1999) 3, 499, 501-502; See also the insightful three-tiered analysis of K. Raustiala, 'Form and Substance in International Agreements', 99 *American Journal of International Law* (2005) 3, 581, 591-601; D. Carreau, *Droit International*, 8th ed. (2004), 205; G. Shaffer & M. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance', 94 *Minnesota Law Review* (2010) 3, 706, 717-721.

<sup>101</sup> This argument has also been made by Blutman, *supra* note 92, 617-618. In the same vein, see M. Reisman, 'Soft Law and Law Jobs', 2 *Journal of International Dispute Settlement* (2011) 1, 25, 25-26.



*lata*. In mind are the identification of rules which although not strictly speaking legal rules are seen as constituting an experimentation ground for futures legal rules whose emergence is deemed desirable.<sup>102</sup> In this case, the resort to non-formal law-ascertainment is meant to be conducive to the subsequent emergence of new rules. This programmatic attitude is widespread in the field of human rights law and environmental law.<sup>103</sup>

## II. Promoting the Expansion of International Law

Laying the foundation for the construction of formally ascertainable future rules is not the only driving force behind the abovementioned deformalization of law-ascertainment. The latter is also widely informed by the idea that international law is inherently good and should therefore be expanded. International lawyers tend to consider that any international legal rule is better than no rule at all and that the development of international law should be promoted as such.<sup>104</sup> This faith in the added value of international law in comparison to other social norms is often accompanied by the belief that the cost for non-compliance necessarily outweighs the benefit thereof. Seen in this light, international law is envisaged as an essential element of any institutionalized form of an international community,<sup>105</sup> and any new legal rule is deemed a step away from the anarchical state of nature towards a greater integration of that community.<sup>106</sup> Accordingly, deformalizing

<sup>102</sup> For an avowed programmatic use of soft law and customary international law, see R.-J. Dupuy, 'Droit déclaratoire et droit programmatoire de la coutume sauvage a la 'soft law', in Société française pour le droit international (ed.), *L'élaboration du droit international public, Colloque de Toulouse* (1975) 132; see also Pellet, *supra* note 6, 415; Fastenrath, *supra* note 94, 324; See also F. Sindico, 'Soft Law and the Elusive Quest for Sustainable Global Governance', 19 *Leiden Journal of International Law* (2006) 3, 829, 836.

<sup>103</sup> See e.g. A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', 12 *Australian Yearbook of International Law* (1988-1989) 22, 47.

<sup>104</sup> This was insightfully highlighted by J. Klabbers, 'The Undesirability of Soft Law', 67 *Nordic Journal of International Law* (1998) 4, 381, 383.

<sup>105</sup> See e.g. G. Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law', 92 *Collected Courses of the Hague Academy of International Law* (1957) 2, 1, 38; Abi-Saab, *supra* note 81, 45.

<sup>106</sup> On the various dimensions of this enthusiasm for the international, see D. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', 4 *Transnational Legal and Contemporary Problems* (1994), 329, 336; See also S. Marks, *The Riddle of All Constitutions* (2003), 146.

international law-ascertainment is seen as instrumental in expanding the realm of the international community with a view to ensuring what is seen as progress.<sup>107</sup> While the idea that international law is necessarily good and should be preferred to non-legal means of regulation can be seriously questioned, it helps explain how the use of non-formal international law-ascertainment has turned into a tool to expand international law. Using informal law-identification criteria is yet another strategy that complements the existing interpretative instruments developed by international lawyers to expand international law.<sup>108</sup>

### III. Accountability for the Exercise of Public Authority

As previously stated, most of today's international normative activity unfolds outside the traditional framework of international law, generating norms which, according to the traditional law-ascertainment criteria of mainstream theory of the sources of international law, do not qualify as international legal rules. It is by virtue of a preoccupation for the accountability deficit generated by the sweeping impact that such norms could bear on international and national actors, that international legal scholars have nonetheless tried to incorporate these new phenomena into the discipline of international legal studies. Encapsulating these new normative phenomena has required the use of informal law-ascertainment. Some of them have even been exclusively focused on this pluralization of norm-making at the international level with a view to designing instruments addressing this accountability deficit. While American liberal scholars and their interest in governmental networks may have been the first to seriously engage in such an endeavor,<sup>109</sup> they were quickly followed by others, such

<sup>107</sup> On the idea of progress see T. Skouteris, *The Notion of Progress in International Law Discourse* (LEI Universiteit Leiden 2008), chapter 3, later published as *The Notion of Progress in International Law Discourse* (The Hague: T.M.C. Asser Press, 2010).

<sup>108</sup> On the use of treaty interpretation to expand international law, see L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', 21 *European Journal of International Law* (2010) 3, 585.

<sup>109</sup> See e.g. Slaughter, *supra* note 1. See also A.-M. Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', 24 *Michigan Journal of International Law* (2003) 4, 1041.

as NYU's Global Administrative Law<sup>110</sup> and the Max Planck Institute's study of the International Exercise of International Public Authority'.<sup>111</sup> Whilst, strictly speaking, the latter do not concentrate on traditional international legal rules, they typify informal law-ascertainment criteria as part of an endeavor to address accountability deficit.

#### IV. A Self-Serving Quest for New Legal Materials

Deformalization of law-ascertainment also stems from international scholar's – conscious or unconscious – quest to *stretch the frontiers of their own discipline*. In that sense, deformalization of law-identification could be a means to alleviate the unease that has followed the sweeping changes in international legal scholarship. Indeed, there is no doubt today that international law has acquired an unprecedented importance in legal discourse and has proven to be an indispensable component of legal studies. Hence, universities and research institutes have significantly increased the number of staff charged with teaching and research in the field of international law. At the same time, many people have “discovered” their calling for international law. International law is now studied to an unprecedented extent. As a result, the international legal scholarship has mushroomed, and the number of research projects and publications on international law has soared. We presently face a proliferation of international legal thinking.<sup>112</sup> Although this may be viewed as an encouraging development that should be celebrated,<sup>113</sup> it has not come about without problems. Because of an abundance of scholars, it is much harder for each to find his or her *niche* in order to distinguish him- or herself. As a

<sup>110</sup> See Kingsbury, Krisch & Steward, *supra* note 70, 29; Harlow, *supra* note 70, 197-214; Kingsbury, *supra* note 70, 23-57.

<sup>111</sup> See also Goldmann, *supra* note 63, 1865 and von Bogdandy, Dann & Goldmann, *supra* note 63, 1375.

<sup>112</sup> This is why I have expounded on in J. d'Aspremont, 'Softness in International Law: A Rejoinder to Tony D'Amato', 20 *European Journal of International Law* (2009) 3, 911. See also d'Aspremont, *supra* note 99. See also Raustiala, *supra* note 100, 582 (he contends that 'pledges are smuggled in into the international lawyer's repertoire by dubbing them soft law').

<sup>113</sup> The variety and richness of scholarly opinions is often seen as one positive consequence of the unforeseen development of legal scholarship. See the remarks of B. Stephens on the occasion of the panel on "Scholars in the Construction and Critique of International Law" held on the occasion of the 2000 ASIL meeting, 94 *ASIL Proceedings* (2000), 317. 318.

result, there are fewer unexplored fields and less room for original findings that are sometimes demanded by incongruous institutional constraints, if not by vanity.<sup>114</sup> Consequently, it is now much harder to make a significant contribution to the field than at the infancy of international legal thinking. The greater hurdle to finding a niche has placed scholars into more aggressive competition with each other, and ignited a feeling of constriction as if their field of study is too small to accommodate all of them. This battle within the profession has simultaneously been fostered by a battle among professions and, particularly the growing interest of non-legal disciplines for subjects traditionally exclusive to legal scholarship.<sup>115</sup> Against that backdrop, many scholars have chosen to advocate for classical international law's expansion by "legalizing" phenomena outside of international law with informal law-ascertainment criteria. The use of informal law-ascertainment criteria, in this context, has helped scholars find new subject material and open new avenues for legal research.<sup>116</sup>

## V. Creative Argumentation Before Adjudicative Bodies

Reference is also made to the abiding and inextricable inclinations of advocates and counsels in international judicial proceedings to take liberty with the theory of the sources of international law.<sup>117</sup> To them, formal law-ascertainment frustrates creativity.<sup>118</sup> Deformalizing law-ascertainment conversely grants them leeway to stretch the limits of international law and

<sup>114</sup> See contra Kennedy, *supra* note 106, 370.

<sup>115</sup> On the battle for controlling the production of discourse, see gen. M. Foucault, 'The Order of Discourse', in R. Young (ed.), *Untying the Text: a Post-Structuralist Reader* (1981), 48, 52.

<sup>116</sup> For an illustration of that phenomenon, see e.g. D. Johnston, 'Theory, Consent and the Law of Treaties: A Cross-Disciplinary Perspective', 12 *Australian Yearbook of International Law* (1988-1989), 109.

<sup>117</sup> See gen. S. Rosenne, 'International Court of Justice: Practice Direction on Agents, Counsel and Advocates', in S. Rosenne (ed.), *Essays on International Law and Practice* (2007), 97; J.-P. Cot, 'Appearing 'for' or 'on behalf of' a State: the Role of Private Counsel before International Tribunals', in N. Ando, E. McWhinney, R. Wolfrum *et al.* (eds), *Liber Amicorum Judge Shigeru Oda*, Vol. 2 (2002), 835; J. P. W. Temminck Tuinstra, *Defence Counsel in International Criminal Law* (2009); U. Draetta, 'The Role of In-House Counsel in International Arbitration', 75 *Arbitration* (2009), 470-480.

<sup>118</sup> Interestingly, the same argument has been made as far as legal scholars are concerned. See Brunnée & Toope, *supra* note 4, 65.

unearth rules that support the position of the actor which they represent.<sup>119</sup> The use of informal law-ascertainment criteria thus offers more freedom for creative argumentation before adjudicative bodies. This tendency – which bears resemblance with the aforementioned inclination to nurture the development of international law or to promote the expansion thereof – does not appear to conflict with the profession's standards of conduct.<sup>120</sup> It usually manifests itself in cases where applicable rules are scarce.<sup>121</sup> It commonly materializes in the invocation of soft legal rules or the use of a very liberal ascertainment of custom and general principles of law.

## VI. The Promotion of Legal Pluralism

Legal forms, including formal ascertainment indicators, are often perceived as preventing rules from evolving and adapting to unforeseen situations, notably the abovementioned challenges posed by the growing pluralization of international norm-making and the increasing number of informal exercises of public authority at the international level. If legal pluralism is understood as eschewing legal uniformity and a common framework of identification,<sup>122</sup> the preservation of formal indicators for international law-ascertainment purposes appears to be at odds with legal pluralism.<sup>123</sup> In that sense, deformalization is meant to enable the

<sup>119</sup> I owe this argument to an interesting discussion with Alan Boyle.

<sup>120</sup> The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals* (27 September 2010) available at [http://www.ucl.ac.uk/laws/cict/docs/Hague\\_Sept2010.pdf](http://www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf) (last visited 29 August 2011); see also Jan Paulsson, 'Standards of conduct for counsel in international arbitration', 3 *American Review of International Arbitration* (1992), 214-222.

<sup>121</sup> For a recent example, see e.g. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 132-142.

<sup>122</sup> On the multiple meanings of legal pluralism, see N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (2010), 71-78.

<sup>123</sup> See, however, on the possibility to withhold a rule of recognition and safeguard pluralism, S. Besson, 'Theorizing the Sources of International Law', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 163, 184; W. Twining, 'Implications of 'Globalisation' for Law as a Discipline', in A. Halpin & V. Roeben (eds), *Theorising the Global Legal Order* (2009), 44-45. On the specific question whether Hart's theory can sustain legal pluralism, see J. Waldron, 'Legal Pluralism and the Contrast Between Hart's Jurisprudence and Fuller's', in P. Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (2010), 135-155 and

development of a more pluralistic discipline that better reflects with the pluralistic international society.<sup>124</sup>

## E. The Cost of Deformalization

The foregoing has shown that international lawyers have found a formidable instrument in deformalization, allowing them to steer the future development of international law, expand international law, promote accountability mechanisms, devise innovative legal arguments for adjudicative purposes or ensure greater pluralism. Yet, deformalization does not come without costs, some of which are well known in studies on customary international law and treaty law. The following paragraphs briefly sketch out the main perils associated with deformalization and, in particular, its cost for the normative character and authority of international law (I), the significance of scholarly debate (II), the feasibility of a critique (III) and the international rule of law (IV). Others possible ramifications are also mentioned (V).

### I. Eroding the Normative Character and Authority of International Law

Deformalization of law-ascertainment first comes with a high price in terms of normative character of international law. It is widely accepted that some elementary formal law-ascertainment in international law is *a necessary condition to preserve the normative character of international law*, and the greater difficulty of identifying international legal rules that accompanies the forsaking of formal law-ascertainment prevents such rules from providing for meaningful commands.<sup>125</sup> In the absence of these

M. Davies, 'The Politics of Defining Law', in P. Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (2010), 157-167.

<sup>124</sup> For an example, Krisch, *supra* note 122, 11-12 and 69-105.

<sup>125</sup> In the same vein, see H. L. A. Hart, *The Concept of Law*, 2nd ed. (1997), 124. Hart borrows from J.L. Austin the speech-act theory and the claims of the latter regarding the performative function of language, a notion that can be understood in Hart's view by recognizing that "given a background of rules or conventions which provide that if a person says certain words then certain other rules shall be brought into operation, this determines the function, or in a broad sense, the meaning of the words in question". See H. L. A. Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence', in *Hart's collected Essays in Jurisprudence and Philosophy* (1983), 265, 274-276.

elementary formal standards of identification – a result of deformalization – actors are less able to anticipate, and thus adapt to, the consequences (or lack thereof) of the rule in question. Likewise, short of any formal law-ascertainment criteria, law-applying authorities will be at pain to evidence the applicable law in cases before them, which will further reduce the ability of actors to anticipate the consequences (or lack thereof) of the relevant rules. As a matter of consequence, the rule that cannot be clearly ascertained will fall short of altering the behavior of its adherents.<sup>126</sup> This is why it is argued here that deformalization and its accompanying heightened difficulty in distinguishing law from non-law can debilitate the normative character of international legal rules. Normativity's preservation is not only doctrinally important<sup>127</sup> as it fundamentally bears upon the ability of international law to fulfill most of the functions assigned to it.<sup>128</sup> Indeed, many of the functions that can be assigned to international law<sup>129</sup> – and I do not want to

<sup>126</sup> J. Hathaway, 'American Defender of Democratic Legitimacy' 11 *European Journal of International Law* (2000) 1, 121, 128-129. Although he embraces a relative normativity, M. Goldmann also pleads for some formalization in the identification of alternative instruments of law with a view to preserving its normative character. See Goldmann, *supra* note 63, 1865, 1879 ("The operator with an internal perspective cannot wait until the instrument causes certain effects, is being complied with or not, before he or she makes a judgment about its legal quality that will allow him or her to determine the conditions for its validity and legality [...]. Only by way of formal criteria the operator within a legal system may anticipate the legal quality of the instrument he or she intends to adopt and apply the legal regime provided by international institutional law for instruments of this kind. Formal criteria would enable the identification and classification of an instrument before its 'normative ripples'").

<sup>127</sup> For an account of the necessity of preserving law-ascertainment for reasons pertaining to the preservation of international law as a proper field of study, see Kratochwil, *supra* note 4, 205.

<sup>128</sup> D. Lefkowitz, 'The Sources of International Law: Some Philosophical Reflections', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010) 187, 195. For a review of some of the most important functions that international law can play, see D. M. Johnston, 'Functionalism in the Theory of International Law', 26 *Canadian Yearbook of International Law* (1988) 3, 25.

<sup>129</sup> In that sense my argument also departs from that of Prosper Weil (see P. Weil, 'Towards Relative Normativity in International Law', 77 *American Journal of International Law* (1983), 413, 420-421) and bears some limited resemblance with that of M. Koskenniemi (M. Koskenniemi, 'What is International Law For?', in M. Evans (ed.), *International Law*, 2nd ed. (2006), 57. For a rebuttal of the idea that Koskenniemi expresses a total disinterest for the question of the functions of international law, see J. Beckett, 'Countering Uncertainty and Ending Up/Down

prejudge any of them here – presuppose that international law retains sufficient meaning to be capable of guiding the actors subject to it. Ultimately, normativity ought to be supported if international law is to retain some *authority*.<sup>130</sup>

## II. International Legal Scholars Talking Past Each Other

The current embrace of deformalization in international legal scholarship is not foreign to the growing cacophony in contemporary scholarly debates in the field of international law. Indeed, nowadays, international legal scholars often talk past each other.<sup>131</sup> It is as if the international legal scholarship had turned into a cluster of different scholarly communities, each of them using different criteria for the ascertainment of international legal rules. The use of formal standards to ascertain international legal rules, which does not do away with the rules' inevitable indeterminacy, helps to preserve the significance of scholarly debates about international law and prevent them from becoming a henhouse or a tower of Babel. Deformalization, to the contrary, hinders the existence of a common language among scholars, thereby making it difficult to scholars to debate about the exact same object.

Arguments: Prolegomena to a Response to NAIL', 16 *European Journal of International Law* (2005) 2, 213.

<sup>130</sup> In the same sense, Danilenko, *supra* note 38, 21. Although he phrased it in terms of effectiveness, A. Orakhelashvili seems to be of the same opinion. See Orakhelashvili, *International Law*, *supra* note 22, 51. S. Besson is more reserved as to the impact of sources of international law on the authority of international Legal rules – a debate she phrases in terms of 'normativity'. She however recognizes that validity – a debate she phrases in terms of 'legality' – is an important part of the legitimacy of international law. See S. Besson, *supra* note 123, 174 and 180. Although contending that formal law-identification is insufficient to ensure the authority of international law, J. Brunnée and S. J. Toope argues that the distinction between law and non-law is fundamental to preserve it. See J. Brunnée & S. J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010), 46.

<sup>131</sup> I already made this point in J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato', 20 *European Journal of International Law* (2009) 3, 911-917. See also J. d'Aspremont, 'La doctrine du droit international face à la tentation d'une juridicisation sans limites', 112 *Revue Générale de Droit International Public* (2008), 849-866.



### III. Frustrating the Possibility of a Critique of International Legal Rules

Because deformalization makes the distinction between law and non-law very elusive, it frustrates the possibility of a critique of international law. Indeed, any critique of law – whether moral, economic, political, etc. – presupposes that international rules are already ascertained. In that sense, formal law-ascertainment of international legal rules is also a prerequisite to a critique. Even though formalism in law-ascertainment does little to determinate the whole phenomenon of law – and especially the content of legal rules – and only applies to in the identification of legal rules, it enables the possibility of a critique of law in the first place. Short of any ascertainment – and, in my view, only formal law ascertainment provides a satisfactory ascertainment tool – less critique is possible due to the greater ambiguity shrouding the object of the critique itself.<sup>132</sup> It should nonetheless be made clear that, while being a prerequisite to the critique of law, formal law-ascertainment does not, however, provide for a yardstick, model or standard of evaluation for that critique. The standard of evaluation remains entirely relative, for it stems from the critique itself and not from law-ascertainment criteria.

### IV. Impairing the International Rule of Law

Deformalization does not come without impairing the sustainability of the rule of law in the legal system concerned.<sup>133</sup> Deformalization arguably does away with one of the indispensable conditions for ensuring that international law reflects the rule of law.<sup>134</sup> Indeed, for law to be a substitute

<sup>132</sup> W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009), 27; J. S. Boyle, 'Positivism, Natural Law and Disestablishment: Some Questions Raised by MacCormick's Moralistic Amoralism', 20 *Valparaiso University Law Review* (1985-1986), 55; A. Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (2007), 21.

<sup>133</sup> On the Rule of Law in international law, see gen. Société française pour le droit international, *L'Etat de droit en droit international: Colloque de Bruxelles* (2007). On the various meanings of the rule of law in the context of international law, see A. Nollkaemper, 'The Internationalized Rule of Law', 1 *Hague Journal on the Rule of Law* (2009) 1, 74-78.

<sup>134</sup> This point is irrespective of who is entitled to the rule of law. See the argument of J. Waldron according to whom States are not entitled to the rule of law. J. Waldron,

to unbridled arbitrary power, clear law-ascertaining criteria are needed.<sup>135</sup> By the same token, the inability to ascertain legal rules with sufficient certainty – the consequence of the deformalization described above – permits a high degree of subjectivity in the identification of the applicable law,<sup>136</sup> thereby allowing “adherents” to more easily manipulate the rules.<sup>137</sup> This argument is echoed by *constitutionalist* legal scholars.<sup>138</sup> International legal constitutionalist approaches presuppose the existence of some elementary formal standards to ascertain the law. According to that view, without formal law-ascertaining standards, no system can sustain the rule of law. Without necessarily espousing a constitutionalist understanding of international law,<sup>139</sup> it seems undisputable that the rule of law cannot be realized without some elementary law-ascertaining standards. The ascertainment-avoidance strategies that some States deliberately engage to preserve their freedom of action<sup>140</sup> – which allows some glaring manipulations of international legal rules – is blatantly obvious in the case

‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’, *NYU Public Law and Legal Theory Research Paper No. 90-01* (5 January 2009) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323383](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323383) (last visited 10 August 2011), 2. See the reaction of A. Somek, ‘Defective Law’, 5, *University of Iowa Legal Studies Research Paper No. 10-33* (16 September 2010) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1678156](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678156) (last visited 29 August 2011).

<sup>135</sup> N. Onuf, ‘The Constitution of International Society’, 5 *European Journal of International Law* (1995) 1, 1, 13; F. Schauer, ‘Formalism’, 97 *Yale Law Journal* (1998), 509; A. L. Paulus, ‘International Law After Postmodernism’, 14 *Leiden Journal of International Law* (2001), 748; B. Cheng, ‘On the Nature and Sources of International Law’, in B. Cheng (ed.), *International Law: Teaching and Practice* (1982), 203, 206; Lefkowitz, *supra* note 128, 187, 195; See also the introductory remarks of H. Charlesworth, ‘Human Rights and the Rule of Law After Conflict’, in P. Cane (ed.), *The Hart-Fuller Debate Fifty Years On* (2010), 43, 44.

<sup>136</sup> See gen. J. Raz, ‘The Rule of Law and its Virtue’, in J. Raz (ed.), *The Authority of Law – Essays on Law and Morality* (1979), 210, 215-216.

<sup>137</sup> In the same vein, see Danilenko, *supra* note 38 16-17. See also Hathaway, *supra* note 126, 121, 128-129.

<sup>138</sup> See e.g. C. Tomuschat, ‘General Course on Public International Law’, 26-29. On this aspect of constitutionalism, see the remarks of J. Klabbers, ‘Constitutionalism and the Making of International Law: Fuller’s Procedural Natural Law’, 5 *No Foundations: Journal of Extreme Legal Positivism* (2008), 84, 85 and 103.

<sup>139</sup> I have elsewhere taken distance with the constitutionalist understanding of international law. See d’Aspremont, *supra* note 5, 261-297.

<sup>140</sup> See the account made by C. Lipson of the practice of deformalization and practice and the benefits thereof. C. Lipson, ‘Why are some international agreements informal’, 45 *International Organization* (1991) 4, 495, 501.

of customary international law which, as has been discussed in section B.II, is identified by virtue of informal criteria.

## V. Other Potential Hazards of Deformalization

The question of legal systems' viability has always been a central concern of legal theory. For instance, it has been contended that a legal system whose rules are systematically left unenforced would probably grow nonviable.<sup>141</sup> This issue has also been discussed in connection with immoral rules,<sup>142</sup> especially since Hart's famous reference to the *minimum content of natural law*, which – in my view – was the object of much misunderstanding.<sup>143</sup> Likewise, the argument has been made in the literature that, short of any elementary law-ascertainment yardsticks, a legal system would prove nonviable. Indeed, formal law-ascertainment arguably contributes to the viability of the international legal system.<sup>144</sup> This position is certainly not unreasonable, for it cannot be ruled out that a legal system without any clear law-identification standards, in addition to failing to generate meaningful guidance to those subject to it, could be beset by insufficiencies affecting its viability. In that sense, deformalization, beyond a certain threshold, could put the viability of the legal system concerned at risk.

<sup>141</sup> A. D'Amato, 'What 'Counts' as Law?', in N.G. Onuf (ed.), *Law-Making in the Global Community* (1982), 83, 85-86. See B. Tamanaha's assumption that a legal system may exist despite the fact that an overwhelming majority of those subjected to the rules live in general disregard of the vast bulk of them. B. Tamanaha, *A General Jurisprudence of Law and Society* (2001), 142-148. According to Tamanaha, the requirement of general obedience does not correspond to social reality.

<sup>142</sup> In the same sense, see, D'Amato, *supra* note 22, 83, 84.

<sup>143</sup> See Hart, *supra* note 125, 193-200 and H. L. A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* (1958) 4, 593, 622-623. The reference to the minimum concept of natural law has often been the object of misunderstanding. It has, for instance, been conflated with a criterion of law-ascertainment. For an illustration of a misuse of Hart's minimum content of natural law as requiring some morality in law to be obligatory, see K. E. Himma, 'Hart and Austin Together Again for the First Time: Coercive Enforcement and Theory of Legal Obligation' (21 May 2006) available at <http://ssrn.com/abstract=727465> (last visited 29 August 2011).

<sup>144</sup> This argument has been made by C. Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law', 281 *Collected Courses* (1999), 9, 26-29; Abi-Saab, *supra* note 81, 35. See also Jennings, *supra* note 40, 3.

Deformalization could also be seen as frustrating the achievement of a *formal unity of international law*.<sup>145</sup> This concept of the unity of international law has been subject to various and divergent theories.<sup>146</sup> It is true that, if international legal rules are identified on the basis of a unified standardized pedigree, they can be seen as belonging to a single set of rules. Such a set of rules can be construed as an order or a system, the distinction between the two – more common in the French and German scholarships – depends on whether international law is not a “random collection of such norms” and whether there are “meaningful relationships between them”.<sup>147</sup> There seems to be little doubt that formal law-ascertainment is conducive to systemic unity of international law and that, in that sense, deformalization comes at the expense of that unity.

## F. The Endurance of Formalism

While we witness a deformalization at the level of law-ascertainment as described in section 2, it is noteworthy that we simultaneously see a formalism’s survival. In other words, the deformalization described above is accompanied by a consequent survival of formalism, albeit in various – and sometimes divergent – ways.

Four examples of formalism’s endurance are discussed here. Each pertains to a different type of formalism and, except for one example, is not restricted to formalism in the context of law-ascertainment. These four different illustrations suffice to show that, for some scholars, the deformalization of law-ascertainment described above is often a preliminary and provisional methodological step to expand the net with which they capture their object of study. Attention will be paid here to Global

<sup>145</sup> See gen. Dupuy, *supra* note 22, 9- 489.

<sup>146</sup> For a survey of the various conceptions of the formal unity of international law, see M. Prost, *Unitas multiplex – Les unités du droit international et la politique de la fragmentation* (2008), 149.

<sup>147</sup> See the conclusion of the Report of the ILC Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.702, 18 July 2006, 7, para. 14 (1). See also the seminal article of J. Combacau, ‘Le droit international: bric-à-brac ou système?’, 31 *Archives de philosophie du droit* (1986), 85.

Administrative Law (I), the Heidelberg project on the Exercise of International Public Authority (II), and Martti Koskenniemi's culture of formalism (III). Each of them promotes a unique incarnation of formalism not restricted to the identification of legal rules. Attention is eventually paid to a new emerging stream of international legal positivism which, while accepting descriptive models informed informal parameters, strongly advocates for the preservation of some elementary formalism in law-ascertainment and is the most direct counterpoint to the abovementioned deformalization (IV).

## I. The Return to Formalism in Global Administrative Law

Global Administrative Law, briefly examined above, embodies an expression of the current deformalization of law-making. Global Administrative Law has grown very diverse and extremely heterogeneous. It is difficult to define it accurately, for it has deliberately been left undefined. It is however not unreasonable to claim that, as has been explained earlier, Global Administrative Law, despite still resting, among others, on "formal sources" including classical sources of public international law,<sup>148</sup> espouses deformalization in the form of substantive validity (publicness)<sup>149</sup> or effect-based ascertainment of rules.<sup>150</sup> However, Global Administrative Law simultaneously remains focused on the development of institutional procedures, principles and remedies which encompass formal mechanisms of the application of Global Administrative Law.<sup>151</sup> The emerging rules it refers to encapsulate formal procedures and standards for regulatory decision-making outside traditional domestic and international frameworks,<sup>152</sup> promoting a formalization of global processes.<sup>153</sup> Whilst capturing the phenomenon at the origin of Global Administrative Law involves deformalization, its objective remains the development of formal rules and procedures.

<sup>148</sup> Kingsbury, Krisch & Stewart, *supra* note 70, 29-30.

<sup>149</sup> Kingsbury, *supra* note 70, 30 ("Only rules and institutions meeting these publicness requirements immanent in public law [...] can be regarded as law").

<sup>150</sup> Kingsbury, *supra* note 70, 25; See also *supra* C.I.

<sup>151</sup> Kingsbury, Krisch & Stewart, *supra* note 70, 27.

<sup>152</sup> S. Chesterman, 'Global Administrative Law (Working Paper for the S.T. Lee Project on Global Governance)' (9 January 2009) available at [http://lsr.nellco.org/nyu\\_plltwp/](http://lsr.nellco.org/nyu_plltwp/) 152, 4 (last visited 29 August 2011).

<sup>153</sup> In the same vein, see *id.*, 3-4.

## II. Formalism in the Heidelberg Project on the Exercise of Public Authority

As mentioned above, the Heidelberg project on the Exercise of Public Authority rests on some very subtle and elaborate forms of expectations-based norm-ascertainment models with the goal of capturing normative instruments outside the traditional international law fabric.<sup>154</sup> Yet, these scholars' ambition remains the elaboration of formal "principles of international public authority"<sup>155</sup> to foster both the effectiveness and the legitimacy of international public authority.<sup>156</sup> Their use of informal criterion has been designed to capture norms which are not international legal rules and are otherwise unidentifiable by formal criteria. Their ultimate aim remains a "legal conceptualization"<sup>157</sup> to the extent necessary to ensure that the exercise of international public authority retains its legitimacy.<sup>158</sup> In that sense, the deformalization of law-identification inherent in their attempt to capture new forms of exercises of public authority is accompanied by a reformation of those "alternative instruments" and, in the same vein as Global Administrative Law, an attempt to devise formal principles of public authority.<sup>159</sup>

## III. The "Culture of Formalism"

The critique of formalism formulated by scholars affiliated with critical legal studies and deconstructivism has primarily been directed at formalism in legal argumentation<sup>160</sup> – rather than formal law-ascertainment itself. These scholars' work has nonetheless simultaneously – and sometimes inadvertently – delivered a fundamental critique of formal law-

<sup>154</sup> See also M. Goldmann, *supra* note 63, 1865 and Bogdandy, Dann & Goldmann, *supra* note 63, 1375.

<sup>155</sup> Bogdandy, Dann & Goldmann, *supra* note 63, 1375-1400. With respect to the development of "standard instruments", see A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research field', 9 *German Law Journal* (2008) 11, 1909-1939. See Goldmann, *supra* note 63, 1865-1908.

<sup>156</sup> *Id.* 1865, 1867.

<sup>157</sup> *Id.* 1865.

<sup>158</sup> *Id.* 1867-1868.

<sup>159</sup> *Id.*

<sup>160</sup> See generally, Koskenniemi, *Apology to Utopia*, *supra* note 15. See also the remarks of Koskenniemi, *supra* note 16, 57, 69.

ascertainment models. In particular, when applied to law-ascertainment, this critique of formalism equates formal law-ascertainment criteria to a problem-solving tactic purported to avoid theoretical controversies and indeterminacy,<sup>161</sup> an attempt that has similarly failed.<sup>162</sup> As problem-solving tactics, formal law-ascertainment criteria, like formal legal argumentation, remain inextricably apologetic or utopian.<sup>163</sup> Yet, at the same time, some of these scholars have proved strong advocates of formalism. The best example of Martti Koskenniemi's "culture of formalism".

Martti Koskenniemi's plea for a "culture of formalism" is well known.<sup>164</sup> This part of his work – which is not devoid of irony – has singled him out among critical legal studies and deconstructivism because his plea is perceived as an endeavor to soften some of deconstruction's effects.<sup>165</sup> It

<sup>161</sup> M. Koskenniemi, 'Letter to the Editors of the Symposium', 93 *American Journal of International Law* (1999) 2, 351, 354.

<sup>162</sup> Skouteris, *supra* note 15. According to Skouteris, "the success of the doctrine of sources cannot be attributed to its (alleged) claim of bringing closure to the perennial questions of law making and law-ascertainment. Sources talk, however, manage to capture the fantasy of an entire profession as a means of moving forward with the discipline. The idea was that, if only one was able to devise a set of finite, universally applicable formal categories of legal norms, one would be able to end the problems of indeterminacy", Skouteris, *supra* note 15, 81.

<sup>163</sup> M. Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* (1990) 4, 20-27; D. Kennedy, 'A New Stream of International Legal Scholarship', 7 *Wisconsin International Law Journal* (1988-1989) 1, 30. On the differences between Koskenniemi's and Kennedy's denunciations of the contradictions in a formal understanding of law, see D. Kennedy, 'When Renewal Repeats: Thinking Against the Box', 32 *New York University Journal of International Law and Politics* (1999-2000) 2, 335, 407. Kennedy emphasized that Koskenniemi's account, while echoing Kennedy's earlier work, has the advantage of dynamism, for one move repeatedly from apology to utopia.

<sup>164</sup> See the famous plea of M. Koskenniemi for a culture of formalism. See Koskenniemi, *Gentle Civilizer*, *supra* note 15, 502-509. M. Koskenniemi, 'What is International Law For?', in M. Evans (ed.), *International Law*, 2nd. ed. (2006), 57, 69-70. See also M. Koskenniemi, 'Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations', in M. Byers (ed.) *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 17, 32-33.

<sup>165</sup> He has been categorized as a mild 'crit' for attempting to domesticate deconstruction. On the distinctive aspects of the critical legal project of Martti Koskenniemi, see e.g. J. A. Beckett, 'Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project', 7 *German Law Journal* (2006) 12, 1045, 1065. Such attempts to domesticate deconstruction have long been the object of criticisms in general legal theory. See e.g.

is not necessary to describe the infinite variety of strands in the scholarship affiliated to deconstructivism and critical legal studies. Yet, it is important to emphasize that the formalism in the theory of the sources of international law advocated in the present article cannot be conflated with the culture of formalism famously put forward by Martti Koskenniemi, even if both ideas share some common characteristics.

From Koskenniemi's own work and the interpretations thereof,<sup>166</sup> this culture of formalism can be understood as a "culture of resistance to power, a social practice of accountability, openness and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it"<sup>167</sup>. In particular, this culture of formalism, while still premised on the idea of an impossibility of 'the universal', represents the possibility of universal legal argumentation as it avoids the dangers of imperialism by remaining empty while preserving the opportunity for alternative voices to be heard and raise claims about the deficiencies of the law. In that sense, it is opposed to the Kantian formalism in legal argumentation and must be construed as a "regulative ideal"<sup>168</sup> or an unattainable "horizon"<sup>169</sup>. According to Koskenniemi, this culture of formalism necessarily accompanies the "critique" of law, for it protects the critique from being hijacked by those who previously instrumentalized the law to conceal their political goals while preserving the possibility of a universal debate. This is why the culture of formalism is a cornerstone of Koskenniemi's project, as it invites international lawyers, once they have laid bare the subjectivity of their claim and to focus on the universality of all legal claims.

P. Schlag, 'Le Hors de Texte, C'est Moi – The Politics of Form and the Domestication of Deconstruction', 11 *Cardozo Law Review* (1990) 5-6, 1631.

<sup>166</sup> Among others, see E. Jouannet, 'Présentation critique', in M. Koskenniemi, *La Politique du Droit International* (2007), 32-33. See also Ignacio de la Rasilladel Moral, 'Martti Koskenniemi and The Spirit of the Beehive in International Law', 10 *Global Jurist* (2010); J. von Bernstorff, 'Sisyphus was an international lawyer. On Martti Koskenniemi's "From Apology to Utopia" and the place of law in international politics', 7 *German Law Journal* (2006) 12, 1015, 1029-1031; Beckett, *supra* note 165, 1045; See also the book review of N. Tsagourias 'Martti Koskenniemi: The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960', 16 *Leiden Journal of International Law* (2003) 2, 397, 398-399.

<sup>167</sup> Koskenniemi, *The Gentle Civilizer*, *supra* note 15, 500.

<sup>168</sup> Koskenniemi, *supra* note 16, 70.

<sup>169</sup> Koskenniemi, *supra* note 167, 508.



Koskenniemi's culture of formalism – like the formalism discussed – is not a tool dictating the outcome of legal reasoning or providing ready-made solutions for political questions to which the law is applied. It is rather a practice or a communicative culture which aspires to the universality of legal arguments for equality and openness's sake. The culture of formalism is thus an “interpretative safeguard”<sup>170</sup>.

While the work of Martti Koskenniemi is aimed at spurring the critique of formal legal argumentation, it is interesting, for the sake of this paper, to note that scholars affiliated with critical legal studies and deconstructivism have themselves been advocating for the preservation of some elementary forms of formalism. Whether the culture of formalism encompasses formal law-ascertainment is another question that does not need to be addressed here.

#### IV. Post-Modern International Legal Positivism

Eventually, a few remarks must be made about a contemporary attempt – probably reflecting a “post-realist” approach<sup>171</sup> – to confront the deformalization described above head-on while accepting the descriptive virtues of deformalization. Indeed, there have been recent attempts to reanimate international legal positivism.<sup>172</sup> These scholarly enterprises cannot be lumped together with uncritical ‘orthodox’ positivist approaches, for they have included a move away from consensualism, the latter being seen as nothing more than another form of natural law. These attempts have simultaneously recognized the arbitrary character of their scholarly approach and have come to terms with the idea that positivism was only one of many ways to cognize international law. Some of their views are fundamentally value-relativist with regard to methodology and the possible content of positive regulation.<sup>173</sup> Another characteristic that they sought to

<sup>170</sup> Beckett, *supra* note 165, 1070.

<sup>171</sup> On Post-realism, see D. Kennedy, ‘A Rotation in Contemporary Legal Scholarship’, 12 *German Law Journal* (2011) 1, 338, 346-350.

<sup>172</sup> See J. d’Aspremont & J. Kammerhofer (eds), *International Legal Positivism in a Postmodern World* (2012); J. Kammerhofer, *Uncertainty in International Law. A Kelsenian perspective*, (2010); d’Aspremont, *supra* note 30 See also Olivier Corten, *Pour un positivisme critique* (2008).

<sup>173</sup> d’Aspremont, *supra* note 5, 261-297.

address is the illusion of formalism which shrouds the mainstream theory of the sources of international law,<sup>174</sup> also discussed in this article.<sup>175</sup> Some of these scholars have also recognized the benefits of the insights of TWAIL and feminist critiques as well as the studies on the dialogue between law-applying authorities, especially since these works can be used to contribute to the clarification of ascertainment's mechanisms of international rules.

Of particular interest for the argument made is that this new generation of international legal positivists has come to accept the relevance of a few deformalized models of cognition for the sake of describing some of the processes of law. To them, static formalism in itself does not provide any satisfactory descriptive framework to capture these new forms of exercise of public authority. They accordingly accept that deformalization may be a necessary step to make sense of a reality unable to be fully captured with formal categories.<sup>176</sup> In their opinion, law can also be considered a process, and law-making processes can be diverse and include different actors.<sup>177</sup> Yet, in their attempt to cognize the rules of the international legal system, some of these scholars have attempted to propose a counterpoint to the deformalization described in this article. Indeed, they suggest that the international legal order is identified through formal criteria enshrined in the rules on law-making (the 'sources of law'), albeit in a different way than the current model offered by the mainstream theory of sources.<sup>178</sup> They have maintained the theory of sources at the center of their modes of cognition of law, thereby claiming that the rules of the international legal system ought to be ascertained via the formal pedigree defined by a theory of sources. In that sense, they have distanced themselves from the project on Global Administrative Law and the International Exercise of Public Authority where the formal ascertainment found in the theory of sources is preliminarily discarded in order to capture as much as possible these new forms of the exercise of public authority. It is noteworthy

<sup>174</sup> This has partly been the ambition of section 1 of this article. For an in-depth analysis of the illusions of formalism permeating the traditional theory of sources, see d'Aspremont, *supra* note 30, especially chapter 7.

<sup>175</sup> See *supra* B.II.

<sup>176</sup> For an example, see d'Aspremont, *supra* note 7, 1.

<sup>177</sup> See gen. J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011).

<sup>178</sup> See d'Aspremont, *supra* note 30.

that, by elevating the theory of sources into the cornerstone of the cognition of law, many, but not all,<sup>179</sup> of these authors have embraced a rejuvenated Hartian social thesis,<sup>180</sup> according to which the meaning of formal pedigree indicators are found in the practice of law-applying authorities broadly defined, and not exclusively restricted to judicial bodies.<sup>181</sup> The conclusions drawn from their theory are applicable to new forms of exercises of public authority at the international level, for, in their view, the pluralization of international norm-making, including the deformalization of norm-making processes themselves, need not accompany a deformalization of norm-ascertainment.

It is probably not the place for further elaboration on the emergence of such a refreshed form of international legal positivism. The latter is still in its infancy and too disparate to constitute a new coherent and identifiable stream. Moreover, the description thereof is being attempted elsewhere<sup>182</sup> and it would be of no avail to engage in it here. This being said, it will not have gone unnoticed that the argument made in this article reverberates the very same posture in terms of formalism and, accordingly, can be seen as constituting itself an expression of this new form of legal positivism in the contemporary modes of cognition of international law. At the heart thereof lies the exact same conviction that formalism in law-ascertainment remains an indispensable tool to understand the growingly complex reality of the international society.

<sup>179</sup> This posture has not been espoused by all of them. See e.g. J. Kammerhofer, *Uncertainty in International Law. A Kelsenian Perspective* (2010), 226 (who argues that the social thesis presupposes the same type of absolute and external standard as naturel law does).

<sup>180</sup> See d'Aspremont, *supra* note 30, especially chapter 7; See also Besson, *supra* note 123, 180-181.

<sup>181</sup> In this respect, their work has been informed by the insights of B. Tamanaha, *A General Jurisprudence of Law and Society* (2001).

<sup>182</sup> See. J. d'Aspremont & J. Kammerhofer (eds), *International Legal Positivism in a Post-modern World* (2012).

## G. Concluding Remarks: the Political Choice for Deformalization

International law's construction and disambiguation fundamentally boil down to a political decision, based on the political stakes associated with each mode of disambiguation,<sup>183</sup> especially given that no authority can decisively clinch such a debate,<sup>184</sup> Accordingly, maintaining or rejecting formalism at the level of law-ascertainment is only one of several political options available to international lawyers. It has not been the intent of this article to advocate or to reject deformalization.<sup>185</sup> Its sole objective has been to show that deformalization, for the reasons mentioned above, is prevalent in the contemporary international legal scholarship. This article has simultaneously sought to show that this deformalization is not unqualified and that various forms of formalism have endured. The strong deformalization discussed in this article thus continues to coexist with multiple forms of formalism.

The existence of such variations seems to confirm that, like formalism in legal argumentation – which, insightfully described by David Kennedy,<sup>186</sup> weathers periods of disuse before being revived – all forms of formalism undergo such fluctuations in the international legal scholarship. This seems to be true with formal law ascertainment as well. In that sense, it is entirely possible that the current deformalization of the identification of international legal rules may someday be survived by a more resilient formal law-

<sup>183</sup> L. Murphy, 'Better to see Law this Way', 83 *New York University Law Review* (2008) 4, 1104; L. Murphy, 'The Political Question of the Concept of Law', in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (2001), 371; See also L. Murphy, 'Concepts of Law', 30 *Australian Journal of Legal Philosophy* (2005), 1. See U. Scarpelli, *Qu'est-ce que le positivisme juridique* (1996), 57; F. Schauer, 'Positivism as Pariah', in R. P. George (ed.), *The Autonomy of Law: Essays of Legal Positivism* (1996), 31, 34; J. Waldron, 'Normative (or Ethical) Positivism', in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001), 410, 411-433; J. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', 12 *European Journal of International Law* (2001) 4, 627, 648; Beckett, *supra* note 129, 214-219.

<sup>184</sup> Kingsbury, *supra* note 70, 23, 26.

<sup>185</sup> This is something I have attempted elsewhere. See d'Aspremont, *supra* note 30.

<sup>186</sup> Kennedy, *supra* note 163, 335. It is interesting to note that such a finding had already been made by Hart. See Hart, *supra* note 125, 130.

ascertainment. At the same time this does not foreclose the possibility of the exact opposite. In fact, because of the growing pluralization of international law-making and the new exercises of public authority at the international level, it is equally possible that deformalization will continue unabated. It is probably hard (and useless to try) to predict the directions of such future trends. What matters now is that the movements of this pendulum – which are ultimately determined by international legal scholars' own conceptual choices – is more systematically informed by sufficient critical distance. Indeed, as this article has tried to demonstrate, deformalization is not a benign tool. It must be wielded with care.

## The Myth of ‘International Crimes’: Dialectics and International Criminal Law

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## Abstract

The label of 'international crime' for genocide, crimes against humanity and war crimes appears to be universally or at least widely accepted and casting doubt regarding this determination is considered a near transgression for an international (criminal) lawyer. The way international (criminal) lawyers label a crime influences the way they present it, their readers perceive it and the academic community reproduces it. Ultimately, repeated references to the presupposed 'international nature' influence the evolution of international (customary) law, blur the line between the 'international' and the 'national' and create an amalgam of wishful thinking, political aspirations, prosecutorial necessities and the evolution of substantive (criminal) law. This article scrutinizes why the current doctrine singles out a certain category of criminalized human rights abuses as 'international' and questions if genocide, crimes against humanity and war crimes should really be viewed as 'international crimes', while murder, theft or sexual abuse are largely being considered as 'national crimes' or 'ordinary crimes'. It concludes that there is no substantive reason for classifying these crimes as 'international': they are per se no threat to peace; they don't share a contextual element; war crimes and genocide are not per se determined by the scale of the abuses; implication of the state or state-like entities is typical for human rights abuses in general and not only the so-called 'international crimes'. However, common to all three crimes is the (perceived) need and wish for an international response to the commission of the crimes in question. If the State is implicated in the commission and the cover-up of some of atrocities, the 'international community' has reason to fear that accountability for and punishment of these crimes cannot be achieved on the national level. 'International prosecutions' of 'national crimes' can therefore be considered legal and legitimate under limited circumstances.



## A. Introduction: A ‘Crime Under International Law’ or an ‘International Crime’

The ‘Convention on the Prevention and Punishment of the Crime of Genocide’<sup>1</sup> (Genocide Convention) states in Art. 1: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a *crime under international law*<sup>2</sup> which they undertake to prevent and punish.” The Genocide Convention is certainly the most famous international convention declaring a behavior as a criminal offence by virtue of international law. Besides being considered as ‘crimes under international law’ genocide, crimes against humanity and war crimes – as enumerated in Art. 5 (1) (a)-(c) of the Rome Statute<sup>3</sup> – are most commonly labeled as ‘international crimes’ or as prominently laid down in the preamble of the same Statute as “the most serious crimes of concern to the international community<sup>4</sup> as a whole”<sup>5</sup>. These labels imply a powerful stigmatization and

<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, 280 [Genocide Convention].

<sup>2</sup> Emphasis added.

<sup>3</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3. [Rome Statute]. The crime of aggression will not be addressed as it is in many aspects different from the other crimes enumerated in Art. 5. Furthermore, it is acknowledged that other crimes e.g. torture, acts of terrorism or piracy are sometimes labeled as ‘international crimes’. While there is no consensus (see e.g. list provided for by A. Cassese, *International Criminal Law*, 2nd ed. (2008), 12. See also the extensive list provided for by C. Bassiouni, *Introduction to International Criminal Law* (2003), 136–226 [Bassiouni, 2003]) on the contours of the debated label – not to speak of an agreed definition (Bassiouni, 2003, 111) – it seems obvious that only a tiny part of abuses of internationally recognized human rights are commonly labeled in such a manner.

<sup>4</sup> For more information on the concept of ‘international community’ see A. Paulus, *Die Internationale Gemeinschaft im Völkerrecht* (2001).

<sup>5</sup> Sometimes those crimes are also referred to as ‘crimes against the international community’ or as ‘crimes against Peace and Security of Mankind’ as laid down in the ‘Draft Code of Crimes against the Peace and Security of Mankind’, text adopted by the International Law Commission in 1996, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf) (last visited 25 August 2011). The term ‘international crime’ appears likewise in Art. 19 of the ‘Preliminary Draft Articles on State Responsibility’ of the International Law Commission published in January 1997, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf) (last visited 25 August 2011). Since the final ‘Draft Articles on State Responsibility of Internationally wrongful acts’, published in

rightfully recall the atrocious nature of genocide, crimes against humanity and war crimes. It can be assumed – not forgetting the failure of the international community to react to the genocide in Rwanda<sup>6</sup> – that they shock the “conscience of humanity”<sup>7</sup> or, if such a notion exists, a “universal conscience”<sup>8</sup>. The label of ‘international crime’ appears to be universally or at least widely accepted and casting doubts regarding this determination is a near transgression for an international criminal lawyer.<sup>9</sup> However, why a certain category of criminalized human rights abuses is being singled out as ‘international’ while others are not should be scrutinized. One has to keep in mind that criminal law, for good reason, is most naturally conceived as being a State prerogative. Most Nation States possess a highly developed body of law, and a distinguished and highly differentiated doctrine and jurisprudence. Moreover, the lower costs involved in national prosecutions, the gathering of evidence, the hearing of witnesses, and the enforcement of the sentence clearly benefit from keeping criminal law at the national (or even regional) level.<sup>10</sup> Furthermore, the national administration of justice guarantees a more democratic legitimization<sup>11</sup> and might thereby increase

2001, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf) (last visited 25 August 2011) do not contain the term anymore this aspect will not be treated in the following.

<sup>6</sup> See R. Dallaire, *Shake Hands with the Devil* (2004).

<sup>7</sup> *Rome Statute*, Preamble.

<sup>8</sup> D. Orentlicher, ‘Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles’, 92 *Georgetown Journal of International Law* (2004) 6, 1057, 1117.

<sup>9</sup> Tallgren puts it as follows: “The unambiguously devastating quantity and quality of the suffering of the victims of serious international crimes calls for intuitive-moralistic answers, in the manner of certain things are simply wrong and ought to be punished. And this we do believe. To feel compelled nevertheless to subject also international criminal law to the question ‘why’ bears the risk of being misunderstood, the risk of being defined in terms of for or against the violence and injustice the crimes represent.” see I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’, 13 *European Journal of International Law* (2002) 3, 561, 564. C. Prittowitz even stresses a quasi-religious belief in International Criminal Law: C. Prittowitz, ‘Internationales Strafrecht: Die Zukunft einer Illusion?’, in 11 *Jahrbuch für Recht und Ethik* (2003), 469, 471. Similarly, Koskenniemi states: “[...] I often wonder to what extent international law is becoming a political theology in Europe [...]”, M. Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’ 16 *European Journal of International Law* (2005) 1, 113, 120 [Koskenniemi, 2005].

<sup>10</sup> M. Bergsmo, O. Bekou & A. Jones, ‘Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools’, 2 *Goettingen Journal of International Law* (2010) 2, 791, 800.

<sup>11</sup> Orentlicher, *supra* note 8.

acceptance of the judgments rendered.<sup>12</sup> Nevertheless and most surprisingly, the ‘international’ nature of the crimes enumerated above appears to be taken for granted. But why – apart from its emanation from international law – should genocide, crimes against humanity and war crimes be considered as ‘international crimes’, while murder, theft or sexual abuse are considered to be ‘national crimes’ or ‘ordinary crimes’?<sup>13</sup> In other words, should a behavior be labeled as an ‘international crime’ for the sole reason that States agreed to include it in an international convention? What if the community of States one day decides to universally condemn a simple theft or an armed robbery (not occurring on the high seas)? Should one then consider theft and armed robbery as ‘international crimes’? Jescheck,<sup>14</sup> the well-respected scholar of international criminal law, once advanced the following three criteria which are to be satisfied to attribute the label of ‘international crime’:

1. The criminal norm has to emanate directly from international (conventional or customary)<sup>15</sup> law;
2. There have to be provisions allowing prosecution by international courts or third States (on the basis of universal jurisdiction); and
3. The international status requires bindingness on a wide majority of States.

<sup>12</sup> See P. Schneider, ‘Menschenrechtsschutz durch Internationale Strafgerichte: Nützlich oder schädlich? Wirksam oder ineffektiv?’, in S. B. Gareis & G. Geiger (eds), *Internationaler Schutz der Menschenrechte* (2009), 81; J. N. Clark, ‘Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation’, 20 *European Journal of International Law* (2009) 2, 415, 423.

<sup>13</sup> The label of ‘ordinary crime’ is an unfortunate one as it might appear a belittlement of the crimes committed. As a contrasting label to ‘international crime’ and in line with the broader consensus it should be kept for the following discussion.

<sup>14</sup> H.-H. Jescheck, ‘International Crimes’, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume II (1992), 1119, 1120.

<sup>15</sup> Cassese recalls that the recognition of international crimes as ‘international crimes’ will in general be achieved through the creation of customary international law since ratification of international conventions rarely achieves the necessary universality; see Cassese, *supra* note 3, 12. See also C. Kreß, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*’, 4 *Journal of International Criminal Justice* (2006) 3, 561, 566 [Kreß, 2006].

These clear criteria most certainly allow for an appraisal of what is to be seen as an 'international crime' at a given moment in history. If one applies the three criteria to genocide, crimes against humanity and war crimes, those crimes would in fact rightly be seen and designated as 'international crimes'. Murder, theft or sexual abuse, on the other hand, would not merit such an 'international' label. Unfortunately, the criteria advanced by Jescheck allow only for a snapshot of what is currently high on the international agenda.<sup>16</sup> He, deliberately or not, does not advance any substantive criteria to determine which crimes merit the adjective 'international'. He leaves out which characteristic features of the *crime itself* ought to be taken into consideration. As will be shown, he merits being applauded for offering such restrictive, precise and clearly articulated contours of the label of 'international crimes'. However, there would not be any basis and need for this article if the label had always been used as cautiously as done by Jescheck. One has to notice that, while there is certainly no agreed-upon definition, the 'international' label is often (implicitly or explicitly) ascribed to genocide, crimes against humanity and war crimes for supposedly existing characteristic features "elevating" them to 'international crimes' and delimiting them from 'ordinary crimes'. It is the author's opinion that such features are non-existent and that therefore the label of 'international crime' should either be used in the strict formalistic sense advanced by Jescheck or be dismissed as misleading and unfit at least for the legal debate. Since the article cannot provide an in-depth analysis of the phenomenon of labeling in international criminal law, it will confine itself to some brief remarks. In the first part (B.), some short reflections about the importance of labeling in international law will be provided. The second part (C.) will be devoted to questions about the label of 'international crime' and the current discrepancy mentioned above. In the third part (D.), it will be advanced that turning away from the label should not be perceived as a setback since international prosecutions of crimes

<sup>16</sup> As Ratner puts it: "to entail such accountability, the international community must share a consensus on the gravity of these offences [...]", S. R. Ratner, 'The Schizophrenias of International Criminal Law', 33 *Texas International Law Journal* (1998) 2, 237, 241; Kittichaisarre proclaims: „It is the international community of nations that determines which crimes fall within this definition [referring to the broad definition of the US Military Tribunal at Nuremberg] in light of the latest developments in law, morality, and the sense of criminal justice at the relevant time", K. Kittichaisarre, *International Criminal Law* (2001), 3.

labeled as ‘national crimes’ or ‘ordinary crimes’ can be legal and legitimated. The fourth part (E.) will briefly reflect on some thorny issues in contemporary international criminal law to suggest that a change of perspective might be helpful. Still one has to acknowledge the statement made by Blutman:

“One can hardly fight against linguistic conventions as these do not necessarily obey the rules of semantics and logic, but are evolving in everyday discourse in an ‘organic’ way.”<sup>17</sup>

## B. Why Labeling Matters!

Lawyers, especially those coming from a civil law background, are – in general – not so much prone to reflect on the influence labeling and discourse can have on the evolution of the normative order. International law and especially customary international law, however, cannot be understood without appreciating how discourse affects the creation and interpretation of norms.

### I. Discourse and the International Legal Order

While legal discourse influences also the interpretation of conventional law, it is especially the creation of customary norms that is affected by scholarly and political debate. Koskenniemi rightly remarked:

“What is being put forward as significant and what gets pushed into darkness is determined by the choice of the language through which the matter is looked at, and which provides the basis for the application of a particular kind of law and legal expertise.”<sup>18</sup>

Concerning customary international law, defined by Art. 38 of the ICJ-Statute as “general practice accepted as law”, two remarks should indicate the way discursive elements play an intrinsic part in norm creation.

<sup>17</sup> L. Blutman, ‘In the Trap of a Legal Metaphor: International Soft Law’, 59 *International and Comparative Law Quarterly* (2010) 3, 605, 605.

<sup>18</sup> M. Koskenniemi, ‘The Politics of International Law – 20 Years Later’, 20 *European Journal of International Law* (2009) 1, 7, 11.

The first remark being of *de jure* relevance, the second relating to a *de facto* influence.

While every student of international law is taught that customary international law is one of the three (main) sources of international law there has always been an intensive scholarly debate on how to identify customary norms and who should be bound by them<sup>19</sup> under which conditions.<sup>20</sup> Despite the disagreement on the exact contours of what is to be perceived as customary international law some norms appear to be widely recognized as amounting to *general practice accepted as law*: the prohibition of genocide,<sup>21</sup> the prohibition of use of force,<sup>22</sup> the prohibition of torture,<sup>23</sup> or the immunity of sitting heads of State<sup>24</sup> are some prominent examples. Taking the definition advanced by the ICJ-Statute seriously, one might wonder why. How is it possible to establish a general practice as proof of a norm that demands for *abstention*?<sup>25</sup> In fact, it is the reaction to acts of genocide or torture and the expressed discontent and disapproval that serves as a (partial) proof of the customary law nature. Furthermore, one should

<sup>19</sup> Main question being the binding effect on states not consenting to a new norm but without persistently objecting to it, see J. P. Kelly, 'The Twilight of Customary International Law', 40 *Virginia Journal of International Law* (2000) 2, 449, 473 and 508. See also P. Weil, 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* (1983) 3, 413.

<sup>20</sup> See as examples: A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', 12 *Australian Year Book of International Law* (1988-1989) 22; Kelly, *supra* note 19, 449.

<sup>21</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, 43, 110, para. 161. It is even by some considered in principle as an accepted norm of *ius cogens*, see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (1988), 466.

<sup>22</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, 27, para. 34.

<sup>23</sup> *Prosecutor v. Delalić, Mucić, Delić, Landžo*, Judgment, IT-96-21-T, International Criminal Tribunal for the Former Yugoslavia, 16 November 1998, 166, para. 454.

<sup>24</sup> Concerning the parallel rule of immunity of foreign ministers see *Case concerning the Arrest Warrant of 11 April 2000, (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3, 21 para. 53 [Arrest Warrant Case].

<sup>25</sup> See also B. Simma & P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Year Book of International Law* (1988-1989) 82, 103.

take into consideration that a mere empirical observation of practice without the discursive entourage does not allow one to distinguish between a State behavior in line with a customary norm in formation and such behavior being at first glance contrary to it, but which could also be seen as an exception to the general norm in formation.<sup>26</sup> A good example is the proclaimed right to pre-emptive defense evoked in order to legitimize the 2003 Iraq intervention.<sup>27</sup> Without the discursive reference to UN SC Res. 678 (1990), pre-emptive needs and humanitarian grounds, how would it be possible to classify the American behavior? Should one consider it as an American refusal to accept the customary rule of the prohibition of the use of force or as a general acceptance of exactly this rule subject to certain exceptions (in this case permission by the Security Council, pre-emption or the so-called humanitarian intervention)? One might therefore conclude that discourse is an inherent part of the assessment of customary international law.<sup>28</sup>

But even if one refuses to widen the scope of what is to be considered as a basis for assessing customary international norms one cannot turn a blind eye to the *de facto* influence that discourse has on the evolution of customary norms. A reason for this can be seen in one of the characteristics of the evolution as described by Orentlicher:

“Strict regard for existing law would inevitably limit the ability of domestic legislatures and courts to contribute to the development of universal jurisdiction in the same way they contribute to other areas of customary international law. For it is precisely through the emergence of state practice that at first represents a departure from established norms that new rules of customary law are established.”<sup>29</sup>

<sup>26</sup> Kelly, *supra* note 19, 500. See also Simma & Alston, *supra* note 25, 97; K. F. Gärditz, ‘Ungeschriebenes Völkerrecht durch Systembildung’, 45 *Archiv des Völkerrechts* (2007) 1, 1, 27.

<sup>27</sup> See S. D. Murphy, ‘Assessing the Legality of Invading Iraq’, in 92 *Georgetown Law Journal* (2004) 2, 173, 174.

<sup>28</sup> See also International Law Association, ‘Final Report of the Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law’ (2000), available at <http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376> (last visited 25 August 2011), 14; Kreß, 2006, *supra* note 15, 573.

<sup>29</sup> Orentlicher, *supra* note 8, 1110.

A departure from established norms is a risky endeavor as the State puts itself in danger of being accused of unlawful behavior.<sup>30</sup> Such steps are consequently accompanied by a strong discourse with good arguments put forward, to avoid the impression of deliberate violation of international law. Furthermore, not only States use discourse to boost progressive law-making. Human rights activists and lawyers,<sup>31</sup> as well as international judges<sup>32</sup> are well known to push the applicable law further and further. To conclude, one might argue that discourse matters!

## II. 'International Crimes' in the International Legal Discourse

It should be noted from the outset that the label 'international crime' or its synonyms, while omnipresent in doctrine and jurisprudence, is totally absent from the specific operative parts of international conventions. Nevertheless, it seems that there have rarely been labels as influential and widely used in international legal discourse as the label of 'international crime' and its synonyms. It makes its appearance, for instance in the debate about universal jurisdiction in *absentia*,<sup>33</sup> immunity of heads of States and government,<sup>34</sup> and the legality of amnesties in case of genocide, crimes

<sup>30</sup> Gärditz, *supra* note 26, 23.

<sup>31</sup> Kelly, *supra* note 19, 469 speaking of a "messianic quest". See also remarks by K. Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences', 20 *European Journal of International Law* (2009) 2, 331, 349-353.

<sup>32</sup> M. Koskeniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 3, 553, 567: "[...] ICTY judges manifest a striking *Missionsbewusstsein* [...]".

<sup>33</sup> See references to "international crimes" in *Arrest Warrant Case*, *supra* note 24, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 50 and "crimes regarded as the most heinous by the international community", para. 60. See also M. Vajda, 'The 2009 AIDP's Resolution on Universal Jurisdiction – An Epitaph or a Revival Call?!', 10 *International Criminal Law Review* (2010) 3, 325, 331. As emblematic example see B. Kuschnik, 'Humaneness, Humankind and Crimes against Humanity', 2 *Goettingen Journal of International Law* (2010) 2, 501, 510: "[...] crimes against humanity are generally regarded as crimes, which due to their heinous nature shock the collective conscience of the peoples and therefore are of concern for the international community as a whole, *resulting* in the right for each state to prosecute crimes against humanity under the universality principle" (emphasis added).

<sup>34</sup> See reference to "international crimes" in *Arrest Warrant Case*, *supra* note 24, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 74 and Dissenting Opinion of Judge *ad hoc* van den Wyngaert, para. 27.



against humanity and war crimes.<sup>35</sup> Recently, the question of what differentiates crimes against humanity – as one example of ‘international crimes’ – from ‘ordinary crimes’ made a renewed appearance at the International Criminal Court (ICC) when Judge Kaul in a Dissenting Opinion questioned the majority opinion of the Pre-Trial Chamber I allowing further investigations into the post-election violence in Kenya.<sup>36</sup>

### C. Questioning the Label

Labels can be questioned for a multitude of reasons and from a wide variety of angles. One could look at the use of discourse as means of (western) struggle for dominance.<sup>37</sup> One could also reflect on the rising influence of non-governmental actors, like NGOs,<sup>38</sup> on international law-making and agenda-setting. Furthermore, it seems equally important to question the way a certain State’s behavior is stigmatized as genocide, the debate surrounding Darfur<sup>39</sup> or the Armenian-Turkish debate being two well-known examples.<sup>40</sup> However, for the purpose of this article, the lens through which the label is to be questioned is the so-called “*Rechtsgutstheorie*” which is central to German criminal law thinking.

#### I. The “*Rechtsgutstheorie*” as a Tool for Questioning the Label

The German “*Rechtsgutstheorie*” defines the function of criminal law as the protection of legal goods (*Rechtsgüter*). This, in German doctrine and jurisprudence widely accepted theory allows for critical reflections on what

<sup>35</sup> See e.g. G. Hafner *et al.*, ‘A Response to the American view as Presented by Ruth Wedgwood’, 10 *European Journal of International Law* (1999) 1, 108, 112.

<sup>36</sup> Dissenting Opinion Judge Kaul, as an annex to the *Decision Pursuant Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19 (Pre-Trial Chamber II), 31 March 2010, para. 10.

<sup>37</sup> See for example Koskenniemi, 2005, *supra* note 9, 123.

<sup>38</sup> See examples mentioned by Kuschnik, *supra* note 33, 503.

<sup>39</sup> See M. L. Wade, ‘Genocide: The Criminal Law between Truth and Justice’, 19 *International Criminal Justice Review* (2009) 2, 150, 154.

<sup>40</sup> See e.g. P. Boghossian, ‘The concept of genocide’, 12 *Journal of Genocide Research* (2010) 1, 69.

sorts of behavior can legitimately be criminalized.<sup>41</sup> There is undoubtedly agreement that the commission of genocide, crimes against humanity and war crimes can and should be considered as criminal offences. In this respect, the “*Rechtsgutstheorie*” does not reveal anything new. Before turning to the second aspect of the theory and for the sake of completeness one might add two brief remarks. First, the determination of a legal good is a necessary condition for criminalization but surely not sufficient. It has further to be established that the criminalization serves the protection of the respective legal good, in other words, that the purposes of punishment can be achieved.<sup>42</sup> Second, criminal law is not only focused on criminalizing direct attacks on the legal good like for instant a murder, an assault or a theft. It can also legitimately encompass behavior posing a risk to these legal goods. A classical example on the national level is the offence of “driving while under the influence of alcohol” which is considered as a (abstract) threat to life and limb of others.

For the present purposes, the second aspect of the *Rechtsgutstheorie* has to be looked at more closely. The *Rechtsgutstheorie* allows for a clearer distinction between and delimitation of different offences as each offence must be traced back to the legal good, which it serves to protect.<sup>43</sup> It can thereby be used as a lens through which the label of ‘international crime’ and the discrepancy occurring in comparison to other criminalized human rights abuses could be evaluated. The discrepancy of labels would be validated if the criminalization of genocide, crimes against humanity and war crimes serves the protection of distinct legal goods (II.) or if the legal goods are threatened in a different way (III.) than by ‘ordinary’ human rights abuses or ‘national crimes’. One general remark should be brought in at this juncture. To serve as a meaningful label for a group of crimes, the crimes labeled as ‘international’ must not only be distinguishable from the so-called ‘national crimes’. The crimes also have to share the characteristic feature(s) delimiting them from others.

<sup>41</sup> For a comprehensive overview see C. C. Lauterwein, *The Limits of Criminal Law*, (2010), 5-40.

<sup>42</sup> Concerning the difficult question which purposes of punishment are to be pursued in international criminal law and if those can be achieved see e.g. M. Damaška, ‘What is the Point of International Criminal Justice?’, 83 *Chicago-Kent Law Review* (2008) 1, 329, 331-339.

<sup>43</sup> Lauterwein, *supra* note 41, 30.

## II. The (Desperate) Search for a Distinct Legal Good

The label ‘international crime’ for genocide, crimes against humanity and war crimes is – applying the lens of the *Rechtsgutstheorie* – the correct one if it can be shown that the criminalization serves the protection of a distinct legal good.<sup>44</sup> As a starting point for the following reflections, one should glance at the preamble of the Rome Statute. Two indications in the preamble are noteworthy. Referring to “unimaginable atrocities that deeply shock the conscience of humanity” indicates that the mere extensive or atrocious nature and gravity of the crime elevates genocide, crimes against humanity and war crimes to ‘international crimes’. Second, it recognizes “that such grave crimes threaten the peace, security and well-being of the world”. To this can be added the characterization made in the Genocide Convention, examined immediately below.

### 1. ‘Great Losses on Humanity’ or ‘the Unimaginable Atrocities’

Already as early as 1948, the preamble of the Genocide Convention stated that: “*genocide has inflicted great losses on humanity*”<sup>45</sup>. Similar ideas can be found in the early work of Arendt who stated in 1963: “And, finally, and most important, there were objections to the charge itself, that Eichmann had committed crimes ‘against the Jewish People,’ instead of ‘against humanity,’ [...]”<sup>46</sup>. It has to be clearly stated from the outset that the term “humanity” is ambiguous and allows for different interpretations. This is reflected in two different German translations of the term

<sup>44</sup> See also E.-J. Lampe, *Verbrechen gegen die Menschlichkeit*, in H. J. Hirsch *et al.* (eds), *Festschrift für Günter Kohlmann zum 70. Geburtstag* (2003), 147, 155; G. Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit*, (2003), 272-273.

<sup>45</sup> Genocide Convention, *supra* note 1, Preamble, 278.

<sup>46</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (1st ed. 1963), 233. Pointing in the same direction but with a clearly dangerous connotation is the description of the perpetrators as ‘enemies of mankind’ or ‘hostis humanis’, see e.g. D. N. Nsereko, ‘The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the International Criminal Court’, 19 *Criminal Law Forum* (2008) 3-4, 373, 381.

'humanity':<sup>47</sup> The first translation being the term *Menschheit* implying reference to the collectivity of human beings. In a second sense, the term *Menschlichkeit* refers to the intrinsic human value of each individual and is thereby closely related to the concept of human dignity.<sup>48</sup>

For the sake of structuring the argument, one should start with the latter. Admittedly, the crime of genocide is in clear disrespect of human dignity and the right to individual and collective existence.<sup>49</sup> The same holds true for crimes against humanity since the acts committed, such as murder, rape or torture, are truly vicious and appalling. But can one State the same for all sorts of war crimes? Is it really degrading and inhumane to make "improper use of a flag of truce"? Besides, one has to remember that life and limb as well as human dignity are also protected by a multitude of international conventions. But does that lead us to consider despicable and clearly degrading acts such as the commission of hate crimes or acts of cannibalism as 'international crimes'. Certainly, it would not. Bassiouni<sup>50</sup> therefore rightly stated in 1986 that the penal proscriptions of war crimes, crimes against humanity, and genocide protect basic human rights.<sup>51</sup> Apparently in the same logic, Kaleck *et al.*<sup>52</sup> choose the expression "human rights crimes"<sup>53</sup>. In fact, the inhumane nature is (unfortunately) not limited to genocide, crimes against humanity and war crimes. It is a characteristic feature of a multitude of crimes. In other words, genocide, crimes against

<sup>47</sup> See H. Vest, 'Humanitätsverbrechen – Herausforderung für das Individualstrafrecht?', 113 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2001) 3, 457, 460. See also Lampe, *supra* note 44, 150; Kuschnik, *supra* note 33, 511-515.

<sup>48</sup> See also Kuschik, *supra* note 33, 509.

<sup>49</sup> See Ratner, *supra* note 16, 238; K. Ambos, *Internationales Strafrecht*, 2nd ed. (2008), 84 [Ambos, 2008]. For a discussion on the protection of collective rights in case of crimes against humanity see A. Gil Gil, 'Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Strafgerichtshofs', in 112 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2000) 2, 381, 382 (with further references).

<sup>50</sup> C. Bassiouni (ed.), *International Criminal Law, Volume I* (1st ed. 1986), 19-21. He recognized however, that an international element is necessary, without elevating this element to a distinct protected value.

<sup>51</sup> Similar Ratner, *supra* note 16, 238; C. Möller, *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte* (2000), 419.

<sup>52</sup> W. Kaleck *et al.* (eds), *International Prosecution of Human Rights Crimes* (2007).

<sup>53</sup> See also T. Smith, 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism', 39 *International Politics* (2002) 2, 175, 176.

humanity and war crimes share the inhumane nature with other crimes that one would not label ‘international crimes’.<sup>54</sup> That is why the definition for ‘international crimes’ advanced by Cassese, who defines them as: “[...] rules [...] intended to protect values considered important by the whole international community [...]”<sup>55</sup>, cannot suffice as it neither specifies from what or whom the values are to be protected nor does it explain which values ought to be in the focus.

Let us now turn to the collectivistic understanding of humanity (*Menschheit*). Such an interpretation of the term hints to a quantitative explanation of why some crimes are elevated to ‘international crimes’.<sup>56</sup> From a phenomenological viewpoint one could easily detect such a pattern of mass violence in the prominent cases at the ICTY, ICTR and nowadays at the ICC and one is thus inclined to read it into the norm itself. This pattern will certainly be more accentuated in the future due to the gravity criterion laid down in 17 (1) (d) of the Rome Statute.<sup>57</sup> It is, however, far from clear if the scale of the acts committed really forms the cornerstone of the crimes as defined in Arts 6 to 8 of the Rome Statute. While there is agreement that the incriminated act of the perpetrator does not presuppose an important quantitative dimension,<sup>58</sup> it remains ambiguous whether a massive circumstantial occurrence of similar acts is a *conditio sine qua non* or whether the pattern determines only the jurisdiction of the international court or tribunal in question. Emblematic of this distinction is Art. 8 (1) of the Rome Statute. It proclaims:

“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

<sup>54</sup> See also Kaul, *supra* note 36, para. 52; Kuschnik, *supra* note 33, 511.

<sup>55</sup> Cassese, *supra* note 3, 11.

<sup>56</sup> As a parenthesis one ought to recall that if this were the case, piracy and torture, would certainly no longer merit the international label.

<sup>57</sup> See S. SaCouto & K. Cleary, ‘The Gravity Threshold of the International Criminal Court’, 23 *American University International Law Review* (2007) 5, 807, 818.

<sup>58</sup> G. Evans, *The Responsibility to Protect* (2008), 12; G. Werle, *Völkerstrafrecht*, 2nd ed. (2007), 279; Ambos, 2008, *supra* note 49, 205; G. Fletcher, ‘The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt’, 111 *The Yale Law Journal* (2002) 7, 1499, 1525; Lampe, *supra* note 44, 156; Manske, *supra* note 44, 295; Boghossian, *supra* note 40, 71; W. Schabas, *Genocide in International Law*, 2nd ed. (2009), 179.

At first sight, one might be inclined to read Art. 8 as if it were laying down a quantitative requirement. However, Art. 8 (1) only determines and limits the jurisdiction of the court.<sup>59</sup> A single wrongful act enumerated in Art. 8 (2) in an otherwise 'clean war' can amount to a war crime.<sup>60</sup> A highly debated issue is also whether genocide is conceivable as a singular event.<sup>61</sup> Art. 2 of the Genocide Convention defines it as follows: "*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.*" The definition in Art. 6 of the Rome Statute is a verbatim copy of the original definition, as well as the definition in Art. 4 (2) of the ICTY-Statute<sup>62</sup> and Art. 2 (2) of the ICTR-Statute<sup>63</sup> and does not remove any ambiguity. The Elements of Crime supplementing the Rome Statute hint, however, in the direction of a quantitative element.<sup>64</sup> Admittedly, an expressive requirement of scale can be found in Art. 7 (1) of the Rome Statute stating that "*a widespread and systematic attack directed against*

<sup>59</sup> M. Cottier, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (1999), Art. 8, para. 9.

<sup>60</sup> Cassese, *supra* note 3, 101.

<sup>61</sup> Pro: *Prosecutor v. Jelisić*, Judgment, IT.95-10-T (Trial Chamber I), International Criminal Tribunal for the Former Yugoslavia, 14 December 1999, para. 100; A. Cassese in A. Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, (2002), 349; Ambos, 2008, *supra* note 49, 209; Werle, *supra* note 58, 286. Contra: Schabas, *supra* note 58, 246. For an overview see L. McKay, 'Characterising the System of the International Criminal Court; An Exploration of the Role of the Court Through the Elements of Crimes and the Crime of Genocide', 6 *International Criminal Law Review* (2006) 2, 257.

<sup>62</sup> *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, Annex to SC Res. 827, 25 May 1993 [ICTY-Statute].

<sup>63</sup> *Statute of the International Tribunal for Rwanda*, Annex to SC Res. 955, 8 November 1994 [ICTR-Statute].

<sup>64</sup> The Elements of crime specify Art. 6 of the Rome Statute by insisting on "a manifest pattern of similar conduct", Elements of Crimes (Art. 6) ICC-ASP/1/3(part II-B) (09.09.2002), available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (last visited 25 August 2011). See also *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-94 (Pre-Trial Chamber I), 12 July 2010, para. 13. However, it is also stated that knowledge of the manifest pattern could be dispensable.

*any civilian population*” has to occur so that murders and rapes are elevated to crimes against humanity.<sup>65</sup> Art. 7 (2) (a) specifies that “‘Attack directed against any civilization population’ means a course of conduct involving multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”. The quantitative dimension, while nowadays widely agreed upon, has not always been the characteristic feature of crimes against humanity.<sup>66</sup> In the aftermath of the Second World War, it was most prominently the close relationship with war and the crime of aggression that was emphasized as a characteristic feature of crimes against humanity. Later on, the jurisdictional threshold of the discriminatory intention gained attention. Art. 5 of the ICTY-Statute did not even evoke the scale of the acts committed and it was only the ICTY Appeals Chamber which helped to turn back the focus on the “widespread or systematic attack”-element.<sup>67</sup> What is important for the present discussion is that purely counting the number of casualties and the amount of rapes committed will take the debate nowhere.<sup>68</sup> It would be a cynical endeavor to try drawing the line between ‘international’ and ‘national’ crimes purely on the basis of the death toll (which is difficult to establish) or the number of women raped. How should one classify school massacres such as Columbine with twelve fatalities? Or how should one quantify a rape in comparison to murder?

What is therefore widely emphasized is not the numerical dimension but the circumstances of the crime or what is most commonly termed as the ‘contextual element’.<sup>69</sup> Even ignoring the fact that there is no real agreement on the contextual element of genocide, it is puzzling why one should focus on the “widespread or systematic attack” or the existence of a (non-) international armed conflict. The emphasis put on the contextual element is confusing and reflects the arbitrary manner of labeling. As has been shown on the one hand, the element of “widespread and systematic attack” comprises the repeated commission of acts regarded as illegal. On the other

<sup>65</sup> Cassese, *supra* note 3, 101.

<sup>66</sup> See R. Dixon, in Triffterer, *supra* note 59, Art. 7, para. 4. It could be argued that this element is only determining a jurisdictional threshold, see Kuschnik, *supra* note 33, 521.

<sup>67</sup> R. Dixon, in Triffterer, *supra* note 59, Art. 7, para. 5, *Prosecutor v. Tadić*, IT-94-1-A, Judgment of the Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, 15 July 1999, para. 249.

<sup>68</sup> See also Lampe, *supra* note 44, 156.

<sup>69</sup> See e.g. Schabas, *supra* note 58, 243; Werle, *supra* note 58, 39.

hand, the occurrence of an armed conflict is, while regrettable, a fact with no legal valuation. War crimes can be committed by every party to the conflict irrespective of the rules of the *ius ad bellum*.<sup>70</sup> The contextual elements for the two crimes are of a totally different nature.<sup>71</sup> In fact, if one wants to explain the international nature by pointing to the contextual element, it is absurd to pick different ones. The contextual element is not a common characteristic of all so-called 'international crimes'.

## 2. 'The Threat to Peace'

Until now, the focus has been on values or, using the terminology of the '*Rechtsgutstheorie*', legal goods attributed to individuals and while there is agreement that those values are treated with contempt, it does not distinguish so-called 'international crimes' from other criminalized human rights abuses. A much more promising approach seems therefore to focus on a distinction made by Köhler.<sup>72</sup> He rightly points out that there are on the one side legal goods accepted *by* the whole international community and on the other side legal goods accepted to be those *of* the whole international community.<sup>73</sup> The paradigmatic example for such an international legal good is 'international peace'.<sup>74</sup> Triffterer states that: "The peace and security of mankind were for a long time the only expressions summarizing the basic, inherent values of the community of nations which had to be protected in the interest of all, individuals and States alike"<sup>75</sup>. Therefore, the

<sup>70</sup> See for an interesting analysis on the implications of the *ius ad bellum* on the *ius in bello*, R. Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', 34 *Yale Journal of International Law* (2009) 1, 47 [Sloane, 2009].

<sup>71</sup> See *Prosecutor v. Tadić*, *supra* note 67, para. 251.

<sup>72</sup> M. Köhler, 'Zum Begriff des Völkerstrafrechts', 11 *Jahrbuch für Recht und Ethik*, (2003), 440. Contrary to this approach Villalpando speaks of "ethical values common to all humankind.", S. Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', 21 *European Journal of International Law* (2010) 2, 387, 407.

<sup>73</sup> See Paulus, *supra* note 4, 253.

<sup>74</sup> Also Kreß, 2006, *supra* note 15, 567 alludes to "fundamental values of the community"; Villalpando, *supra* note 72, 407.

<sup>75</sup> Triffterer, in Triffterer, *supra* note 59, preamble, para. 11. See also: Werle, *supra* note 58, 40; Ambos, 2008, *supra* note 49, 83; K. Ambos, 'Möglichkeiten und Grenzen völkerstrafrechtlichen Rechtsgüterschutzes', in F. Neubacher & A. Klein, *Vom Recht der Macht zur Macht des Rechts?* (2006), 111; Tallgren, *supra* note 9, 586.



historically articulated close connection between these crimes and their (supposedly) negative effect on international peace and security should be addressed in the following section. Anderson argues that: “international criminal law and the ICC are efforts to address the ‘unstable’ world”<sup>76</sup>. This declaration is in line with previous UN Security Council Resolutions declaring the commission of horrible crimes as ‘a threat to peace’<sup>77</sup> in accordance with Art. 39 of the UN Charter.<sup>78</sup>

In order to gain significant results, the term ‘peace’ must be employed cautiously. To assess the exact scope of the notion of ‘peace’, the UN Charter, due to its universality and quasi-constitutional character, will provide the most relevant insights. Since the ICTY and ICTR were created by virtue of the powers conferred to the UN Security Council in Chapter VII and Arts 13(b) and 16 of the Rome Statute refer to this central chapter, Art. 39 of the UN Charter – as the key for operative measures to protect ‘peace’ – has to be examined closely. As Frowein and Krisch convincingly point out, the notion of ‘peace’ in Art. 39 is strictly focused on military conflicts in an inter-state relationship thus following a narrow concept of ‘peace’.<sup>79</sup> The narrow interpretation of the notion of ‘peace’ is balanced, however, by an extensive interpretation of the notion of ‘threat to peace’.<sup>80</sup> Applying this notion one can examine whether the presumption that these crimes are to be considered as a ‘threat to peace’, is compelling. To approach this question, one clarification is to be made from the outset. There is a difference between the commission of the crime as a ‘threat to peace’ and the non-prosecution<sup>81</sup> of such crimes as a distinct ‘threat to peace’.<sup>82</sup> Unfortunately,

<sup>76</sup> Anderson, *supra* note 31, 333. See also K. Kaikobad, ‘Crimes against International Peace and Security, Acts of Terrorism and Other Serious Crimes: A Theory on Distinction and Overlap’, 7 *International Criminal Law Review* (2007) 2-3, 187, 190; Vest, *supra* note 47, 464; Bassiouni, 2003, *supra* note 3, 114.

<sup>77</sup> See M. Bothe, in W. Vitzthum (ed.), *Völkerrecht*, 5th ed. (2010), 679-81.

<sup>78</sup> Ambos, 2008, *supra* note 49, 83.

<sup>79</sup> J. Frowein & N. Krisch, in B. Simma *et al.* (eds), *The Charter of the United Nations. A Commentary*, 2nd ed., (1995), 720. See also Bothe, *supra* note 77, 681; G. Gaja, ‘Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial’, *Revue Générale de Droit International Public* (1993), 297, 301.

<sup>80</sup> It therefore seems to be questionable that Werle proclaims international criminal law to provide protection of peace using a broad interpretation, see Werle, *supra* note 58, 55.

<sup>81</sup> The author does not want to use the term ‘impunity’ as its contours are not totally clear and still open to debate.

<sup>82</sup> See below Part D.

the UN Security Council Resolutions 827 and 955 creating the ICTY and ICTR are not entirely precise in this regard. In Resolution 955, the Security Council states:

“*Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,*

*Determining that this situation continues to constitute a threat to international peace and security [...]*”<sup>83</sup>

This part shows that the UN Security Council sees the acts committed in Rwanda as a ‘threat to peace’. These atrocities could be legitimately called ‘international crimes’ as they threaten an international legal good, namely ‘international peace’. However, the assessments by the UN Security Council have to be looked at very cautiously. What the UN Security Council states is that the acts committed *in Rwanda* constitute a ‘threat to peace’. That is not to say that every occurrence of such crimes constitutes *ipso facto* a ‘threat to peace’.<sup>84</sup> A short look at the definition of the crimes recognized in Arts 6 to 8 of the Rome Statute may support this viewpoint. To begin with, none of the definitions explicitly make reference to ‘peace’ and ‘security’. Some of these provisions might even be counter-productive for a rapid transition to ‘peace’ – recalling the narrow definition of ‘peace’ as an international legal good recognized in international law. One should consider the following virtual example. A (not even necessarily) democratically inspired rebel group finds itself in an armed struggle with a tyrannical government. In order to avoid further combat and to defeat the governmental army once and for all, it decides to (mis-) use uniforms of the United Nations. Such methods are in clear violation of international

<sup>83</sup> ICTR-Statute, *supra* note 63.

<sup>84</sup> On three occasions the UN Security Council decided to ascribe to certain behavior such an abstract peace threatening capability: SC Res. 1373, 28 September 2001 determined acts of international terrorism in general as threats to peace (reaffirmed in SC Res. 1390, 28 January 2002; SC Res. 1540, 28 April 2004 ascribed to the Proliferation of weapons of mass destruction a general peace threatening capability. Finally, SC Res. 1422, 12 July 2002 implicitly declared the risk of prosecutions of international peacekeepers by the ICC as having a peace threatening potential, see J. Macke, *UN-Sicherheitsrat und Strafrecht* (2010), 180.

humanitarian law and criminalized as war crimes (Art. 8 (2) (b) (vii) of the Rome Statute). However, they may be employed to guarantee victory and to enable a peaceful and democratic transition.<sup>85</sup> As Blum rightly remarks with regard to war crimes: “The entire project of IHL is premised on the idea that some cruelty must be curbed, even at the expense of prolonging lawful violence and suffering”<sup>86</sup>. Or as Walzer puts it: “There is no right to commit crimes in order to shorten a war [...]”<sup>87</sup>. Another – this time unfortunately realistic – example might also help to elucidate the problem. The deadly American attacks on Hiroshima and Nagasaki would certainly nowadays be characterized as war crimes<sup>88</sup> as defined in Art. 8 II (b) (iv) of the Rome Statute as it can be assumed that such attacks “cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”<sup>89</sup>. Although the motivations justifying the American attacks are questionable,<sup>90</sup> one could argue that the dropping of the bombs accelerated the end of the Second World War in the Far East.<sup>91</sup> These examples can show that a direct and unambiguous link between the incriminated act and ‘peace’ appears not always to be existent. An indicator for such an

<sup>85</sup> This is not to say that such a conduct should be legalized. The interdiction of improper use of insignias and uniforms is of utmost importance for assuring the status of neutrality of the UN and the International Committee of the Red Cross (ICRC), enabling them to alleviate the pain for combatants and civilians suffering from the war ravaging their country, G. Blum, ‘The Laws of War and the “Lesser Evil”’, 35 *Yale Journal of International Law* (2010) 1, 1, 41.

<sup>86</sup> *Id.*, 5.

<sup>87</sup> M. Walzer, *Just and Unjust Wars*, 4th ed. (2006), 210.

<sup>88</sup> The ICJ in the Nuclear weapons Case declared them in 1996 as generally in violation of international humanitarian law, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 266 para. 105, see also M. Mandel, *How America gets away with murder* (2004), 223; J. Meernik & R. Aloisi, ‘I Do Declare: Politics, Declarations and the International Criminal Court’, 9 *International Criminal Law Review* (2009) 2, 253, 261. Blum, *supra* note 85, 2. See also the critique by John Bolton, arguing that under the Rome Statute the bombs on Hiroshima and Nagasaki would be considered as war crimes, J. Bolton, ‘The Risks and Weaknesses of the International Criminal Court from America’s Perspective’, 64 *Law and Contemporary Problems* (2001) 1, 167, 170.

<sup>89</sup> See Cassese, *supra* note 61, 396-408.

<sup>90</sup> Mandel, *supra* note 88, 222; Blum, *supra* note 85, 24-26.

<sup>91</sup> For the purpose of this article it suffices to mention that the use of the atomic bomb did not prolong the Second World War.

interpretation can also be seen in Art. 13(b) of the Rome Statute. A Security Council referral has to be based on Chapter VII of the UN Charter and a determination of a ‘threat to peace’ pursuant to Art. 39 of the Charter.<sup>92</sup> Why would such a restriction<sup>93</sup> be necessary – especially recalling the gravity criterion in Art. 17 (d) of the Rome Statute – if the crimes committed are *ipso facto* to be considered as peace threatening? To conclude, one might question the peace threatening nature of the so-called ‘international crimes’.<sup>94</sup> A short and final reflection might underline this conclusion. If the primary objective is to avoid ‘threats to peace’, why then is only aggression<sup>95</sup> criminalized under international law while intra-state upheavals – as certainly more direct threats to international peace than for example war crimes – remain outside the scope of application of international criminal law? What one could only argue is that every crime is to be seen as an abstract ‘threat to peace’ (*abstraktes Gefährdungsdelikt*)<sup>96</sup> even if the threatening nature does not become evident in each and every case.

### 3. A Distinct Legal Good - Concluding Remarks

Having put the focus on the search for a distinct legal good one must conclude that the discrepancy between crimes labeled as ‘international crimes’ and those labeled as ‘national crimes’ or ‘ordinary crimes’ cannot convincingly be explained. The sole anchorage for such a distinct treatment could be the purely hypothetical and thereby abstract peace threatening nature of genocide *et al.*. What one might argue, however, is that it is not the legal good which determines the ‘international’ or ‘national’ nature, but rather the way the legal good is threatened.

<sup>92</sup> C. Contag, *Der Internationale Strafgerichtshof im System Kollektiver Sicherheit* (2008), 112.

<sup>93</sup> D. Heilmann, *Die Effektivität des Internationalen Strafgerichtshofs* (2006), 153.

<sup>94</sup> Manske, *supra* note 44, 283.

<sup>95</sup> Quoting the Judgment of the Nuremberg Tribunal, Nsereko points out that aggression “contains within itself the accumulated evil of the whole”, see Nsereko, *supra* note 46, 390.

<sup>96</sup> See Möller who speaks of a “threatened legal good” (*gefährdetes Rechtsgut*), *supra* note 51, 8. Vest emphasizes a threat potential of genocide, *supra* note 47, 476.

### III. The Source of the Threat as a Distinctive Feature?

A characteristic aspect of genocide, crimes against humanity and war crimes is the fact that those crimes are phenomena that are (widely perceived to be) related to state or state-like behavior.<sup>97</sup> However, looking at international jurisprudence and doctrine it is not clear whether state implication really is a legal necessity. While the prohibition of war crimes is focused on misbehavior of soldiers and therefore presupposes the implication of the State or a state-like entity there is controversy whether such an implication is legally necessary for the commission of crimes against humanity and genocide. Looking at the definition of genocide in Art. 6 of the Rome Statute<sup>98</sup> one must conclude that an implication of the State is far from being an evident and necessary condition, as can also be observed in the ICTR judgment against members of Radio Milles Collines.<sup>99</sup> Concerning crimes against humanity, the ICC Pre-Trial Chamber decision on the Kenya situation is highly symbolic for the debate. While Judge Kaul fervently advocates a necessary link to the State or a state-like entity,<sup>100</sup> the majority allows even criminal gang activities to be subsumed under the Rome Statute.<sup>101</sup> What is certainly true is that mafia-like organizations (e.g. in southern Italy) are able to terrorize the population, extort important sums of money, bribe local officials, commit crimes in an organized manner similar to what one would consider a “widespread and systematic attack”. While the author tends to agree with Judge Kaul the determination bears no real relevance for the question debated here. Even assuming state (or state-like) implication as *conditio sine qua non* for genocide, crimes against

<sup>97</sup> See Kaul, *supra* note 36, para. 61; Manske, *supra* note 44, 319.

<sup>98</sup> And same holds true for Art. 2 of the Genocide Convention, *supra* note 1.

<sup>99</sup> *Prosecutor v. George Ruggiu*, Judgment, ICTR-97-32-I, (Trial Chamber I), International Criminal Tribunal for Rwanda, 1 June 2000 (after guilty plea for incitement to genocide as a journalistic broadcaster). See also the case of Julius Streicher, convicted in Nuremberg for publishing the Nazi ‘newspaper’ *Der Stürmer*. For more on the issue of the relationship between media and international law, see D. Joyce, ‘Human Rights and the Mediatization of International Law’, 23 *Leiden Journal of International Law* (2010) 3, 507-527.

<sup>100</sup> Kaul, *supra* note 36, para. 52, see also Gil Gil, *supra* note 49, 386.

<sup>101</sup> *Decision Pursuant Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19 (Pre-Trial Chamber II), 31 March 2010, para. 91. See also Manske, *supra* note 44, 318; emphasizing a territorial control element Vest, *supra* note 47, 470.

humanity and war crimes, it does not amount to a distinctive feature compared to other human rights abuses. Targeted killings, arbitrary detention, electoral fraud or unlawful expropriation are in most cases acts of state or state-like agents. Campaigns of intimidation of opposition figures are often planned and executed by members of the police or police-like militias. State implication *in the commission* of the crimes therefore does not explain the discrepancy in the labeling.<sup>102</sup> A totally distinct question is, which conclusions should be drawn from a possible implication of the State in a cover up of the crimes or in shielding the suspected perpetrators. However, the nature of the crime committed cannot be dependent on the manner that the State reacts to them retrospectively. If this were to be the case it would lead to the bizarre result that the ‘international’ or ‘national’ nature of the crime cannot be defined at the moment the crime is being committed but only after the national institutions failed to address it. The (non-) reaction of the State therefore has and can only have procedural implications.

#### IV. Questioning the Label – Concluding Remarks

Through the lens of the *Rechtsgutstheorie* the label of ‘international crime’ appears to be at least questionable.<sup>103</sup> A persuasive value-based explanation is inexistent. Apart from the somewhat abstract ‘threat to international peace’ one might discern in the commission of crimes such as genocide, crimes against humanity and war crimes, no distinctive feature can be established that would “[...] elevate the acts [...] to international crimes [...]”<sup>104</sup>. Neither the state implication nor the cruelty and scale can explain how to draw a line between “[...] human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to the international community”<sup>105</sup>. One other aspect has to be touched upon in order to illustrate that such a label is not only inexplicable but also in flagrant disregard of the evolution of human rights. Is it not a step backwards when one declares atrocious human rights abuses as ‘crimes against the international community’? Is it not one of the most

<sup>102</sup> Cassese, *supra* note 3, 12.

<sup>103</sup> See also Vajda, *supra* note 33, 334.

<sup>104</sup> Kaul, *supra* note 36, para. 18.

<sup>105</sup> *Id.*, para. 53.

important successes to have left behind the conception that rights are granted to individuals only as constituent part of another entity: his or her State?<sup>106</sup> How can one then declare incommensurable harm inflicted on an individual or a group of individuals as a crime against the international community or as ‘international crime’? Such labeling amounts to what Christie called “structural theft”<sup>107</sup> by arbitrarily “elevating” a certain category of crimes to the international level<sup>108</sup> and stealing it from the local community directly concerned by the atrocities.

#### D. International Prosecutions of ‘National Crimes’

It may feel uncomfortable to give up the label of ‘international crime’ as the label appears to be a perfect way to consolidate support for the fight against impunity for crimes of a truly atrocious nature. For many, the creation of international tribunals such as the ICTY or the ICTR, the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Special Tribunal for Sierra Leone and finally the ICC are accomplishments which are linked to the basic idea that genocide, crimes against humanity and war crimes are crimes which are somewhat ‘international’ or ‘universal’ in nature. The important question is: Does one need such a label in order to advance the protection of fundamental human rights? Is the nature of the crime really of such relevance in order to engage international actors? This depends on how one conceives the relationship between the nature of the crimes committed and international involvement. Judge Kaul declares in his Dissenting Opinion:

“There are, on the one side, international crimes of concern to the international community as a whole, in particular genocide, crimes against humanity and war crimes pursuant to articles 6, 7, and 8 of the Statute. There are, on the other side, common crimes, albeit of a

<sup>106</sup> See Ratner, *supra* note 16, 241.

<sup>107</sup> N. Christie, ‘Conflicts as Property’, 17 *British Journal of Criminology* (1977) 1, 1-15.

<sup>108</sup> Pocar notes, that the current (partial) criminalization of human rights violations may even be contrary to the human rights idea as such in creating a de facto hierarchy of human rights, Pocar, in M. Politi & G. Nesi, *The Rome Statute of the International Criminal Court* (2001), 72. The haphazard results of the partial criminalization are also outlined by Ratner, *supra* note 16.

serious nature, prosecuted by national criminal justice systems [...].”<sup>109</sup>

This quote, the author believes, reflects the somewhat binary thinking which underlies the usage of the term ‘international crime’ and international criminal law in general. It ascribes to each category of crime the prosecutorial model it deserves. Describing genocide, crimes against humanity, and war crimes as ‘international crimes’ implies that national and international judicial organs are acting as agencies of the ‘international community’ by reprimanding violations of international law.<sup>110</sup> But is it inconceivable to allow for international prosecutions of crimes one would consider as ‘national crimes’?

The fact that there is wide enthusiasm for labeling crimes as ‘international’ as a way of calling for international prosecutions can certainly be explained by the deep mistrust towards classical human rights enforcement mechanisms – under the ICCPR, ECHR or by the ICRC in case of international humanitarian law – and a certainly well-founded fear that human rights protection in the hands of the Nation State is far from being guaranteed. History shows a multitude of examples where national law enforcement failed in time of crisis. The classical human rights mechanisms which are focused on influencing state behavior are futile if the central State organs refuse to adapt to outside pressure. International prosecutions and the threat thereof might be seen as a necessary and promising tool to address such noncompliance. That is not to say that international prosecutions, be they by international tribunals or third States, should be seen as a panacea and therefore critical voices try frequently to be heard.<sup>111</sup> However, for the present reflections some positive effects of international prosecutions should be assumed. Two questions have to be answered. First, are international prosecutions of ‘national crimes’ permitted under international law? Second and if so, when should they be considered legitimate?

<sup>109</sup> Kaul, *supra* note 36, para. 8.

<sup>110</sup> See Möller, *supra* note 51, 8; El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, 23 *Michigan Journal of International Law* (2002) 4, 869, 911.

<sup>111</sup> See e.g. F. Dencker, ‘Verbrechen gegen die Menschlichkeit und internationales Strafrecht’, 3 *Zeitschrift für internationale Strafrechtsdogmatik*, (2008) 7, 298; Prittwitz, *supra* note 9, 469-487, A. Branch, ‘Uganda’s Civil War and the Politics of ICC Intervention’, 21 *Ethics and International Affairs* (2007) 2, 179, P. Stolle & T. Singelstein, in Kaleck *et al.*, *supra* note 52, 37-52, Anderson, *supra* note 31.



## I. The Legality of International Prosecutions of ‘National Crimes’

The following remarks should be considered as being obvious. International tribunals as well as third States are only competent to prosecute individuals if their jurisdictional basis is accepted in international law and can thereby be traced back to the consensus of their Home State. While the territoriality and the personality principle are unanimously recognized in international law as a potential basis for international prosecutions, the principle of universal jurisdiction (*in absentia*) is far more controversial. It would not be wise at this juncture to reopen the debate on universal jurisdiction and especially universal jurisdiction *in absentia*. What can be stated, however, is that third State prosecutions based on universal jurisdiction can only be deemed legal if it can be established that there is international consensus that every State should have the right to prosecute the crime in question. Taking the example of piracy one can see that such consensus has been achieved even for crimes that one could<sup>112</sup> (or should) not define as the “*most heinous crimes of concern to the international community as a whole*” and which are certainly not of a peace threatening nature. In other words, once consensus is established even minor crimes could theoretically be prosecuted universally. The qualification of the crime does not limit a consensual expansion of prosecutorial rights. It appears also clear that such consensus should not be replaced by vague and ambiguous reference to the grave nature of the crime. There is - and should be - no rule granting universal jurisdiction based on an assessment of the mere nature of the crime.<sup>113</sup> In addition to third State prosecutions there are multiple examples of prosecutions by international courts and tribunals. While the ICCs jurisdiction is mainly based on territoriality and personality as enshrined in Arts 12 (2) and 13 (a), (c) of the Rome Statute, Art. 13 (b) as well as the creation of the ICTY and ICTR show that by way of implication of the UN Security Council international prosecutions are possible even

<sup>112</sup> Kreß, 2006, *supra* note 15, 569: “These statements provoke a measure of astonishment. It should go without saying that piracy does not even come close to match the ‘heinousness’ of genocide or crimes against humanity [...]”.

<sup>113</sup> That is certainly why Jescheck emphasizes the need for an international consensus on the jurisdictional basis: Jescheck, ‘International Crimes’, *supra* note 14, 1120.

without specific consent of the Home State of the accused.<sup>114</sup> However, as the powers granted to the UN Security Council result from the consent of the Member States to the UN Charter international prosecutions are in line with international law as long as the reigning impunity amounts to a 'threat to peace'. The UN Security Council stated therefore in Resolution 955<sup>115</sup>:

“*Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and the restoration and maintenance of peace, [...]”

It thereby declared the non-prosecution of certain crimes as being a distinct 'threat to peace'. Otherwise, the UN Security Council would not have been in the position to establish the ICTR. The UN Charter demands for more than an assertion of a 'threat to peace' in line with Art. 39. The action taken by the Security Council must be conceived so as to address the determined threat.<sup>116</sup> But can the impunity for 'national crimes' be considered as a 'threat to peace'? Taking into consideration the creation of the Lebanon-Tribunal one could respond in the affirmative.<sup>117</sup> Art. 2 of the Statute of the Special Tribunal for Lebanon<sup>118</sup> states:

“The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to provisions of this Statute:

- a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, [...] and
- b) Articles 6 and 7 of the Lebanese Law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'.”

<sup>114</sup> See D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *Journal of International Criminal Justice* (2009) 2, 333, 343.

<sup>115</sup> SC Res. 955, 8 November 1994.

<sup>116</sup> J. Aston, *Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsprinzip* (2005), 80.

<sup>117</sup> Macke, *supra* note 84, 170.

<sup>118</sup> *Statute of the Special Tribunal for Lebanon*, Attachment to SC Res. 1757, 30 May 2007.

International prosecutions of ‘national crimes’ are absolutely in line with international law as long as they are backed by a consensus *in concreto* or *in abstracto* by the primarily responsible Home State.<sup>119</sup>

## II. The Legitimacy of International Prosecutions of ‘National Crimes’

While, from the viewpoint of international law, there is no theoretical limit to international prosecutions it would be unwise to stretch such interference in domestic affairs too far. Self-restraint in this area is recommendable for a multitude of reasons already suggested.<sup>120</sup> At present, it appears that the level of legitimate intervention through international prosecutions is closely linked to and determined by a catalogue of crimes. The focus is on the substantive law, which is by its very nature an all-or-nothing-option. It lacks the flexibility that procedural norms can provide.<sup>121</sup> If one agrees with the assessment made above that it is impossible to distinguish genocide *et al.* from other sorts of criminalized human rights abuses, it is nothing but logical to establish the level of international involvement by looking at the need for international prosecutions.<sup>122</sup> If, and only if, the international community and its core values ‘international peace’ and ‘security’ are put at risk by the way a State addresses the crimes committed one can legitimately call for international action.<sup>123</sup> Benchmarks might be conceived as follows:

<sup>119</sup> Bassiouni even states that “[a] sovereign state or a legal entity that has some sovereign attributes can enforce the prescription of another state, or of international law, even though the enforcing power may not have prescribed what it enforces”, C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 *Virginia Journal of International Law* (2001-2002) 1, 81, 89 [Bassiouni, 2001].

<sup>120</sup> *Id.*, 96, Bassiouni speaks of the “natural judge”.

<sup>121</sup> See A. Bruer-Schäfer, *Der Internationale Strafgerichtshof* (2001), 154.

<sup>122</sup> See Vajda, *supra* note 33, 343.

<sup>123</sup> Bassiouni, 2001, *supra* note 119, 97 rightfully recalls that the call for international prosecutions can be the result of a pragmatic policy-oriented position “that recognizes that occasionally certain commonly shared interests of the international community require an enforcement mechanism that transcends the interests of the singular sovereignty.” See also Lampe, *supra* note 44, 153.

- Necessary preconditions for legitimate international prosecutions is agreement on the need for criminalization of a set of human rights abuses.<sup>124</sup>
- As all human right abuses are to be seen as ‘national crimes’ there is a presumption for national prosecutions.
- International prosecutions, if accepted *in abstracto* or *concreto* by the community of States, should be exceptions rather than the rule. They are legitimate if the behavior of the State in question has a peace threatening potential. That will mostly be the case if the Nation State is unable to guarantee a fair trial or if it is unwilling to address (not necessarily to punish)<sup>125</sup> the crimes committed.

The last aspect certainly merits some further explanation as the difference between “unwilling to address” and “unwilling to prosecute” is an essential one. To further evaluate this aspect one has to differentiate between a possible short-term risk and a middle and long-term risk. Where exactly to draw the line for a legitimate intervention should be open to debate – a debate often neglected due to the favored all-or-nothing approach.

### 1. Short-Term Risk

Crimes of this magnitude typically occur in the wake of civil or regional wars. An absence of appropriate reactions to such atrocities risks perpetuating a cycle of violence. If a State fails to address such cycle of violence and to stabilize the country, it can be of interest to the international community to make a contribution by prosecuting the worst offenders in order to avoid trans-border effects and regional destabilization. However, considering the short-term dimension, an appropriate reaction cannot be reduced to criminal prosecution. As one can see in the case of South

<sup>124</sup> See e.g. Lampe, *supra* note 44, 161.

<sup>125</sup> Sloane notices “that where state authorities can and will genuinely investigate or prosecute, international penal interests dissipate [...]”, R. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’, 43 *Stanford Journal of International Law* (2007), 39, 55 [Sloane, 2007]. The problematic point in Sloane’s argumentation is the fact that it presupposes an international penal interest which could then dissipate.

Africa,<sup>126</sup> the stabilization of a country can well be achieved by other means, be they a Truth and Reconciliation Commission or other forms of addressing the past. Presently, it is hotly debated whether the struggle for 'peace' in Northern Uganda can be achieved by similar means. A cursory glimpse at the situation should illustrate the dilemma unstable governments might face: The Lords' Resistance Army (LRA) has committed and is still committing atrocious crimes in northern Uganda, southern Sudan, the Central African Republic and the Democratic Republic of Congo. While the ICC issued an arrest warrant against the LRA leader, Joseph Kony, the peace processes is faltering. One of the main reasons for the deadlock appears to be the threat of criminal prosecution.<sup>127</sup> Outweighing the costs of a continuation of the hostilities and the risk of perpetuating impunity, the Ugandan Government issued the 2000 Amnesty Act for each LRA fighter voluntarily giving up the fight. This stick-and-carrot-approach convinced a number of LRA fighters to lay down their weapons, and is by some considered to be a feasible way to end the fighting in Northern Uganda and the neighboring countries.<sup>128</sup> If this turns out to be true such deal-making might decrease the risk of further conflict in the short-term.

## 2. Long-Term Risk

An appropriate method to pacify a conflict in the short-term might have negative implications in the long-term, both for the country in question as well as for 'international peace'. A total disrespect for international norms could undermine the (international) legal order, creating a 'ticking bomb'-situation for future conflicts.<sup>129</sup> Therefore, for instance, self-amnesties and other deals forced on the war-torn society by unscrupulous

<sup>126</sup> See M. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* (1999) 3, 507, 510; P. van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation commission', 52 *Journal of International Affairs* (1999) 2, 647-669; E. Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court', 44 *Columbia Journal of Transnational Law* (2006) 3, 801, 834.

<sup>127</sup> Quinn, 'Getting to Peace? Negotiating with the LRA in Northern Uganda', 10 *Human Rights Review* (2009) 1, 55, 66.

<sup>128</sup> This would necessitate a withdrawal of the pending arrest warrant against Joseph Kony.

<sup>129</sup> See also Villalpando, *supra* note 72, 395.

Latin American leaders, appear to be dubious and surely are a risky endeavor. Nonetheless, one should not consider every kind of deal as contrary to the spirit of human rights and democracy. The example of the South African Truth and Reconciliation Commission (TRC) clearly reflects the general acceptance of and adherence to international human rights norms by the transitional leadership. Public hearings, lustration procedures, and the fact that confessions were required for perpetrators to qualify for amnesties on an individual basis, show that non-prosecution cannot be equated with lawlessness. It surely does not conform to an international rule of *criminal* law. As the South African transitional government acted to avoid further bloodshed and atrocities it conformed with their obligations to prevent its population from falling victim to more human rights violations.<sup>130</sup> Even if one feels the necessity to emphasize the urgent need for a prosecutorial response<sup>131</sup> one has to admit that there is no manifest lack of law observance and it therefore remains unclear whether such behavior has long-term peace threatening potential.

### E. Why a Change of Perspective Might Be Helpful!

Until now, this article focused on why the term 'international crime' is void of any meaningful content. Genocide *et al.* are by no means always more inhumane than other human rights abuses. State implication in the

<sup>130</sup> See the obligation to prevent as enshrined e.g. in Art. 1 of the Genocide Convention, *supra* note 1. See also remarks by M. Toufayan, 'The World Court's Distress When Facing Genocide: A Critical Commentary on the *Application of the Genocide Convention Case (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*', 40 *Texas International Law Journal* (2005) 2, 233.

<sup>131</sup> This certainly implies a turning away of a strong emphasis on negative deterrence which can hardly be achieved by other means than criminal prosecution. The importance of the negative deterrent function of international criminal prosecutions has to be put into perspective in three aspects. First, it is doubtful that the threat of criminal prosecution is significantly dissuading perpetrators from committing crime (see e.g. Sloane, 2007, *supra* note 125, 76-77) Second, a renunciation to prosecution will remain the absolute exception. E.g. as the Ugandan Amnesty Act points out, in case the LRA fighter are captured they are not benefiting from the amnesty. Therefore, the deterrent function can be upheld while accepting limited exceptions. See M. Deiters, *Legalitätsprinzip und Normgeltung* (2006), 46-49. Third, watching new crimes being committed undermines the norm which is to be upheld. See M. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', 15 *Harvard Human Rights Journal* (2002) 39, 70.

commission is typical for human rights abuses in general. Even the supposed peace threatening nature is far from being a constant feature of these crimes and more importantly not limited to them. It has also sketched why discourse matters for the interpretation and evolution of international law. It is understood that the way one labels a crime has by no means a concrete legal implication. However, it shapes the legal debate and the subtle influence wording might have makes more reflection necessary. By way of conclusion, the article glimpses at some current issues in international criminal law to illustrate how a change in perspective could affect the debate.

## I. The Complementarity Principle

As a starting point, one should turn to the issue of complementarity. It has been argued that the complementarity principle as enshrined in Arts 1 and 17 and the preamble of the Rome Statute was a policy choice<sup>132</sup> reflecting the States Parties' will to preserve a maximum of State sovereignty,<sup>133</sup> reducing the workload of the ICC, and encouraging the adoption of national laws to criminalize and prosecute the crimes enumerated in Art. 5 (1) (a)-(c) of the Rome Statute.<sup>134</sup> The view that the complementarity principle is a result of a political compromise and therefore implicitly, as a renunciation to primacy, reflects the drafting procedure. The assessment is right in a historical sense. However, taking into consideration the assessments made above one wonders whether complementarity is not the only logical option for a permanent international prosecutorial system. The concept of primacy presupposes that international courts act as agents avenging infringements on legal goods of the international community. The same does not apply to the ICTY and ICTR. Their primacy rules<sup>135</sup> are the result of an assessment *in concreto* that the former Yugoslavia and Rwanda could not cope with the major crimes

<sup>132</sup> Williams & Schabas, in Triffterer, *supra* note 59, Art. 17 para. 20. Kreß, 2006, *supra* note 15, 579 (referring to the resolution 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' of the Institute of International Law, available at [http://www.idi-iil.org/idiE/resolutionsE/2005\\_kra\\_03\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf) (last visited 25 August 2011)), 581.

<sup>133</sup> Williams & Schabas, in Triffterer, *supra* note 59, Art. 17 para. 1.

<sup>134</sup> See also Bergsmo *et al.*, *supra* note 10, 791-811.

<sup>135</sup> Art. 9 (2) ICTY-Statute, *supra* note 62, Art. 8 (2) ICTR-Statute, *supra* note 63.

committed as fair trials were far from being guaranteed.<sup>136</sup> A further example where the issue of complementarity arises is the discussions surrounding universal jurisdiction *in absentia*. The ICJ-Judges Higgins, Kooijmans and Buergenthal in their Dissenting Opinion in the Arrest Warrant Case proclaim that while the assertion of universal jurisdiction *in absentia* is in conformity with international law, “it [a State exercising the jurisdiction] must also ensure that certain safeguards are in place”<sup>137</sup>. One safeguard is regarded to be an offer to the national State of the accused to act on the charges in question. One cannot but agree with them. It seems, however, not evident why such a safeguard should be a legal necessity<sup>138</sup> – and not only a pragmatic compromise – considering that the Judges adhere to the principle that those crimes ought to be considered as ‘international crimes’.<sup>139</sup> However, it fits the assessment made above. The same holds true for the concept of ‘Responsibility to Protect’ which is also encompassing a two-step approach. Focusing on the same crimes discussed here, an international responsibility emerges only in case of inability of unwillingness of the primary responsible Nation State.<sup>140</sup> To accept the complementarity principle as natural and inherent limitation to international prosecutions might also implicate on the interpretation of Art. 17 (1) of the Rome Statute. The OTP suggests that the “unwilling and unable test” does

<sup>136</sup> See B. Brown, ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, 23 *Yale Journal of International Law* (1998) 2, 383, 395-398. One has to ponder on the question why primacy was granted over all courts and not only courts of the region, see also Brown, 402. The Appeals Chamber of the ICTY in the Tadić case seems to address two different approaches to legitimize the primacy rule: “Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national court. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as ‘ordinary crimes’ [...] or proceedings being ‘designed to shield the accused’, or cases being not diligently prosecuted [...]” *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 October 1995, para. 58.

<sup>137</sup> *Arrest Warrant Case*, *supra* note 24, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 59.

<sup>138</sup> See also Hafner *et al.*, *supra* note 35, 118.

<sup>139</sup> A. Colangelo recalls that limitations to universal jurisdiction are theoretically inconsistent once it is assumed that the crimes committed are international crimes, see. A. Colangelo, ‘The new Universal Jurisdiction: In Absentia Signaling over clearly defined crimes’, 36 *Georgetown Journal of International Law* (2005) 2, 537, 541.

<sup>140</sup> GA Res. 60/1, 25 October 2005, paras 138-139.



not apply in case of inaction of the State. While the interpretation of the wording is totally convincing,<sup>141</sup> one might wonder why the ICC Appeals Chamber<sup>142</sup> stated in this respect: “*Such an interpretation [the need for an assessment of unwillingness or inability] is not only irreconcilable with the wording of the provision, but is also in conflict with a purposive interpretation of the Statute.*” What the Appeals Chamber seems to suggest is that there is a presumption for ICC jurisdiction. This presumption has even been upheld in situations where the ICC is not better equipped to handle the case, like e.g. the Kony case, and has therefore sparked widespread criticism.<sup>143</sup>

## II. Sentencing

If one accepts that the crime is by its nature a national (or even local) occurrence, one might question the way international courts deal with sentencing.<sup>144</sup> If one considers international prosecutions as a substitute to national proceedings and as a way to fill the void created by the failure of national institutions, why then should one define a distinct international sentencing policy? One should keep in mind the criticism of lenient sentences by the ICTY and ICTR and the resulting difficulties to explain that while the masterminds of the 1994 genocide came well off being judged

<sup>141</sup> See C. Kreß, “‘Staateneigenüberweisungen’ an den Internationalen Strafgerichtshof und die Rolle des Chefanklägers”, in F. Neubacher & A. Klein, *Vom Recht der Macht zur Macht des Rechts?* (2006), 103-109.

<sup>142</sup> *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment, ICC-01/04-01/07-1497 (Appeals Chamber), 25 September 2009, para. 79.

<sup>143</sup> For the debate see P. Akhavan, ‘Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?’, 21 *Criminal Law Forum* (2010) 1, 103-120, N. Jurdi, ‘The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?’, 10 *International Criminal Law Review* (2010) 1, 73-96, Kreß, in Neubacher & Klein, *supra* note 75, 103-109.

<sup>144</sup> For further information concerning the actual uncertainty about sentencing see e.g. R. Henham, ‘Some issues for Sentencing in the International Criminal Court’, 52 *International and Comparative Law Quarterly* (2003) 1, 81-114; A. Keller, ‘Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR’, 50 *International and Comparative Law Review* (2001) 1, 53-74; M. Bargaric & J. Morss, ‘International Sentencing Law: In Search of a Justification and Coherent Framework’, 6 *International Criminal Law Review* (2006) 2, 191-255; Damaška, *supra* note 42.

in an international setting, much harsher punishment applied to the low-level offenders. It is not to say that international courts should impose harsher sanctions. One should strongly consider, however, adhering to national standards as a basis for determining the sentence; an emphasis that has (in theory) been laid out famously in Art. 24 (1) of the ICTR-Statute. The fear of “justice à la carte”<sup>145</sup> could and must be addressed by harmonization. Capital punishment cannot be accepted as there is growing consensus in the international community against the imposition of the death penalty.<sup>146</sup>

### III. The so-called ‘Peace vs. Justice Debate’ and Art. 53 of the Rome Statute

The Chief Prosecutor of the ICC once famously stated in a policy paper on the interest of justice as enshrined in Art. 53 of the Rome Statute: “[...] there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor.”<sup>147</sup> With all due respect, it is difficult to fully agree with this statement in light of the classification of crimes advocated for above. The Prosecutor is right in the sense that the criminalization of genocide, crimes against humanity and war crimes is not related to the notion of ‘peace’. The *raison d’être* of international criminalization is the protection of human rights. However, it is the preservation of ‘international peace’ which legitimizes the international involvement in internal affairs. It is the *raison d’être* for international prosecutions. As a procedural norm, Art. 53 might well be interpreted differently.

<sup>145</sup> See H. van der Wilt, ‘National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals’, 10 *International Criminal Law Review* (2010) 2, 209, 236-240.

<sup>146</sup> Sloane, 2007, *supra* note 125, 67.

<sup>147</sup> Policy Paper on the Interests of Justice (2007), Office of the Prosecutor, available at <http://www.oud.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> (last visited 25 August 2011).

## F. Conclusion

International prosecutions have always been accused of being used as a political tool in international politics. While most accusations are (poor) defenses of suspected war criminals trying to avoid prosecutions or to seize the very last opportunity to cause a stir, it is no secret that international criminal law is deeply affected by world politics and *vice versa*. Fortunately, a great number of international legal practitioners and academics fervently oppose the instrumentalization of the criminal justice system and underline a kind of 'international separation of powers'. However, the interdependence between the field of criminal law and politics can, as this article has tried to demonstrate, also be detected in the domain of language and discourse. Political discourse surrounding post-conflict societies took up the panoply of legal and semi-legal expressions. Nowadays, one cannot find any peace agreements or strategy paper without reference to at least some shady and vague terms such as 'justice', 'accountability', 'rule of law', 'truth' or 'reconciliation'. Same holds true for legal doctrine and jurisprudence. The label of 'international crime' is but one of many examples of unclear terminology in current international legal discourse.

## **Does International Criminal Law Still Require a ‘Crime of Crimes’? A Comparative Review of Genocide and Crimes against Humanity**

Alexander R. J. Murray\*

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## Abstract

This article argues that the crime of genocide is now a redundant crime in international law given the advances that have been made in the case law and application of crimes against humanity. It does this by providing an historical analysis of the two crimes before going on to consider four separate crimes against humanity and corresponding acts of genocide. The primary argument leveled against genocide is the difficulties that stem from proving the intent in the mind of the perpetrator to destroy a particular group in contrast to the less demanding category of crimes against humanity. It argues for a pragmatic rather than philosophical approach to international justice for the benefit of the victims and the prevention of criminal acts in the future.

## A. Introduction

It has been said that genocide is the ‘crime of crimes’<sup>1</sup> and consequently it occupies the apex of international criminal law. Critics of the international community’s refusal to label atrocities genocide are themselves guilty of downplaying the significance of crimes against humanity which in turn leads to an undermining of its status in international politics and thus international law. This article seeks to redress this imbalance by examining several crimes against humanity which correspond to acts of genocide, thereby demonstrating that genocide is not only a special category of crimes against humanity but also that, as a result, it is largely a redundant crime. It focuses on the substantive elements of international criminal law and argues for a pragmatic rather than philosophical approach to international justice for the benefit of the victims and the prevention of criminal acts in the future.

Genocide is defined in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (hereafter referred to as the Genocide Convention) as being the commission of specific acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. The specified acts can be killing members of the group; inflicting bodily or mental harm on members of the group; inflicting conditions of life

<sup>1</sup> *Kambanda*, ICTR Trial Chamber, Judgment, ICTR-97-23, 4 September 1998, para. 16.

calculated to bring about the group’s destruction; forcible birth control; and the forcible transfer of children.<sup>2</sup> In addition to acts of genocide the Genocide Convention sets out inchoate offences and complicity in genocide as crimes against the Convention.<sup>3</sup> Genocide depends on the existence in the perpetrator’s mind of a specific intent to destroy in whole or in part a Convention group by one of the specified methods, alongside the intent to commit the specified act. So for example, for an individual to be found guilty of genocidal killing it must be proven that he intended to kill his victim and that by so doing it was his intent to destroy in whole or in part that person’s national, ethnical, racial or religious group.

Crimes against humanity present a broader range of offences and there is no requirement for a specific group to be targeted; it is sufficient for there to be a widespread or systematic attack committed against a civilian population. The offences that can constitute a crime against humanity include murder, extermination, and enslavement;<sup>4</sup> the Statute of the International Criminal Court (ICC) adds, *inter alia*, apartheid, enforced disappearance, and sexual slavery.<sup>5</sup> Crimes against humanity, therefore, cover a broad range of offences and require only that the criminal act was part of a widespread or systematic attack against a civilian population.

Broadly stated, in a comparative study of genocide and crimes against humanity such as this article presents, the latter offence appears to have very few drawbacks. Indeed, Schabas has noted that there “have been no convictions for genocide where a conviction for crimes against humanity could not also have been sustained”<sup>6</sup>. This is borne out by examining the indictments from the ICTR where crimes against humanity feature alongside genocide. However, if one believes in a hierarchy of international crimes with genocide as the ‘crime of crimes’ at the zenith of international criminal law then crimes against humanity forms a lower category of offences. In some minds this might mean that a prosecution for crimes against humanity fails to confront the seriousness of the crime of genocide. However, as this article will demonstrate below the two offences are technically different yet substantially the same.

<sup>2</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 12 January 1951, Art. 2, 78 U.N.T.S. 277.

<sup>3</sup> *Id.*, Art. 3, 78 U.N.T.S. 277.

<sup>4</sup> Art. 5 Statute of the ICTY, Art.3 Statute of the ICTR.

<sup>5</sup> Art. 7(1)(a-k) Statute of the ICC.

<sup>6</sup> W. Schabas, *The UN International Criminal Tribunals* (2006), 185.

Further confusion is generated by genocide's status as an element both of international criminal law and of international law. This is starkly illustrated in the *Genocide*<sup>7</sup> case at the International Court of Justice (ICJ), established to resolve disputes between states, and not to hold individuals to account. Indeed, Turns comments that some people "might consider that the ICJ was not the right forum for such a case"<sup>8</sup>. The case before the ICJ was brought by Bosnia and Herzegovina against Serbia and Montenegro. The Court was asked to consider Serbia's liability for acts of genocide committed by Bosnian Serbs. In its judgment the Court concluded that Serbia was not directly liable for the Srebrenica massacre<sup>9</sup> but that it was liable under the Genocide Convention for failing to cooperate with the ICTY.<sup>10</sup> However, give this article's focus on genocide as part of international criminal law and not international law, the ICJ ruling, which is solely focused on state and not individual liability, is of only limited concern to the ideas advanced herein.

In a recent paper in this journal, Bernhard Kuschnik tackled the thorny problem of defining humanity and argued international criminal law requires a concrete notion of the term to aid our understanding of 'crimes against humanity'.<sup>11</sup> He finishes his analysis by noting that 'crimes against humanity should be considered as crimes both against humaneness and humankind.'<sup>12</sup> Ultimately, his examination of crimes against humanity leads him to conclude that the ICC should take a more expansive understanding of the term 'humanity' than is set down in the ICC Statute. He believes that the 'legal framework of crimes against humanity, as well as its legal history, would call for the latter.'<sup>13</sup> Such a position echoes the calls to expand the term of genocide beyond its legal definition, perhaps with recourse to customary international law. However, this article is largely concerned with the drawbacks of genocide as an international crime, while it does stress the

<sup>7</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43.

<sup>8</sup> D. Turns, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide Bosnia and Herzegovina v. Serbia and Montenegro', 22 *Melbourne Journal of International Law* (2007) (8) 2, 398, 399.

<sup>9</sup> ICJ, *supra* note 7, para. 413.

<sup>10</sup> *Id.*, para. 449.

<sup>11</sup> B. Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity', 2 *Goettingen Journal of International Law* (2010) 2, 501.

<sup>12</sup> *Id.*, 529-530.

<sup>13</sup> *Id.*, 530.

significant advantages of individual crimes against humanity over specific, comparable, acts of genocide, its primary purpose is to examine substantive aspects of international criminal law, not to engage in a philosophical exercise.

This article will examine three crimes against humanity – persecution, extermination, and torture – and compare each with a corresponding act of genocide. Persecution will be examined in conjunction with the *mens rea* of genocide, extermination compared with genocidal killing, and torture with serious bodily or mental harm. This will be followed by an examination of the crime of deportation, a crime against humanity, which in the case of Nazi atrocities and the massacres in the former Yugoslavia acted as a prelude to genocide, despite not in itself being considered an act of genocide. Prior to any detailed examination it is first however necessary to consider the historical position of genocide and crimes against humanity in international law. This will provide the foundation on which the arguments of this article will be based.

## B. The Historical Position of Genocide and Crimes Against Humanity

The prosecutions which took place in front of the Nuremberg International Military Tribunal (IMT) saw individual high-ranking Nazis indicted for war crimes and crimes against humanity in, respectively, counts III and IV of the Indictment.<sup>14</sup> These included the extermination of concentration camp prisoners, torture, medical experimentation, persecution on political, racial, and religious grounds, and deportation. While genocide was neither mentioned in the IMT Statute nor discussed at length by the IMT in its judgment, the atrocities committed by the Nazi regime can undoubtedly be classed as acts of genocide by modern standards. Instead, the IMT considered that deliberately persecuting Jews, Poles and other ethnic, racial, national or religious groups, alongside other categories of people, would constitute a crime against humanity.<sup>15</sup> The IMT took the view that crimes against humanity could only be committed in times of armed

<sup>14</sup> An excellent resource for the Nuremberg Trials can be found on the website of the Avalon Project at Yale University, available at [http://avalon.law.yale.edu/subject\\_menus/imt.asp](http://avalon.law.yale.edu/subject_menus/imt.asp) (last visited 16 August 2010).

<sup>15</sup> R. Overy, ‘The Nuremberg trials: international law in the making’, in P. Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice* (2002), 21.



conflict and, despite the wording of Count IV of the Indictment, no convictions for acts committed before 1939 were secured. Following Nuremberg, international criminal justice was a largely vacant concept until the end of the Cold War and the conflict in what came to be the former Yugoslavia.

The creation, by UN Security Council Resolution 827 (1993), of the International Criminal Tribunal for the former-Yugoslavia (ICTY) in 1993 ushered in a new era of criminal responsibility for international crimes. The ICTY Statute provided that the Tribunal would have jurisdiction over genocide, crimes against humanity and war crimes. Given that very little had changed in the almost 50 years since Nuremberg, the Statute provided that the Tribunal had the power to prosecute individuals for crimes against humanity “when committed in armed conflict, whether international or internal in character and directed against any civilian population”<sup>16</sup>. At this stage genocide appeared to offer greater protection, at least in that it could be committed in times of peace. The position of crimes against humanity began to change in the first case prosecuted before the ICTY. In an interlocutory motion, the ICTY Appeals Chamber held that the necessity for the requirement that crimes against humanity be committed solely in an international armed conflict ran contrary to customary international law:

“[it] is by now a settled rule of customary international law that crimes against humanity do not require a connection to an international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all”<sup>17</sup>.

The Appeals Chamber continued that by requiring an armed conflict, international or otherwise, the Security Council ‘may have defined the crime in Article 5 [crimes against humanity] more narrowly than necessary under customary international law.’ The Statute for the International Criminal Tribunal for Rwanda (ICTR) on the other hand did not make reference to the need for the existence of any armed conflict for the commission of crimes against humanity. This is a position reflected in the Statute of the

<sup>16</sup> Art. 5 Statute of the ICTY.

<sup>17</sup> *Tadić*, ICTY Appeal Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 141.

International Criminal Court (ICC) and must by now be considered part of customary international law.

It might seem that the codification of the law prohibiting genocide represents progress in the field of international criminal law, yet the target groups and acts are narrowly and strictly defined in the Genocide Convention and consequently its applicable scope is limited. Thus it excludes from its protection political and social groups, amongst others. This article does not subscribe to the view that genocide should be extended to encapsulate these groups because to do so would constitute a violation of international law and the intention of the drafters of the Genocide Convention; this point is explained in more depth below. Instead, it calls for greater respect from international tribunals and prosecutors for the seriousness of offences termed ‘crimes against humanity’ and a shift away from the label granted to genocide in the *Kambanda* judgment at the ICTR as the “crime of crimes”<sup>18</sup>.

International criminal law is based, at the ICTY/R and ICC, on codified definitions of the law. Genocide is strictly defined under the Genocide Convention and in the respective statutes of the tribunals. It could be suggested that in customary international law there exists a conception of genocide, which includes socio-economic or political groups. However, this article considers genocide and crimes against humanity as concrete laws by which individuals are held to account and often sentenced to long periods of imprisonment. If this is the purpose of the law then justice demands that the laws by which such individuals are prosecuted are as certain as possible. Customary international law simply does not fulfill this requirement of certainty. The customary international law of genocide is weak because it has largely been supplanted by the Genocide Convention and the subsequent statutes of the ICTY/R and ICC. Indeed, the Commission of Experts in its report on the Rwandan crisis suggests that genocide as a peremptory norm simply reflects the content of the Genocide Convention and does not offer a more expansive definition of groups protected by the Genocide Convention.<sup>19</sup>

<sup>18</sup> ICTR, *supra* note 1.

<sup>19</sup> *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, A/54/315, S/1999/943, 7 September 1999, para. 152.

Both genocide and crimes against humanity are offences listed in the ICC Statute, and neither requires the existence of an armed conflict for individuals to be indicted.<sup>20</sup> The current status of crimes against humanity in international law means that the protection afforded to individuals by the Genocide Convention is no longer unique to the crime of genocide. The international criminal tribunals have operated produced volumes of case law, which has strengthened and developed the concept of crimes against humanity to the extent that prosecuting individuals for genocide must at least be questioned.

### C. Persecution and the *Mens Rea* of Genocide

The essential element of genocide is that the perpetrator intended, by his actions, to destroy in whole or in part a Convention group. Essentially, targeting individuals because of their group membership with a view to destroying that particular group is discriminatory and thus an act of persecution. A hierarchy of the *mens rea* for international crimes has been described by Clark.<sup>21</sup> In this hierarchy genocide is the crime which requires the highest level of proof of *mens rea* namely the specific intent, or *dolus specialis*, to destroy in whole or in part a Convention group. Crimes against humanity require proof that the individual possesses knowledge of the wider context of the crimes for a successful prosecution to result. War crimes require no such level of *mens rea* to be proven; it is enough that, for example, an accused intended to cause the death of a member of a protected group.<sup>22</sup> This hierarchy also applies to the contextual element, which requires that genocide possesses a manifest pattern of abuse, crimes against humanity need to be either widespread or systematic, while war crimes must take place within the context of an international armed conflict.<sup>23</sup>

As a crime against humanity persecution has three distinct elements. First, there is the occurrence of a discriminatory act; secondly, the occurrence of the act based on the group membership of the victims; and thirdly, 'the persecutory act must be intended to cause, and result in, an

<sup>20</sup> Art. 7(1) Statute of the ICC makes no reference to the need for an armed conflict, nor does Art. 6, which concerns genocide.

<sup>21</sup> R. S. Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', 12 *Criminal Law Forum* (2001) 3, 291-334.

<sup>22</sup> *Id.*, 316.

<sup>23</sup> *Id.*, 324.

infringement on an individual’s enjoyment of a basic or fundamental [right].<sup>24</sup> Count 4(B) of the Nuremberg Indictment specified persecution on ‘political, racial, or religious grounds’ as a crime against humanity. In addition to listing persecutory acts against the Jews, the indictment also specified acts committed against political and religious figures such as Chancellor Schuschnigg and Pastor Niemoeller.<sup>25</sup> It stands to reason that in the context of widespread persecution, the targeting of those best able to offer opposition should be considered an additional aggravating factor. Once a community’s ability to organize resistance to oppression is removed it is a much easier target, and that is undoubtedly why such references were made in the Nuremberg indictments.

Persecution is a broad crime which “encompasses a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights”<sup>26</sup>. These acts need not in themselves be inhumane as the ICTY noted in Kupreškić:

“[a]lthough individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed ‘inhumane’”<sup>27</sup>.

Furthermore, it is not necessary to identify which rights constitute “fundamental rights for the purpose of persecution”<sup>28</sup>. The ICTR has said that the basic or fundamental right can be laid down either in international customary or in treaty law.<sup>29</sup> This leaves open the possibility that an individual could be prosecuted for acts, which violate international human rights instruments, provided the necessary discriminatory intent is proven.

In order for an individual to be successfully prosecuted for genocide it must, first, be proved that the individual possessed the *mens rea* to commit the underlying offence (those listed in Article 2 of the Genocide Convention). Secondly, it must be proved that the accused possessed the

<sup>24</sup> *Tadić*, ICTY Trial Chamber Judgment, IT-94-1, 7 May 1995, para. 715.

<sup>25</sup> Count 4 (B), IMT Indictment, in *International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal – 14 November 1945 – 1 October 1946* (1947) Vol. 1, 66.

<sup>26</sup> ICTY, *supra* note 24, para. 710.

<sup>27</sup> *Kupreškić*, ICTY Trial Chamber Judgment, IT-95-16, 14 January 2000, para. 622.

<sup>28</sup> *Stakić*, ICTY Trial Chamber Judgment, IT-97-24, 31 July 2003, para. 773.

<sup>29</sup> *Nahimana*, ICTR Trial Chamber Judgment, ICTR-96-11, 3 December 2003, para. 986.

intent to destroy in whole, or in part, a Convention group as such. If the intent to destroy a Convention group is not proven, any prosecution for genocide is more likely to become a prosecution for crimes against humanity, an issue which will be examined in more detail below. In the *Jelišić* judgment the ICTY noted that it is “in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law”<sup>30</sup>. The following section will, first, examine in more depth the position set out above regarding the *dolus specialis* of genocide. Secondly, the *mens rea* for the individual acts of genocide found in the Genocide Convention, and its progeny? at the UN international tribunals and the ICC will be considered, before evaluating how this poses difficulties in proving the crime of genocide.

*Dolus specialis* is a civil law term which the ICTR, in particular, has equated with the common law term of “specific intent”<sup>31</sup>. Essentially, it must be the specific intent of the perpetrator to destroy in whole or in part a racial, ethnical, national or religious group. Article 30 of the ICC Statute establishes the *mens rea* for the offences over which it has been granted jurisdiction. However, this only renders an individual criminally responsible if the *actus reus* is committed “with intent and knowledge”<sup>32</sup>. Consequently, it must be proven that the individual accused intended to engage in the criminal act, and meant to cause the consequences of his act.<sup>33</sup> Without both the first and second elements of genocide being proved beyond reasonable doubt any prosecution for genocide must, as a matter of law, fail.

For an individual to be found guilty of genocide it must be proved that the act in question was intended to destroy, in whole or in part, a Convention group. In *Akayesu* the Tribunal reasoned that the accused intended to destroy a Convention group because of the way in which members of the Tutsi group were targeted. This was through the way “members of the Tutsi population were sorted out” at roadblocks and checkpoints to be “apprehended and killed”<sup>34</sup>. In *Jelišić* the ICTY Trial Chamber stated that the “‘special’ intention which [...] characterises his intent to destroy the discriminated group as such, at least in part”<sup>35</sup> must be proved beyond reasonable doubt for a conviction for the crime of genocide

<sup>30</sup> *Jelišić*, ICTY Trial Chamber Judgment, IT-95-10, 14 December 1999, para. 66.

<sup>31</sup> *Akayesu*, ICTR Trial Chamber Judgment, ICTR-96-4, 2 September 1998, para. 122.

<sup>32</sup> Art. 30(1) Statute of the ICC.

<sup>33</sup> Art. 30(2)(a-b) Statute of the ICC.

<sup>34</sup> ICTY, *Akayesu*, *supra* note 31, paras 123-124.

<sup>35</sup> *Jelišić*, *supra* note 30, para. 78.

to result. This corresponds to the above discussion of the *dolus specialis* of genocide. Proving that the accused intended, by his actions, to destroy in whole or in part a Convention group adds a further hurdle which must be crossed for a successful prosecution, yet this is crucial to proving that the accused had the requisite *mens rea*.<sup>36</sup> In *Akayesu*, the Trial Chamber noted the difficulties associated with proving the *mens rea* of genocide. It found “that intent is a mental factor which is difficult, even impossible, to determine”<sup>37</sup>. Consequently, “intent can be inferred from a certain number of presumptions of fact” including the “the scale of atrocities committed [...] the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups”<sup>38</sup>. Aptel concludes on this subject that “circumstantial evidence may also be used to establish the requisite intent”<sup>39</sup>.

Labeling genocide as the ‘crime of crimes’ but then lowering the burden of proof for the *mens rea* is unsatisfactory, and cannot contribute to a fair trial for an accused. This was recognized in *Bagilishema* where the Trial Chamber ruled that the “that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the [accused]”. The Court ruled that a defendant’s “intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action”<sup>40</sup>. However, such a method poses problems in proving the *dolus specialis* of an accused. While it may be easy to prove that the defendant killed or deported a number of people of a given group, it must also be proved that the individual desired the destruction of that group. This sets it apart from crimes against humanity, and could be one reason why so few low-ranking soldiers and civilians have been convicted of genocide. While it would be naïve to state that a low ranking soldier *did not* wish to effect the destruction of a Convention group, from the *Bagilishema* ruling it is more difficult to prove that this was indeed the case when compared to a senior politician who urges the destruction of a group then produces detailed plans.

Due to its nature persecution is also an umbrella offence under which other crimes against humanity can be committed as noted in *Todorovic*:

<sup>36</sup> C. Aptel, ‘The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda’, 13 *Criminal Law Forum* (2002) 3, 273, 287.

<sup>37</sup> *ICTY, Akayesu*, *supra* note 34, para. 523.

<sup>38</sup> *Id.*

<sup>39</sup> Aptel, *supra* note 36, 288.

<sup>40</sup> *Bagilishema*, ICTR Trial Chamber Judgment, ICTR-95-1, 7 June 2001, para. 63.

“persecution is the only crime enumerated in Article 5 of the [ICTY] Statute which [...] by its nature...may incorporate other crimes”<sup>41</sup>. As such it is possible to combine persecution with, for example, extermination or deportation to provide for an effective prosecution of crimes against humanity which takes into account not only the ‘substantive’ crime of extermination, but also the persecutory intent of the crime. In this way persecution operates as a standalone crime, which in effect equates to the special intent of genocide, yet the prosecution, as a whole, need not in itself fail if the crime of persecution cannot be proven. This contrasts with the crime of genocide whereby if the special intent is not proven then the defendant would be found not guilty not only of discriminatory acts but also the underlying act such as killing.

Under the ICC Statute, persecution is a crime against humanity that can be readily applied to crimes that target individuals because of their group identity, be it because of their membership of a Convention group or another group. The crime of persecution can encompass, *inter alia*, acts of extermination and deportation, which are committed on the basis of group membership. In addition, crimes against humanity are easier to prove because of the lower *mens rea* threshold. While this view may appear to condone a less thorough judicial process, it does the opposite. Proving the *dolus specialis* of genocide is difficult, therefore it may lead those embarking on genocidal programs to believe that they may act with impunity. By using the lower threshold of crimes against humanity it is possible to challenge this impunity.

## D. Extermination and Genocidal Killing

The two crimes of extermination and genocidal killing are closely linked. While it is true that genocide could be committed by targeting only a handful of individuals, such a scenario is merely hypothetical if one looks at the history of genocidal acts. It is the contention of this article that the two offences of genocidal killing and crimes against humanity are on close inspection the same in terms of the consequences. It is true that genocide has a different *mens rea* but its weaknesses were highlighted above. Should the acts not meet the threshold for extermination then murder is also a crime against humanity which would fill in any lacunae generated by the threshold not being met. Essentially, extermination (and murder) provides a better

<sup>41</sup> *Todorović*, ICTY Trial Chamber Judgment, IT-95-9/1, 31 July 2001, para. 32.

basis for the prosecution of those who commit atrocities when compared to genocide.

In *Stakić* extermination was described as “the annihilation of a mass of people”<sup>42</sup>, and just after Nuremberg it was described by Egon Schwelb as “murder on a large scale”<sup>43</sup>. As with other crimes against humanity, the act of extermination lacks the specific intent required for genocide, but must take place within the context of widespread or systematic attacks. What distinguishes extermination from genocidal killing is that the former targets not a group but a large number of people. This can be comprised of one act or a number of acts “which contributes to the killing of a large number of individuals”<sup>44</sup>, a position supported in *Vasiljević*<sup>45</sup> and further supported in *Niyitegeka* at the ICTR.<sup>46</sup> In *Kayishema and Ruzindana* the ICTR held that an individual may be prosecuted for the crime of extermination for “a single killing” if that “killing form[s] part of a mass killing event” and that the murder took place in the context of mass killing.<sup>47</sup> In contrast, the ICTY in *Vasiljević* found that “[r]esponsibility for one or for a limited number of such killings is insufficient”<sup>48</sup> for a successful prosecution for the crime of extermination. The “scale of the killing required for extermination must be substantial”<sup>49</sup> yet it is possible that a limited group may be targeted and this group may be “made up of only a relatively small number of people”. It is enough that a “numerically significant part of the population” is targeted.<sup>50</sup> A quantifiable threshold by which to judge whether the crime has been committed has not been set. This position is in accordance with the principle of judicial interpretation and the discretion afforded to the court to arrive at a judgment in particular cases. Of course, the crime against humanity of murder provides cover for any acts which would not make the threshold of extermination because “apart from the question of scale, the essence of the

<sup>42</sup> *Stakić*, ICTY Trial Chamber Judgment, IT-97-24, 31 July 2003, para. 641.

<sup>43</sup> E. Schwelb, ‘Crimes Against Humanity’, in H. Lauterpacht (ed.), *23 British Yearbook of International Law* (1946), 178, 192.

<sup>44</sup> G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), 176.

<sup>45</sup> *Vasiljević*, ICTY Trial Chamber Judgment, IT-98-32, 25 February 2004, para. 229.

<sup>46</sup> *Niyitegeka*, ICTR Trial Chamber Judgment, ICTR-96-14, 13 May 2003, para. 450.

<sup>47</sup> *Kayishema and Ruzindana*, ICTR Trial Chamber Judgment, ICTR-95-1, 1 June 2001, para. 147.

<sup>48</sup> ICTY, *supra* note 45, para. 227.

<sup>49</sup> *Semanza*, ICTR Trial Chamber Judgment, ICTR-97-20, 15 May 2003, para. 340.

<sup>50</sup> *Krstić*, ICTY Trial Appeals Chamber Judgment, IT-98-33, 19 April 2004, para. 503.



crimes of murder as a crime against humanity and extermination as a crime against humanity is the same”<sup>51</sup>.

The *Vasiljević* judgment found that in order for an accused to be convicted of extermination he must have intended “to kill [...] or otherwise [intended] to participate in the elimination of a number of individuals”. Furthermore, the individual must participate with “the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing”<sup>52</sup>. Unlike the crime of genocide there is no requirement that the accused acted with discriminatory intent towards his victims. The *Stakić* judgment confirmed the victims of the perpetrator may be negatively defined meaning that the targeted individuals are seen “as not belonging to, not being affiliated with or not loyal to the perpetrator or the group to which the perpetrator belongs”<sup>53</sup>. This is in sharp contrast to the strong positive identity required by the Genocide Convention. Again, in contrast to the Genocide Convention there is no requirement that the perpetrator be motivated by a hatred or destructive intent for his victims, as was found in *Vasiljević* where the ICTY concluded that “the ultimate reason or motives – political or ideological – for which the offender carried out the acts are not part of the required *mens rea* and are, therefore, legally irrelevant”<sup>54</sup>. This clearly lends itself more to securing a sound conviction than relying on tenuous evidence concerning either group identity or on proving that the individual had the *dolus specialis* of genocide.

Extermination may be committed through omission,<sup>55</sup> meaning that the perpetrator may inflict conditions of life calculated to bring about the destruction of those he targets. In *Kayishema and Ruzindana* the ICTR provided the following as examples of such a method of extermination:

“[i]mprisoning a large number of people and withholding the necessities of life which results in mass death [or] introducing a

<sup>51</sup> *Kamuhanda*, ICTR Trial Chamber Judgment, ICTR-99-54, 22 January 2004, para. 686.

<sup>52</sup> *Vasiljević*, *supra* note 45, para. 229.

<sup>53</sup> *Stakić*, ICTY Trial Chamber Judgment, IT-97-24, 31 July 2003, para. 639; see also *Vasiljević*, *supra* note 45, para. 228.

<sup>54</sup> *Vasiljević*, *supra* note 45, para. 228.

<sup>55</sup> *Kayishema and Ruzindana*, *supra* note 47, para. 144.

deadly virus into a population and preventing medical care which results in mass death”<sup>56</sup>.

Clearly, this is very similar to Article 2(c) of the Genocide Convention which is concerned with the imposition of conditions calculated to bring about the destruction of a Convention group. As with the other crimes against humanity, however, no specific intent to destroy a Convention (or other) group is required; it is enough to seek to destroy the targeted individuals.

Genocide, as dealt with above, requires the individual to have the intent to destroy in whole or in part a Convention group. In *Akayesu* the ICTY dealt with the specific requirements of the crime of genocide. The Tribunal determined that in order for killing to occur an individual must be dead, that the death must have resulted from an illegal act or omission, and the accused must have had the requisite *mens rea* for the death.<sup>57</sup> In the popular consciousness, killing is the principal means by which genocide is committed. Examining killing as an act of genocide involves inspecting the two constituent components of *mens rea* namely the intention to kill, and the intention that this would in some way lead to the destruction in whole or in part of the targeted group. Such killing need not be carried by the accused; it is enough for him to have ordered the killings as was the case in *Rutaganda* where the accused, after distributing weapons, told the militia under his command to “get to work [because] there was a lot of dirt that needed to be cleaned up”<sup>58</sup>. Despite the absence of the individual’s direct participation in the killing it was held that he still intended the deaths of several Tutsi. The ICTR held that the defendant’s words were enough to constitute evidence of a genocidal *mens rea*.<sup>59</sup> If the accused had killed a number of individuals from a Convention group, and the *mens rea* for the underlying act was proven, difficulties would still lie in proving that he possessed the intent to destroy that group. This matter arose in *Jelišić* where, it was argued that the defendant took sadistic pleasure in killing for the sake of killing, rather than with genocidal intent.<sup>60</sup>

<sup>56</sup> *Id.*, para. 146; and *Rutaganda*, ICTR Trial Chamber Judgment, ICTR-96-3, 6 December 1999, para. 84.

<sup>57</sup> ICTY, *Akayesu*, *supra* note 31, para. 589.

<sup>58</sup> *Rutaganda*, *supra* note 56, paras 385 and 389.

<sup>59</sup> *Id.*, para. 389.

<sup>60</sup> *Jelišić*, *supra* note 30, para. 130.

Extermination as an international crime fits easily into the popular conception of genocide. The massive scale of the killing evokes images of the Holocaust, and the crime lends its name to the extermination camps operated at Auschwitz-Birkenau and elsewhere. It was a crime punished at Nuremberg under Article 6(c) of the IMT Charter, and has been successfully prosecuted at the international tribunals.<sup>61</sup> Coupled with this demonstrated success is the lower mens rea required for a successful prosecution for the crime of extermination. This is in contrast to the crime of genocide which requires the specific intent to destroy in whole or in part a Convention group. It could be argued that genocide could take place on a scale small enough not to meet the threshold required for extermination. If this was the case the crime of murder (ICC Statute Article 7(1)(a)) would provide the necessary grounds for a prosecution as discussed above. The crime of extermination as a crime against humanity adequately dealt with the circumstances of the Holocaust which leaves the question: why does international criminal law require the crime of genocide? Extermination, when coupled with the crime of persecution, can provide an appropriate response in situations where acts of genocide take place without being subject to the same rigorous, and superfluous, requirements for the same conclusion.

### E. Torture, Inhumane Treatment and Causing Serious Bodily or Mental Harm

Torture is considered one of the gravest contraventions of international law, as it is one of the few agreed peremptory norms of international law.<sup>62</sup> It is a component of crimes against humanity, and can be considered an act of genocide under the Genocide Convention. Acts of torture are also grave breaches of the Geneva Conventions and are prohibited by several international treaties including the Convention Against Torture<sup>63</sup> and the European Convention on Human Rights.<sup>64</sup> This section

<sup>61</sup> See for example *Krstić*, ICTY Trial Appeals Chamber Judgment, IT-98-33, 19 April 2004 and *Semanza*, ICTR Trial Chamber Judgment, ICTR-97-20, 15 May 2003, n. 41.

<sup>62</sup> See M. Shaw, *International Law* (2008), 326; *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No.3)* [2000] 1 A.C 147 per Browne-Wilkinson, 198. *Furundzija*, ICTY Trial Chamber Judgment, IT-95-17/1-T, 10 December 1998, para. 144.

<sup>63</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*, 10 December 1984, Art. 1, 1465 U.N.T.S. 85.

will also consider other acts which are crimes against humanity, for example inhumane treatment and rape, and which have also been considered acts of genocide. This will further demonstrate that crimes against humanity have a wide enough scope to prosecute acts of genocide alongside crimes against humanity.

With regard to the definition of torture, there is a variation in its definition as a crime against humanity and as an act of genocide. There is extensive jurisprudence at the international tribunals as to what constitutes torture and this article will only briefly summarize the respective positions. As a crime against humanity, this article refers to the definition given in *Kunarac*. Here the Trial Chamber held that the elements of the offence are: the infliction, by act or omission, of severe pain or suffering, whether physical or mental; the act or omission is intentional; and the act or omission is aimed at obtaining information or a confession, or at punishing, intimidating or coercing the victim or third person, or at discriminating, on any grounds, against a person or third person.<sup>65</sup> This was approved by the Appeals Chamber.<sup>66</sup>

Genocide’s approach to the issue of torture is slightly different in that the Genocide Convention refers to “causing serious bodily or mental harm” with the intention to destroy a Convention group. This is a broader approach to that taken by crimes against humanity. In *Akayesu*, the ICTR defined the term as meaning “acts of torture, be they bodily or mental, inhumane or degrading treatment [and] persecution”<sup>67</sup>. It also found that it could include rape as an act of genocide under this heading.<sup>68</sup> In *Krstić* this provision of the Genocide Convention was held to extend to acts of persecution.<sup>69</sup>

Given that genocide, on the definitions set out above, protects against acts of deportation and sexual violence, it might be thought that the level of protection it offers is comparable, if not more comprehensive, to that offered by crimes against humanity. However, the statutes of the international criminal tribunals and now the ICC criminalize several acts as crimes against humanity. For example, rape is a specific offence, as are deportation and persecution. In addition, they also make it a crime against humanity to

<sup>64</sup> Art. 3 ECHR.

<sup>65</sup> *Kunarac*, ICTY Trial Chamber Judgment, IT-96-23, 22 February 2001, para. 497.

<sup>66</sup> *Kunarac*, ICTY Appeals Chamber Judgment, IT-96-23, 12 June 2002, para. 156.

<sup>67</sup> ICTY, *Akayesu*, *supra* note 31, para. 504.

<sup>68</sup> *Id.*, paras 731-733.

<sup>69</sup> *Krstić*, *supra* note 50, para. 513.

commit ‘other inhumane acts’, which the statutes do not define or further elucidate.<sup>70</sup> The latter crime will be discussed in more detail below.

The ICTY and ICTR have widened the scope of the term ‘serious bodily or mental harm’ to include the anguish suffered by victims immediately before their deaths. For example, the *Popović* judgment states that the “killing operation inflicted serious bodily and mental harm” in part due to the removal from the victims of their personal property. Further it held that “for all of them, any hope of survival was extinguished in the terrifying moments when they were brought to execution sites”. Consequently, serious bodily and mental harm was inflicted on the victims.<sup>71</sup> While this is undeniable, the idea that these acts *in themselves* constituted an act of genocide is untenable. The acts of removing from an individual his personal property and transporting him to a site of execution are acts aimed at facilitating the killing of the individual in furtherance of the aim of destroying in whole or in part a Convention group; they are not acts which intrinsically fulfill the *mens rea* of genocide. The ICTY also held in *Popovic* that this category of crime could also include the suffering borne by those suffering distress due to the uncertainty over the fate of their male relatives. This is unsatisfactory. The idea that an act which causes distress in the minds of relatives constitutes an act of genocide is stretching the definition too far. It cannot be said on reading the Genocide Convention and the interpretative jurisprudence that causing distress in the minds of relatives is an act which evinces an intention to destroy in whole or in part a Convention group. It is a consequence but not a constituent act.

Crimes against humanity, on the other hand, specifically provide for the crime of disappearance and ‘other inhumane acts’ as noted above. Disappearance is now a recognized crime under the ICC statute which prohibits the “enforced disappearance of persons”<sup>72</sup>. The ICTY/R Statutes do not provide for a discrete offence relating to disappearance. However, it could be considered an ‘inhumane act’, as discussed below. It is notable that the ICC Statute includes the offence of ‘disappearing’ individuals, yet it merely reflects international indignation at the intentional act of causing individuals to disappear leaving their families with no closure. Such acts occurred under the Pinochet regime in Chile and have been documented

<sup>70</sup> Art. 5 (i) Statute of the ICTY; Art. 3 (i) Statute of the ICTR; Art. 7 (1) (k) Statute of the ICC.

<sup>71</sup> *Popović*, ICTY Trial Chamber Judgment, IT-05-88, 10 June 2010, para. 844.

<sup>72</sup> Art. 7(1)(i) Statute of the ICC.

during Russia’s fight against Chechnyen insurgents.<sup>73</sup> There is no doubt that such acts are considered atrocities in themselves, especially as most of the ‘disappeared’ never return and are to be presumed dead.

Other inhumane acts have been described as a “residual category”<sup>74</sup> of crimes which has been deliberately left broad. The ICTY Appeals Chamber has defined the crime as being the infliction of serious bodily or mental harm by an act or omission with the intent to inflict serious bodily or mental harm on the victim.<sup>75</sup> This category would include acts of mistreatment which are ostensibly acts of torture but fail to meet the requirements discussed above, and other acts which are clearly inhumane but do not constitute a defined crime against humanity. The effect of such a provision is to grant to the international judiciary the power to exercise their judgment when presiding over a case.

The strength of crimes against humanity comes from its lower *mens rea* requirement as well as the breadth of offences of which it is comprised. It was remarked earlier that persecution is an umbrella offence in that it can incorporate other crimes against humanity. It is possible to see crimes against humanity as an umbrella category of crimes which offers almost universal protection to civilian populations in times of conflict and times of peace. Indeed, there is one case at the ICTY, that of *Galic*,<sup>76</sup> where a Bosnian Serb general was convicted of crimes against humanity for acts which were ostensibly war crimes. Schabas remarks that the potential consequence of this ruling is to make all war crimes involving suffering and injury of civilians punishable as crimes against humanity<sup>77</sup>. While this article does not agree with the total replacement of war crimes with crimes against humanity, on the grounds that they operate in two different but overlapping spheres, the simplification of international criminal trials can only lead to a stronger conception of international justice in the context of genocide and crimes against humanity.

<sup>73</sup> See for example *Khatuyeva v. Russia*, ECHR Judgment (App no 12463/05), 22 April 2010.

<sup>74</sup> *Naletilić and Martinović*, ICTY Trial Chamber Judgment, IT-98-34, 31 March 2003, para. 247; See also ICTY, *Akayesu*, *supra* note 31, para. 585.

<sup>75</sup> *Kordić*, ICTY Appeal Chamber Judgment, IT-95-14/2, 17 December 2004, para. 117.

<sup>76</sup> *Galić*, ICTY Trial Chamber Judgment, IT-98-29, 5 December 2003, para. 151.

<sup>77</sup> Schabas, *supra* note 6, 225.

## F. Deportation – a Prelude to Genocide

Deportation, forcible transfer and acts of ‘ethnic cleansing’ are persecutory acts in that they seek to remove persons from a given area for reasons based primarily on the identity of the individuals being removed. There is a distinction between the three which is to be discussed below, but in addition to constituting acts of persecution they are also discrete categories of crimes against humanity. They offer a greater level of protection because despite deportation being a component part of many acts of genocide, for example the Holocaust and the atrocities committed by Bosnian Serbs in the former-Yugoslavia where deportation and forcible transfer preceded further persecutory acts, the ICTY has held that forcible transfer, and by extension deportation, does not in itself constitute an act of genocide.<sup>78</sup> This raises questions as to the effectiveness of the protection offered by criminalizing acts of genocide and contributes to the argument that crimes against humanity could easily supplant the crime of genocide.

Article 7(2)(d) of the ICC Statute defines deportation and forcible transfer as the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”. At Nuremberg, the IMT Statute granted the tribunal jurisdiction over acts of deportation as both a war crime<sup>79</sup> and as a crime against humanity. As a war crime, the IMT prosecuted defendants for the deportation of individuals for political and racial reasons.<sup>80</sup> Count 4 of the IMT indictment concerned deportation as a crime against humanity but does not specify the required elements for this crime.<sup>81</sup>

Prior to the establishment of the ICC, the ICTY dealt extensively with the crimes of deportation and forcible transfer. In *Naletilić* the Trial Chamber wrote that there exists a fundamental distinction between

<sup>78</sup> *Popović*, ICTY Trial Chamber Judgment, IT-05-88, 10 June 2010, para. 843.

<sup>79</sup> Article 6(b) Statute of the IMT, in *International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal – 14 November 1945 – 1 October 1946*, Vol. 1 (1947), 11.

<sup>80</sup> Count 3(B)(1) of the IMT Indictment, in *International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal – 14 November 1945 – 1 October 1946*, Vol. 1, (1947), 51.

<sup>81</sup> Count 4(A) of the IMT Indictment, in *International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal – 14 November 1945 – 1 October 1946*, Vol. 1 (1947), 66.

deportation and forcible transfer. The former must involve a transfer beyond state borders, while the latter “may take place within national borders”<sup>82</sup>. However, both share the same feature in that they “relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside”<sup>83</sup>. ‘Transfer’ must not be confused with evacuation which is permitted, in limited circumstances, by Article 49 of the Fourth Geneva Convention and Article 17 of Additional Protocol II. The ICTY examined this very point in *Krstić* and found that in Srebrenica the civilian population was forcibly expelled and that the “evacuation was itself the goal and neither the protection of the civilians nor imperative military necessity justified the action”<sup>84</sup>. Indeed, the Tribunal determined that while the safety of the civilians was used to justify the transfer, hostilities in the locale had ceased,<sup>85</sup> and therefore “the transfer was carried out in furtherance of a well organised policy whose purpose was to expel the Bosnian Muslim population from the enclave”<sup>86</sup>. The civilians of Srebrenica “were displaced within the borders of Bosnia-Herzegovina” and consequently “the forcible displacement may not be characterised as deportation in customary international law”<sup>87</sup>. Instead, the Court found that it amounted to forcible transfer, lacking the requirement for deportation that individuals are forcibly transported across a border into the territory of another state.

The distinction between the deportation and forcible transfer can be described thus: removing the individuals from the place where they are legally residing is forcible transfer, while removing them from the place in which they legally reside and removing individuals ‘from the protection of the authority concerned’ is deportation.<sup>88</sup> In essence the difference is that of moving victims from one place to another in a state or territory (forcible transfer), and removing the concerned victims from the territory to another territory or state (deportation). Additionally, the ICTY has found that expulsion can be “treated in the same way as deportation [but] it would need [...] to meet the test of sufficient gravity in order to constitute

<sup>82</sup> *Naletilić and Martinović*, ICTY Trial Chamber Judgment, IT-98-34, 31 March 2003, para. 670.

<sup>83</sup> *Krstić*, *supra* note 50, para. 520.

<sup>84</sup> *Id.*, para. 527.

<sup>85</sup> *Id.*, para. 525.

<sup>86</sup> *Id.*, para. 527.

<sup>87</sup> *Id.*, para. 531.

<sup>88</sup> *Stakić*, *supra* note 28, para. 674.



persecution”<sup>89</sup>. It must also be proved that individuals were deported or expelled. In *Krnojelac*, because those individuals alleged to have been deported or expelled were never seen or heard from again, the Trial Chamber was unable to determine that deportation or expulsion occurred.<sup>90</sup> A further problem in proving deportation over expulsion arose from the nature of the conflict in the former Yugoslavia which meant that, in places, the *de facto* boundaries of the states or territories concerned were contested and constantly changing. In *Stakić* the ICTY solved this problem by determining that the term ‘boundary’ could be taken to mean both internationally recognized *de jure* borders and *de facto* boundaries.<sup>91</sup> The pragmatic approach taken in *Stakić* recognized the challenges posed by the conflict in the former Yugoslavia and can be seen as wider acknowledgment that modern conflicts are frequently non-international in nature and involve conflicting claims to the control of territory.

Ethnic cleansing is often confused with genocide, or classed as an act of genocide. However, they are distinctly different crimes, with ethnic cleansing now falling into the category of crimes against humanity.<sup>92</sup> Ethnic cleansing has occurred in many conflicts most notably in Bosnia and, contentiously, in the Darfur region of Sudan. Firstly, it is necessary to examine the *actus reus* of ethnic cleansing and its development in the jurisprudence of the ICTY. While the term ‘ethnic cleansing’ started its life as a way of describing government policy rather than as a form of crime against humanity,<sup>93</sup> it is now indubitably in the latter camp through numerous pieces of ICTY jurisprudence. The crime itself has been variously defined. In the case of *Bosnia-Herzegovina v. Serbia and Montenegro* at the International Court of Justice, the Court quoted a report by the Commission of Experts for Security Council Resolution 780 which described ethnic cleansing as being the practice of “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area”<sup>94</sup>. In the case of *Stakić*, the ICTY determined that, in reference to the deportation of Bosnian Muslims, the “expulsion of a group

<sup>89</sup> *Krnojelac*, ICTY Trial Chamber Judgment, IT-97-25, 15 March 2002, para. 476; and see also *Stakić*, *supra* note 28 para. 675.

<sup>90</sup> *Krnojelac*, ICTY Trial Chamber Judgment, IT-97-25, 15 March 2002, para. 485.

<sup>91</sup> *Stakić*, *supra* note 28, para. 679.

<sup>92</sup> The ICC Statute prohibits forcible transfer and deportation.

<sup>93</sup> W. Schabas, *Genocide in International Law* (2000), 190.

<sup>94</sup> ICJ, *supra* note 7, 43, para. 190.

or part of a group does not in itself suffice for genocide”<sup>95</sup> because the aim of such action is to dissolve the group in a particular area rather than its physical destruction. This part of ethnic cleansing ties in with the section above on inflicting conditions calculated to bring about the destruction of a particular Convention group. The crime of ethnic cleansing, consequently, is intimately linked to the crime of genocide in that it targets individuals because of their specific group identity, whether real or perceived. Ethnic cleansing often involves the killing of a small proportion of the target group in order to coerce the remainder of that group to leave the region. However, its intention is clearly very different from genocide, an issue which shall be examined in the following chapters on the *mens rea* of genocide.

How do the acts of deportation and forcible transfer as crimes against humanity render genocide a redundant crime under international law? The crimes of deportation and ethnic cleansing could be considered to be ‘intelligent acts of genocide’ in that they aim to destroy a group in a particular area without committing any of the acts listed in the Genocide Convention. It is because of this link that crimes against humanity are better positioned to offer protection than that afforded by the Genocide Convention. Indeed, many modern atrocities have to some extent involved deportation or forcible transfer. Additionally, there is no requirement that the individuals targeted for expulsion, deportation or transfer belong to a Convention group. All that is required is that there has been a widespread or systematic attack against a civilian population, and *may* also occur under the umbrella of the crime of persecution. It is for this reason, and for those given above, that the crimes against humanity of deportation and forcible transfer of individuals offer far better protection than the non-existent protection offered by the Genocide Convention.

## G. Reassessing the Role of Genocide

Throughout this article it has been argued that crimes against humanity are better positioned than the crime of genocide to prevent future atrocities. It has also been argued that genocide depersonalizes the violence, focusing on the violence of one group to another. It seemingly fails to take into account the impact such atrocities have on a personal level, with regard to both the perpetrator and the victim. Indeed the ICTY in *Popovic* has

<sup>95</sup> Stakić, *supra* note 28, para. 519 [emphasis added].

stated that the “ultimate victim of the crime of genocide is the group”<sup>96</sup>. This is simply wrong in an era where international law is so concerned with the fundamental and inviolable rights of individuals. In contrast, it has been commented that as a crime against humanity, persecution “stops with the victim”<sup>97</sup>. This means that instead of targeting the group through its members, the crime targets individuals *because of* their group identity. This is a difference of fundamental importance. In this sense it reawakens the debate concerning human rights and whether groups can ever possess such rights. Obviously they cannot as human rights are so called and not ‘group rights’. Essentially, crimes against humanity restore the link between humanitarian law and human rights, bringing the individual back into the focus of the law. As has been noted, genocide removes humanity from the crime. Crimes against humanity make the occurrences of such crimes more real in popular consciousness and thus more preventable by weakening the culture of impunity which is widespread in dictatorial regimes and the minds of warlords the world over.

In the conclusion to his book *Genocide in International Law*, Schabas comments that the law of genocide can be developed in two ways. First, the definition of a Convention group can be broadened to include other groups. Secondly, he believes it necessary to extend the scope of “obligations assumed by States parties, notably in the direction of a duty to intervene in order to prevent genocide”<sup>98</sup>. Both of these proposals are problematic. Redefining a Convention group to include the likes of political and gender groups seriously weakens the true meaning of genocide, and suggests a reluctance to describe such serious violations of international law as crimes against humanity. Furthermore, he uses the term “victims of mass killing”<sup>99</sup>. It is as if Schabas, despite the contents of his book, has fallen victim to the belief that mass killing is a *sine qua non* of genocide, despite killing being only one of five acts of genocide enumerated by the Genocide Convention. It demonstrates the way in which the term has come to be abused. The second proposal, that of imposing obligations on States parties to intervene in genocide, is dangerous because it will lead to States parties denying the existence of genocide in a country when it could objectively be demonstrated that it is occurring. This poses a great risk to the security of individuals living within a genocidal state. A third proposal could be added

<sup>96</sup> Popović, *supra* note 71, para. 821.

<sup>97</sup> Mettraux, *supra* note 44, 334.

<sup>98</sup> Schabas, *supra* note 93, 551.

<sup>99</sup> *Id.*, 551.

to Schabas’ two, that the Genocide Convention should be left as it is as a piece of historical international legislation and that for the vast majority of instances crimes against humanity should become the ‘crime of crimes’.

While the Genocide Convention is often said to have been born out of the Nuremberg trials, legally speaking this is incorrect. Genocide as a concept existed before the IMT Statute was drawn up and could have been incorporated as a separate indictable offence. Crimes against humanity were the charges brought against the Nazi leadership even though they indubitably possessed the necessary *mens rea* for a successful prosecution for genocide. Genocide grew out of the law forbidding crimes against humanity, and the fact that genocide now has such a prominent place in international criminal law is a damning indictment of the international community’s neglect of the ‘lesser’ crimes against humanity.

Furthermore, the idea that a law prohibiting genocide will prevent future occurrences of the Nazi genocide are ill-founded and dangerously naïve. The fact remains that while individuals are convinced of their own historic, social, political, racial, ethnic, or religious superiority, they will ignore laws, no matter how inviolable the international community holds them to be, and commit crimes because they *believe* that they are right. Crimes against humanity make a better choice for the international community, not just a fallback in case a prosecution for genocide fails but as a category of crimes which offers more flexibility and a sounder legal standing than genocide.

## H. Concluding Remarks

This article has examined four crimes against humanity and compared them with crimes of genocide. It has been shown that, in each of the four offences, crimes against humanity offer a viable and adequate alternative to prosecuting individuals for acts of genocide. The lack of a discriminatory intent for the former is a significant boon, although should discrimination or persecution occur there is a separate crime for which individuals may be prosecuted. Extermination and murder as crimes against humanity provide better protection than that afforded by the Genocide Convention, and not only because of the lower *mens rea* threshold. Torture and inhumane acts as crimes against humanity between them offer coverage of a wide range of situations where torture or inhumane acts are committed. Lastly, the crimes of deportation and forcible transfer were examined beside acts of ethnic cleansing. It was shown that such acts, despite being as destructive as other offences against the Genocide Convention, are not considered acts of

genocide thereby leaving a huge hole in the protection granted by the Convention. It was demonstrated that in instances such as these crimes against humanity is the only category of crimes to protect individuals even if the perpetrators possess the *mens rea* required for genocide.

It remains to be seen how the ICC will approach cases concerning genocide although inevitably it will draw on the jurisprudence of the ICTY and the ICTR in particular. However, as this article has argued, is this necessary? It has been argued that the “paralysing obsession in finding a genocide [...] is to misapply the Genocide Convention and misunderstand the legal alternatives”<sup>100</sup>. Crimes against humanity provide an overarching category of crimes. Indeed as Schabas has commented, there “have been no convictions for genocide where a conviction for crimes against humanity could not also have been sustained”. He continues that the “real ‘umbrella’ rule of the tribunals is the prohibition of crimes against humanity”<sup>101</sup>. Consequently, given the difficulties posed by establishing the occurrence of genocide is it sensible to rely upon it as a basis for future prosecutions? Critics of this position will no doubt offer the impressive jurisprudence of the ICTR in answering this question, yet the ICTR trials leave a lot to be desired. For instance, there is a dispute as to whether the Hutu and Tutsi really are ethnically different, and they certainly are not to be considered ‘stable and permanent groups’ as the ICTR readily acknowledged. Instead of exploring the issue in detail, as a court of law should, the Tribunal ‘fudged’ the issue in *Akayesu*.<sup>102</sup> Subsequent cases have simply taken judicial notice of the fact that genocide occurred. Whether this approach is satisfactory to the interests and purposes of international criminal justice is a question that few are willing to consider.

Justice Birkett, the presiding British judge at Nuremberg, said that the “thing that sustains me is the knowledge that this trial can be a very great landmark in the history of International Law. There will be a precedent of the highest standing for all successive generations”<sup>103</sup>. It seems strange then that one of the greatest achievements of the International Military Tribunal was the successful prosecution of individuals for the commission of crimes against humanity, only for it now to be considered by many as a crime second to genocide in the international hierarchy of crimes.

<sup>100</sup> P. Quayle, ‘Unimaginable Evil: The Legislative Limits of the Genocide Convention’, *International Criminal Law Review* (2005) 5, 372, 371.

<sup>101</sup> Schabas, *supra* note 6.

<sup>102</sup> ICTY, *Akayesu*, *supra* note 31, paras 112-129.

<sup>103</sup> Cited in J. Owen, *Nuremberg: Evil on Trial* (2006), 98.

It is true that the past 20 years or so have been a period of great expansion and development for international criminal law. Writing in 1992, a year before the ICTY was established, Bassiouni commented forlornly that “expectations are bleak that a legally satisfactory codification of “crimes against humanity” will soon emerge”<sup>104</sup>. Yet, a few years later with the ICTY’s ruling in *Tadić*, international criminal justice had a well-developed conception of crimes against humanity, one that has been developed subsequently both at the ICTY/R and at other international criminal tribunals, and also incorporated into the Statute of the ICC.

The coming years will mark another milestone in the development of international criminal law. Already the first indictments have been handed down by the ICC Prosecutor and the first trials getting underway. Omar Bashir, the Sudanese president, has been indicted for acts of alleged genocide in Darfur although he currently remains free. It will take some courage for the ICC to offer effective scrutiny of alleged offences at any trial concerning genocide. The Court must not repeat the mistakes of the ICTR by simply taking judicial notice of the existence of genocide. Lastly, it must remain aware of the heritage of international criminal law, and the significance and advantages that are offered by crimes against humanity.

<sup>104</sup> M. C. Bassiouni, *Crimes Against Humanity in International Law* (1992), 488.



## **Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?**

Christopher Peters \*

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## Abstract

The present Article considers and compares the subsequent practice of the parties according to Art. 31 (3) (b) VCLT and established practice amounting to rules of an international organization (Art. 5 VCLT). The significance of these concepts lies in their potential to contribute to the adaptation of constituent instruments of international organizations to changing factual and normative circumstances. Established practice can serve as a hinge between the general law of treaties and the law of international organizations. The paper argues that both concepts are not two sides of the same coin, but that they have to be distinguished. Whereas subsequent practice primarily serves in interpretation, established practice amounting to a rule of the organization is quasi-customary law specific to the respective organization. It can even influence the preconditions for and significance of subsequent practice in the application of constituent instruments. Thus, the requirements for the agreement of the parties in accordance with Art. 31 (3) (b) VCLT can be relaxed and tacit consent can be recognized more easily. In some cases even organ practice which is independent from (all) Member States can create subsequent practice. However, these informal mechanisms of change raise problems of legitimacy.

## A. Introduction

Practice has always played a vital role in the development of international law. As an essential condition for the formation of customary law, it has received particular attention in international legal scholarship. However, some aspects of practice may not have been sufficiently examined so far. *Subsequent practice* has the potential to contribute to the evolution of treaties over time and to their adaptation to changing factual circumstances, in short, to contribute both to the stabilization and to the further development of international law.<sup>1</sup> It has been codified as a method of

<sup>1</sup> This topic has recently been taken up by the International Law Commission, *Treaties over Time – in particular: Subsequent Agreement and Practice*, Annex A to the ILC Report 2008 (60th session), <http://untreaty.un.org/ilc/reports/2008/english/annexA.pdf> (last visited 16 August 2011).

interpretation in Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties<sup>2</sup> (VCLT) and reflects customary law.<sup>3</sup>

Article 31 – General rule of interpretation

“3. There shall be taken into account, together with the context:  
[...]

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

Subsequent practice means consistent, treaty-related actions and omissions of the parties to or organs established by the treaty on international level, which reflect the common ideas of all the parties about the interpretation of the treaty.<sup>4</sup> It is vital for the understanding of the following considerations to keep in mind that Art. 31 (3) (b) VCLT demands the agreement of *all the parties* in order to make practice relevant for treaty interpretation.<sup>5</sup>

The adaptation of treaties to changing circumstances is an especially important function with regard to the constituent instruments of international organizations. The international community entrusts international organizations with a growing number of vital tasks, such as protecting the environment, safeguarding economic stability, keeping peace

<sup>2</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 [VCLT].

<sup>3</sup> The predominant view is that Art. 31 VCLT reflects customary law: e.g. M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), Art. 31, paras 37-38; W. v. Vitzthum, *Völkerrecht*, 5th ed. (2010), para. 123; the ICJ shares this opinion: see e.g. *Case concerning Legality of Use of Force (Serbia and Montenegro v. Belgium)* Preliminary Objections, Judgment, ICJ Reports 2004, 279, 318, para. 100; *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466, 501, para. 99; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, 75, para. 19 [Use by a State of Nuclear Weapons].

<sup>4</sup> Result of a further development of the definitions of W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983), 112-120 [Karl, 1983] and U. Linderfalk, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 165-171.

<sup>5</sup> G. McGinley, ‘Practice as a Guide to Treaty Interpretation’, 9 *Fletcher Forum of World Affairs* (1985) 1, 211, 217; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), 356-357; Villiger, *supra* note 3, Art. 31, para. 22.

and security and many more. Those tasks are subject to constant changes, which cannot all be “absorbed” by formal amendment or revision procedures for the affected constituent instruments. Therefore, considering the practice of an organization when interpreting its constituent instrument is a way to mitigate some – although of course not all – tensions between those instruments and the current circumstances. Nevertheless, it is important to remember that formal amendment procedures are guarantors of legitimacy and that the necessary legitimacy of informal change must be provided in a different way.

Taking these reasons into consideration, in the case of international organizations, one soon comes across another concept of practice: the so-called *established practice*. It can lead to the formation of so-called *rules of the organization*. References to the rules can be found in Art. 5 VCLT and numerous other instruments.<sup>6</sup> Rules of the organization mean, for example, according to the definition in Art. 2 (1) (j) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT-IO)<sup>7</sup>:

“[...] in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization”.

The most recent Draft Articles on Responsibility of International Organizations contain a similar definition.<sup>8</sup> The rules of the organization play a significant role in this document. For example, according to Art. 9, the breach of an international obligation by an international organization “may arise under the rules of the organization”. The rules are also highly

<sup>6</sup> Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, UN Doc.A/CONF.129/15 [VCLT-IO]; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 14 March 1975, UN Doc. A/CONF.67/16; Draft Articles on Responsibility of International Organizations (adopted by the ILC on first reading), ILC Report on the work of its sixty-first session, available at <http://untreaty.un.org/ilc/reports/2009/english/chp4.pdf> (last visited 2 August 2011), 19.

<sup>7</sup> VCLT-IO, *supra* note 6.

<sup>8</sup> Art. 2 (b) of the Draft Articles on Responsibility of International Organizations, *supra* note 6; see also Art. 1 (34) Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, *supra* note 6.

relevant, *inter alia*, for the attribution of conduct<sup>9</sup> and the applicability of the Draft Articles.<sup>10</sup> This illustrates the importance of this concept in most areas of international law in which international organizations play a role.

Interestingly enough, the VCLT, which is indisputably the most important of the cited documents, lacks a definition of the rules. Yet most authors agree that established practice is also part of the relevant rules in Art. 5 VCLT.<sup>11</sup> Art. 5 VCLT reads:

Article 5 VCLT – Treaties constituting international organizations and treaties adopted within an international organization

“The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization *without prejudice to any relevant rules of the organization.*”<sup>12</sup>

This provision reflects the notion that constituent instruments of international organizations are different from other bilateral and multilateral treaties, as can be seen from the dense institutional structure in the form of organs, which sometimes develop a life of their own.<sup>13</sup> All provisions of the

<sup>9</sup> Art. 5 (2) of the Draft Articles on Responsibility of International Organizations, *supra* note 6.

<sup>10</sup> *Id.*, Art. 63; for recent comments of international organizations on the scope of the rules of the organizations cf. Responsibility of international organizations – Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), e.g. Comments of the European Commission, 24-25 and UN Doc. A/CN.4/637/Add.1 (2011), Comments of the United Nations, 6-7, 17, 30. These comments discuss the extent to which the rules of the organization are rules of international law or of the organization’s internal law. This issue is above all relevant for the scope of the responsibility of international organizations and will not be further discussed here.

<sup>11</sup> W. Karl, ‘Die spätere Praxis im Rahmen eines dynamischen Vertragsbegriffs’, in R. Bieber & G. Ress (eds), *Die Dynamik des europäischen Gemeinschaftsrechts* (1987), 81, 90-91 [Karl, 1987]; A. Verdross & B. Simma, *Universelles Völkerrecht*, 3rd ed. 1984, 434-435; Villiger, *supra* note 3, Art. 5, para. 8.

<sup>12</sup> Italics added.

<sup>13</sup> The own life of international organizations is a notion which can be found frequently: Separate Opinion of Judge Lauterpacht, *Voting Procedure in Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, Advisory Opinion, ICJ Reports 1955, 67, 90, 106; e.g. taken up by B. Fassbender, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia*

VCLT are, when applied to the constituent instruments of international organizations, subject to Art. 5 VCLT and the rules of the organization. On condition that established practice really amounts to such a rule, it can influence the application of the VCLT to the constituent instruments and thus the entire relationship between the law of treaties and the law of international organizations.

This explains why the concepts subsequent and established practice matter as such. A recent written statement on the Draft Articles on Responsibility of International Organizations delivered in the Sixth Committee of the UN General Assembly illustrates why the interrelation between subsequent practice and established practice raises particular problems as well. *Sir Daniel Bethlehem QC*, Legal Adviser of the Foreign and Commonwealth Office of the United Kingdom, made the following comments on Art. 2 (b) of the Draft Articles on Responsibility of International Organizations, which contains one of the aforementioned definitions of the rules of the organization:

“[...] further explanation about what constitutes ‘established practice’ and when such ‘established practice’ of an international organisation amounts to a ‘rule’ would be helpful. We understand the Special Rapporteur considers the term ‘vague’ but ‘indispensable’. We share that concern and wonder whether ‘established practice’ is best considered a means for interpreting the rules of an international organisation, rather than constituting a rule in itself. Further elaboration by the Commission would assist”.<sup>14</sup>

*Journal of Transnational Law* (1998) 3, 529, 540; G. Fitzmaurice, ‘Hersch Lauterpacht – The Scholar as Judge. Part III’, 39 *British Yearbook of International Law* (1963), 133, 166. However, this concept can only serve to vivify and illustrate the role of organs and must not be taken literally, as the States always preserve a considerable if not decisive influence on this “life”.

<sup>14</sup> Written Statement of the United Kingdom on the ILC Report 2009, 16th meeting of the Sixth Committee of the General Assembly in its 64th session, 27 October 2009, 4-5, on file with the author; there are other authors who use the term established practice when discussing the relevance of practice for the interpretation of constituent instruments: S. Engel, “‘Living’ International Constitutions and the World Court (The Subsequent Practice of International Organs under Their Constituent Instruments)”, 16 *International and Comparative Law Quarterly* (1967) 4, 865, 894; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), 241; H. Schermers & N. Blokker, *International Institutional Law*, 4th ed. (2003), para. 1347.

This comment suggests that established practice and subsequent practice have the same function, namely, interpretation. Thus, they would be nothing but two sides of the same coin: heads, subsequent practice of the member states and organs, and tails, established practice of the organization, both of which are relevant for the interpretation of constituent instruments.

Such an assumption contradicts the understanding of established practice as expressed in the above-mentioned conventions. In this understanding, established practice amounts to *rules* of the organization. Rules do not interpret, they are interpreted. Pursuant to Art. 5 VCLT, the rules of the organization could modify or even precede the general rules expressed in the provisions of the VCLT. Art. 31 (3) (b) VCLT is one of these provisions. Thus, established practice could change the way to consider subsequent practice when it comes to the interpretation of constituent instruments, but it would not be a substantive basis for their interpretation. The purpose of the present article will be to examine the interrelation between both kinds of practice and to offer a solution for the problems just described.

A specific example may illustrate why this is worth the effort: the *Wall Advisory Opinion*<sup>15</sup> of the International Court of Justice, read in context with a prior opinion, *Use of Nuclear Weapons*.<sup>16</sup> Having been confronted with the question whether under Arts 96 (1) and 12 (1) of the UN Charter the General Assembly could ask for an Advisory Opinion of the ICJ while the Security Council was seized on the same matter, the Court almost exclusively referred to the practice of both organs in application of Art. 12 of the UN Charter to answer it to the positive. It did so without discussing whether the respective General Assembly resolutions were unanimous or majority decisions and whether those of the Security Council were expressly or impliedly supported by the Member States.<sup>17</sup> If this consideration of organ practice in an international organization rested on Art. 31 (3) (b) VCLT alone,<sup>18</sup> as the earlier *Use of Nuclear Weapons Opinion* could suggest,<sup>19</sup> the consent of all parties to the UN Charter to such an interpretation would seem to have been necessary, for this provision is

<sup>15</sup> *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 [Wall Opinion].

<sup>16</sup> Use by a State of Nuclear Weapons, *supra* note 3.

<sup>17</sup> Wall Opinion, *supra* note 15, 148-150, paras 24-29.

<sup>18</sup> More exactly: the according rule of customary law.

<sup>19</sup> Use by a State of Nuclear Weapons, *supra* note 3, 75, para. 19.

seen to require the agreement of *all* the parties.<sup>20</sup> The ICJ should have looked for unanimous decisions, borne by the States, and it should have said so. If not, and if the reference to Art. 31 (3) (b) VCLT was still correct, then something must have influenced this provision. This could be the rule of customary law as codified in Art. 5 VCLT. Further, the established practice of the United Nations could have created a rule of the organization with the content that its subsequent practice does not strictly require the agreement of *all* the Member States.

The analysis of this issue will take the following course: after a very short overview of the drafting history of Art. 5 VCLT (B.), it will be determined whether established practice also belongs to the rules of the organization as far as the VCLT is concerned (C.). The next step will be to specify the content and nature of established practice and the conditions on which it can amount to a rule of the organization. This operation cannot be performed without connecting and comparing it with subsequent practice in order to see whether both concepts are identical or whether they differ substantively (D.).

Additionally, if subsequent practice and established practice are really different concepts, the original and most important question of their interplay will be posed. We will briefly revisit the introductory case and see whether one concept of practice can really influence the other (E.).

## B. Drafting History of Art. 5 VCLT

Art. 5 VCLT garnered considerable attention during the course of the debate of the ILC and the Vienna Conference.<sup>21</sup> The ILC drafted and changed various provisions which were the predecessors of Art. 5.<sup>22</sup> In Vienna a considerable number of delegates, both of States and of international organizations, took the floor in order to comment on the respective versions of the Article.<sup>23</sup> Sir Francis Vallat, the chairman of the

<sup>20</sup> See *supra* note 5.

<sup>21</sup> Cf. Villiger, *supra* note 3, Art. 5, para 2.

<sup>22</sup> Rosenne, *supra* note 14, 201-211.

<sup>23</sup> An elaborate description of the various suggestions and reactions has been made by J. González Campos, 'La aplicación del future convenio sobre derecho de los tratados a los acuerdos vinculados con Organizaciones Internacionales (Artículo 4 del proyecto de la C.D.I. de 1966)', in *Estudios de Derecho Internacional, Homenaje a D. Antonio de Luna (1968)*, 212, 228. For a shorter overview see Villiger, *supra* note 3, Art. 5, para. 2.

UK delegation, even “said that in substance Art. 4 [by now Art. 5]<sup>24</sup> was one of the most important before the Committee”.<sup>25</sup> The most important change of this Article happened at Vienna when “[...] the application of the present Articles [...] *shall be subject to*<sup>26</sup> any relevant rules of the organization” was replaced with today’s “[...] *without prejudice to*<sup>27</sup> any relevant rules of the organization”. Though some authors are of the opinion that it did not make a substantial difference,<sup>28</sup> this change of wording will play an important role in the following considerations. The eventful drafting history lies at the origin of two extensive contemporary analyses.<sup>29</sup> The fact that it had been the subject of so much attention and debate would seem to suggest that jurisprudence would be full of references to Art. 5 of the VCLT, but this is not the case. There are no judgments or advisory opinions of the ICJ, nor any arbitral awards which expressly quote Art. 5.<sup>30</sup>

The drafting history evokes the impression that the ILC, the States and organizations represented in Vienna and many international legal scholars considered Art. 5, the rules of the organization, the established practice and

<sup>24</sup> Comment of the author.

<sup>25</sup> United Nations Conference on the Law of Treaties, Official Records, 1st Session 1968, UN Doc. A/CONF.39/11 (1968), 44, para. 31.

<sup>26</sup> Italics added.

<sup>27</sup> Italics added.

<sup>28</sup> Villiger, *supra* note 3, Art. 31, para. 7.

<sup>29</sup> González Campos, *supra* note 23, 218-226; Rosenne, *supra* note 14, 252-255; Rosenne’s work can be considered contemporary since he mainly transferred the essay ‘Is the Constitution of an International Organization an International Treaty?’, 12 *Comunicazioni e Studi* (1966), 21 to his monograph previously cited, which will be consulted as the more recent work.

<sup>30</sup> Even though there are several cases in which the basic thought of this provision might have been applied. Many of them were issued before the draft of today’s Art. 5 VCLT, but appear to consider the relationship between the law of treaties and the constituent instruments of international organizations in a similar way: Cf. Wall Opinion, *supra* note 15, 149-150, paras 27-28; *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, 22 [Namibia]; *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151, 157 [Certain Expenses]; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4, 8-9 [Competence of Admission]; *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 182; in *Use by a State of Nuclear Weapons*, *supra* note 3, 74, para 19, the Court even mentioned the “relevant rules of the organization”.



their influence on the general law of treaties vital issues, highly relevant for international legal practice and worth to be discussed intensely. The role Art. 5 has played in practice evokes the impression that they all were mistaken. These curious impressions are further reasons for the analysis undertaken here.

### C. Is Established Practice Part of the Rules of the Organization in Art. 5 VCLT?

Thus, it is time to turn to the question of whether the established practice of the organization can amount to rules of the organization. The language of Art. 5 can serve as a starting point. The term “rules” does not give any hint at whether only provisions of the constituent instruments are comprised or the established practice of the organization as well. *Rules* only imply that the concept shall be mandatory, that is, legally binding.<sup>31</sup> The word “any” is the only indication of the meaning of the reservation element contained in Art. 5 “[...] *any* relevant rules of the organization” must refer to more than only the constituent instruments;<sup>32</sup> otherwise, it would have been much more straightforward to omit the “any” and replace “rules of the organization” with “rules of the constituent instrument of the organization”.

An examination of the preparatory works leads to results that are in line with this interpretation. There, the rules of the organization are not only referred to as the provisions of the constituent instruments, but also as the (unwritten) customary rules developed in practice,<sup>33</sup> as stated by the Chairman of the Drafting Committee, *Yasseen*.<sup>34</sup> However, the Commentary to the ILC Draft of 1966 does not give a definition of the rules of the organization and does not refer to the issue of practice.

<sup>31</sup> Cf. United Nations Conference of the Law of Treaties, Official Records, 1st session (1968), *supra* note 25, 147, paras 9-10 (Yasseen).

<sup>32</sup> R. Bernhardt, ‘Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts 27, 28, 29 and 38 of the ILC’s 1966 Draft Articles on the Law of Treaties’, 27 *Heidelberg Journal of International Law* (1967), 491, 494.

<sup>33</sup> Yearbook of the International Law Commission (1963), Vol. II, 213, Commentary to Draft Art.48 on the Law of Treaties, para. 2; United Nations Conference on the Law of Treaties, Official Records, 2nd session (1969), UN Doc. A/CONF.39/11/Add.1, 4 para. 22.

<sup>34</sup> United Nations Conference of the Law of Treaties, Official Records, 1st session (1968), *supra* note 25, 147, para. 15.

As the VCLT does not contain a definition of the rules of the organization, the relevant literature has to make recourse to the other conventions and draft articles which contain *and* expressly define the rules. In Art.2 (1) (j) VCLT-IO the rules of the organization – a term which is used, *inter alia*, in the almost identical Art.5 VCLT-IO – are defined as

“[...] in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and *established practice* of the organization”.

The definition in Art. 1 (1) (34) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975 is similar. It only lacks the hierarchy established between the elements of the definition in Art. 2 (1) (j) VCLT-IO (“in accordance with them”). The most recent example is Art. 2 (b) of the ILC Draft Articles on Responsibility of International Organizations<sup>35</sup> which is also almost identical to Art. 2 (1) (j) VCLT-IO.<sup>36</sup>

Whatever other slight differences in wording may be, all three definitions of the rules of the organization include established practice. Thus it is not surprising that most authors apply Art. 2 (1) (j) VCLT- IO – as this convention is most comparable to the VCLT – also to Art. 5 VCLT and include established practice.<sup>37</sup> Yet it does not go without saying that the VCLT-IO can in principle be used to interpret Art. 5 VCLT in context.

Since the rules of interpretation are applicable to the Convention itself,<sup>38</sup> Art. 31 VCLT also determines the contextual interpretation of Art. 5

<sup>35</sup> Draft Articles on Responsibility of International Organizations, *supra* note 6, 43.

<sup>36</sup> VCLT-IO, *supra* note 6. The ILC refers in its Commentary to Art. 2 Draft Articles on Responsibility of International Organisations to “a few minor stylistic changes”: *supra* note 6, 49, para. 15. The only evident difference is the inclusion of “other acts of the organization” into the definition of the rules of the organization. This does not really mean a difference in scope and content, given the words “in particular” in all definitions. They make already clear that the enumeration of the constituent instruments, the decisions, resolutions and the established practice is not supposed to be complete. Thus the advantages of this extension are uncertain, all the more since “other acts of the organization” can also be considered part of its practice.

<sup>37</sup> See *supra* note 11.

<sup>38</sup> Karl, 1983, *supra* note 4, 358-362; Villiger, *supra* note 3, Art. 31, para. 35, Issues of Customary International Law, para. 27; cf. also Art. 24 (4) VCLT, *supra* note 2. Yet the self-applicability is not undisputed: K. Marek, ‘Thoughts on Codification’, 31 *Heidelberg Journal of International Law* (1971), 489, 510.

VCLT. More specifically, paragraph 1 (“in their context”) and paragraph (3) (c) are of assistance. According to sub-paragraph (c) “any relevant rules of international law applicable in the relations between the parties” shall be considered for the purpose of interpretation. The VCLT-IO, however, has not entered into force, as its Art. 85 (1) requires 35 ratifications by State parties, which have not been achieved.<sup>39</sup> Thus, the Convention as such has not reached the status of a *binding* rule of international law<sup>40</sup> which is a precondition for the application of Art. 31 (3) (c) VCLT.<sup>41</sup> Finally Art. 31 (1) VCLT, which refers to an interpretation of the terms of a treaty *in their context*, only applies to the context of the terms within the same treaty<sup>42</sup> and does not include other treaties. In this regard paragraph (3) sub-paragraph (c) is *lex specialis*. Therefore, Art. 2 (1) (j) VCLT-IO cannot *directly* be considered in a contextual interpretation of Art. 5 VCLT.

Nevertheless, the object and purpose of Art. 5 VCLT speak in favor of an inclusion of established practice into the term “rules of the organization.” Object and purpose of the provision are on the one hand, to provide for a comprehensive application of the Vienna Convention to the constituent instruments of international organizations – and, on the other hand, not to disregard the characteristics of these instruments and the needs of the organizations established by them.<sup>43</sup>

This purpose cannot be served without considering established practice: in many cases the constituent instruments of international organizations do not contain the necessary regulations for the proper functioning of the organization, whereas the provisions of the Vienna Convention, if applied without modification, are not consistent with the special qualities and needs of the organizations due to their autonomous features. Thus, it is inevitable to resort, *inter alia*, to the practice of the organization in order to compensate for the shortcomings of both regimes.

The best example is the interpretation of the constituent instruments. Normally, they do not themselves provide for their interpretation and, as a result, recourse to the Vienna Rules (Arts 31 *et seqq.* VCLT) has to be

<sup>39</sup> UNTC Chapter XXIII N 3, available at <http://treaties.un.org> (last visited 4 August 2011), only 29 states and 12 International Organizations.

<sup>40</sup> Cf. T. Stein & C. von Buttlar, *Völkerrecht*, 12th ed. (2009), para. 36.

<sup>41</sup> Villiger, *supra* note 3, Art. 31, para. 25.

<sup>42</sup> Cf. *id.*, Art. 31, para. 10.

<sup>43</sup> Cf. Spanish Delegation, United Nations Conference of the Law of Treaties, Official Records, 1st session 1968, *supra* note 25, 44, paras 23-30.

made.<sup>44</sup> This is the case despite the prevailing view in the relevant literature and jurisprudence that the constituent instruments have to be interpreted differently from bilateral and regular multilateral treaties.<sup>45</sup> The most prominent example of such difficulties is the United Nations.

All things considered, the language, history and purpose of Art. 5 VCLT lead to the conclusion that established practice is part of the rules of the organization regardless of the difficulties of contextual interpretation.

#### D. What is Established Practice and how can it be Distinguished from Subsequent Practice?

Established practice is neither defined in any of the mentioned ILC Conventions/draft articles nor in the commentaries. The ILC commentary to the VCLT-IO specifies the conditions for practice to be *established*, but it does not specify its legal nature and what the practice itself can consist of.<sup>46</sup> The latter may be due to the fact that every international lawyer can imagine what such practice of international organizations is. First of all, he or she would think of resolutions and decisions of organs, then he or she might draw the parallel to State practice as a factor in the formation of customary law. This would mean to include all the acts of States discussed in that context, such as declarations, waivers, notifications, protests, statements

<sup>44</sup> Exceptions are the provisions in the constituent instruments of some UN specialized agencies providing for an authoritative interpretation by a determined organ, e.g. Art. 84 Convention on International Civil Aviation (ICAO), 7 December 1944, 15 U.N.T.S. 295; Art. IX Articles of Agreement of the International Bank on Reconstruction and Development, 27 December 1944, 2 U.N.T.S. 134; Art. XXIX Articles of Agreement of the International Monetary Fund, 22 July 1944, 2 U.N.T.S. 39; Art. IX, para. 2 of the Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154.

<sup>45</sup> J. Alvarez, 'Constitutional interpretation in international organizations', in J.-M. Coicaud & V. Heiskanen (eds), *The legitimacy of international organizations* (2001), 104, 136-137; C. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (2005), 59; E. Lauterpacht, 'The Development of the Law of International Organization by the Decision of International Tribunals', 152 *Recueil des Cours* (1976) 4, 377, 416; M. Ruffert & C. Walter, *Institutionalisiertes Völkerrecht* (2009), paras 136-138; Use by a State of Nuclear Weapons, *supra* note 3; Cf. Certain Expenses, *supra* note 30, 157; Cf. Competence of Admission, *supra* note 30, 8-9.

<sup>46</sup> Yearbook of the International Law Commission (1982), Vol. II (Part 2), 21, para. 25.

before international bodies, domestic acts, etc.,<sup>47</sup> as long as they refer to the organization in question and are representative for the whole membership. If State practice comprises such informal acts, this must also apply to organ practice, for there is no reason to limit the relevant action of organs to formal acts such as resolutions. Nevertheless, formal acts are the most important sources of established practice, as they expressly refer to the constituent instruments, as they are easily accessible for interpreters and as they are saved and documented, so that access is possible at all.

This raises the question of the relationship between established practice, on the one hand, and the “decisions and resolutions adopted in accordance with them [the constituent instruments]<sup>48</sup>” referred to in the various definitions of the rules of the organization, on the other hand. The different categories of rules of the organization should not be considered equal in rank. On the contrary, there are good reasons to assume a hierarchy between them,<sup>49</sup> as the reservation “in accordance with them” shows. It is worth pointing out that this phrase does not grammatically refer to established practice, but only to the decisions and resolutions.<sup>50</sup> Thus, it is possible that numerous decisions and resolutions with a similar content cumulatively lead to the creation of an established practice, without prejudice to their – lesser significance as isolated acts. In any case it would be implausible to assume that a single decision or resolution can have the same influence on the application of the VCLT to the constituent instrument as an established practice with the combined effect of numerous consistent acts.

As regards the legal nature of established practice amounting to rules of the organization, it shows strong parallels to customary law. It should be

<sup>47</sup> K. Zemanek, ‘What is “State Practice” and who Makes It?’, in U. Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht, Festschrift für Rudolf Bernhardt* (1995), 289, 293-299.

<sup>48</sup> Explanation of the author.

<sup>49</sup> ILC Report on the work of its sixty-first session, *supra* note 6, 50; Responsibility of international organizations – Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), 18, note 12 (joint submission of several international organizations).

<sup>50</sup> G. Gaja, ‘A New Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Critical Commentary’, 58 *British Yearbook of International Law* (1987), 253, 262.

considered a kind of customary law of the organization,<sup>51</sup> formed by the organization and applying only to the organization. Yet it is not entirely that simple because at the same time established practice has a characteristic which is due to its origins in the organization: it is based to a large extent on secondary law of the organization, on the binding resolutions and decisions of its organs.<sup>52</sup> This does not mean, however, that *opinio iuris* is dispensable for the formation of such a rule.

To the contrary, *opinio iuris*, or better, a surrogate/subjective element corresponding to the characteristics of an international organization, is necessary. In the case of binding secondary law, it will be very easy to detect an *opinio iuris* behind it, but there are other cases which are not so clear. Even though Art. 5 VCLT refers to *rules* of the organization, i.e. binding norms, it is also possible that principles repeatedly adopted in unanimous non-binding resolutions of a plenary organ eventually become a binding rule, if they are supported by a strong intention to make them binding. However, this will be rare and consequently difficult to prove and can be assumed only in exceptional circumstances. In any case, the *opinio* behind established practice forming a rule of the organizations must be backed up by the organs and the Member States represented in them.

There is reason to believe that the concept of established practice is not limited in its scope to the ILC conventions and draft articles containing it. In other words, the inclusion of established practice in all these instruments drafted by experts of international law and ratified by a high number of States and international organizations admits the conclusion that established practice is a more comprehensive concept within the law of international organizations. It not only influences the meta-rules on the conclusion, interpretation and termination of the constituent instruments but also as quasi-customary law of the organization, it has the potential to at

<sup>51</sup> For the concept of customary law of the organization cf. already Yearbook of the International Law Commission (1963), Vol. II, 213, Commentary to Draft Art. 48 on the Law of Treaties, para. 2; Official Records of the UN Convention on the Law of Treaties, 1<sup>st</sup> session (1968), *supra* note 25, 147, para. 15; 2<sup>nd</sup> session (1969), *supra* note 33, 4, para. 22. Cf. also Lauterpacht, *supra* note 45, 464; R. Higgins, 'The Development of International Law by the Political Organs of the United Nations', 59 *American Society of International Law Proceedings* (1965), 116, 121; Pollux, 'The Interpretation of the Charter', 23 *British Yearbook of International Law* (1946), 54.

<sup>52</sup> Cf. Art. 2 (1) (j) VCLT-IO, *supra* note 2.

least add substantive rules to the law of the organization, which have not been included into the constituent instruments.<sup>53</sup>

Additionally, it can even be a mechanism for the informal modification of existing provisions, beyond the limits of interpretation, which subsequent practice – at least in terms of Art. 31 (3) (b) VCLT – has to respect. After all, it is often acknowledged that later customary law binding for the parties to a treaty can in principle modify the treaty.<sup>54</sup> The same would be true for the quasi-customary law of established practice and the constituent instruments. Thus, established practice can not only be a link between the general law of treaties and the law of international organizations, but another mechanism, which can adapt constituent instruments to changing circumstances. As a matter of course it has to meet much stricter requirements than subsequent practice,<sup>55</sup> for it has a greater impact on the constituent instruments and bears the danger of abuse and circumvention of formal revision procedures.

Such requirements for practice to be *established* are described in the ILC draft commentary to the VCLT-IO: established practice must not be uncertain or disputed.<sup>56</sup> There are convincing teleological reasons to follow the ILC and to abstain from the consideration of *uncertain* practice.

In case of such practice the danger of legal uncertainty is overwhelming: who should decide which one of two or more contradictory practices had to be considered? This would certainly bear the danger of arbitrariness. Practice has to be consistent in order to obtain legal relevance. This holds true both for subsequent practice in order to be considered for

<sup>53</sup> Cf. P. Sands & P. Klein, *Bowett's Law of International Institutions*, 6th ed. (2009), para. "14-033"; a notion apparently rejected by C. Brölmann, *The Institutional Veil in Public International Law*, (2007), 114.

<sup>54</sup> Draft Art. 68 (c) of the 1964 ILC Draft Articles on the Law of Treaties, *Yearbook of the International Law Commission* (1964), Vol. II, 198; M. Akehurst, 'The Hierarchy of the Sources in International Law', 47 *British Yearbook of International Law* (1974-75), 273, 275-276; N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (1994), 145-157; Villiger, *supra* note 3, 'Issues of Customary International Law', paras 30-33.

<sup>55</sup> Cf. with regard to the necessity of stricter requirements for modification than for interpretation through practice: Amerasinghe, *supra* note 45, 463; N. White, *The law of international organizations*, 2nd ed. (2005), 27.

<sup>56</sup> *Yearbook of the International Law Commission* (1982), Vol. II (Part 2), 21, para. 25.

interpretation<sup>57</sup> and for established practice in order to amount to a rule of the organization.

As far as *undisputed* practice is concerned, practice borne by the organs concerned with the matter, supported expressly or impliedly by the Member States, should be required. Protest or negative voting, however, even of a single member would impede such practice for the following reason: an international organization depends on its homogenous legal structure because it is built on cooperation and its work can entirely be stopped by a single Member State. The conditions for the formation of established practice must be stricter than those for the formation of customary law, despite the parallels between them. In contrast to an organization, the international community as a whole can cope with some persistent objectors to rules of customary law.

What is the difference then between established practice amounting to a rule of the organization according to Art. 5 VCLT and subsequent practice according to Art.31 (3) (b) VCLT? While subsequent practice has a contractual nature and is based on the consent of the parties to a treaty, established practice is based on customary law and secondary law of the organization. In other words, subsequent practice is in its tendency party-related and established practice organization-related. Of course there is a significant overlapping, for organs serve both as a forum for representatives of the Member States, who are subject to instructions, and as mechanisms serving the purposes and principles of the organization, which have a momentum of their own. Whereas subsequent practice as codified in Art. 31 (3) (b) VCLT serves the interpretation of pre-existing provisions of the constituent instruments, established practice leads to binding legal (customary) rules, which add to the law of an international organization. One could even go so far to consider it a third source of the law of international organizations, apart from primary and secondary law, with the restriction that secondary law is a decisive factor in its creation.

This is where we come back to the question: are subsequent practice and established practice two sides of the same coin? The answer we have found is that they are not so. On the contrary, the opposite thesis is right, namely, that established practice as contained in Art. 5 VCLT has the potential to modify or even precede Art. 31 (3) (b) VCLT to the

<sup>57</sup> Cf. Karl, 1983, *supra* note 4, 196; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984), 137.



consequence that subsequent practice works differently concerning the interpretation of constituent instruments.

## E. The Interplay between Subsequent Practice and Established Practice

In order to figure out the exact interplay between subsequent practice and established practice, the general relationship between the rules of the organization and the VCLT must be considered. Do they take the place of the law of treaties or do they just modify it?

### I. The General Relationship between the Rules of the Organization and the Provisions of the VCLT

*Rosenne* showed that the relationship between the rules of the organization and the provisions of the VCLT was linked with and determined by the legal nature of the constituent instrument of an international organization, whether it is to be considered rather a multilateral treaty with some few specific characteristics or an instrument *sui generis*, of a constitutional character.<sup>58</sup> This legal nature of the constituent instruments and the antagonism between treaty and constitution is a much-discussed topic.<sup>59</sup> Of course, the character of the constituent instrument as the constitution of a single international organization is referred to here (or basic instrument, setting up its organs, their powers and the relationship between each other and with the Member States) and not as constitution of the international community as a whole,<sup>60</sup> concepts which must be distinguished.<sup>61</sup> It cannot and shall not be the task of this essay to find an answer to the question of treaty or constitution. The debate characterized by approaches varying from extreme answers (basically a treaty<sup>62</sup> or a

<sup>58</sup> *Rosenne*, *supra* note 14, 191-200.

<sup>59</sup> Cf. Use by a State of Nuclear Weapons, *supra* note 3, 75; Certain Expenses, *supra* note 30, 157; J. Alvarez, *International Organizations as Law-Makers* (2005), 65-74; Fassbender, *supra* note 13, 529; J. Klabbers, *An Introduction to International Institutional Law*, 2nd ed. (2009), 74-76; *Rosenne*, *supra* note 14, 191-200; White, *supra* note 55, 14-23.

<sup>60</sup> On the UN Charter: Fassbender, *supra* note 13.

<sup>61</sup> Cf. Ruffert & Walter, *supra* note 45, para. 135.

<sup>62</sup> Cf. Certain Expenses, *supra* note 30, 157.

constitution<sup>63</sup>) to more mediating ones<sup>64</sup> rather illustrates that there might be no definite answer, but that the reply coming closest to reality is both, treaty and constitution. And the emphasis depends on the institutional arrangement of the specific international organization.

This has effect on the relationship between the rules of the organizations and the provisions of the VCLT. The dividing line between the law of treaties and the rules of the organization should be as flexible as the dividing line between treaty and constitution. Therefore, a flexible and balanced approach<sup>65</sup> is preferable over a strict rule of precedence.

*Rosenne*, for example, who referred to the *lex specialis* rule when interpreting Art. 5 VCLT, sometimes seems to understand it as a strict collision rule<sup>66</sup> and sometimes as a way to balance between the VCLT and the rules of the organization.<sup>67</sup> Both interpretations of the *lex specialis* rule are, generally speaking, possible. In some cases it can provide for a strict exception from a general rule, for a kind of precedence, in other cases it might only substantiate the general rule for a special case. The first understanding leads to the alternative of either applying a provision of the VCLT or a rule of the organization, but no middle course, no balance would be possible. The second understanding means that both rules are applicable at the same time. Thus, the *lex specialis* only specifies and substantiates the *lex generalis*, but does not enjoy complete precedence. Therefore, it is necessary to find a balance between the competing aspects of both rules,<sup>68</sup> so that the correct approach in the case of the *lex generalis* contained in the VCLT and the *lex specialis*, the rules of the organization, is the second one.

This is not only due to the character of constituent instruments as a mixture of treaty and constitution. There are further arguments in favor of a flexible and balancing approach. First, the decision of the Vienna Conference to replace the words of the then ILC Draft Articles 4 “[...] shall

<sup>63</sup> E.g. regarding the UN Fassbender, *supra* note 13.

<sup>64</sup> E. Klein, in Graf Vitzthum, *supra* note 3, paras 37-38.

<sup>65</sup> Cf. Spanish Delegation, United Nations Conference of the Law of Treaties, Official Records, 1st session (1968), *supra* note 25, 44, paras 23-30; Villiger, *supra* note 3, Art. 5, para. 7.

<sup>66</sup> Rosenne, *supra* note 14, 211.

<sup>67</sup> Rosenne, *supra* note 14, 257.

<sup>68</sup> Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, UN Doc. A.CN.4/L.682, 13 April 2006, 46-47.

*be subject to*<sup>69</sup>[...]” with “[...] *without prejudice to*<sup>70</sup> the relevant rules of the organization” is such an argument. This change in the language used was indeed a development from a strict rule of precedence to a more flexible protection of the characteristics of the organizations. Second, as previously mentioned, the object and purpose of Art. 5 VCLT is to provide for a comprehensive application of the Convention to the constituent instruments of international organizations, but with regard to their needs and special qualities.<sup>71</sup> To follow a strict method of delimitation would often mean either deny the application of the general law of treaties as codified in the Vienna Convention and thus to favor the fragmentation of this field of international law or to apply a general rule, which can in principle assist in the solution of the legal problem at hand, but only in principle. Third, there are many different categories of international organizations, all of them with their particular needs. There are universal and regional organizations, administrative and political organizations, economic and security organizations and many more. The cases in which a general rule from the VCLT will fit all of them will be rare.

What, then, is exactly envisioned as a balanced or “flexible” approach? It would mean modifying the respective provision of the VCLT according to the rules and the character of the particular organization and according to the relevant field of the law of treaties. On a more abstract level, this would mean taking into consideration, on the one hand, the equal rights of the Member States in connection with the principle of consent and the treaty base of the constituent instrument; and, on the other hand, the constitutional character of the instrument, the procedural autonomy, own legal personality or the often exerted own life of the organization,<sup>72</sup> and to balance these competing aspects.

This approach, which admittedly does not give clear criteria and leaves a broad margin of appreciation for those who apply the law, could be criticized for opening the floodgates to legal uncertainty. Yet the balancing of the rules of the organization and the provisions of the VCLT is nothing more than a process of interpretation. Interpretation is neither an exact science nor craft, but (depending on the degree of certainty of the provision

<sup>69</sup> Italics added.

<sup>70</sup> Italics added.

<sup>71</sup> Cf. Spanish Delegation, United Nations Conference of the Law of Treaties, Official Records, 1st session (1968), *supra* note 24, 44, paras 23-30.

<sup>72</sup> See *supra* note 13.

to be construed) a sometimes rather open process, even though it would go too far to speak of interpretation as an art.<sup>73</sup> The only thing legal science can do to contribute to the simplification and legitimacy of the process is to provide for rules and methods predetermining the result of interpretation as well as possible.

## II. Art. 5 VCLT and Art. 31 (3) (b) VCLT

Having outlined the general relationship between the rules of the organization and the law of treaties in general terms, it is now possible to apply this theoretical background to the concrete example set out at the beginning, *i.e.*, the influence of established practice/rules of the organization on Art. 31 (3) (b) VCLT as regards the conditions for interpretation of the constituent instruments in the light of practice. The interesting questions are whether Art. 31 (3) (b) VCLT can at all be applied to the practice of an organization, especially that of organs; and whether the same demands have to be placed on such practice, that is, to be the expression of agreement by *all* the Member States of the organization.

It can be observed that the language used in Art. 31 (3) (b) VCLT does not exclude the consideration of organ practice. It can also be practice of organs that establishes or represents the agreement of the parties; it need not be the parties themselves performing the practice.<sup>74</sup> Thus it is, for example, possible that the decisions or resolutions of a plenary organ reflect the agreement of the parties regarding the interpretation of the constituent instrument.

A more interesting situation, however, arises when there is no such clear case: in other words, when we face the practice of an organ with

<sup>73</sup> See for this debate e.g. M. Bos, 'Theory and Practice of Treaty Interpretation', 27 *Netherlands International Law Review* (1980) 1, 3, 17-18; Klabbers, *supra* note 59, 86; K. Schmalenbach, 'Die rechtliche Wirkung der Vertragsauslegung durch IGH, EuGH und EGMR', 59 *Austrian Journal of Public and International Law* (2004), 213, 215.

<sup>74</sup> Alvarez, *supra* note 58, 87; R. Gardiner, *Treaty Interpretation* (2008), 247-248; E. Klein, 'Vertragsauslegung und spätere Praxis Internationaler Organisationen', in Bieber & Ress, *supra* note 11, 101, 102; Lauterpacht, *supra* note 45, 460-461, considers institutional practice an independent concept. This opinion is shared by Schermers & Blokker, *supra* note 14, para. 1347; Spender completely denied the relevance of organ practice as such: Separate Opinion of Judge Spender, *Certain Expenses*, *supra* note 30, 182.

limited membership that does not encounter much reaction from the other states. Under Art. 31 (3) (b) VCLT in its pure and unmodified form such practice should be, generally speaking, not relevant for interpretation, as it is undisputedly considered to require the agreement of *all* parties.<sup>75</sup> However, implied agreement, tacit agreement (acquiescence) and estoppel are discussed in the scope of Art. 31 (3) (b) VCLT,<sup>76</sup> which already render this requirement as less absolute.

In international organizations their established practice or, respectively, their tradition of interpretation<sup>77</sup> can influence Art. 31 (3) (b) *via* Art. 5 VCLT to the effect that the requirement of an agreement of the parties is further softened. In other words, it can be established practice and thus a (customary) rule of the organization that the practice of its organs deserves more weight in the interpretation and application of its constituent instruments and becomes more independent from the agreement of the parties. The intensity of this effect will depend on the organization, its particular established practice, the degree of autonomy and the set of rules to be interpreted. This is nothing but the implementation of the flexible approach, the balancing of Art. 31 (3) (b) VCLT with the rules of the respective organization.

In the following, only some possible implications of this theoretical background shall be outlined.<sup>78</sup> The influence of established practice can have the effect that no express or even implied agreement of all the Member States would be required, but a simple lack of reaction to consistent practice by some Member States – or even the majority – would be no harm. Such a result is, in addition to the effect of established practice, also supported by deliberations based on acquiescence: with a high degree of institutional cooperation goes a higher standard of care. This means that there are higher expectations on the Member States to participate and a lack of reaction to consistent institutional practice is, even if the State does not know about it, also a lack of interest, care and participation.

<sup>75</sup> See *supra* note 4.

<sup>76</sup> Karl, 1983, *supra* note 4, 276-281, 324-339; *Temple of Preah Vihear (Thailand v. Cambodia)*, Judgment, ICJ Reports 1962, 6, 23, 30-33.

<sup>77</sup> Karl, 1987, *supra* note 11, 90-91.

<sup>78</sup> They should not be considered definitive, but on the contrary, they are theses which need further theoretical *and* empirical research for their verification, which will be done, *inter alia*, in the author's dissertation project.

On account of the higher expectations to participate, the State can be required to stay informed on such practice if it wants to impede it. Practice of an organ without negative feedback from the States would not be entirely independent or autonomous, but it would remain covered by the Member States' assent and be within the framework of an Art. 31 (3) (b) VCLT modestly modified or redefined.

An unresolved problem connected with such a role of practice, however, is one of good faith (as reflected by Art. 26 VCLT). Some smaller States simply lack the resources to stay informed about every practice taking place in every organ. There are several thinkable mechanisms to resolve this issue: First, to ignore it and insist on the principle of sovereign equality. Second, to apply different standards of care to States with different resources. Third, to impose duties on States or neutral organs to inform about practice. All these mechanisms have serious disadvantages. The shortcoming of the first one is obvious; the second and the third one are impractical and hardly implementable in the decentralized system of international law. This is one of the issues demanding further reflection.

Protest or negative voting of a single Member State can *in principle* impede the impact of subsequent practice on the constituent instrument, and it will – at least in theory – always impede the creation of established practice, due to its more serious effects on the organization and its legal framework. Otherwise, there would be the danger that some Member States might lose their influence on the development of the organization. This would impair their equal rights as founders and members of the organization and bear the danger of serious conflicts within the membership, doing harm to the common goals pursued in the cooperative framework of the organization.<sup>79</sup> Yet the reservation *in principle* has to be taken seriously, as there will be cases in which even the protest of several parties cannot impede the impact of the subsequent practice on the interpretation of the constituent instrument if the rules of the organization or the established practice say so. These cases would principally concern rather internal or procedural matters of, for example, the organ which performed the practice,<sup>80</sup> i.e. matters that do not directly affect the protesting member(s) and are, in contrast, determined by the independent or autonomous character

<sup>79</sup> See chapter D.

<sup>80</sup> Cf. Certain Expenses, *supra* note 30.

of the organization, its so called “*own life*”.<sup>81</sup> Thus even autonomous organ practice is possible.<sup>82</sup>

There is evidence in some advisory opinions of the ICJ which supports the foregoing considerations. In *Certain Expenses*, the Court used resolutions of the General Assembly for the interpretation of Art. 17 (2) UN Charter which were not unanimous.<sup>83</sup> In *Namibia*, it made reference to the consistent practice of the Security Council when it decided that abstentions of permanent members should be considered as concurring votes in terms of Art. 27 (3) UN Charter. It did so with reference to a general acceptance by the Member States, which, however, was not substantiated.<sup>84</sup> In the *Wall Opinion* the Court interpreted Art. 12 UN Charter in the light of the practice of the General Assembly and the Security Council, without considering the character of the Council as an organ of limited membership, the voting within both organs and the position of the Member States on that issue.<sup>85</sup>

Though these three advisory opinions do not expressly support the justification of such organ practice based on Art. 5 VCLT, the Court referred to the relevant rules of the organization when interpreting the WHO Constitution in the *Use of Nuclear Weapons* advisory opinion.<sup>86</sup> This can easily be understood as a reference to the manifestation of Art. 5 VCLT as a rule of customary law. It referred expressly to Art. 31 (3) (b) VCLT and applied it in the interpretation of the WHO constitution, considering the practice of the organization. The Court did so, however, without addressing on the method with which the rules of the organization could be harmonized with the provisions of the VCLT.<sup>87</sup>

<sup>81</sup> See *supra* note 13.

<sup>82</sup> Cf. with different arguments Amerasinghe, *supra* note 45, 52-55.

<sup>83</sup> *Certain Expenses*, *supra* note 30, 174.

<sup>84</sup> *Namibia*, *supra* note 30, 22, para. 22.

<sup>85</sup> *Wall Opinion*, *supra* note 15, 149-150; the Court only refers to the “accepted practice of the General Assembly”, but it does not specify the nature and scope of this “acceptance”. Indeed, the three General Assembly Resolutions expressly (yet incorrectly) quoted in the opinion in support of this interpretation of Art. 12 of the UN Charter (the Court probably referred to GA Res. 1599 (XV), 15 April 1961; GA Res. 1600 (XV), 15 April 1961; GA Res. 1913 (XVIII)) were all adopted against several negative votes, see the statistics at <http://www.un.org/depts/dhl/resguide/r15.htm> and <http://www.un.org/depts/dhl/resguide/r18.htm> (last visited 9 August 2011).

<sup>86</sup> *Use by a State of Nuclear Weapons*, *supra* note 3, 74-75.

<sup>87</sup> The Court only talks about “elements which may deserve special attention when the time comes to interpret these constituent treaties”, ICJ, *id.*, 75.

Finally, the introductory example, the *Construction of a Wall* opinion read together with *Use of Nuclear Weapons*,<sup>88</sup> can be connected with the theoretical background, that is, the concept of established practice, the balancing approach and the softening of the agreement of the parties as condition for relevant subsequent practice as outlined above. The consideration of organ practice by the Court without a thorough examination of voting and support from the member states can be explained, inter alia, with established practice, a (customary) rule of the United Nations, giving more weight to the (subsequent) practice of its organs and reducing the requirements for the agreement of the Member States.<sup>89</sup>

## F. Conclusions and Perspectives

Subsequent practice and established practice are not two sides of the same coin, as the British representative in the Sixth Committee of the General Assembly suggested, but two concepts which should be distinguished. Subsequent practice according to Art. 31 (3) (b) VCLT is a method of interpretation which finds its contractual basis in the agreement of the parties to a treaty/a constituent instrument, whereas established practice is a kind of quasi-customary law of an international organization, which is primarily, but not exclusively, based on its secondary law. It can even be referred to as a third source of the law of international organizations. Since it can amount to a rule of the organization according to Art. 5 VCLT, it has the potential to modify wide parts of the law of treaties (or perhaps even the constituent instruments of international organizations themselves).

<sup>88</sup> See chapter A.

<sup>89</sup> It should be noted, however, that there are also good arguments that the adaptation of Art. 12 UN Charter in practice rather led to an informal amendment or modification of this provision: K. Hailbronner & E. Klein, 'Article 12', in B. Simma, *The Charter of the United Nations*, Vol. 1, 2nd ed. (2002), paras 22, 31. Consequently, this would be no case of subsequent practice made possible by established practice, but a rather questionable case of established practice against the negative votes or protest of a minority of Member States. For the present article, which cannot extensively discuss the distinction between interpretation and amendment, the assumption of the Court that Article 12 UN Charter has merely been reinterpreted, expressed in Wall Opinion, *supra* note 15, 149, para 27, serves as a basis. Certain Expenses, *supra* note 30, however, is also a very good example of established practice reducing the requirements for interpretation in the light of subsequent practice.



This holds also true for Art. 31 (3) (b) VCLT and subsequent practice. The established practice of an organization can reduce the requirements for an agreement of the parties as regards subsequent practice of its organs. Possible implications are that an express or implied agreement of all Member States would not be necessary, but that a simple lack of reaction of a minority of Member States would not render the subsequent practice irrelevant. Even autonomous organ practice is possible.

Subsequent practice and established practice are significant concepts of the law of treaties and of the law of international organizations. Established practice is a hinge between both fields of law and an instrument to replenish the constituent instruments with suitable regulations. Subsequent practice has the potential to further develop the law of international organizations and to adapt it to current exigencies. The former can promote the latter.

Both concepts, however, also bear risks. Codifications like the VCLT shall promote legal certainty, but they still depend on quasi-customary concepts, such as established practice, to fit into the structure of international law. Subsequent practice and established practice lack the legitimacy that formal amendment procedures possess. They could even contribute to the fragmentation of international law, as informal development of legal regimes can cause them to depart from each other step by step. At the same time, established practice contributes to a contrary process in bringing together the law of treaties and the law of international organizations. However, both the opportunities of a more flexible adaptation of international law to new challenges and the risks may illustrate why subsequent practice and established practice matter and why their interplay deserves our attention.

# Normative Heterogeneity and International Responsibility: Another View on the World Trade Organization and its System of Countermeasures

Ranieri Lima Resende\*

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## Abstract

As legal subjects, international organizations are seen as apt for both active and passive participation in the international judicial area and, in this regard, are regulated according to a specific responsibility regime, as established by the United Nations International Law Commission, in its latest reports on this matter. The challenge here lies on testing this regime as to its applicability in relation to the World Trade Organization, in view of the fact that this organization's conduct may potentially produce internationally illicit acts. After asserting the WTO's juridical nature, normative parameters to which the entity is submitted are established in the general international law based on the acknowledgement of its horizontal and vertical relations with the so-called WTO Law. From this point onwards, it is possible to assert that international illicitness in the World Trade Organization's practice becomes legally verifiable through an institutional performance capacity analysis of its organs and agents, with special focus on its countermeasures system.

### A. Introduction: A Possible Connection between the Law of International Responsibility and the WTO Law

“Between Scylla and Charybdis” is a good metaphor for demonstrating the researcher's position, when he/she analyses juridical gray borders located between two relatively complex fields. In this sense, traditional and compartmentalized lawyer's views over some kind of scientific objects should not show the myriad of possibilities, which international economic law and international law are capable of producing together in their contact zones. In this way, the specific mixture of the World Trade Organization and the regime of responsibility of international organizations can cause exciting surprises.

Before the research, some questions are raised, such as: 1) Could the WTO Law be qualified as a self-contained regime, isolated from the public international law (PIL)? 2) If not, which kind of principles or/and norms from PIL are able to “invade” the WTO sphere? 3) Could it be possible talk about hierarchy in that normative relationship? 4) Does the WTO's institutional activity pursuit direct effects over individual rights and affect the responsibility of the International Organization itself? 5) Are the countermeasures an example of potential international illicit acts, which attract the shared responsibility of the WTO and the executing Member?

In sum, the follow considerations intent to show the high potential of that problems to produce new academic investigations over the contemporary international scenario, focused on the international law field.

## B. The WTO Law in the International Law Atmosphere

Some international economic law theories give the impression that WTO law is a hermetically closed legal system with no normative relationship with any other field of international law. Nevertheless, the very recognition of the personality and legal capacity of the World Trade Organization requires a larger normative environment in which its legal faculties may be legitimately exercised.

One inescapable line of questioning raised by Hermann Mosler<sup>1</sup> resides in defining whether the internal legal framework of international organizations is part of international law or if it constitutes separate legislation similar to the legislation of States under a dualistic view. If one considers that international organizations are part of the International Community, the latter option would in theory be the correct one.

Nevertheless, it is necessary to take into account the fact that the internal legal framework of international organizations is linked to a constitutive treaty which is, in turn, immediately connected to general international law. A consequence of this assumption is the necessary alignment of the methods for interpretation and application of internal law in these organizations with the principles and rules of international law.

It is for no other reason that international organizations are presented not only as communities integrated through an internal legal framework, but also as entities operating within the legal space of the International Community under the aegis of general international law.<sup>2</sup>

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) states in Article 3.2:

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Member recognize that it serves to preserve the rights and obligations of Member under the covered agreements, and to clarify the existing provisions of those agreements in accordance with

<sup>1</sup> H. Mosler, *The International Society as a Legal Community* (1980), 203.

<sup>2</sup> A. P. Sereni, *Le Organizzazioni Internazionali* (1959), 45.

customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.”

The reference to “customary rules of interpretation” encompasses the entire range of principles and norms of interpretation of public international law, some of which are included in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969).<sup>3</sup>

Although the Vienna Convention on the Law of Treaties was not ratified by all members of the WTO, in its provisions it summarizes customary international law on the subject.<sup>4</sup>

In this sense, we must quote the contents of the aforementioned rules of interpretation:

“Article 31: General rule of interpretation

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a. any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - b. any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

<sup>3</sup> P. Stoll, ‘Article 3 DSU’, in R. Wolfrum *et al.* (eds), *Max Planck Commentaries on World Trade Law: WTO – Institutions and Dispute Settlement* (2006), 288.

<sup>4</sup> R. L. Silva, *Direito Internacional Público*, 2nd ed. (2002), 95.

- b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - c. any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a. leaves the meaning ambiguous or obscure; or
- b. leads to a result which is manifestly absurd or unreasonable.”

Based on the referenced ruling assumptions, it is feasible to assert that the WTO Agreement must not be viewed in a clinically isolated fashion in its relationship to public international law, as admitted by the WTO Appellate Body in its report on the *US – Gasoline* case.<sup>5</sup>

## C. Horizontal and Vertical Relationships between WTO Law and International Law

### I. WTO Law as a Self-Contained Regime?

Unfortunately, the rules and procedures governing the settlement of disputes in the WTO, unlike other international legal systems, fail to define clearly the extent to which international law can or must be applied in conjunction with the framework of rules of the institution.<sup>6</sup>

<sup>5</sup> United States – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996.

<sup>6</sup> G. Jaenicke, ‘The Dispute Settlement System of the World Trade Organization: Jurisdiction and Applicable Law’, in J. A. Frowein *et al.* (eds), *Verhandeln für den Frieden: Negotiating for Peace: Liber amicorum Tono Eitel* (2003), 364.

The fact that what is referred to as WTO Law does not represent a complete legal response to the multi-dimensionality of disputes presented within international trade originates from the heteronymous nature of the legal system under analysis.<sup>7</sup>

It is therefore necessary to consider the assumption that the legal framework of the WTO does not appear to be strictly self-sufficient or self-contained,<sup>8</sup> with its interpretation and application occurring in conjunction with other norms of public international law.

The historical foundation of the self-contained regime concept is based on the *specialia generalibus derogant* principle originated in Roman Law, which establishes that the existence of a rule of a particular nature renders the legal incidence of the initially applicable general rule redundant.<sup>9</sup>

This notwithstanding, the English expression originated from international judicial language used in the ruling on the *S.S. Wimbledon* case by the Permanent Court of International Justice,<sup>10</sup> when the Treaty of Versailles concerning legal regime of the Kiel Canal were classified as self-contained, keeping those provisions from being supplemented or interpreted on the basis of the norms pertaining to other navigable bodies of water in Germany.

The issue was again considered under the auspices of the International Court of Justice in its ruling in the *United States Diplomatic and Consular Staff in Teheran* case.<sup>11</sup>

When analyzing the allegation of the occurrence of actions by members of the U.S. diplomatic and consular staff that characterized undue interference in internal Iranian affairs and thereby presenting the incident in the embassy as a legally acceptable act of retaliation, the Court considered the norms of diplomatic law as a self-contained regime. If on the one hand it imposes obligations on the receiving State with respect to facilitation,

<sup>7</sup> J. P. Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard International Law Journal* (1999) 2, 333, 338.

<sup>8</sup> D. Palmetier & P. C. Mavroidis, 'The WTO Legal System: Sources of Law', 92 *American Journal of International Law* (1998) 3, 398, 413.

<sup>9</sup> P. Dupuy, 'L'Unité de l'Ordre Juridique International: Cours General de Droit International Public', in *Recueil des Cours: Collected Courses of The Hague Academy of International Law* (2003), 428.

<sup>10</sup> *S. S. Wimbledon Case (United Kingdom, France, Italy and Japan v. Germany)*, PCIJ Series A, No. 1 (1923), 23, 24.

<sup>11</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, 40, para. 86.



prerogatives and immunities for members of the diplomatic mission, on the other hand diplomatic law provides the legal remedies to be adopted in the case of abuse of these rights.

In this sense, the mechanism for notification of *persona non grata*, or unacceptable person, when referring to an undesirable member of a foreign delegation, finds normative provision in the Vienna Convention on Consular Relations (1963) and represents a proportional response to the actions referred by the Iranian defense.

Inspired by the aforementioned precedent, the *Rapporteur* on the topic of the international responsibility of States to the International Law Commission of the United Nations (ILC), Willem Riphagen,<sup>12</sup> concluded in his third report that recognition of self-sufficient legal regimes would in itself introduce the necessary notion of separate subsystems of norms within the body of international law. Moreover, in response to the primary norms generating obligations for both parties, there would then be secondary norms within an individual subsystem to deal with responsibility law within the same legal category.

As an example, a treaty could create a specific subsystem within international law, with its secondary norms implicitly or explicitly linked to the established primary norms. Faults occasionally uncovered in a specific subsystem would be resolved by accessing the internal prescriptions of another subsystem based on the criterion of normative subsidiarity.

In a renowned article on the subject, Bruno Simma wrote that even though the Court's precedent in the *U. S. Diplomatic and Consular Staff in Teheran* case based its decision on the recognition of diplomatic law as a legal system of special nature, there is no question that serious violations of diplomatic rights may generate the justified application of countermeasures in the guise of the suspension of general obligations in other fields of international relations, even supported by customary international law.<sup>13</sup>

The idea of a normative subsystem with a fulcrum on the doctrinal position of Simma abandons its essential base as a restrictive distinction. In this sense, the unsustainable aspect of the idea of isolation of WTO Law transmutes the concept of a self-sufficient regime, admitting its permeation through a plurality of norms applying both in the vertical plane (e.g.

<sup>12</sup> W. Riphagen, 'Third Report of the Special Rapporteur on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)', in *Yearbook of the International Law Commission*, Vol. II (1982), 22.

<sup>13</sup> B. Simma, 'Self-Contained Regimes', 16 *Netherlands Yearbook of International Law* (1985), 111, 120.

international environmental law), and on the plane of normative horizontality (e.g. *jus cogens*).

At this point, it is necessary to partially disagree with the position put forward by Mitsuo Matsushita *et al.*<sup>14</sup> in the sense that the legal regime of the WTO is a hybrid system since its laws originated from the texts of the Agreements while its interpretative elements are found in the decisions of the dispute settlement system.

In actual fact, the hybrid nature of WTO Law comes not only from exogenous influences within the field of interpretation of its positive provisions, but also from its horizontal and vertical relationships with other normative systems within the larger field of international law.

In its consultative statement in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the International Court of Justice issued the following declaration: “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”<sup>15</sup>.

During its 1957 session in Amsterdam, the *Institut de Droit International* (IDI) adopted a specific resolution on the acceptable remedies against decisions issued by international bodies and organizations, at same time it named several normative sources from which the legal links and those of obligation required for these institutions may arise.

On this matter, the resolution being commented established that:

“The Institute of International Law,

Considering that every international organ and every international organization has the duty to respect the law and to ensure that the law be respected by its agents and officials; that the same duty is incumbent on States as members of such organs or organizations,

[...]

II.

Is of the opinion that judicial control of the decisions of international organs must have as its object the assurance of respect for rules of law which are binding on the organ or organization under consideration, notably:

<sup>14</sup> M. Matsushita *et al.*, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (2006), 24.

<sup>15</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73, 89-90, para. 37.

- a) general international law;
- b) the constitutional provisions applicable to that organ or organization and those which regulate the functioning of the international organ;
- c) the rules established by that organ or organization whether they concern the States members, the agents and officials of the organ or organization, or private persons to the extent that their rights and interests are involved;
- d) the provisions of applicable treaties;
- e) any provision of internal law applicable to the juridical relations of that organ or organization.”<sup>16</sup>

In line with the position of the *Institut*, the test for the legality of acts by international organizations relates to exogenous elements pertaining to general international law and applicable treaties and to endogenous ones, that is, the normative paradigms generated by the institution, centered in its constitutive act and its internal legal framework.

In the opinion of *Rapporteur* Wilhelm Wengler, the reference to “general international law” in the aforementioned item “a” encompasses customary international law as well as general legal principles, especially those extracted from the practice in the matter of jurisdiction remedies.<sup>17</sup>

## II. Horizontality: *Jus Cogens* and International Public Order

As previously explained, it is possible to affirm that legislation applicable to international organizations encompasses both their internal legal framework and general international law.

Taking into account that the application of international customs and general legal principles is not necessarily subordinated to an express acceptance on the part of the subjects of international law, the degree of pro-activeness present in the establishment of the internal normative framework, through the participation of the members, is not evidenced in the hypothesis of the submission of such institutions to customary international law and, by extension, to *jus cogens*.<sup>18</sup>

<sup>16</sup> Institut de Droit International, *Annuaire de l'Institut de Droit International: Session d'Amsterdam*, Vol. 47, T. II (1957), 488, 489.

<sup>17</sup> *Id.*, 297.

<sup>18</sup> E. David, ‘Le Droit International applicable aux Organisations Internationales’, in M. Dony (ed.), *Mélanges en Hommage à Michel Waelbroeck*, Vol. I (1999), 15, 22.

From a substantive viewpoint, decisions, recommendations and authorizations adopted within the World Trade Organization will result in consequences of an illicit nature if, for example, they either directly or indirectly violate *erga omnes* obligations derived from cogent norms.

In the field of general international law, there are norms in which the imperative contents aim at protecting the common interests of the International Community, for that reason they are rated as *jus cogens*.<sup>19</sup> By virtue of this differentiated nature, these norms generate obligations of an *erga omnes* character, i.e. applicable without distinction. In this sense, it is possible to regard *jus cogens* norms as the truly substantive conditions for the legal validity of acts undertaken in the field of institutional activity of all the subjects in international law, a group in which international organizations are included.<sup>20</sup>

Despite representing a wide range of normative prescriptions and given the eminently evolving nature of the international legal system,<sup>21</sup> among all the imperative norms of a cogent nature recognized by the International Court of Justice, it is important to mention prohibition of aggression<sup>22</sup> and genocide,<sup>23</sup> the right to self-determination,<sup>24</sup> basic human rights and the repression of slavery and racial discrimination.<sup>25</sup>

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) expressly recognized the existence of mutual obligations of participant States to concretely avoid committing this type of act, but its dispositions in fact endorsed provisions originated by the *jus cogens* norms.

As an example, the mere signing of a trade agreement to enable the transfer of military technology for the purpose of perpetrating genocide clearly violates *erga omnes* obligations included in the norms under

<sup>19</sup> M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 47, 73.

<sup>20</sup> E. P. Nicoloudis, *La Nullité de Jus Cogens et le Développement Contemporain du Droit International Public* (1974), 26, 132, 134.

<sup>21</sup> M. Virally, *El Devenir del Derecho Internacional: Ensayos Escritos al Correr de los Años* (1998), 175.

<sup>22</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 100-101, paras 190, 191.

<sup>23</sup> *Case Concerning Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, 595, 616, para. 31.

<sup>24</sup> *Case Concerning East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, 102, para. 29.

<sup>25</sup> *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment [Second Phase], ICJ Reports 1970, 3, 32, para. 34.

discussion. It must be noted that this is not just a hypothetical scenario, if one considers that the Rwanda genocide in 1994 was made possible by a previous massive importation of machetes.<sup>26</sup>

It is enlightening to examine the various resolutions adopted by the United Nations in the 1970s and 1980s on the subject of the South African *Apartheid* theme,<sup>27</sup> whereby a series of embargoes was the object of binding recommendations to all members of the International Community, making evident the *erga omnes* nature of these restrictive diplomatic and commercial actions.<sup>28</sup>

Nevertheless, as James Crawford<sup>29</sup> pointed out, not all obligations applicable to the International Community necessarily have their origins in such peremptory norms, as exemplified in some rights and obligations of a consuetudinary character included in the United Nations Convention on the Law of the Sea, which have an essentially interstate nature (e.g. the obligation to fly the flag of the country of registry and the subjection of ships without registry to general jurisdiction).

A concept that deserves particular mention is one put forward by Günther Jaenicke,<sup>30</sup> which relates to an international public order of which the principles and norms would not be confined within the strict limits of the *jus cogens* normative category.

In spite of the supremacy of its fundamentals against the dogma of traditional international law (based essentially on the reference to verifiable rights and obligations between two or more States), since it encompasses links of obligation within the International Community as a whole, international public order recognizes the existence of obligations derived not only from the *jus cogens* norms, but also from other matters of common interest.

In the trial of the *Soering v. The United Kingdom* case argued in the European Court of Human Rights in 1989, Judge De Meyer recorded in his concurrent opinion that the conduct of extraditing a person over whom there

<sup>26</sup> S. H. Cleveland, 'Human Rights Sanctions and International Trade: a Theory of Compatibility', 5 *Journal of International Economic Law* (2002) 1, 133, 155.

<sup>27</sup> See SC Res. 418, 4 November 1977, and SC Res. 569, 26 July 1985.

<sup>28</sup> A. A. Cançado Trindade, *Direito das Organizações Internacionais*, 2nd ed. (2002), 556.

<sup>29</sup> J. Crawford, *International Law as an Open System: Selected Essays* (2002), 351.

<sup>30</sup> G. Jaenicke, 'International Public Order', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. II (1995), 1348, 1351.

is a risk of imposition of the death penalty by the requesting State results in a serious violation of European Public Order.<sup>31</sup>

In a more recent ruling in the case of *Loizidou v. Turkey*, the same Court found the expropriation by Turkey of real estate owned by ethnic Cypriot Greek citizens to constitute an express violation of public order considering that its implementation was based on criteria of clear racial discrimination.<sup>32</sup>

The legal contents of the international public order may be classified into the following normative requirements:<sup>33</sup>

- a) principles and norms relating to the formation and modification of international law (e.g. the law of treaties, the law of responsibility, creation and changes in customary international law);
- b) principles and norms relating to the organizational structure of the International Community (e.g. the coexistence of the independent sovereignty of States, territorial integrity, self-determination, equality between States, spheres and limits of state jurisdiction, constitution of international organizations and their relationships with members and non-members);
- c) principles and norms of substantive law that serve the essential rights of the International Community and their respective protection, for which evidence of consensus may be extracted from international conventions, the United Nations Charter and from other organizations, as well as resolutions defined in international conferences.

Therefore, the area encompassed by peremptory international norms lies within the domain of international public order.<sup>34</sup>

Although the logic of the legal thesis proposed by Günter Jaenicke is extremely convincing, it should be emphasized that this is not an undisputed position in international doctrine and judicial decisions, both of which remain firmly tied to the *jus cogens* concept framework of an international normative structure of a hierarchical nature, in some instances refuting it completely on strictly voluntaristic arguments.

<sup>31</sup> *Soering v. The United Kingdom*, ECHR (1989) Series A, No. 161.

<sup>32</sup> *Loizidou v. Turkey*, ECHR (1998) Series A, No. 310.

<sup>33</sup> Jaenicke, *supra* note 30, 1350.

<sup>34</sup> A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 29.

The evidenced existence of structural norms in international law, that are more extensive than the *jus cogens* limits, demonstrates the validity of the Jaenicke's scheme focused on the international public order.

### III. Verticality: Interactions Recognized by WTO/DSB

Without intending to exhaust the subject, it is important to list the hypotheses in which normative assumptions external to WTO Law are incorporated in the decisions of the DSB, irrespective of the hierarchy concept of the norms. Unlike the horizontal relationships discussed above, in this topic we deal with verticality.

In the same line of Joost Pauwelyn's lesson,<sup>35</sup> general principles of law have an important role for international organizations, especially for those with compulsory dispute settlement like the WTO, as a converging factor between the law of the international organization and the public international law's *corpus iuris*. Otherwise, general principles of law can be a fundamental tool for the judicial function within the institution to construe the law of the organization according to the contemporary problems.

In this sense, the analysis of the precautionary, non-retroactivity and proportionality principles applicable to the WTO Law demonstrate useful examples for the interaction between precepts of same normative hierarchy.

#### 1. International Environmental Law and the Precautionary Principle

General international law is not the only source of nourishment for the normative order of the World Trade Organization. The decisions from the system for the settlement of disputes are well-disposed to recognize interests of environmental protection as justification for commercial restrictions related to production methods (particularly on the basis of Article XX, item g, of the 1947 GATT)<sup>36</sup>, provided that the State invoking the restrictions has

<sup>35</sup> J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003), 130.

<sup>36</sup> Art. XX General Agreement on Tariffs and Trade (General Exceptions): "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

sought adequate solutions for the issue beforehand and in a non-discriminatory way.<sup>37</sup>

Before the WTO-era, two GATT 1947 panels (*Tuna-Dolphin* cases) have analyzed the efficacy of multilateral environmental agreements (MEAs) in trade dispute matters. With an incipient perception, the *Tuna II* panel stated that MEAs were not relevant as a primary means of interpretation of the General Agreement,<sup>38</sup> in accordance with the Article 31.3(a) of the Vienna Convention,<sup>39</sup> despite the inevitable conclusion that multilateral treaties are the best positive evidence of an international consensus.

Otherwise, analyzing the argument that the yellowfin tuna capture process has been caused dangerous consequences for dolphin's population, the United States prohibition to import tuna was considered incompatible with the rules of GATT,<sup>40</sup> especially with the "necessary" test of Article XX(b).<sup>41</sup>

Inspired by the *Tuna-Dolphin* cases, in the adjudicating process related to *US – Shrimp* case, the DSU has faced a very similar problematic involving the shrimps' fishing process and its dangerous implication for sea turtles. In that case, a systematic interpretation method was adopted by the Appellate Body to specify the concept of "exhaustible natural resources" (Article XX.g), especially based on the 1982 United Nations Convention on the Law of the Sea, the Convention on Biological Diversity and the "Agenda 21" adopted by the United Nations Conference on Environment and Development.<sup>42</sup>

On other hand, when unilateral measures respond to political convenience associated to domestic issues and not to objective reasons, they

[...] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

<sup>37</sup> M. Herdegen, *Völkerrecht*, 6th ed. (2007), 352.

<sup>38</sup> J. Cameron & K. R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body', 50 *International and Comparative Law Quarterly* (2001) 2, 248, 264, 265.

<sup>39</sup> Art. 31 Vienna Convention on the Law of Treaties (General Rule of Interpretation): "[...] 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

<sup>40</sup> Matsushita *et al.*, *supra* note 14, 795.

<sup>41</sup> Art. XX General Agreement on Tariffs and Trade (General Exceptions): "[...] (b) necessary to protect human, animal or plant life or health".

<sup>42</sup> Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, 48, 50.



could result clearly in discriminatory acts which are incompatible with the fundamental principles of international trading system.<sup>43</sup> Side by side with the multilateral agreements of environmental protection, there are principles of law recognized by the International Community which can contribute against the discriminatory phenomena.

A good example of the WTO interactions with other environmental law sources is the precautionary principle, according to McIntyre and Mosedale,<sup>44</sup> as a general principle of international environmental law, which aims to minimize, and, if possible, eliminate, unnecessary human interference with a legitimate environmental interest, in order to avoid the occurrence of inadvertent environmental harm.

The status of the precautionary principle within international law, as highlighted by the WTO Appellate Body in the report on the *EC – Hormones* case, remains the object of fierce debate in both academic and legal spheres. Nevertheless, the controversy does not have to be settled in order to define precaution in the sense of a principle belonging to international environmental law or as a general principle of international law derived by a customary origin. Essentially, one must consider the aspects resulting from the precautionary principle and the Agreement on the Application of Sanitary and Phytosanitary Measures included in Attachment 1A of the WTO Agreement.<sup>45</sup>

Relating to the risk evaluation and connected with the precautionary principle, in *EC – Asbestos* case,<sup>46</sup> the Appellate Body supported the panel's conclusion for rejecting the argument, and focused on the viability of controlled use of asbestos, considering that the European Communities has demonstrated that there was no "reasonably available alternative" to the prohibition applicable by France against asbestos and products containing asbestos fibers, for the protection of human life or health.

<sup>43</sup> F. O. Vicuña, 'Trade and Environment: New Issues under International Law', in V. Götz *et al.* (eds), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (1998), 708.

<sup>44</sup> O. McIntyre & T. Mosedale, 'The Precautionary Principle as a Norm of Customary International Law', 9 *Journal of Environmental Law* (1997) 2, 221, 240.

<sup>45</sup> Report of the Appellate Body, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R, 16 January 1998, 50 [EC – Hormones].

<sup>46</sup> Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, 63.

## 2. Non-Retroactivity Principle

Within the vertical normative plan, another exogenous provision referred to in the WTO case-law itself focuses on the general principle of the non-retroactivity of treaties as expressed in Article 28 of the Vienna Convention,<sup>47</sup> which states that a treaty shall not be applied to facts preceding its juridical validity, unless the intent of the parties is different, as agreed in the *Brazil – Coconut* case.<sup>48</sup>

In the *EC – Bananas III*,<sup>49</sup> the Appellate Body has agreed with the Panel's statement that the European Communities practice were *de facto* discriminatory and did continue to exist after the entry into force of the GATS ("continuing measures"). Inspired by the Article 28 of the Vienna Convention, the analyzed period of time did not include events before the GATS legal appearance, according to a harmonic interpretation of the non-retroactivity principle.

In the same way, in *Canada – Patent Term* report was registered that a new treaty (*TRIPS Agreement*) applies to existing rights, even when those rights result from acts which occurred before the treaty entered into force. According to the Article 28 of the Vienna Convention, in absence of contrary intention, treaty obligations do apply to any fact or situation which has not ceased to exist – that is, to any situation that arose in the past, but continues to exist under the new treaty.<sup>50</sup>

With regard to the remedies recommended by the DSU, in the large majority of cases,<sup>51</sup> arbitrators have authorized the applicability of exclusive prospective countermeasures, that is, stating that the obligation to

<sup>47</sup> Art. 28 Vienna Convention on the Law of Treaties (Non-Retroactivity of Treaties): "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

<sup>48</sup> Report of the Appellate Body, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, 21 February 1997, 16.

<sup>49</sup> Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, 99, 100 [EC – Bananas III].

<sup>50</sup> Report of the Appellate Body, *Canada – Term of Patent Protection*, WT/DS170/AB/R, 18 September 2000, 21.

<sup>51</sup> For example: EC – Hormones, *supra* note 45; EC – Bananas III, *supra* note 49; Arbitration Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/ARB, 28 August 2000 [Brazil – Aircraft].

compensate becomes applicable after the expiration of the reasonable period of time.<sup>52</sup>

On the other hand, there were five cases in GATT-era<sup>53</sup> and only one WTO report panel (*Australia – Automotive Leather II*) that stated that the institutional normative structure had no specific norms against retroactive measures.<sup>54</sup> This isolated position intensifies the juridical perspective in support of the non-retroactivity principle before the WTO system.

### 3. Proportionality Principle

Within the general principles of public international law applicable to the comprehension of the WTO legal structure, its rights and obligations, the proportionality principle is detached with regard to the rules of international responsibility and their relationship with the countermeasures' juridical control.<sup>55</sup>

Explicitly based on the Draft Articles of the International Law Commission on State Responsibility, the Arbitrators in the case *Brazil – Aircraft (DSU, Art. 22.6)* rescued the definition of countermeasures from the state practice, international judicial decisions and doctrinal writings, as sources of international law, and used this concept to conclude that “a countermeasure is ‘appropriate’ *inter alia* if it effectively induces compliance”<sup>56</sup>.

When referring to the principle of proportionality of countermeasures, there was a clear case-law understanding recorded in the *US – Cotton Yarn* in the sense of its full applicability to WTO Law, taking into account that it is absurd to sanction the violation of an obligation by means of proportionally applied countermeasures while, in the absence of this violation, the Member State is subjected to non-proportional or punitive retaliation.<sup>57</sup>

Another very interesting question is focused on the *erga omnes* character of some WTO obligations. According to the *US – FSC*

<sup>52</sup> Matsushita *et al.*, *supra* note 14, 185.

<sup>53</sup> *Id.*

<sup>54</sup> Report of the Panel, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW, 21 January 2000, 15.

<sup>55</sup> M. E. Footer, *An Institutional and Normative Analysis of the World Trade Organization* (2006), 315.

<sup>56</sup> *Brazil – Aircraft*, *supra* note 51, 14, 15.

<sup>57</sup> Report of the Appellate Body, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 8 October 2001, 37, 38.

*Arbitration*, there was considered that the obligation concerning prohibited subsidies “is an obligation owed in its entirety to each and every Member. It cannot be considered to be ‘allocatable’ across the Membership. Otherwise, the Member concerned would be only partially obliged in respect of each and every Member, which is manifestly inconsistent with an *erga omnes per se* obligation”<sup>58</sup>.

In this sense, the proportionality principle cannot apply as between the countermeasures and the effects of the violation upon the complainant,<sup>59</sup> because it would not be possible precise the specific and individualized violation’s result.

Finally, as the Appellate Body stated in the *US – Line Pipe*,<sup>60</sup> the proportionality test in the countermeasures’ qualification and quantification derived from a recognized “principle of customary international law”, which is full applicable to WTO law system.

#### IV. Human Rights and the Kimberley Process

Several treaties forbid arbitrary discrimination, torture, slavery and child exploitation among other prohibitions. Far from these norms being of a strictly conventional nature, current development of the subject through the pioneering action of the regional protection systems has shown that human rights, under several hypotheses, reveal aspects that are typical of customary international law.<sup>61</sup>

One particular episode demonstrates the interaction between WTO Law and the human rights theme quite clearly: the adoption by the WTO General Council of the Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds.<sup>62</sup>

<sup>58</sup> Arbitration Report, *US – Tax Treatment for ‘Foreign Sales Corporations’*, WT/DS108/ARB, 30 August 2006, 21.

<sup>59</sup> T. Gazzini, ‘The Legal Nature of WTO Obligations and the Consequences of their Violation’, 17 *European Journal of International Law* (2006) 4, 723, 740.

<sup>60</sup> Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002, 82.

<sup>61</sup> F. Francioni, ‘Environment, Human Rights and the Limits of Free Trade’, in F. Francioni (ed.), *Environment, Human Rights and International Trade* (2001), 6.

<sup>62</sup> Decision of the General Council, *Waiver Concerning Kimberley Process Certification Scheme*, WT/L/518, 27 May 2003.

First, it should be clarified that the WTO, in an act of exemption, allows a Member to forfeit the obligations arising from the WTO Agreements in the face of exceptionally justified circumstances.<sup>63</sup>

The factual foundation of the waiver under analysis refers to the occurrence of serious violations of humanitarian law as a result of armed conflict in several States in the African continent – notably in Angola, Sierra Leone and Liberia – , the financing of which could be directly traced to the illegal diamond trade. One should also add to this the massive proliferation of weapons among the war-faring groups as a result of this illicit trade.

The legal basis for the aforementioned waiver decree within the WTO concentrates on the legitimate institution of the Kimberley Process by means of a specific treaty concluded with the incentive of the UN General Assembly<sup>64</sup> and Security Council<sup>65</sup>. Through this international agreement, a series of legal requirements for certification were put in place aimed at removing diamonds from circulation that were in any way connected with the armed conflict.

In synthesis, from the implementation of the Kimberley Process, trade among Member States must be restricted only to diamonds bearing international certification, with complete prohibition of the diamond trade between Participants and Non-Participants in the Process.<sup>66</sup>

It is immediately evident that the Kimberley Certification Scheme contradicts one of the basic icons of international economic law, i.e. the most favored nation treatment.

As expressed in Article I of the GATT 1947, the rule on the treatment of a most favored nation establishes that:

“Article I: General Most-Favoured-Nation Treatment

1. 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

<sup>63</sup> K. N. Schefer, ‘Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process’, in T. Cottier *et al.* (eds), *Human Rights and International Trade* (2005), 440, 441.

<sup>64</sup> GA Res. 55/56, 29 January 2001.

<sup>65</sup> SC Res. 1459, 28 January 2003.

<sup>66</sup> J. Pauwelyn, ‘WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for ‘Conflict Diamonds’ ’, 24 *Michigan Journal of International Law* (2003) 4, 1177, 1179.

charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, 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.”

However, we once again need to consider the WTO legal system from the viewpoint of its intrinsic heterogeneity, apparent by its rich permeability to the principles of international humanitarian law and international human rights law in its normative composition.

The considerations shown here do much more than merely report on the state of art included in WTO Law in connection with other aspects of public international law.

The very juridical and interpretative integration of the WTO Agreements with elements exogenous to them reveals the emergence of an *ethos* specific to its normative system,<sup>67</sup> directed towards placing the agreed-upon rights and obligations within the larger context of international law without the confinement of a legal framework isolated from the other legal factors governing the International Community.

## D. The Doctrine of “Direct Effect” and the Law of International Responsibility

### I. The “Direct Effect” Doctrine

Despite the fact that, historically, international organizations deal primarily with issues of an interstate nature, individuals and corporations are progressively being affected, albeit incidentally, by their operations due to the vast array of legal relationships established by these institutions in the globalized environment.<sup>68</sup>

<sup>67</sup> M. Koskenniemi, Report of the Special Rapporteur on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, International Law Commission, Report presented during the 58th session of the ILC, UN Doc A/CN.4/L.682, 13 April 2006, 90.

<sup>68</sup> M. H. Arsanjani, ‘Claims against International Organizations: Quis Custodiet Ipsos Custodes’, 7 *Yale Journal of World Public Order* (1982) 2, 131, 136.

With the intention of supporting the legal feasibility of the immediate efficacy of acts by international organizations within the internal sphere in States, some authors defend the so-called “direct effect doctrine“, which can only be understood from an essentially one-tier viewpoint. In general terms, the basis of this doctrine shows itself to be, in theory, applicable to cases where there is an intrinsic conflict between internal and international norms, when a private entity might object to a provision of internal law by going to the relevant adjudicative instance based on the obligation of the State linked to the prevailing provision in international law.<sup>69</sup>

Armin von Bogdandy defends a position in complete opposition to the doctrine under analysis, by affirming that the instances where decisions by international organs have a direct effect are indeed very rare. The most important exception<sup>70</sup> relates to Article 68.2 of the American Convention on Human Rights (1969), which admits the possibility of direct execution of a condemnatory decision issued by the Inter-American Court of Human Rights, in the same way applicable to internal decisions issued against the State.<sup>71</sup>

We do not deny the assumption that the original purpose of WTO Law was not to generate individual rights, which does not necessarily mean that no act perpetrated by the International Organization embodies in itself the potential to violate first tier individual rights.

Consequently, nothing prevents individual rights from being directly linked to the actions of an international organization, as in the case of international financing operations promoted by regional development banks through contracts signed with their member States, or their nationals in social and economic development projects.<sup>72</sup>

The international practice described below is a good illustration of this issue.

<sup>69</sup> T. Cottier, *The Challenge of WTO Law: Collected Essays* (2007), 311.

<sup>70</sup> Setting aside the jurisdiction of the European Court of Justice to determine the direct effect of Community Law within the legal framework of its Members.

<sup>71</sup> A. von Bogdandy, ‘Legal Effects of World Trade Organization Decision within European Union Law: a Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages under Article 288(2) EC’, 39 *Journal of World Trade* (2005) 1, 45, 59.

<sup>72</sup> Arsanjani, *supra* note 68, 138.

## II. The World Bank Inspection Panel: A Necessary Instance of Institutional Control?

In 1993, a decision by the World Bank Board of Executive Directors created the Inspection Panel under the title of an institutional organ. Its primary purpose is to address the interests of people who may have been affected by projects developed by the Organization, as well as assuring that it supports its policies and standardized operating procedures through the planning, preparation and implementation phases of its projects.<sup>73</sup>

The Inspection Panel operates as a review administrative instance, with no participation in the legal proceedings, preparing recommendations to the World Bank President and its Executive Directors.<sup>74</sup> As an organ reporting to the Administrative Council, the Panel is composed of three members and enjoys full independence in fulfilling its function since its members are not subjected to the organic hierarchy of the Institution.<sup>75</sup>

The idea embodied in the Inspection Panel initiative is focused on promoting a contact point between individuals and social groups with the decision-making instances of the Organization, an initiative that is in line with amplifying access to the international decision-making process.

A fitting example was the action of the Panel in the Urban Transport Project in Mumbai, India, financed by the World Bank. Several complaints lodged by members of the community that had to be re-located because of the Project. The basis for the complaints was the fact that the place chosen for resettlement is near a public garbage dump, resulting in a high level of pollution in the area where the displaced individuals would permanently live.

On the basis of an investigative report issued by the Panel, the International Organization interrupted the transfer of financial resources to the Project until the local government corrected a series of faults and met

<sup>73</sup> Accountability at the World Bank: The Inspection Panel 10 Years on (2003) available at [http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8\\_07.pdf](http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8_07.pdf) (last visited 29 August 2011), 3.

<sup>74</sup> E. Nurmukhametova, 'Problems in Connection with the Efficiency of the World Bank Inspection Panel', 10 *Max Planck Yearbook of United Nations Law* (2006), 397, 398.

<sup>75</sup> L. B. de Chazournes, 'Le Panel d'Inspection de la Banque Mondiale: à Propos de la Complexification de l'Espace Public International', 105 *Revue Générale de Droit International Public* (2001), 146, 149.



the minimum requirements for the relocation established by the Financing Institution.<sup>76</sup>

There are authors such as Ibrahim Shihata,<sup>77</sup> who believe that no legal obligations are applicable to the World Bank to guarantee that projects financed with resources from the International Institution meet the desired practical results and cause no harm to the people affected by the Project. Nevertheless, this opinion is high controversial in the actual stage of the international law.

Although implementation of such projects is the responsibility of the State that benefits from the financing, the essential participation of the World Bank is evident not only during the preparatory phase and before construction, but also during and in parallel with its execution, given its undeniable technical and financial assistance.

Therefore, once the Institution is aware of legal-international violations resulting from its projects, as in the case of forced resettlements, affronts to human rights or serious environmental damage, the obligation to stop financial and technical assistance by the International Organization is directly linked to the cessation of the offending conduct perpetrated by the State that executes the project.

The dispositions of Article 13 of the Draft Articles on Responsibility of International Organizations, adopted by ILC, deal with this question:

“Article 13: Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that organization.”<sup>78</sup>

<sup>76</sup> World Bank, *Annual Report of the Inspection Panel: July 1<sup>st</sup>, 2005, to June 30<sup>th</sup>, 2006* (2006), 51, 57.

<sup>77</sup> I. F. I. Shihata, *The World Bank Inspection Panel: in Practice*, 2nd ed. (2000), 241.

<sup>78</sup> Responsibility of International Organizations: Provisory Titles and Text of the Draft Articles adopted on the 61st session, Official Records of the UN General Assembly, UN Doc A/64/10, 84 (2009) [Provisory Titles and Text of the Draft Articles adopted on the 61st session].

From the reasoning above it is clear that the problems raised by the “direct effect doctrine” do not in any way invalidate the full applicability of the principles and norms concerning the public international law.

In conclusion, private and individual rights can be directly affected by international organizations’ activity, and for that reason their institutional acts are able to be qualified as internationally illicit under the normative regime of international responsibility.

In the case of the WTO the issue acquires an interesting dimension with respect to the peculiarities of its system of countermeasures, as explained below.

## E. International Responsibility and the WTO System of Countermeasures

### I. The WTO/DSB Recommendations and their Binding Force

Both the WTO Law and the recommendations of the Dispute Settlement Body must be considered as precepts that impose binding legal obligations on their addressees,<sup>79</sup> since it is not difficult to extract a clear normative option favoring the existence of a “compliance duty” inherent to the recommendations issued by the DSB from the Understanding on Rules and Procedures Governing the Settlement of Disputes.<sup>80</sup>

Although there are contrary opinions based on the assumption that the norms produced within the WTO are simply non-binding from a legal point of view,<sup>81</sup> one must bear in mind that immediate obedience to these legal prescriptions is fundamental to assure the effective settlement of disputes, generating global benefits for all members of the Organization.

This is determined by Article 21.1 of the DSU: “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members”.

<sup>79</sup> J. Pauwelyn, ‘Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach’, 94 *American Journal of International Law* (2000) 2, 335, 341.

<sup>80</sup> J. H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (2000), 167.

<sup>81</sup> J. H. Bello, ‘The WTO Dispute Settlement Understanding: Less is More’, 90 *American Journal of International Law* (1996) 3, 416.

In the WTO Agreement itself there is clear reference with respect to the obligatory nature of its prescriptions, as recorded in its Article II.2: “The agreements and associated legal instruments included in Annexes 1, 2 and 3 (...) are integral parts of this Agreement, binding on all Members”.

When approved by the DSB, the report from the Special Group or the Appellate Body generates international responsibility on the part of the WTO member when it recognizes its obligation to revoke or modify the action being questioned in such a way as to avoid continuity of the conflict with the multilateral norms of trade.<sup>82</sup>

If the member receiving a decision issued by the DSB does not implement it of its own initiative, it must initially offer compensatory measures to the complainant, aiming at re-establishing legality to the commercial flow between the litigating parties. If on the other hand the parties fail to reach a compensatory agreement, the plaintiff can implement retaliatory countermeasures by suspending commercial benefits offered to the defendant by virtue of the WTO Agreements.<sup>83</sup>

When the time comes for concrete action on the recommendations of the DSB, or more specifically, at the moment of imposing countermeasures authorized by it, there may be repercussions that infringe the international legal system as a whole, generating the incidence of the responsibility principle.

## II. Countermeasures in General International Law

As a general rule, international organizations are formed essentially to adopt decisions in the area of their institutional competence and, secondarily, to assure effective implementation of their decisions. Based on this assumption, it is reasonable to conclude that in the majority of cases these decisions can be classified as acts of a unilateral nature, i.e. issued by a globally considered individual subject, even if these acts derive from internally collegiate manifestations.<sup>84</sup>

Nevertheless, some actions by international organizations are composed externally from a larger span of wills, as in the case of countermeasures within the WTO, which will be analyzed further below.

<sup>82</sup> W. Barral, ‘Solução de Controvérsias na OMC’, in A. D. de Klor *et al.* (eds), *Solução de Controvérsias: OMC, União Européia e Mercosul* (2004), 42.

<sup>83</sup> M. S. A. Braz, *Retaliação na OMC* (2006), 20.

<sup>84</sup> M. Virally, ‘Unilateral Acts of International Organizations’, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), 241.

In the realm of international law, countermeasures are a typical element in a decentralized system through which a harmed State can seek to redress its rights, alongside the restoration of the primary legal relationship with the State responsible for the internationally illicit act.<sup>85</sup>

According to international practice, countermeasures are understood as being the reactions of a State to a behavior by another State that is considered harmful to its interests. In this fashion, the purpose of such reactions is to restore the state prior to the violation while simultaneously restoring the legal balance that was destabilized by the illicit action.<sup>86</sup>

When ruling on the case concerning the *Gabcikovo-Nagymaros Project*, the International Court of Justice accepted that countermeasures may justify a behavior that under different circumstances would be illicit, but required that their adoption would only be in response to a previous illicit act committed by another State, for which reason they should be directed only towards the offending State, always provided that certain specific conditions are met.<sup>87</sup>

Among the legal conditions to be observed for a legitimate decision to implement countermeasures by States, the International Law Commission listed the following essential characteristics:<sup>88</sup>

- they must aim at inducing the offending State to comply with the specific international obligation that was breached;
- they must as far as possible be reversible;
- they must be commensurate with the injury suffered;
- they must be preceded by a call on the responsible State to comply with its obligation; and
- they must be accompanied by an official note to the offending State specifying the countermeasures to be adopted and an offer to negotiate with that State.

In accordance with the ILC, some obligations may not be impaired by the adoption of countermeasures, among which the protection of human

<sup>85</sup> State Responsibility: Titles and Text of the Draft Articles adopted on the 53th session, Official Records of the UN General Assembly, UN Doc A/56/10 (2001), 128.

<sup>86</sup> M. Virally, 'Panorama du Droit International Contemporain: Cours General de Droit International Public', in *Recueil des Cours: Collected Courses of The Hague Academy of International Law* (1985), 217, 218.

<sup>87</sup> *Case Concerning Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 55-56, paras 83, 84.

<sup>88</sup> International Law Commission, *supra* note 85, 129, 135.

rights and obligations of a humanitarian character merit particular emphasis, in addition to other obligations under peremptory norms of general international law. It is opportune to note that threats or the use of force is strictly prohibited in the ambit of countermeasures.<sup>89</sup>

Another restriction inherent to countermeasures resides in their subjective thrust, as they must be directed against the State which has effectively committed the concrete wrongful act, and may not affect the rights or legal interests of third parties uninvolved in the dispute.<sup>90</sup> Even if unintentional, the violation of the legal sphere of third parties by countermeasures will characterize an internationally illicit act in relation to which the affected third party may also retaliate.

The need for the international legal system to set reasonable qualitative and quantitative standards to guard against the empirical possibility of overreaction on the part of the injured State, in complete dissonance with the nature and intensity of the illicit conduct that is being retaliated, results from the application of the principle of proportionality.<sup>91</sup>

One of the more interesting criticisms to the institution of countermeasures as established by the International Law Commission points to the priority assigned to its unilateral adoption and conditions, as opposed to the compulsory mechanisms for the resolution of controversies in international relations,<sup>92</sup> to the extent that authoritative command relates more closely to a fragmented international society based on juxtaposition rather than the contemporary idea of an International Community of increasingly institutionalized character.

The central problem with the unilateral nature of countermeasures relates therefore to deliberative judgment on their adoption, since it is the same State adopting them that defines when, how, why and to what extent the reaction will be applied concretely, characterizing in some ways an instance of *self-judging*,<sup>93</sup> especially in view of the lack of obligation to submit to previous judgmental proceedings in the area of general international law.

<sup>89</sup> J. Crawford & S. Olleson, 'The Nature and Forms of International Responsibility', in M. D. Evans (ed.), *International Law* (2003), 464.

<sup>90</sup> A. Cassese, *International Law*, 2nd ed. (2005), 305.

<sup>91</sup> E. Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *European Journal of International Law* (2001) 5, 889, 890.

<sup>92</sup> P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997), 272.

<sup>93</sup> M. E. O'Connell, 'Controlling Countermeasures', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), 50.

Despite the defense of Arangio-Ruiz,<sup>94</sup> the thesis stating that countermeasures could only be adopted after the procedures for the resolution of international controversies had been exhausted and if implemented under effective subsequent control was rejected by the International Law Commission in its Draft Articles on Responsibility of States.

Nevertheless, the general regime of countermeasures may be adapted to other individual legal systems, in relation to which specific norms are feasible as in the case of the reagency of the subject within the World Trade Organization.

### III. Countermeasures in the WTO

Countermeasures within the World Trade Organization assume that a formal request has been made by the Applicant, which is then approved by the Dispute Settlement Body under the terms put forward in the final part of Article 22.2 of the DSU: “any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements”.

One must therefore conclude that the concrete implementation of trade retaliations must incorporate the dual conjugation of both wills: 1) that of the Applicant State; and 2) that of the Organization that approves them.

Since concurrence of wills between the international organization and the State is essential in order to perfect countermeasures within the WTO, it is appropriate to classify them as international legal acts of a complex character, unlike simple legal acts that originate in a single organ of the entity or composite legal acts issued by a plurality of organs in the same institution.<sup>95</sup>

It is precisely from this articulated conjunction of wills that it is feasible to put together a notion of co-authorship when any infringement of a legal obligation is committed, in which case the WTO and the Applicant Member will be classified as concurrent.<sup>96</sup>

<sup>94</sup> G. Arangio-Ruiz, ‘Counter-Measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility: a Crucial Issue before the ILC’, 5 *European Journal of International Law* (1994) 1, 20.

<sup>95</sup> Sereni, *supra* note 2, 227.

<sup>96</sup> P. Klein, *La Responsabilité des Organisations Internationales: dans les Ordres Juridiques Internes et en Droit des Gens* (1998), 467-468.

In the majority view of specialized doctrine, members of an international organization are not responsible for the illicit acts of the entity simply by being members.<sup>97</sup> Nevertheless, if there is a concurrence of the wills of two or more legal subjects to commit a specific illicit international act, the responsibility link may extend to all involved.

According to the ILC, the organization may compromise its international responsibility if it authorizes a Member State to commit an illicit international act, or if it recommends such a practice.

In such cases there is no space for the incidence of responsibility of a secondary or subsidiary nature through which it would only be possible to involve the co-responsible after exhausting the complaint against the principal subject,<sup>98</sup> since in the case of countermeasures produced within the WTO, the intervention of the organization is evident in the authorization, implementation and closure phases of the retaliatory measure.

If such considerations were insufficient, one must add that the Dispute Settlement Body has the specific role of monitoring the countermeasures to which the Applicant Member is entitled, to assure that they are restricted to the boundaries previously approved by the International Organization.

Article 22.8 of the DSU states that:

“In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.”

In this sense, an omission on the part of the World Trade Organization regarding its legal duty of prevention may subsequently characterize

<sup>97</sup> R. Wilde, ‘Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake’, 12 *ILSA Journal of International & Comparative Law* (2006) 2, 395, 401.

<sup>98</sup> M. Hirsch, ‘The Responsibility of the Members of International Organizations: Analysis of Alternative Regimes’, 6 *Griffin’s View on International and Comparative Law* (2005) 2, 8, 16.

international responsibility,<sup>99</sup> particularly if the practice of the countermeasures implemented tends to extrapolate its legal competence.

The conduct that generates the responsibility for internationally illicit acts may result either from an action or from an omission attributable to an international organization<sup>100</sup> and, in this aspect, there are no differentiated constituent elements in the violation of the so-called “obligations of conduct” and the “obligations of result”, it being clear that in both cases omission by the international organization will be evaluated under the principle of effectiveness.

Moreover, let it not be said that the delegation of powers by the international organization to third parties is sufficient to exclude the responsibility of the delegating entity, as may be understood in the case of countermeasures authorized by the WTO to an executing Member, taking into account that such a responsibility may not be the object of a transfer, especially when the power originating from the delegation remains under the title and control of the same institution.<sup>101</sup>

In conclusion of this topic, it is important to highlight the institutional statement made by the World Trade Organization in a recent response to questions submitted by the International Law Commission on the subject of countermeasures: “Even when allowed under a particular treaty, countermeasures may breach other international obligations, thus potentially generating liabilities for the organization having authorized such countermeasures and the States having implemented them”<sup>102</sup>.

## F. Final Considerations

Whether in relation to the interpretative method or in the interaction of WTO Law with other normative assumptions originated in international law, it would appear impossible to deal with the legal framework in the Organization based on a strict concept of a self-contained regime.

<sup>99</sup> Responsibility of International Organizations: Provisory Titles and Text of the Draft Articles adopted on the 57th session, Official Records of the UN General Assembly, UN Doc A/60/10, 90 (2005).

<sup>100</sup> Provisory Titles and Text of the Draft Articles adopted on the 61st session, *supra* note 78, 20.

<sup>101</sup> K. Wellens, ‘Accountability of International Organizations: Some Salient Features’, *97 American Society of International Law* (2003) 2-5, 241, 243.

<sup>102</sup> Responsibility of International Organizations: Comments and Observations received from International Organizations during the 60th session, Official Records of the UN General Assembly, UN Doc A/CN.4/593, 2007, 12.



On the horizontal plane, the recognition of the existence of an international public order, even if composed minimally of norms with a *jus cogens* content, leads to the conclusion that external *erga omnes* obligations, which prevail hierarchically over WTO Law, condition the acts of the Institution.

Furthermore, it is the World Trade Organization itself that accepts the legal validity of other norms of international law irrespective of normative hierarchy, as illustrated by examples in cases on the principles of precaution, non-retroactivity, proportionality, human rights and rights of humanitarian nature.

Despite not offering unrestricted support to the so-called “direct effect doctrine” of acts of international organizations in the face of the internal legal order of their respective Members, we still fail to see sufficient constraints to inhibit the activity of these institutions in directly impacting the legal sphere of States, corporations or individuals, as indicated in the analysis on the actions of the World Bank and its Inspection Panel.

Finally, the present investigation considered that violations of obligations within the scope of the application of countermeasures – these having been authorized and monitored by the Dispute Settlement Body of the WTO – may generate international responsibility shared between the Organization and the Member executing the retaliatory action, taking into account the eminently complex nature of the international act in question.

## **A System of Collective Defense of Democracy: The Case of the Inter-American Democratic Charter**

Vasiliki Saranti\*

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## Abstract

In the years that followed the end of the Cold War, the international community showed a growing interest in the democratic legitimacy of governments. With regard to the Western Hemisphere, the Organization of American States has been particularly pioneering in this respect, since it initiated a mechanism of intervention by peaceful means, once the democratic stability in a state was threatened, a process which culminated with the approval of the Inter-American Democratic Charter.

The present article will evaluate the developments on democratization at the universal and regional level with particular focus on the Americas, as well as studying the effectiveness of the Inter-American Democratic Charter using as case study the constitutional turmoil in Honduras (2009) and will purport to formulate suggestions for other international institutions building on OAS best practices. The protection, promotion, consolidation, and ultimately the collective defense of democracy as an important feature of the OAS could serve as a helpful paradigm for other regional institutions as well as for the United Nations in conflict prevention and in the operationalization of the “responsibility to protect” doctrine.

## A. Introduction

In the years that followed the end of the Cold War, the international community showed a growing interest in the democratic legitimacy of governments. With regard to the Western Hemisphere, the Organization of American States (hereinafter OAS) has been particularly pioneering in this respect, since it initiated a mechanism of intervention by peaceful means, once the democratic stability in a state was threatened, a process which culminated with the approval of the Inter-American Democratic Charter (hereinafter IADC).

The present article will evaluate the developments on democratization at the universal and regional level with particular focus on the Americas, as well as studying the effectiveness of the IADC using as case study the constitutional turmoil in Honduras (2009) and will purport to formulate suggestions for other international institutions building on the OAS best practices. The protection, promotion, consolidation, and ultimately the collective defense of democracy as an important feature of the OAS could

serve as a helpful paradigm for other regional institutions as well as for the United Nations in conflict prevention and in the operationalization of the “responsibility to protect” doctrine.

## B. The Emergence of a Right to Democracy in the Post-Cold War Era

The effective protection of democracy in the domestic legal order was neither a priority, nor even a matter of concern for the international community when the UN was established. In the aftermath of the Second World War, the primary concern of the members of the international community was to defend their territorial integrity and sovereignty from outside threats, thus conferring particular importance to the establishment of systems of collective defense and security. Hence, the UN Charter does not make any reference to the notion of the democratic state, for instance as a condition for UN membership.<sup>1</sup> On the other hand, the principle of non-intervention in the domestic affairs of states (Art. 2 para. 7 Charter of the United Nations)<sup>2</sup> would hinder any qualitative evaluation of the regime or the form of government of a state.

Similarly, the legality of a regime at the international level was not an object of study for international law. A governmental structure that was exercising effective control of a state, whether it was recognized or not and irrespective of the means it used to seize power, would enjoy legal standing in the international fora. Unlike the observance of human rights, which exited early enough from the ambit of the *domaine réservé*, the legitimacy

<sup>1</sup> Art. 4 para. 1 Charter of the United Nations: “Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations”. See, also, the report of the former UN Secretary-General B. Boutros-Ghali, Supplement to reports on democratization, UN Doc A/51/761, 20 December 1996, paras 26-60.

<sup>2</sup> See also the Declaration on Principles of International Law concerning friendly relations and cooperation among States in accordance with the Charter of the UN, GA Res. 2625 (XXV), 24 October 1970. The said principle forms part of customary law, see the judgement of the ICJ in the case concerning *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction of the Court, Judgment, ICJ Reports 1986, 14, paras 184, 203 [Nicaragua Case].

of a government was a matter essentially within the domestic jurisdiction of states.<sup>3</sup>

This approach has been upheld by the international justice. In its advisory opinion on Western Sahara, the International Court of Justice has noted that: “No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today”<sup>4</sup>. Furthermore, in the *Nicaragua* Case, exploring the extent of the fundamental principle of non-intervention in domestic affairs, it stressed the following:

“A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy<sup>5</sup> [...] A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law<sup>6</sup> [...] adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests, and

<sup>3</sup> For the relationship between the principle of non-intervention and the legality of national governments at the international level see B. Roth, *Government Illegitimacy in International Law* (2000). For an in-depth analysis of the legitimacy of governments in international law see J. d'Aspremont, *L'Etat non Démocratique en Droit International. Etude Critique du Droit International Positif et de la Pratique Contemporaine* (2008); J. d'Aspremont, 'Legitimacy of Governments in the Age of Democracy', 38 *New York University Journal of International Law and Politics* (2006) 4, 877-917; A. Mahiou, 'Droit International et Droit Constitutionnel: de la Non-Intervention à la Bonne Gouvernance', in A. Amor (ed.), *Droit Constitutionnel et Mutations de la Société Internationale*, Académie Internationale de droit constitutionnel, XVIIe session, 6-21 July 2001, 157-228; S. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', 48 *International and Comparative Law Quarterly* (1999) 3, 545-581; N. Petersen, *Demokratie als teleologisches Prinzip: zur Legitimität von Staatsgewalt im Völkerrecht* (2009); A. Rosas, 'International Legitimacy of Governments', in G. Alfredsson & P. Macalister-Smith, *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of other Vulnerable Groups: in Memory of Atle Grahl-Madsen* (1996), 201-217.

<sup>4</sup> *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, para. 94.

<sup>5</sup> *Nicaragua Case*, *supra* note 2, para. 205.

<sup>6</sup> *Id.*, para. 258.

the freedom of choice of the political, social, economic and cultural system of a State<sup>7</sup>”.

However, after the end of the Cold War and the democratization processes initiated in many states we witness the gradual emergence of the right to democracy as a rule of international law.<sup>8</sup> International organizations declare in every occasion that the principle of democratic governance is indispensable for the guarantee of institutional and effective protection of human rights. Democracy is propounded as the means to prevent international and internal armed conflicts, to establish the rule of law and to achieve in general the regional and international stability.<sup>9</sup>

The growing importance of democratization is further demonstrated by the electoral observation missions organized by the UN, the EU (European Commission), the OSCE (ODIHR), the OAS (Department for the Promotion of Democracy),<sup>10</sup> the Council of Europe etc. The change in the

<sup>7</sup> *Id.*, para. 263.

<sup>8</sup> On these developments see in particular R. Ben-Achour, ‘Le Droit International de la Démocratie’, *Cours Euro-Méditerranéens Bancaja de Droit International*, Volume 4 (2000), 359; B. Boutros-Ghali, ‘Pour un Droit International de la Démocratie’, in *Theory of International Law at the Threshold of the 21<sup>st</sup> Century. Essays in Honour of Krzysztof Skubiszewski* (1996), 99-108; G. Fox & B. Roth (eds), *Democratic Governance and International Law* (2000); T. M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) 1, 46-91; L.-A. Sicilianos, *L’ONU et la Démocratisation de l’Etat: Systemes Regionaux et Ordre Juridique Universel* (2000); Société Française pour le Droit International, *L’Etat de Droit en Droit International* (2009). G. Fox maintains that it remains uncertain whether the practice of international organizations has coalesced into a “right” to democratic governance, see G. Fox, ‘The International Protection of the Right to Democracy’, *Max Planck Encyclopedia of Public International Law* (March 2008) available at <http://www.mpepil.com/> (last visited 23 August 2011).

<sup>9</sup> See the relevant references in the report of the former UN Secretary-General B. Boutros-Ghali, *An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping*, UN Doc. A/47/277-S/24111, 17 June 1992, the Vienna Declaration and Programme of Action: Report of the World Conference on Human rights, UN Doc. A/CONF.157/23, 12 July 1993 and the Document of the Moscow Meeting of the Conference on the human dimension of the CSCE, 4 October 1991. See also, R. Ben-Achour, ‘La Contribution de B. Boutros-Ghali à l’Emergence d’un Droit International Positif de la Démocratie’, in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber. Paix, Développement, Démocratie* (1998), 909-923.

<sup>10</sup> The Department for the Promotion of Democracy is an important mechanism for conflict prevention in the OAS and has developed various special missions in this field, including the first joint UN-OAS mission in Haiti in 1993 for the verification of

regional democratization process refers both to the engagement of international actors, particularly international organizations, therein, and the influence they can exercise in the outcomes of this process. Furthermore, in rare cases the Security Council has even proceeded to the adoption of coercive measures in order to ensure respect for the democratic order, demonstrating thereby that it is not a matter of exclusive domestic jurisdiction but that it concerns the international community as a whole, especially the neighboring states. The coups d'état in Haiti (1991) and Sierra Leone (1997), following elections that were monitored by international observers, led to the immediate reaction of the UN Security Council and the invocation of Chapter VII of the UN Charter.<sup>11</sup> However, this reaction is fragmentary, since other serious disturbances of the democratic order have not attracted the attention of the Security Council

the respect for human rights and institution building (MICIVIH-International Civilian Mission in Haiti).

<sup>11</sup> In the case of Haiti the UN Security Council: “deplored the fact that, despite the efforts of the international community, the legitimate government of Jean-Bertrand Aristide has not been reinstated” and stated that: “the continuation of this situation threatens international peace and security in the region” thus deciding to adopt sanctions against the “de facto authorities” of the country (SC Res. 841, 16 June 1993). By virtue of Res. 940 it authorized a multinational force under unified command and control: “to restore the legitimately elected President and authorities of the Government of Haiti” (SC Res. 940, 31 July 1994). In the case of Sierra Leone it was even more explicit demanding: “that the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order” (SC Res. 1132, 8 October 1997). During the political crisis of November 2010 in Côte d’Ivoire, following the refusal of former President L. Gbagbo to step down, the UN Security Council adopted Res. 1962 (2010) under Chapter VII urging: “all the Ivorian parties and stakeholders to respect the will of the people and the outcome of the election in view of ECOWAS and African Union’s recognition of Alassane Dramane Ouattara as President-elect of Côte d’Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission” and renewing the mandate of UNOCI as it was set out in Res. 1933 (2010). According to the latter, UNOCI has been mandated, amongst others, to “support the organization of open, free, fair and transparent elections”. In subsequent resolutions it has been even more explicit as to the need of state institutions to yield to the authority vested by the people in President A. Ouattara (SC Res. 1975, 2011) albeit it did not expressly mandate UNOCI to use force in order to reinstate him in power.



(see e.g. Burma/Myanmar in 1990, Pakistan in 1999, Thailand in 2006, Bangladesh in 2007).<sup>12</sup>

The culmination of this process, regarding the importance of democratic governance, which developed rapidly but in an uneven way after the Cold War, was the report of the High-level Panel on Threats, Challenges and Change that proposed a mechanism: “to protect democratically elected governments from unconstitutional overthrows”<sup>13</sup>. However, such a reference has not been included in the 2005 World Summit Outcome. This document contains only the well-known references on the interrelationship between human rights, democracy and the rule of law but avoids establishing particular mechanisms to cope with interruptions of the democratic order in the UN member states.<sup>14</sup>

## C. The Protection of Democracy in the Framework of the Organization of American States

### I. Introductory Remarks

In the Western Hemisphere, the member states of the OAS displayed always a particular “sensitivity” regarding the strict compliance with the principle of non-intervention. In the OAS framework, one of the first instruments that were adopted was the Rio Treaty which established a system of reciprocal assistance in case of attack against a state-party.<sup>15</sup> Nevertheless, the concept of democratic governance is present in the OAS charter adopted on 30 April 1948. Since its establishment, the OAS declared that representative democracy constituted one of the fundamental principles

<sup>12</sup> T. Christakis, ‘La violation du droit interne en tant que menace contre la paix?’, in Société Française pour le Droit International, *L’Etat de Droit en Droit International* (2009).

For an analysis see Christakis, *supra* note 3, 107-122. On the other hand, d’Aspremont maintains that the disruption of the democratic order as such does not constitute violation of an international rule, see J. d’Aspremont, ‘La Licéité des Coups d’Etat en Droit International’, in Société Française pour le Droit International, *supra* note 8, 123-142.

<sup>13</sup> Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, 2004, para. 94.

<sup>14</sup> UN Doc. A/60/L.1, 15 September 2005, see in particular paras 119, 135-137.

<sup>15</sup> Inter-American Treaty of Reciprocal Assistance (Rio Treaty), 9 February 1947, OAS Treaty Series No 9 and 61, 324 U.N.T.S 21.

of the organization,<sup>16</sup> an “indispensable condition for the stability, peace and development of the region” (Preamble). However, these references were to a certain extent only rhetorical, since they were not endowed with a specific implementation mechanism.<sup>17</sup>

## II. The First Attempt: the Declaration of Santiago de Chile

The American states made a first – albeit incomplete – effort to establish a mechanism of defense of the right to democracy during the 5<sup>th</sup> Meeting of Consultation of Ministers of Foreign Affairs,<sup>18</sup> held in Santiago de Chile (12-18 August 1959). Among the agenda items was the study of the juridical relation between the effective respect for human rights and the exercise of representative democracy, taking into account the strict observance of the principle of non-intervention. The meeting ended with the adoption, *inter alia*, of two important documents: a) *Resolution IX*, whereby the OAS Council was requested to prepare, in cooperation with the technical organs of the Organization and in consultation with the governments of the American states, a draft Convention on the effective exercise of representative democracy, that would determine the procedure and the measures to be applied in that respect, and b) the *Declaration of Santiago*,

<sup>16</sup> Art. 3d OAS Charter (OAS, Treaty Series, nos. 1-C and 61, 1609 U.N.T.S 119): “The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy”. The Council of Europe followed one year later (5 May 1949) with a reference to: “the principles of individual freedom, political liberty and the rule of law, which form the basis of all genuine democracy” in the Preamble of its statute. In Africa, similar efforts begin to take place only the last decade, see the Declaration on the framework for an OAU response to unconstitutional changes of government (2000), the Constitutive Act of the African Union (2000, Arts 3 and 4) and the Protocol relating to the establishment of the Peace and Security Council of the African Union (2002, Arts 3f and 7 para. 1m). In 2007, the African Charter on democracy, elections and governance was adopted, but it is ratified only by three countries and has not yet entered into force. See also Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the mechanism for conflict prevention, management, resolution, peacekeeping and security, adopted by the Economic Community of West African States (ECOWAS) in Dakar, in December 2001. At the EU level see the Treaty of Lisbon (2007), especially Art. 1a, Title II “Provisions on democratic principles”, Art. 8A, 8B, 8C and Art. 10A.

<sup>17</sup> E. Spehar, ‘Democracy in our Hemisphere and the Role of the Organization of American States’, 11 *Revue Québécoise de Droit International* (1998) 1, 35, 35-46.

<sup>18</sup> The Meeting of Consultation of Ministers of Foreign Affairs is a decision-making organ of the OAS of major importance, see Chapter X of the OAS Charter.

an instrument that referred, *inter alia*, to the “desire of the American peoples to live under democratic institutions, to their “faith in the effective exercise of representative democracy as the best mean to promote their political and social progress” and affirmed that the existence of antidemocratic regimes amounted to a violation of the principles on which the OAS was founded.<sup>19</sup> Although a draft Convention that would have had a binding effect to that end was never prepared, the Declaration of Santiago is seen as the predecessor of all efforts aiming at the stabilization of democracy in the Western Hemisphere which culminated after the end of the Cold War.

However, the years that followed the 5<sup>th</sup> Meeting of Consultation of Ministers of Foreign Affairs could in no way foster the right to democracy in the Americas. Cold war, harsh dictatorial regimes, military coups, violent and long-lasting armed conflicts ravaged the Hemisphere. Democracy seemed elusive in the majority of the American states, with the exception of Costa Rica and, of course, Canada and the United States. It is characteristic that the only state that was expelled for having violated the democratic principles was Cuba, a move that was due to political reasons more so rather than as a result of the strict implementation of the principles of the Santiago Declaration.<sup>20</sup> The OAS was still lacking the procedural mechanisms that would allow it to react properly against the violent disruptions of the constitutional order in the member states.

### III. The Interplay between Democracy and Human Rights: the Multifaceted Activities of the Inter-American Commission on Human Rights

In the same 5<sup>th</sup> Meeting, the Ministers of Foreign Affairs of the OAS member states decided the establishment of an Inter-American Commission on Human Rights (IACHR).<sup>21</sup> Since the 1960s, the IACHR has

<sup>19</sup> Both documents are included in the Final Act of the meeting, available at <http://www.oas.org/CONSEJO/SP/RC/Actas/Acta%205.pdf> (last visited 23 August 2011).

<sup>20</sup> The 8<sup>th</sup> Meeting of Consultation of Ministers of Foreign Affairs (Punta del Este, Uruguay, January 1962) suspended the Cuban government from participation in the OAS, although this punitive measure was not provided for at the time in the OAS Charter and precedes the first regular session of the General Assembly (1971).

<sup>21</sup> Res. VIII, OEA/Ser.L/V/1.4, included in the Final Act, *supra* note 19. The mandate and activities of this organ is not the object of this study. For a thorough analysis see,

demonstrated a remarkable proficiency in the field of human rights promotion and protection. It embarked upon a wide range of activities during internal disturbances, non-international armed conflicts, military regimes in all OAS member states, parties or not to the American Convention on Human Rights (ACHR).<sup>22</sup> The activity of the IACHR was further fostered by the retreat of the principle of non-intervention in the field of human rights protection. Human rights are no more within the *domaine réservé* of states.<sup>23</sup> However, its conclusions on the reported human rights violations had no consequence as to the right of the *de facto* governments<sup>24</sup>

amongst others, K. Vasak, *La Commission Interaméricaine des Droits de l'Homme* (1968); D. Padilla, 'The Inter-American Commission on Human Rights of the Organization of American States: a Case-Study', 9 *American University Journal of International Law and Policy* (1993), 95.

<sup>22</sup> In case a State has not ratified the ACHR, the instrument of reference is the American Declaration of the Rights and Duties of Man. The IACHR conducts onsite visits on its own initiative, following a request by an OAS organ or a NGO or at the invitation of the respective government. Its findings are included in special reports, while it also submits an annual report to the OAS General Assembly. At a later stage and more systematically after the adoption of the ACHR it acquired the power to receive individual petitions. For more information consult the site <http://www.cidh.org>.

<sup>23</sup> Particularly groundbreaking in this respect was the so-called "Greek Case". When the colonels seized power in Greece in 1967, Denmark, Sweden, Norway and the Netherlands filed an interstate application against the Greek government with the former European Commission on Human Rights. The perpetrated gross human rights violations that were reported led Greece to withdraw from the Council of Europe. For a comprehensive analysis see (*in greek*) S. Perrakis, *The "Greek Case" before the International Organizations (1967-1974). Law and Politics of the International Protection of Human Rights*, (1997). Also, T. Buergenthal, 'Proceedings against Greece under the European Law of Human Rights', 62 *American Journal of International Law* (1968) 2, 441-450. This firm reaction of the Council of Europe has considerably influenced all international institutions when faced with similar cases. For instance, in the OAS framework, after the invasion of the Presidential Palace, the murder of Salvador Allende and the introduction of military rule in Chile, the IACHR conducted an on site visit, drafted a particularly critical report for the flagrant human rights violations by the military regime and forwarded it to the UN Human Rights Commission, thereby internationalizing the dire situation in the country. For further reactions at the UN level see, J. Fitzpatrick, *Human Rights in Crisis. The International System for Protecting Human Rights during States of Emergency* (1994), 127. See also the mobilization of the IACHR in the cases of Nicaragua, Paraguay etc. *id.* 178.

<sup>24</sup> A *de facto* government is a government "wherein all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them to others, who, sustained by a power above the forms of law, claim to act and do really act in their stead", J. Ballentine, *Law Dictionary*, 2<sup>nd</sup> ed. (1948), 345. The Encyclopedia of Public International Law differentiates between a "*de facto* regime"

and dictatorial regimes to participate in the OAS, with one notable exception: the application of Article 27 ACHR.<sup>25</sup>

Indeed, in the framework of Article 27 ACHR, regarding the legality of derogation measures adopted during states of emergency,<sup>26</sup> the IACHR does not hesitate to control in a way the legality of the government itself that adopts the derogation measures. These conclusions are sometimes followed by the activation of the other organs of the inter-American system.<sup>27</sup> For instance, the systematic control of the Somoza regime in

which is defined as: “entities that claim to be States or governments, which control more or less clearly defined territories without being recognized – at least by many States – as States or governments (e.g. Taiwan)” [J. Frowein, ‘De Facto Regime’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume I (1992), 966-968 (1987)] and “*de facto* government” which is used: “for the non-recognised government” (*id.*, 966). Despite this differentiation, the terms “*de facto* government”, “*de facto* regime” and “*de facto* authorities” may be used with the same meaning interchangeably in the present article. For a general overview of the *de facto* regimes in international law see J. A. Frowein, *Das de facto-Regime im Völkerrecht: eine Untersuchung zur Rechtsstellung "Nichtanerkannter Staaten" und Ähnlicher Gebilde*, (1968).

<sup>25</sup> Art. 27 ACHR, under the title “Suspension of Guarantees”, reads as follows: “1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Art. 3 (Right to Juridical Personality), Art. 4 (Right to Life), Art. 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Art. 9 (Freedom from Ex Post Facto Laws), Art. 12 (Freedom of Conscience and Religion), Art. 17 (Rights of the Family), Art. 18 (Right to a Name), Art. 19 (Rights of the Child), Art. 20 (Right to Nationality), and Art. 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension”.

<sup>26</sup> For the so-called “Derogation Clause” of the major human rights treaties (ICCPR, ECHR, ACHR) see J. Oraá, *Human rights in States of Emergency in International Law* (1992).

<sup>27</sup> According to the Resolution on the protection of human rights in connection with the suspension of constitutional guarantees or “state of siege”, adopted by the IACHR in 1968 (OEA/Ser.L/V/II.19, Doc. 32, 16 May 1968), when the States do not comply with the requirements of Art. 27 ACHR, the IACHR has the power to report to the

Nicaragua by the IACHR has contributed to its eventual overthrow, since it led to the adoption of a historical and pioneering resolution by the Meeting of Consultation. Indeed, the IACHR, after it had conducted onsite visits and prepared a special report on Nicaragua,<sup>28</sup> referred the situation to the Meeting of Consultation of Ministers of Foreign Affairs. The latter in a resolution, adopted on 23 June 1979, questioned, *inter alia*, the legality of a government that had perpetrated gross human rights violations and asked for its immediate replacement by a democratic regime that would respect human rights:

“The Seventeenth Meeting of Consultation of Ministers of Foreign Affairs, declares: That the solution of the serious problem, is exclusively within the jurisdiction of the people of Nicaragua; that [...] this solution should be arrived at on the basis of the following: 1. Immediate and definitive replacement of the Somoza regime. 2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups, which oppose the Somoza regime and which reflects the free will of the people of Nicaragua. 3. Guarantee of the respect for human rights of all Nicaraguan, without exception. 4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom, and justice”<sup>29</sup>.

In this way, the IACHR gradually incorporated into the substantive conditions of the legality of derogation measures that they are adopted by the legitimate government, the one that is democratically elected.<sup>30</sup>

Inter-American Conference or the Meeting of Consultation of Ministers of Foreign Affairs, see in general Oraá, *supra* note 26, 53.

<sup>28</sup> OEA/Ser.L/V/II.45, Doc. 18 rev. 1, 17 November 1978.

<sup>29</sup> 17<sup>th</sup> Meeting of Consultation of Ministers of Foreign Affairs, Res/2, Ser/FII.17, Doc. 49/79 Rev. 2, 23 June 1979. Excerpts are included in the IACHR Special Report on Nicaragua (1981), OEA/Ser.L/V/II.53, Doc. 25, 30 June 1981, ‘Introduction’.

<sup>30</sup> See also Res.OEA/Ser.L/V/II.19, Doc. 32, *supra* note 27, which stipulates that the declaration of a state of emergency should not entail the overthrow of the constitutional order. Furthermore, the Inter-American Court of Human Rights, in its advisory opinion *Habeas Corpus in emergency situations* (Arts 27 para. 2, 25 para. 1 and 7 para. 6 ACHR) has stated that: “the suspension of guarantees cannot be disassociated from the ‘effective exercise of representative democracy’ referred to in Article 3 of the OAS Charter”, 30 January 1987, Serie A, No 8, para. 20. The same

#### IV. The Changes Brought About with the End of the Cold War: Resolution 1080 and the Washington Protocol

After the end of the Cold War, the American states decided to alter their strict stance regarding the principle of non-intervention.<sup>31</sup> At the same time, the decay and eventual dissolution of the Union of Soviet Socialist Republics eased United States interventionism. The OAS was relieved of strategic concerns and was free to emphasize on its mission to promote democracy. The American states began to develop a system of mediation and facilitated dialogue among domestic political actors, a move that was described as “intervention without intervening”<sup>32</sup>.

After the gradual collapse of the military regimes in Latin America, the concept of democracy emerges as a *conditio sine qua non* for the achievement of regional security and stability.<sup>33</sup> The OAS member states search for ways to bolster democracy and establish it as a prerequisite and condition of participation in the activities of the organization. In 1985, “as enthusiasm for democracy spread through the region”<sup>34</sup>, the American states amended the OAS Charter so as to include in its purposes the promotion and establishment of representative democracy. Thus, the Cartagena Protocol added Article 2b to the OAS Charter: “The OAS in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the UN, proclaims the following essential purposes: b) to promote and consolidate representative democracy, with due respect for

approach is followed by the IACHR in the case of Honduras. In its preliminary observations after its visit in the country it concluded that: “for a suspension of guarantees to be legitimate, it must meet a series of requirements established in the Convention. The first of these requirements is that the suspension of guarantees be adopted by a government that exercises public power legitimately, within the context of a democratic society”, IACHR, Preliminary observations on the visit in Honduras, 21 August 2009, available at <http://www.cidh.org/comunicados/English/2009/60-09eng.Preliminary.Observations.htm> (last visited 25 August 2011).

<sup>31</sup> D. E. Acevedo & C. Grossman, ‘The OAS and the Protection of Democracy’, in T. Farer (ed.), *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (1996), 132, 137.

<sup>32</sup> A. Cooper & T. Legler, *Intervention without Intervening? The OAS Defense and Promotion of Democracy in the Americas* (2006). See, also, T. Farer (ed.), *supra* note 31; T. Legler *et al.* (eds), *Promoting Democracy in the Americas* (2007).

<sup>33</sup> See C. Shaw, ‘Conflict Management in Latin America’, in P. Diehl & J. Lepgold (eds), *Regional Conflict Management* (2003), 123.

<sup>34</sup> The expression belongs to D. Hawkins & C. Shaw, ‘The OAS and Legalizing Norms of Democracy’, in T. Legler *et al.*, *supra* note 32, 21, 21.

the principle of non-intervention”<sup>35</sup>. But still the Protocol, apart from its explicit reference to the principle of non-intervention, did not specify the type of action to be taken in order to achieve the described purposes. This shortcoming was fully demonstrated during the 1989 crisis in Panama.<sup>36</sup>

Meanwhile, the Rio Group, which was created in 1986 and contains the majority of Latin American countries without US participation,<sup>37</sup> had already established democracy as a criterion of participation. In two cases (Panama-1989 and Peru-1992) suspension was adopted as sanction for the interruption of democratic order<sup>38</sup>. The Rio Group essentially compressed the whole philosophy that penetrates all the subsequent efforts to defend democracy in the region, from Resolution 1080 to the Inter-American Democratic Charter: rejection of the use of military force and activation of all possible diplomatic channels to restore democracy – the peaceful

<sup>35</sup> Protocol of Amendment to the Charter of the Organization of American States “Protocol of Cartagena de Indias”, 14th Special Session of the OAS General Assembly, 5 December 1985, OAS Treaty Series No 66.

<sup>36</sup> See Cooper & Legler, *supra* note 32, 25.

<sup>37</sup> The Rio Group is an international organization created on 18 December 1986 by means of the Declaration of Rio de Janeiro. During the Cold War, it was perceived as an alternative body to the OAS, since the latter was dominated by the United States. The Rio Group does not have a secretariat or permanent body, and instead relies on yearly summits of heads of States. Its Member States are Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. The major objectives of the organization, as were described in the Declaration of Rio de Janeiro, include: to expand and systematize political cooperation among the Member States; to examine international issues which may be of interest and coordinate common positions on these issues; to promote more efficient operation and coordination of Latin American cooperation and integration organizations; to present appropriate solutions to the problems and conflicts affecting the region; to provide momentum, through dialogue and cooperation, to the initiatives and actions undertaken to improve inter-American relations; and to explore jointly new fields of cooperation which enhance economic, social, scientific and technological development, see <http://www.iccnw.org/?mod=riogroup> (last visited 25 August 2011). The Community of Latin American and Caribbean States, a regional bloc created on 23 February 2010, is seen as the successor of the Rio Group.

<sup>38</sup> See A. Frohmann, ‘Regional Initiatives for Peace and Democracy: the Collective Diplomacy of the Rio Group’, in C. Kaysen *et al.* (eds), *Collective Responses to Regional Problems: the Case of Latin America and the Caribbean* (1994), 129-141. See also similar activities by the Andean Group, MERCOSUR and CARICOM in Cooper & Legler, *supra* note 32, 31-32.



settlement of inter-state disputes has been, after all, a *modus vivendi* and *operandi* deeply rooted in the political history of Latin American states.

In the 1990s the OAS entered a renewal phase. One of the basic items that were incorporated in the inter-american agenda was the defence and promotion of democracy. In 1991, with the “Santiago Commitment to Democracy and the Renewal of the Inter-American System”, the member states declared that democracy was an indispensable condition for the stability, peace and development of the region<sup>39</sup>. It was soon followed by Resolution 1080 of the OAS General Assembly on “Representative Democracy”, whereby the member states of the OAS agreed to intervene collectively, with diplomatic means, in the domestic affairs of a member state in order to protect the democratic order.<sup>40</sup>

Hence, the governments become for the first time accountable towards the member states of the Organization for the means and methods they employ in order to rise to power. Res. 1080 requests the OAS Secretary General to convene immediately:

“a meeting of the Permanent Council in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization’s member states, in order, within the framework of the [OAS] Charter, to examine the situation, decide on and convene and ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period”.

The purpose of the meeting of the foreign ministers or of the special session of the General Assembly would be to look into the events collectively and adopt any decisions deemed appropriate in accordance with the OAS Charter and international law.

The Res. 1080 mechanism was invoked in four cases:<sup>41</sup> Haiti (1991-96)<sup>42</sup>, Peru (1992)<sup>43</sup>, Guatemala (1993)<sup>44</sup> and Paraguay (1996)<sup>45</sup>. However, it

<sup>39</sup> OAS GAOR, 21<sup>st</sup> Reg. Sess., OEA/Ser.P/AG, Doc. 2734/91 (4 June 1991).

<sup>40</sup> AG/RES.1080 (XXI-O/91), 5 June 1991, in Proceedings of the 21<sup>st</sup> Regular Session, OEA/Ser.P/XXI.O.2, Volume I, 20 August 1991.

<sup>41</sup> See in general for the implementation of this resolution H. Caminos, ‘The Role of the OAS in the Promotion and Protection of Democratic Governance’, 273 *Recueil des Cours de l’Académie de Droit International* (1998), 103, 141-176.

remained largely a mechanism of consultation. In those cases the initiatives included the dispatch of fact-finding missions and other diplomatic delegations, but the OAS General Assembly never proceeded to the suspension of a member state.

In 1992 the threat of sanction, in the form of suspension of membership, is for the first time put forward. According to the Protocol of Washington, which amended the OAS Charter (Art. 9):

“A member of the organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established”<sup>46</sup>.

<sup>42</sup> On 30 September 1991, the very day on which the coup d'état had taken place in Haiti, the Permanent Council, in the exercise of the powers conferred on it by Res. 1080, convened an ad hoc Meeting of Ministers of Foreign Affairs to assess the seriousness of the events that had occurred and had caused the sudden and violent interruption of the democratic process in that country, see references in AG/RES. 1373 (XXVI-O/96), 6 June 1996. The foreign ministers decided to adopt any appropriate measure in order to restore the constitutional order, including the imposition of an economic embargo, a process that eventually led to the involvement of the UN for the restoration of democracy. Moreover, the OAS Secretary General mediated for the restitution of the elected President Jean-Bertrand Aristide, Fitzpatrick, *supra* note 23, 189.

<sup>43</sup> On 4 April 1992 the Peruvian President, Alberto Fujimori, dissolved Congress, shut down the courts, suspended the Constitution and vested himself with emergency powers. OAS Permanent Council passed Resolution CP/RES. 579 (897/92), declaring thereby that Fujimori's actions constituted an interruption of the democratic order and invoking Res. 1080 to call an emergency meeting of foreign ministers. Although the response was timely and crucial it, failed to restore the democratic *status quo ante*, a failure that was demonstrated during the 1990s, marred by manipulated elections and gross human rights violations, until the final exodus of Fujimori in 2000.

<sup>44</sup> With the adoption of Resolution 605 (1993), the Permanent Council condemned the attempted “self-coup”, leading to the restoration of constitutional government.

<sup>45</sup> See the references in A. Valenzuela, *The Collective Defense of Democracy. Lessons from the Paraguayan Crisis of 1996*, Report to the Carnegie Commission on Preventing deadly conflict, December 1999. Also, A. Valenzuela, ‘Paraguay: the Coup that didn't Happen’, 8 *Journal of Democracy* (1997) 1, 43, 43-55.

<sup>46</sup> Protocol of Amendments to the Charter of the Organization of American States “Protocol of Washington”, approved on December 14, 1992, at the Sixteenth Special Session of the General Assembly (A-56), 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF).

The power to suspend was to be exercised only when such diplomatic initiatives undertaken by the OAS for the purpose of promoting the restoration of representative democracy in the affected member state have been unsuccessful and the decision to suspend was to be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the member states. The Protocol of Washington entered into force in 1997, but Article 9 has never been invoked, whilst the instrument has not yet been ratified by all member states.<sup>47</sup>

## V. On the Way to the Adoption of the Inter-American Democratic Charter

Even though this approach to defending democracy was unprecedented at the international level, it remained limited in many respects. Thus, Res. 1080 limited explicitly the OAS action only in cases of “sudden or irregular interruption of the democratic political institutional process”, leaving out of its scope of application eventual cases of slow institutional erosion or minor offences to the democratic principles and institutions that did not necessitate the activation of the Organization’s mechanisms. On the other hand, the Washington Protocol was even more limited, since it called for action only in case the democratic order was overthrown by violent means. Therefore, if for instance the president of a state invited the military to participate in the government, then this case would not trigger the mobilization of the Washington Protocol mechanism. Moreover, this instrument was not ratified by all member states.<sup>48</sup>

<sup>47</sup> See the status of signatures and ratifications in [http://www.oas.org/dil/treaties\\_A-56\\_Protocol\\_of\\_Washington\\_sign.htm](http://www.oas.org/dil/treaties_A-56_Protocol_of_Washington_sign.htm) (last visited 25 August 2011). The doubts about its usefulness in handling this kind of crises are clearly expressed by Mexico. In its declaration at the time of the adoption it expressed its opposition to the amendment, stating that, notwithstanding the fact that it “has reacted swiftly and firmly to disruptions of the constitutional order on numerous occasions in the past”, nonetheless it remained: “convinced that democracy is a process which comes from the sovereign will of the people, and cannot be imposed from outside”, while “it insists that it is unacceptable to give to regional organizations supra-national powers and instruments for intervening in the internal affairs of the states”. Finally, it opposed strongly to the punitive character of the amendment and maintained that “the preservation and strengthening of democracy in the region cannot be enhanced through isolation, suspension or exclusion”, see [http://www.oas.org/dil/treaties\\_A-56\\_Protocol\\_of\\_Washington\\_sign.htm#Mexico](http://www.oas.org/dil/treaties_A-56_Protocol_of_Washington_sign.htm#Mexico) (last visited 25 August 2011).

<sup>48</sup> States parties include Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador,

In recent years, the Latin American region in particular is witnessing the emergence of new ways of disrupting the democratic order that are more sophisticated than the traditional military coups of the former decades. For instance, they could come from the democratically elected government, the so-called *autogolpes*, when the elected president dissolves the legislature, suspends the national constitution and governs by means of decrees, or when the executive reorganizes the judiciary under the pretext of “purification”, but in reality in order to protect the executive and promote impunity for crimes that may have been committed. The system that had been developed during the 1990s, proved to be insufficient for these situations.

As with Panama in 1989, which revealed the dysfunction of the Cartagena Protocol, the Inter-American Democratic Charter was precipitated by the failure of Res. 1080 in the Peru crisis (2000), when the Peruvian president, Alberto Fujimori, attempted to win a third term of office by means of fraudulent elections.<sup>49</sup> At the same time, the political crisis in Peru has proved a unique opportunity to develop decisively the insufficient consultation mechanism of Res. 1080, since it was during this crisis that the insufficiency of the mechanism was clearly demonstrated.

The initial call for a democratic charter was made on 11 December 2000 by Javier Pérez de Cuéllar, former UN Secretary General and by that time Foreign Minister of Peru in the transitional government after the Fujimori expulsion, during a speech in the Peruvian Congress.<sup>50</sup> His proposal was repeated during the 3<sup>rd</sup> Summit of the Americas that took place in Quebec City, Canada, from 20-22 April 2001.<sup>51</sup> The Declaration of Quebec, adopted by the Heads of States and Governments of 34 nations, contained a democracy clause which stated that: “any unconstitutional alteration or interruption of a state’s democratic order constitutes an

El Salvador, Guatemala, Guyana, Honduras, Nicaragua, Panama, Paraguay, Peru, St Vincent and Grenadines, United States, Uruguay, Venezuela, see [http://www.oas.org/dil/treaties\\_A-56\\_Protocol\\_of\\_Washington\\_sign.htm](http://www.oas.org/dil/treaties_A-56_Protocol_of_Washington_sign.htm) (last visited 25 August 2011).

<sup>49</sup> For the discrepancies between the OAS Member States as to the applicability of Res. 1080 in this situation, see Cooper & Legler, *supra* note 32, 65.

<sup>50</sup> Cooper & Legler, *supra* note 32, 87. See also the resolution of the OAS General Assembly “Vote of thanks to the government of the Republic of Peru”. GA-Res. 2 (XXVIII-E/01), 11 September 2001.

<sup>51</sup> The Summit of the Americas is a process that was initiated after the end of the Cold War. The first one was held in Miami (1994) and the second in Santiago de Chile (1998).

insurmountable obstacle to a state's further participation in the Summit of the Americas process"<sup>52</sup>. The Declaration also instructed the foreign ministers to adopt an Inter-American Democratic Charter at the next regular session of the OAS General Assembly, so as to reinforce OAS instruments for the active defence of representative democracy.<sup>53</sup>

Indeed, the OAS General Assembly, in its 31<sup>st</sup> session held in San José de Costa Rica from 3-5 June 2001, recommended, by Resolution 1838,<sup>54</sup> that the Permanent Council schedule a special session of the OAS General Assembly with the purpose to adopt the Democratic Charter. The Permanent Council took up the torch, and through Resolution 793,<sup>55</sup> scheduled the 28<sup>th</sup> special session of the General Assembly to begin on 10 September 2001 in Lima, Peru. The Inter-American Democratic Charter was adopted on 11 September 2001,<sup>56</sup> coinciding tragically with the terrorist attacks that same day in the United States. Thenceforth, democracy in the Americas is no longer an act of internal or domestic jurisdiction or exclusive to the state.<sup>57</sup>

<sup>52</sup> See the text of the Declaration available at [http://www.summit-americas.org/iii\\_summit/iii\\_summit\\_dec\\_en.pdf](http://www.summit-americas.org/iii_summit/iii_summit_dec_en.pdf) (last visited 25 August 2011).

<sup>53</sup> For a description of the 3<sup>rd</sup> Summit and the approach of the various delegations to the prospect of a democratic charter see E. Lagos & T. Rudy, 'The Third Summit of the Americas and the 31<sup>st</sup> Session of the OAS General Assembly', 96 *American Journal of International Law* (2002) 2, 173.

<sup>54</sup> AG/RES.1838 (XXXI-O/01) in Proceedings of the OAS General Assembly's 31<sup>st</sup> Regular Session, Volume I.

<sup>55</sup> OEA/Ser.G, CP/RES.793 (1283/01), 27 June 2001.

<sup>56</sup> AG/RES.1 (XXVIII-E/01).

<sup>57</sup> The IADC was the "peak of multilateralism", compared by some commentators to campaigns such as the ban of landmines, the adoption of the International Criminal Court Statute or the cluster munitions ban, see Cooper & Legler, *supra* note 32, 100.

## D. The Inter-American Democratic Charter: Legal Nature and Content

### I. The Legal Position of the Inter-American Democratic Charter in the OAS System

A basic question that arises, before proceeding to any further examination of the IADC, is its legal nature and validity.<sup>58</sup> The IADC is a soft law instrument, approved unanimously by the Ministers and Ambassadors of the OAS member states during a special session of the OAS General Assembly. The IADC does not amend the OAS Charter<sup>59</sup> nor does it have to be ratified in order to be implemented. Finally, the states are not obliged to amend their respective national legislations in order to incorporate the provisions of the IADC.

Despite its soft law nature, it is generally accepted that the IADC is legally binding, since it is considered as an authoritative interpretation of the OAS Charter, according to Art. 31 para. 3a of the Vienna Convention on the Law of Treaties.<sup>60</sup> Indeed, prior to the approval of the instrument, the delegates of the OAS member states sought advice from the Inter-American Juridical Committee, an OAS advisory body entrusted, *inter alia*, with the promotion of the progressive development and the codification of international law. According to its opinion on the legal status of the IADC,

<sup>58</sup> See for an in depth analysis, T. Rudy, 'A Quick Look at the Inter-American Democratic Charter of the OAS: what is it and is it 'Legal'?', 33 *Syracuse Journal of International Law and Commerce* (2005) 1, 237, 237-248.

<sup>59</sup> However, there is a question whether it amends in particular Art. 9 OAS Charter, introduced by the Washington Protocol.

<sup>60</sup> The IADC is considered a "subsequent agreement" according to the wording of Art. 31 para. 3a of the Vienna Convention: "there shall be taken into account, together with the context: a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". For the position of the Inter-American Court of Human Rights as to the legal effect of instruments that constitute authoritative interpretations of the OAS Charter, see *Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el marco del artículo 64 de la Convención Americana sobre derechos humanos*, Advisory Opinion OC-10/89, 14 July 1989, paras 43, 45. See, also, AG/RES.1957 (XXXIII-O/03), whereby Member States are encouraged: "to promote and publicize the Democratic Charter as well as to implement it". However, according to certain commentators the binding character of the IADC is not certain, d'Aspremont, *supra* note 12, 129.

actually on the legal nature of the resolutions of the OAS General Assembly,<sup>61</sup> since the IADC was approved by such a resolution:

“[...] the provisions of resolutions of this nature generally have as their purpose the interpretation of treaty provisions, the provision of evidence of the existence of customary norms [...]. The provisions of some resolutions of an organ of an international organization may have an obligatory effect”<sup>62</sup>.

In the same document, the Inter-American Juridical Committee stresses that:

“it would be unnecessary to amend the OAS Charter, provided that the text of the Democratic Charter explicitly states that it is setting forth an interpretation of the OAS Charter and assuming of course that the IADC is adopted by consensus”<sup>63</sup>.

To that end a paragraph was inserted in the preamble of the IADC in order to clarify that the resolution adopting the document was the unanimous interpretation of Article 9 of the OAS Charter: “Bearing in mind the progressive development of international law and the advisability of clarifying the provisions set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice”. It is true, however, that the legal impediments persist, in case the OAS decides to suspend a government of a state that has not ratified the Washington Protocol.<sup>64</sup>

<sup>61</sup> The resolution approving the IADC can be described as an “operational act” of the OAS General Assembly since it is “done in the course of the direct and substantive operations of the organization”, see C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (2005), 168. The legal effects of such acts depend on the constitution of the organization, see *id.* Since the OAS General Assembly is described as the “supreme organ of the OAS”, competent to decide the general action of the organization (Art. 54 OAS Charter), it goes without saying that its acts are binding upon Member States. Of course the wording of each resolution adopted in each different case has to be taken also into account.

<sup>62</sup> CJI Res. 32, LIX O/01, 24 August 2001, para. 5 in the Annual Report of the Inter-American Juridical Committee to the General Assembly, OEA/Ser.Q/VI.32, Doc. 79 (2001).

<sup>63</sup> *Id.* para. 40.

<sup>64</sup> Rudy, *supra* note 58, 242.

Furthermore, the IADC, although it constitutes a secondary source of law and this type of resolution does not feature among the sources of law listed under Article 38 of the International Court of Justice Statute, could be crystallized in customary law provided that both elements of the creation of customary rules are fulfilled namely general practice and *opinio juris*, i.e. conviction that such practice reflects or amounts to law (*opinio juris*) or is required by social, economic or political exigencies (*opinio necessitatis*).<sup>65</sup> To date, no state in the hemisphere has questioned the applicability and application of the IADC in specific circumstances. To the contrary, they have accepted as duly and appropriate the multilateral intervention of the organization. Should this *opinio juris* be followed by a consistent practice, then in a few years this multilateral mechanism of defending democracy could become a local customary rule in the Americas.

What is the content of the instrument? The IADC contains both soft and hard provisions. In a large part it refers to notions such as human rights, development etc., trying to describe and define the meaning of democracy. The fact that the success of the IADC depends largely on the political will of governments may allow some to conclude that it is more a political rather than legal document.<sup>66</sup> However, it does not lack legal provisions. In fact, the six articles contained in Chapter IV of the IADC, which outline the mechanisms to defend democracy, is the legal section of the document.<sup>67</sup>

With the IADC, matters that were exclusively of domestic jurisdiction acquire international or at least regional interest. In other words, it is an instrument that purports the establishment of a regional system of defence of democracy, since it requires from each member state to respect its national

<sup>65</sup> See in general about the formation of the customary rule A. Cassese, *International law*, 2nd ed. (2005), 163-165. The ICJ in the *Nicaragua* Case, having to decide on the legal validity of the UN Declaration on principles of international law concerning friendly relations and cooperation among States, adopted by a UN General Assembly resolution has held that: “the effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter. To the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves”, *Nicaragua* Case, *supra* note 2, para. 188. The same stands for OAS General Assembly resolutions at the regional level. Indeed, the Court referred to a resolution of the OAS General Assembly to prove the *opinio juris* as to the customary rule on the prohibition of the use of force, *id.* para. 192.

<sup>66</sup> Arts 17 and 18 of the IADC are activated only following an invitation of the government.

<sup>67</sup> Rudy, *supra* note 58, 239.



constitution. Thus, in this framework, the IADC is a challenge for international law, since it integrates issues of national constitutional law (e.g. interpretation of constitutional provisions), that are matters of clearly domestic jurisdiction, into the framework of the international obligations of states. Is there truly an actionable right to democratic governance in international law or is it just a matter of internal jurisdiction? Is it a matter of law or of politics? The important feature of the IADC is that it establishes for the first time a system of automatic activation, as soon as the democratic stability in a member state is threatened. The member states of the OAS are allowed to intervene multilaterally in order to preserve and restore democracy in a state having at their disposal as the strongest sanction the suspension of a government from participation in the OAS.<sup>68</sup> In this way, through the establishment of an international mechanism, the growth of the right to democratic governance is further favored.<sup>69</sup>

In other words, the aim and aspirations of the authors of the IADC was to reconcile two contradictory notions: on the one hand the principle of non-intervention in matters of the domestic jurisdiction of states, in an area, let us not forget, that endured a lot of suffering due to the interventionism of the USA, and on the other hand the principle of “collective intervention” with diplomatic means, once the democratic process is disrupted. The extent to which these two notions can be reconciled will be decisive for the eventual success or failure of this system of collective defence of democracy.

## II. The Inter-American Democratic Charter’s Provisions

### 1. The Preventive Mechanism

The IADC establishes at the international level and as a collective right, the internal right to democratic governance. Article 1 stipulates:

“The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it”.

The IADC contains also various provisions on the relationship between democracy and human rights, democracy and economic and social

<sup>68</sup> Rudy, *supra* note 58, 240.

<sup>69</sup> See Franck, *supra* note 8, 47.

development, and election observation missions, all of which actually define the term democracy. But the part that we will focus on is Chapter IV (Arts 17-22), under the title: “Strengthening and Preservation of Democratic Institutions”. This chapter is the operative part of the IADC, giving impetus to the democracy clause that was adopted by the 3<sup>rd</sup> Summit of the Americas.

Articles 17 and 18 establish, in the first place, a preventive mechanism of guaranteeing the democratic institutions, the main characteristic of which is the consent of the state for any kind of action that the OAS organs will undertake. The use and the eventual effectiveness of the preventive mechanism are somewhat questionable, since it requires the consent of the respective state, which is not very often the case.<sup>70</sup> It is not impossible, though, as we will see later on in the case of Honduras.

According to Article 17:

“When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system”.

Hence, in order to bring this article into operation, the government has to accept, even implicitly, that its democratic institutions are somehow in peril. This formal acceptance does not occur very often. Venezuela is a characteristic example thereof. In December 2002, when the opposition called for a general strike for two weeks, just eight months after the failed political-military coup, the government of President Hugo Chávez requested the convocation of a special session of the Permanent Council but it refrained from referring to Chapter IV of the IADC or particularly to Article 17. Instead, it presented a draft resolution stating that the OAS expressed its full support for the constitutionally elected government of Venezuela. According to the state’s representative to the Permanent Council, the invocation of Article 17 would actually mean that the government is incompetent or incapable of managing the crisis.

<sup>70</sup> See also the doubts of E. Lagos & T. Rudy, ‘In Defense of Democracy’, 35 *Inter-American Law Review* (2004) 2, 283, 291-292.

According to Article 18:

“When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening”.

Hence, even though the consent of the state is required for the initial OAS reaction, the subsequent initiatives are taken by the Secretary General and the Permanent Council.

## 2. The Sanctions

The rest of Chapter IV (Arts 19-22) refers to the sanctions that shall be adopted if the state does not comply with the democratic principles. This part is actually a combination of Res. 1080 and the Washington Protocol, containing both the consultation and the punitive mechanism.

Article 19 reiterates the democratic clause as it was adopted in the 3<sup>rd</sup> Summit of the Americas. According to it:

“the unconstitutional interruption of the democratic order or the unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government’s participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization”.

Article 20 resembles Res. 1080, since it establishes a consultation mechanism before the actual coup: “In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems

appropriate”<sup>71</sup>. In this phase, the action is limited to diplomatic initiatives, for instance good offices by the Permanent Council or the General Assembly.

Finally, according to Art. 21 IADC, the Special Session of the General Assembly shall take the decision to suspend said member state from the exercise of its right to participate in the OAS if there has been an unconstitutional interruption of the democratic order.

It is obvious that in the phase of the sanctions, the consent of the state is not needed. But, up until the time of this writing, the punitive mechanism has not been resorted to without the prior use of the preventive mechanism. In the case of Venezuela, the Permanent Council invoked Article 20 IADC in April 2002, when the coup against President Chávez had already begun to falling apart.<sup>72</sup> Accordingly, it convened a special session of the General Assembly (the 29<sup>th</sup>), but it took place after the failure of the coup and, consequently, it did not adopt sanctions.<sup>73</sup>

<sup>71</sup> According to some commentators, whether the facts will correspond to this criterion will be a matter of political rather than legal interpretation, Lagos & Rudy, *supra* note 70, 296. See, however, the case of Honduras *infra*.

<sup>72</sup> OEA/Ser.G CP/RES.811 (1315/02), 13 April 2002. It’s worth noting that the request for the activation of Art. 20 IADC came from the Rio Group. The OAS Permanent Council initiated a consultation procedure through a tripartite mission – comprised of the OAS, the Carter Center and the United Nations Development Programme – in order to facilitate dialogue between the government of Hugo Chávez and the “Coordinadora Democrática”, an opposition umbrella organization, but its next resolution [OEA/Ser.G CP/RES.821 (1329/02), 14 August 2002] does not refer at all to the IADC. This is not strange, if we bear in mind that by the time the diplomatic mission reached Venezuela on 15 April, Chavez had regained power, see T. Legler *et al.*, ‘The international and transnational dimensions of democracy in the Americas’, in T. Legler (ed.), *Promoting Democracy in the Americas* (2007), 2. Extensive references to the IADC appear again in Res. 833 “Support for the democratic institutional structure in Venezuela and the facilitation efforts of the OAS Secretary General”, [OEA/Ser.G CP/RES.833 (1349/02) corr.1, 16 December 2002].

<sup>73</sup> The OAS General Assembly [AG/RES.1 (XXIX-E/02), 18 April 2002] expressed: “satisfaction at the restoration of the constitutional order and the democratically elected government of President Hugo Chávez”, reaffirmed the: “determination of the Member States to continue applying the mechanisms provided for in the IADC for the preservation and defense of representative democracy, rejecting the use of violence to replace any democratic government”, urged: “all sectors of the society to devote their most determined efforts to bringing about the full exercise of democracy [...] abiding fully by the Constitution and taking into account the essential elements of representative democracy set forth in Arts 3 and 4 IADC” and instructed the Permanent Council to present a comprehensive report on the situation in Venezuela to

When the IADC was adopted, it purported to have a deterrent effect against possible future disruptions of the democratic order. Hence, initially, the states were unwilling to invoke the special mechanisms of the IADC for the defence of democracy and they limited their reactions only to verbal references.<sup>74</sup> The OAS has cited the IADC in various occasions: Haiti (2001-2004),<sup>75</sup> Venezuela (2002), Ecuador (2005),<sup>76</sup> Belize (2005),<sup>77</sup> Bolivia (2005),<sup>78</sup> Nicaragua (2005)<sup>79</sup>. In these cases the means that were used were par excellence diplomatic, even though in the case of Nicaragua the possibility of sanctions was left open.<sup>80</sup> The first case of suspension of a

the next regular session of the General Assembly. See also Res. 821 and 833 of the Permanent Council.

<sup>74</sup> See also the references of the Inter-American Court of Human Rights in cases *Herrera-Ulloa v. Costa Rica*, Serie C-107, 2 July 2004, para. 115 and *Yatama v. Nicaragua*, Serie C-127, paras 193, 207, 215 and concurring opinion of judge Garcia-Sayán, paras 15-17.

<sup>75</sup> See the references in OEA/Ser.G CP/RES.806 (1303/02) corr. 1, 15 January 2002. A more explicit reference was included in Res. 822 [OEA/Ser.G CP/RES.822 (1331/02), 4 September 2002].

<sup>76</sup> The OAS Permanent Council decided, in accordance with Art. 18 IADC and in keeping with the invitation issued by the delegation of Ecuador at its meeting, to send a mission, comprising the Chair of the Permanent Council, the acting Secretary-General and representatives of sub-regional groups, to work with officials of the country and with all sectors of Ecuadorian society in their effort to strengthen democracy [OEA/Ser. G CP/RES.880 (1478/05), 22 April 2005]. For a follow-up see “Support to the Republic of Ecuador”, OEA/Ser.G CP/RES.883 (1484/05), 20 May 2005.

<sup>77</sup> “Support for the constitutional government of Belize”, OEA/Ser.G CP/RES.881 (1479/05), 27 April 2005.

<sup>78</sup> “Support for democracy in Bolivia”, OEA/Ser.G CP/RES.885 (1499/05), 26 July 2005; “Support for the process of dialogue, peace and for democratic institutions in Bolivia”, OEA/Ser.G CP/RES.935 (1648/08), 3 May 2008.

<sup>79</sup> Following a General Assembly resolution [Res. AG/DEC.43 (XXXV-O/05), OEA/Ser.P/AG, Doc.4496/05, 13 June 2005] a Special Diplomatic Mission was established led by the Secretary General José Miguel Insulza to promote dialogue between the rival parties. Parallely, the “Friends of the Democratic Charter”, an alliance comprised by former political figures, undertook several mediation activities. All these activities helped the political compromise that was reached by October 2005, Legler *et al.*, *supra* note 72, 2-3.

<sup>80</sup> See OEA/Ser.G CP/RES.892 (1507/05), 9 September 2005: “[...] to continue its direct attention to the unfolding of events in Nicaragua and should the urgency of the situation so warrant, to convene without delay a special session of the General Assembly”.

member state from the OAS activities, by virtue of the IADC, was the case of Honduras in the summer of 2009.

## E. The Inter-American Democratic Charter in Action: the Constitutional Crisis in Honduras

### I. The Facts

The case of Honduras is *sui generis*.<sup>81</sup> It is not about the classic military coup d'état, as we know it from recent Latin American history, i.e. overthrow of a democratic government by violent means and takeover by the military, actions that may even lead to the jeopardy of regional stability. To the contrary, the coup d'état had a semblance of legitimacy, a kind of "constitutional clothing"<sup>82</sup>. Before proceeding to the legal issues that were raised, an exposition of the facts is necessary.

At dawn of 28 June 2009, the Honduran President, José Manuel Zelaya Rosales, was arrested on charges of treason, abuse of authority and usurpation of functions and was deported to Costa Rica. The alleged *ratio* behind his arrest was that he attempted to conduct a referendum to amend the national constitution, so that he could claim a second term in the presidency of the state. The evening of the same day of the President's deportation, the Congress convened and, based on a false letter of resignation for Zelaya, it substituted him with the President of the Congress, Rigoberto Micheletti. His removal was based afterwards on Art. 239 of the Honduran Constitution, which states firstly that a president cannot run for a second term and secondly that: "any official who proposes the reform of this provision, as well as those who support its alteration directly or indirectly, cease immediately in the performance of their respective positions and will be disqualified by ten years from the exercise of public office"<sup>83</sup>. However, this provision does not explicitly authorize the Congress to proceed to the replacement of the President.

<sup>81</sup> For an analysis of the crisis from a comparative perspective see D. Nölte, 'Verfassungsreformen und Verfassungskrise in Honduras in vergleichender Perspektive', 43 *Verfassung und Recht in Übersee* (2010) 1, 28.

<sup>82</sup> The expression belongs to D. Cassel, 'Coup d'état in constitutional clothing?', 13 *ASIL Insights* (2009) 9, 1, 1.

<sup>83</sup> 'Constitution De La Republica de Honduras, 1982, Title V, Chapter VI, Article 239', available in Spanish at [http://www.honduras.net/honduras\\_constitution2.html](http://www.honduras.net/honduras_constitution2.html) (last visited 25 August 2011).

The procedure that was followed subsequently was in conformity with the Constitution of the state: the military did not meddle in the exercise of power, the Congress did not dissolve, the judiciary continued to function normally, the independent authorities remained in their position and, most importantly, the state's Supreme Court welcomed unanimously Zelaya's removal as consistent with the Honduran Constitution.<sup>84</sup>

Even though it was not the traditional coup d'état, there is no doubt that it was an irregular alteration of the democratic order, enough to activate the mechanisms of the IADC (the president of the state and the members of the government are arrested and deported with summary procedures, while the new authorities declare martial law).<sup>85</sup> The removal of the head of the state in such a way, without a prior legal procedure, without clear indications in the national constitution regarding who has the power to remove him, the deportation of himself and his government from the country, constitute violations of fundamental provisions of the national Constitution, almost in every part of the world as well as in Honduras.<sup>86</sup> To expel a president from his country, to prohibit his return and to substitute him under the pretext that he is absent was exactly the kind of constitutional irregularity for which the IADC was adopted. Whether Zelaya is guilty of treason or not, is a question that must be answered by the Supreme Court or by the competent judicial authority, following a procedure that will comply with all the guarantees of a fair trial, and not by the Congress.<sup>87</sup>

At the same time, the repression exercised by the authorities was intense. The *de facto* government declared a state of emergency, mobilized the army to control the demonstrations, the police and military forces were accused of arbitrary and excessive use of force, thousands of civilians were trapped between the roadblocks that the army set up along the border with Nicaragua, the arbitrary arrests and detentions rose to hundreds, freedom of expression was limited, and there were complaints of ill-treatment of the

<sup>84</sup> See Corte Suprema de Justicia, 'Comunicado especial' (29 June 2009) available at <http://www.cidh.org/comunicados/English/2009/60-09eng.Preliminary.Observations.htm> (last visited 25 August 2011).

<sup>85</sup> The only element that is missing is the dissolution of the Parliament, see Sicilianos, *supra* note 8, 149.

<sup>86</sup> See in particular Art. 102 of the Honduran Constitution: "No Honduran can be expatriated or delivered by the authorities to a foreign state", *supra* note 83.

<sup>87</sup> According to Art. 242 of the Honduran Constitution the Congress has the power to replace the president only if his absence is absolute. But in the case of Zelaya his absence was involuntary.

detainees. All of which were confirmed almost in their entirety by the IACHR during its on site visit.<sup>88</sup>

## II. The International Reaction

Honduras' political crisis has provoked an unprecedented international mobilization. Foreign governments and international organizations, including the UN General Assembly<sup>89</sup> and the European Union<sup>90</sup>, have condemned the disruption of the constitutional order and expressed their support for the ousted president. At the same time, the punitive mechanism of the IADC has been activated in its entirety.

Just two days before the coup, the OAS Permanent Council had received a request for assistance from the government of Zelaya, pursuant to Art. 17 IADC. The Permanent Council had accepted the request: "of the constitutional and democratic government of Honduras" and decided: "to provide support to preserve and strengthen the democratic institutions of the state"<sup>91</sup>. This fact may have facilitated the subsequent invocation of Art. 21 IADC, regarding the suspension of Honduras and the request of the immediate reinstatement of Zelaya. It also demonstrates that the intervention of the OAS member states did not come out of the blue and cannot be considered as an unacceptable intervention in the internal affairs of the state, since it was the legitimate government of the state that had actually requested this intervention.

Indeed, when the coup occurred, the OAS Permanent Council convened immediately, vehemently condemned the coup, demanded the immediate, safe and unconditional return of President Zelaya, declared that no government arising from this unconstitutional interruption would be recognised, instructed the OAS Secretary General, according to Art. 20 IADC, to carry out necessary consultations and convened a special session of the OAS General Assembly: "to take whatever decisions it considered

<sup>88</sup> See the Preliminary Observations on the IACHR visit to Honduras <http://www.cidh.org/comunicados/English/2009/60-09eng.Preliminary.Observations.htm> (last visited 25 August 2011), as well as the final report IACHR, 'Honduras: human rights and the coup d'état', OEA/Ser.L/V/II. Doc.55, 30 December 2009.

<sup>89</sup> GA Res. 63/301, 1 July 2009, 'Situation in Honduras: democracy breakdown'.

<sup>90</sup> Council of the European Union, PESC/09/84, 24 July 2009 "Declaration by the Presidency on behalf of the EU on the political situation in Honduras", available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PESC/09/84&format=HTML&aged=1&language=EN&guiLanguage=en> (last visited 25 July 2011).

<sup>91</sup> OEA/Ser.G CP/RES.952 (1699/09), 26 June 2009.



appropriate in accordance with the OAS Charter, international law and the provisions of the IADC<sup>92</sup>. No one could doubt about what would follow, unless the situation returned to normalcy.

The OAS General Assembly in its Special Session of 30 June 2009, reiterated substantially the condemnatory wording of the Permanent Council, characterized the coup as “an unconstitutional alteration of the democratic order”, set a time limit of 72 hours to the *de facto* government for the restoration of Zelaya,<sup>93</sup> and when the deadline had expired without reaction by the *de facto* authorities, it decided, at the close of the session (4 July 2009), to suspend Honduras from participation in the Organization. In the resolution,<sup>94</sup> the OAS General Assembly instructs the Secretary General to: “step up all diplomatic initiatives and to promote other initiatives for the restoration of democracy and the rule of law in the Republic of Honduras and the reinstatement of President José Manuel Zelaya Rosales so that he may fulfill the mandate for which he was democratically elected, and to report immediately to the Permanent Council”, encourages the member states and international organizations: “to review their relations with the Republic of Honduras during the period of the diplomatic initiatives for the restoration of democracy” and reaffirms that the *de facto* government: “must continue to fulfil its obligations as a member of the Organization, in particular with regard to human rights”. In this framework the Inter-American Commission on Human Rights is urged: “to continue to take all necessary measures to protect and defend human rights and fundamental freedoms in Honduras”.

The IACHR was indeed activated from the very first day of the crisis, by adopting precautionary measures, following multiple requests by NGOs and also on its own initiative based on information it had gathered.<sup>95</sup> At the

<sup>92</sup> OEA/Ser.G CP/RES.953 (1700/09), 28 June 2009.

<sup>93</sup> OEA/Ser.P AG/RES.1 (XXXVII-E/09) rev. 1, 1 July 2009.

<sup>94</sup> OEA/Ser.P AG/RES. 2 (XXXVII-E/09) rev. 1.

<sup>95</sup> The first precautionary measures were ordered at the day of the coup and concerned the Minister of Foreign Affairs, Patricia Rodas, who was also arrested by the *de facto* authorities, as well as other officials of the government, leaders of indigenous groups and NGOs and relatives of the ousted president. As the days passed by and the crisis persisted, the content of the precautionary measures was gradually broadened (on 29 June 2009, 2, 10, 15, 24, 25 and 30 July 2009 and 7 August 2009) in order to include other individuals whose lives were at risk (prosecutors, members of the local administration, journalists, political leaders etc.). The *de facto* authorities responded only partially to the precautionary measures (3 July 2009) indicating that many of the victims had requested refuge to foreign embassies without disclosing names.

same time, it submitted to the de facto authorities, swiftly after the coup (on 30 June 2009), a formal request for an on site visit that was accepted on 13 July 2009. The visit took place from 17-21 August 2009 with the aim to gather information about human rights violations and to verify the observance of human rights by the de facto authorities. The IACHR met with representatives of the de facto government and members of the civil society and received complaints and testimonies on human rights violations from over 100 persons. In its preliminary observations, as well as in the final report,<sup>96</sup> the IACHR records a series of violations due to the abuse of emergency powers: the deployment of the army to control the demonstrations and to preserve public order (Decree No 011-2009), the arbitrary use of force during peaceful demonstrations in Tegucigalpa and other cities, the arbitrary detentions of thousands of individuals (according to estimations 3.500-4.000) by military and police authorities, the lack of judicial guarantees to challenge the legality of detentions, the violation of the fundamental rights of the detained (lack of official records, secret detentions etc.), the ill-treatment during detention, the attacks against the mass media and journalists, the disappearances, the lack of judicial protection etc. The IACHR continues up until today to monitor closely the situation.<sup>97</sup>

### III. A New Aspect: the – Withdrawn – Application before the International Court of Justice

On 21 September 2009, Zelaya returned, incognito, to Honduras and found refuge in the Brazilian embassy in Tegucigalpa. Once the news spread, the followers of President Zelaya crowded the area around the embassy and the Teachers Union of Honduras ordered an indefinite nationwide strike in show of support for the ousted president.

In the early hours of 22 September 2009, the army and police forces launched an operation against and around the Brazilian embassy, throwing

<sup>96</sup> IACHR, 'Honduras: human rights and the coup d'état', *supra* note 88.

<sup>97</sup> See the press releases No. 4/2010 (26 January 2010) "IACHR concerned about the ambiguity of the amnesty decree approved by the National Congress of Honduras"; 26/10 (8 March 2010) "IACHR deplores murders, kidnappings and attacks in Honduras"; 31/10 (16 March 2010) "IACHR deplores murder of journalist in Honduras". The Commission carried out a follow-up visit in the country from 16-18 May 2010, see the Preliminary Observations of the IACHR on its visit to Honduras, OEA/Ser.L/V/II, Doc. 68, 3 June 2010.

tear gas grenades, firing both rubber and live rounds, and beating demonstrators with batons.<sup>98</sup> The use of force provoked serious physical injuries to many individuals, while the army prohibited initially the access to the premises for medical personnel and delegates of the ICRC.<sup>99</sup> The operation was condemned by the OAS Permanent Council, which called on the *de facto* regime: “to put an immediate end to these actions, to respect the Vienna Convention on Diplomatic Relations and international instruments on human rights and to withdraw from the areas surrounding the embassy” and issued a strong appeal: “for continuation of the dialogue under the terms of the proposal of the San José Agreement, without any attempt to open topics other than those contained in said proposal”<sup>100</sup>.

However, the *de facto* government did not follow the latter instruction. On 28 October 2009, the Ambassador of Honduras to the Netherlands filed at the International Court of Justice an “Application instituting proceedings by the Republic of Honduras against the Federative Republic of Brazil”. The application indicated that Zelaya and “an indeterminable number of Honduran citizens” were using the embassy’s premises to conduct political propaganda and that the Brazilian diplomatic staff allowed the group to use the facilities and other resources in order to evade justice in Honduras. Accordingly, the applicant requested the ICJ to declare that Brazil had breached its obligations under Art. 2 para. 7 of the UN Charter (principle of non-intervention) and those under the *Vienna Convention on Diplomatic Relations* and reserved the right to file a request for the indication of provisional measures should Brazil not immediately put an end to the disturbance caused.<sup>101</sup>

Ironically, by filing the application, the *de facto* government of Honduras “internationalised” what in fact it was claiming to be an issue of internal affairs. Thus, it is of no surprise that the application was

<sup>98</sup> See for an account of the events, IACHR, ‘Honduras: human rights and the coup d’état’, *supra* note 88, para. 101.

<sup>99</sup> See press release No 68/09, 25 September 2009 of the IACHR. The ICRC delegate entered only on 25 September 2009, see their press release No 09/191, 26 September 2009 available at <http://www.icrc.org/Web/por/sitepor0.nsf/html/honduras-news-260909> (last visited 25 August 2011).

<sup>100</sup> OEA/Ser. G CP/DEC.43 (1723/09), 21 October 2009.

<sup>101</sup> ICJ Press Release No 2009/30, 29 October 2009. For a brief account of the procedural and substantial issues raised see D. Akande, ‘Dispute Concerning Honduran Government Crisis Heads to the International Court of Justice’, (30 October 2009) available at <http://www.ejiltalk.org/dispute-concerning-honduran-government-crisis-heads-to-the-international-court-of-justice/> (last visited 25 August 2011).

subsequently withdrawn,<sup>102</sup> leaving certain questions unanswered: How should Brazil have reacted, since the implementation of the IADC was actually requested by President Zelaya, just before the coup, and the OAS General Assembly urged the members states to review their relations with the *de facto* regime until the legitimate president was reinstated to power? On the other hand, insofar as the multilateral mechanisms of the OAS had been activated, was Brazil authorized to react unilaterally in such a way? And, last but not least, what should prevail? The IADC – if we assume it reflects customary law (Art. 38 para. 1b ICJ Statute) because otherwise the IADC as soft law instrument is not applicable before the ICJ – or the principle of non-intervention?

#### IV. The Current Situation in the Country

Honduras has finally exited the crisis in May 2011 after a long process of political dialogue between all implicated actors and stakeholders. The dialogue has been initiated in the first place between the two parties – the ousted and the *de facto* president – thanks to the mediation of the OAS Secretary General. After the initial failure of the San José Agreement (22 July 2009),<sup>103</sup> a new round of talks began. The so-called “Guaymuras dialogue” was facilitated by the President of Costa Rica, Oscar Arias, and led to a mutual understanding, known as the Agreement of Tegucigalpa and San José (29 October 2009). Pursuant to the agreement, Zelaya could return to power to serve out the remaining months of his term, following an approval by the Supreme Court and the National Congress and on condition that he would not run for president in the elections of 29 November 2009. It also provided for the immediate institution of a national reconciliation and unity government and of a truth commission in the first half of 2010. The implementation of the agreement would be monitored by a Commission of Verification, composed of two members of the international community, and two members of the national community and would be coordinated by the OAS.

However, the national unity government was formed without participation from the camp of President Zelaya and the latter declared the

<sup>102</sup> *Certain questions concerning diplomatic relations, Honduras v. Brazil*, ICJ Order of 12 May 2010. In the meantime, the Tegucigalpa/San José agreement has been signed, elections have taken place and Porfirio Lobo has been elected president, see *infra* IV.

<sup>103</sup> See the references in the report of the IACHR, ‘Honduras: human rights and the coup d’état’, *supra* note 88, paras 140-146.

agreement “dead” on 6 November 2009, refusing to recognize the anticipated elections of 29 November 2009. Moreover, the Supreme Court insisted on its refusal. On 25 November 2009, it decided that Zelaya could not be reinstated, since he had violated the Constitution.<sup>104</sup> And finally, on 2 December 2009, the National Congress voted against Zelaya’s reinstatement and supported the victory of Porfirio Lobo Sosa, who was elected President in the elections of 29 November, a procedure boycotted by Zelaya.

Even though Zelaya declared the Tegucigalpa/San José Agreement void, its provisions have been fully executed by the new government, by virtue of the Agreement for national reconciliation and strengthening of democracy in Honduras,<sup>105</sup> signed on 20 January 2010 between the President of the Dominican Republic, Leonel Fernández, and President-elect of Honduras Porfirio Lobo. According to the Agreement Zelaya was relocated from the Brazilian embassy to the Dominican Republic, while the Truth and Reconciliation Commission was formed on 5 May 2010. Moreover, the OAS General Assembly, at its 40<sup>th</sup> regular session (6-8 June 2010), decided to dispatch to the country a High-Level Commission composed of persons appointed by the Secretary-General to “analyze the evolution of the situation” and submit its recommendations no later than 30 July 2010.<sup>106</sup>

The Commission presented its conclusions on 12 July 2010,<sup>107</sup> highlighting six points that would function as a basis for the OAS General Assembly to adopt the resolutions it deemed pertinent:

- a) end lawsuits against former President Zelaya
- b) provide him with protection, as former President of the country, once he returns home

<sup>104</sup> The Supreme Court insisted on the principles of internal self-determination and non-intervention, see IACHR, ‘Honduras: human rights and the coup d’état’, *supra* note 88, 34, fn. 145. It’s worth noting, however, that the IACHR has criticized the function of the judiciary during the crisis, indicating that it has been unable to control the emergency measures adopted by the executive, while the Supreme Court had from the very first moment supported the removal of President Zelaya. Furthermore, Honduran citizens and civil officers question the impartiality of the Supreme Court, see in particular the complaint of judges that were dismissed from their posts by the Supreme Court, after having criticized the coup, IACHR, press release No 54/10.

<sup>105</sup> OEA/Ser.G CP/INF.5967/10, 22 January 2010.

<sup>106</sup> AG/RES.2531 (XL-O/10), 8 June 2010.

<sup>107</sup> See <http://hondurashumanrights.wordpress.com/2010/07/12/report-of-the-commission-on-high-level-on-the-situation-in-honduras/> (last visited 25 August 2011).

- c) that former President Zelaya joins the Board of PARLACEN,<sup>108</sup> as Constitutional President of the Republic of Honduras prior to President Porfirio Lobo
- d) concrete actions to comply with recommendations of the IACHR (clarify the murder of several people, put an end to threats and harassment, put an end to impunity for human rights violations etc.)
- e) full support and collaboration of all sectors of Honduran society with the Commission of Truth and Reconciliation
- f) convene a national dialogue among all political sectors.

The abovementioned recommendations, along with some other provisions such as the registration of the National Front for Popular Resistance as a political party and its participation in the electoral political process, the amendment of Art. 5 of the Honduran Constitution which regulated the call for a referendum, the creation of the Ministry of Justice and Human Rights following the recommendations made to Honduras during the Universal Periodic Review process of the UN Human Rights Council etc. have been incorporated in the Agreement for the National Reconciliation and Consolidation of the Democratic System of the Republic of Honduras,<sup>109</sup> signed on 22 May 2011 between the President Porfirio Lobo and the former President José Manuel Zelaya Rosales, which paved the way for the full participation of Honduras in OAS activities.

The OAS reaction was swift. Indeed, on 24 May 2011, the Permanent Council, by virtue of resolution 986 (1806/11), decided to convene a special session of the OAS General Assembly. Accordingly, the latter decided on 1 June 2011: “to lift the suspension, with immediate effect, of the right of the state of Honduras to participate in the OAS”<sup>110</sup>.

<sup>108</sup> Central American Parliament, a political institution devoted to the integration of the Central American countries, available at [http://www.parlacen.org.gt/documentos/PPT\\_english.pdf/](http://www.parlacen.org.gt/documentos/PPT_english.pdf/) (last visited 25 August 2011).

<sup>109</sup> See <http://www.hondurasweekly.com/component/content/article/163-agreements/3737-accord-for-the-national-reconciliation-and-consolidation-of-the-democratic-system-of-the-republic-of-honduras/> (last visited 25 August 2011).

<sup>110</sup> OEA/Ser.P AG/RES. 1 (XLI-E/11) rev. 1, 22 June 2011.

## F. Conclusions

Undoubtedly, there is still a long way to go until the international community achieves the effective implementation and protection of the right to democracy, a notion with no definition, extending from the respect of the national constitution to the effective protection of human rights and the rule of law. There is also no doubt that the OAS intervention averted a worse outcome in the case of Honduras.

However, the stalemate that persisted nearly for two years in the internal political scene, indicated in a way the limits of international intervention. When a state's Supreme Court, that is par excellence competent to interpret the domestic constitution, refuses to allow the ousted president to return to power because he has violated the constitution of the state, what should be the proper reaction of the international community? It is unfortunate that the ICJ will not proceed on the merits of the *Honduras v. Brazil* case, since it could provide us very useful answers to a series of questions, such as the exact content of the principle of non-intervention and the limits (if any) of the international community's intervention, by diplomatic means, to restore the democratic order in a state. This was certainly a missed opportunity to determinate about the range of the principle of non-intervention and draw a line between matters that are exclusively of domestic jurisdiction and matters of international concern. Perhaps the time has not yet arrived for such a judgment.<sup>111</sup>

Likewise, only future practice will demonstrate whether the IADC can be used effectively in the political and diplomatic sphere to prevent the unconstitutional alterations of the democratic order. Certainly, democracy cannot be imposed by outside actors, that can only function as facilitators of the dialogue. It is rather a process that requires the political will of all parties involved at the national level. In any case, the OAS has proven that its contribution – initially in the form of sanction (suspension of membership) and subsequently through mediation – has been a catalyst for

<sup>111</sup> Especially if we bear in mind that some scholars caution about the long-term implications of “the shift in foundational norms governing the relationship between international and domestic legal authority” inaugurated by the international reaction to the Honduras coup, see B. Roth, ‘The Honduran Crisis and the Turn to Constitutional Legitimism, Part II: the Pitfalls of Constitutional Legitimism’, (5 October 2009) available at <http://www.ejiltalk.org/the-honduran-crisis-and-the-turn-to-constitutional-legitimism-part-ii-the-pitfalls-of-constitutional-legitimism/> (last visited 25 August 2011).

the peaceful settlement of the political impasse. The positive resolution to the Honduras case, in a way that is not considered as a retreat from the OAS principles, has been a crucial test and will surely contribute to the efforts of other international organizations, particularly at the regional level. Democracy is essential for conflict prevention<sup>112</sup> and a system of collective and effective defence of democratic principles is an important preventive mechanism that should be included in UN policy. It is equally important in order to operationalize the “responsibility to protect” doctrine.<sup>113</sup> Indeed, one of the components of the doctrine is the responsibility to prevent. The institutional preparedness of the various actors in areas such as the protection and promotion of democracy, as well as the economic and social development, is essential for the prevention of crises that could eventually escalate, especially in fragile states, in open conflicts. The recent turmoil in Cote d’Ivoire, where the outgoing president, Laurent Gbagbo, refused to recognize Alassane Ouattara as the winner of the elections demonstrated that in fragile states democracy is an essential component of security and ultimately of peace. The multilateral intervention with diplomatic means initiated by the OAS could also serve as a useful precedent for the regional African organizations, especially the ECOWAS, and replace its background of forcible intervention to protect democracy.<sup>114</sup> Indeed, Cote d’Ivoire had been suspended in December 2010 from participation in the decision-making bodies of ECOWAS and in all activities of the African Union, until the democratically elected president effectively assumed power.<sup>115</sup> After months of serious clashes between the two rival factions that brought the country on the brink of civil conflict,<sup>116</sup> A. Ouattara was finally sworn into

<sup>112</sup> E. Spehar, ‘The Role of the Organization of American States in Conflict Prevention’, 8 *International Journal on Minority and Group Rights* (2001), 61-70. Also E. Spehar, ‘Hemispheric Security and the OAS: towards a New Regional Approach’, *XXX Curso de Derecho Internacional organizado por el Comité Jurídico Interamericano y la Secretaría General de la OEA en agosto de 2003* (2004), 335-347.

<sup>113</sup> G. Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes once and for all* (2008), 79.

<sup>114</sup> E.g. Sierra Leone in 1997. For this background see C. Gray, *International Law and the Use of Force*, 3rd ed. (2008), 418.

<sup>115</sup> See the references in UN Security Council res. 1962, 20 December 2010. The decision of ECOWAS was taken on 7 December 2010, by virtue of Art. 45 of the ECOWAS Protocol on Democracy and Good Governance, *supra* note 16, 22. The suspension from the AU was decided by the Peace and Security Council on 9 December 2010.

<sup>116</sup> The war crimes and crimes against humanity allegedly committed in Côte d’Ivoire since 28 November 2010 have led ICC Prosecutor Luis Moreno Ocampo to request



office as President of Cote d'Ivoire on 6 May 2011. Just a few days earlier, on 21 April 2011, the Peace and Security Council of the AU had lifted the suspension.<sup>117</sup>

Lastly, the effective implementation of the IADC will favour to a great extent the emergence of an actionable right to democracy. As it has already been stated by L. Condorelli nearly twenty years ago, “[t]he resolutions of international organizations represent a remarkable enrichment and acceleration of the law-making process in the present-day international community”<sup>118</sup>. In the same way the bolstering of democratic principles through the activities of international organizations, including the creation of systems of collective defence of democracy, will certainly contribute and may eventually also lead to the formation of a legally actionable right to democracy before international institutions.

the ICC judges for authorisation of an investigation pursuant to Art. 15 of the ICC Statute, see ICC-02/11, 23 June 2011.

<sup>117</sup> PSC/PR/COMM.1(CCLXXIII).

<sup>118</sup> L. Condorelli, ‘The Role of General Assembly Resolutions’, in A. Cassese & J. Weiler (eds), *Change and Stability in International Law-Making* (1988), 43.

## **Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem**

Killian S. O'Brien\*

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## Abstract

Following in the aftermath of the Arab Spring, Europe's southern marine borders have been the showplace of human tragedies previously unseen on this scale and the issue of refugees on the high seas has assumed a newfound importance. This article examines the flawed system provided by the 'Constitution of the Oceans', the UN Convention on the Law of the Sea for the protection of the lives of migrants at sea. It submits that international refugee law is well-equipped to assume a greater responsibility in ensuring the protection of those involved. Although the concept of *non-refoulement* cannot be stretched *ad absurdum*, it may still be reasonably interpreted as providing a temporary right to disembark for the purpose of processing possible asylum applications. In the long-term, a system of burden-sharing and permanent, yet flexible, reception agreements remain the only sustainable solution.

## A. Introduction

The reality of life at sea is, despite any romantic allusions to the contrary, widely accepted as being particularly harsh, unforgiving and, perhaps most importantly, dangerous. It is primarily for these very reasons that a genuine perception of the need to exercise solidarity has tended to characterize the interactions of seafarers when confronted with perilous situations at sea as well as the actions of coastal States in providing assistance. There is almost even an unwritten moral convention of exercising humanity at sea. Leaving aside any associated important yet precarious ethical issues,<sup>1</sup> the rescue of refugees at sea has persistently presented a number of legal dilemmas for those confronted with the situation of a vessel or persons in peril as well as the consequences resulting from a rescue. A myriad of actors,<sup>2</sup> the multitude of international Conventions and other legal instruments purporting to govern all eventualities and the often imprecise interaction between these instruments

<sup>1</sup> This author recognizes the difficulty of a legal order totally ignorant to the moral elements of any attempt to regulate human behavior. See I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 27-28. Nonetheless, it is the purpose of this article to examine the legal standards applicable to the situation of refugees at sea.

<sup>2</sup> For example private mariners, chartered vessels, government enforcement vessels, coast guard crafts as well as private search and rescue charities etc.

and domestic law: These, and many other factors, add to the complexity of the situation and, as is often the case, considerations concerning the wellbeing of the persons who were initially in need of assistance are often accorded only inadequate attention. Indeed, recent examples of refugees in need of assistance at sea have tended to illustrate this situation, which is characterized by increased patrols and surveillance of border by coastal States on the high seas and at domestic borders as well as an increase in instances of failure to assist persons in distress by the masters of vessels in the vicinity.<sup>3</sup> The activities of the European border control agency FRONTEX,<sup>4</sup> for example, have been heavily criticized in the press as having resulted in asylum-seekers taking longer, more arduous journeys upon themselves so as to avoid patrols.<sup>5</sup> One of the most disquieting aspects of this increased migration control is the increase in incidents of both rescues and interceptions of migrants on the high seas, an area of the sea, which, by its very nature, is not generally well suited to the application of specific positive duties such as those which are often imposed in situations where human life is endangered.<sup>6</sup>

Given that the events at the subject of this article are played out at sea, one could be forgiven for expecting that a solution ought to be provided for somewhere within the United Nations Convention on the Law of the Sea (UNCLOS), which, in its Preamble, purports to “settle, in a spirit of mutual understanding and cooperation, *all issues* relating to the law of the sea

<sup>3</sup> J. Coppens & E. Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’, *25 International Journal of Marine and Coastal Law* (2010) 3, 377, 380-381.

<sup>4</sup> See generally, A. Fischer-Lescano & T. Tohidipur, ‘Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX’, *67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007) 4, 1219.

<sup>5</sup> I. Fisher, ‘For African Migrants, Europe Becomes Further Away’, *The New York Times*, 26 August 2007, 6; D. Johnson, ‘Weg in die Unmenschlichkeit’, *Die Tageszeitung*, 13 November 2007, 3.

<sup>6</sup> R. Wolfrum, ‘Kapitel 4. Hohe See und Tiefseeboden (Gebiet)’, in W. Graf Vitzthum (ed.), *Handbuch des Seerechts* (2006), 295; R. Churchill & V. Lowe, *The Law of the Sea*, 3rd ed. (1999), 205. See also R. Weinzierl & U. Lisson, *Border Management and Human Rights. A Study of EU Law and the Law of the Sea* (2007), 34, available at [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/study\\_Border\\_Management\\_and\\_Human\\_Rights.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/study_Border_Management_and_Human_Rights.pdf) (last visited 21 August 2011).

[...]”<sup>7</sup>. UNCLOS does not, however, function within a vacuum and regard must also be had to other relevant rules and principles of general international law.<sup>8</sup> To this end, related international Conventions aimed at improving the safety of maritime travel and, should the necessity arise, other areas of law which may be applicable must also be considered. This article aims to provide a solution to the problem posed by the rescue of refugees on the high seas by employing relevant norms of international refugee law as a means of ensuring that greater consideration is paid to humanitarian concerns.

## B. Historical Background

Migration by boat and the hazards associated with such an undertaking regrettably have an established pedigree in modern history. The phrase “boat people”, referring to asylum-seekers emigrating in large numbers in often crudely made or ill-equipped boats, was coined in the aftermath of the communist victory in Vietnam and the subsequent mass exodus from Indo-China in the mid to late 1970s.<sup>9</sup> Indeed, even earlier, during the Nazi horrors of the Second World War, some Jewish refugees fled in this manner<sup>10</sup> but it was after the fall of Saigon in 1975 that the problem began to be specifically referred to as the “boat-people” problem.<sup>11</sup> Since then, scarcely a single considerable stretch of water has not seen some activity of this nature and incidents of tragedy at sea involving asylum-seekers remain constant.<sup>12</sup> Thousands of Haitians and Cubans are still

<sup>7</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397 [UNCLOS].

<sup>8</sup> This is particularly so when one considers that it is nigh on impossible for an international Convention to regulate all matters pertaining to a particular issue and that provision must always be made for a legal interpretation which accounts for unforeseen circumstances, without, however, going as far as to strain that legal interpretation so that it would be incongruous.

<sup>9</sup> Coppens & Somers, *supra* note 3, 381-382.

<sup>10</sup> E. Papastavridis, ‘Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law’, 36 *Syracuse Journal of International Law and Commerce* (2009) 2, 146.

<sup>11</sup> B. M. Tsamenyi, ‘The “Boat People”: Are They Refugees?’, 5 *Human Rights Quarterly* (1983) 3, 348.

<sup>12</sup> For example, on 14 December 2010, dozens of asylum seekers were drowned after their attempt to reach Christmas Island, south of Indonesia: ‘Dozens dead in Australia boat crash’, *Irish Times*, 15 December 2010, available at <http://www.irishtimes.com/newspaper/breaking/2010/1215/breaking2.html> (last visited 21 August 2011).

making efforts to reach the USA despite the vigorous attentions of the US Coast Guard; Australia still engages in active interception measures with respect to potential refugees arriving from Indonesia and elsewhere; and in Europe the issue has also become more prevalent.<sup>13</sup> For a long time, the notion of asylum-seekers attempting to immigrate by boat was not considered a European problem. This can no longer be said to be the case. However, attempts to quantify the scale of the issue are problematic as it is particularly difficult to estimate the number of persons who fail to arrive safely. The estimates provided by humanitarian NGOs such as Fortress Europe suggest that there were approximately 500 deaths in the Mediterranean in the first six months of 2009 and that, in total, almost 11,000 people have lost their lives in an attempt to reach European shores by boat in the last 20 years.<sup>14</sup> Although this article deals specifically with the legal provisions pertaining to asylum-seekers on the high seas, the gravity of the situation is clear from the foregoing. The present article is limited for practical reasons to a depiction of the legal situation regarding refugees rescued on the high seas only and cannot account for the applicability or otherwise of human rights instruments such as the European Convention on Human Rights. With this it is by no means denied that human rights law is of utmost importance in the present context.<sup>15</sup>

### C. International Law of the Sea

As mentioned above, the fundament of the pertinent legal framework is provided by UNCLOS, which is supplemented by two further treaties, namely the International Convention on Maritime Search and Rescue (SAR

<sup>13</sup> M. Pugh, 'Europe's Boat People: Maritime Cooperation in the Mediterranean', *Chaillot Papers* (2000) 41, 31-33.

<sup>14</sup> 'The massacre continues: 459 deaths in the first 6 months of 2009' (2 July 2009) available at <http://fortresseurope.blogspot.com/2007/01/eu-massacre-continues-459-deaths-in.html> (last visited on 9 June 2011). About a third are from sub-Saharan Africa, half are from the Mediterranean littoral States and the remainder originate from various other States (mainly in Asia and the Middle East).

<sup>15</sup> See, by way of example, F. Coomans & M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004); A. Edwards, 'Human Rights, Refugees and the Right "to Enjoy" Asylum', 17 *International Journal of Refugee Law* (2005) 2, 293; K. Loper, 'Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong', 22 *International Journal of Refugee Law* (2010) 3, 404.

Convention)<sup>16</sup> and the International Convention for the Safety of Life at Sea (SOLAS Convention)<sup>17</sup>. The two latter treaties can be said to represent a *lex specialis* with respect to situations of maritime rescue.<sup>18</sup> The SAR Convention is designed to encourage increased cooperation between States Parties with the aim of optimizing search and rescue operations at sea. Considering that the aim of the SAR Convention is to ensure a speedy response following a maritime incident (i.e. it is reactionary in nature), it can be distinguished from the preventive approach adopted by the SOLAS Convention, which endeavors to establish minimum standards for the construction, equipment and operation of ships (so-called CDEM measures).<sup>19</sup> These three international treaties create a number of rights and obligations, which are variously aimed at flag States, transit States and coastal States. In the following, three duties contained in these treaties are identified, namely the duty to provide assistance, to bring to a place of safety and to provide for disembarkation.

## I. Duty to Provide Assistance

A duty to provide assistance to persons in danger of being lost at sea is, without doubt, one of the most well-established, elementary tenets of the law of the sea.<sup>20</sup> It is codified in Art. 98(1) UNCLOS in the following terms:

“Every State shall require the master of a ship flying its flag, in so far as he can do without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

<sup>16</sup> *International Convention on Maritime Search and Rescue*, 27 April 1979, 1405 U.N.T.S. 119 [SAR Convention].

<sup>17</sup> *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 U.N.T.S. 278 [SOLAS Convention].

<sup>18</sup> On the *lex specialis* character of SOLAS see: M. Pallis, 'Obligations of States towards Asylum Seekers at Sea', 14 *International Journal of Refugee Law* (2002) 2 and 3, 329, 331.

<sup>19</sup> S. Bateman, 'Chapter 2. Good Order at Sea in the South China Sea', in S. Wu & K. Zou (eds), *Maritime Security in the South China Sea* (2009), 20.

<sup>20</sup> E. de Vattel, *Le droit des gens ou principes de la loi naturelle; appliqués à la conduite aux affaires des nations et des souverains*, Vol. 1 (1758), 170.

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; [...]"

From this it is clear that this duty rests not on the individual mariner, rather it requires the flag State of that mariner to ensure that an adequate transpositional law is enacted which imposes this obligation on the master of the ship; it is not a self-executing norm.<sup>21</sup> Nor can the duty to assist contained in the SOLAS Convention be said to be self executing.<sup>22</sup> The scope of the duty *ratione personae* is broadly formulated to the benefit of "any person" in UNCLOS and "regardless of [...] the circumstances in which that person is found"<sup>23</sup>, an important factor bearing in mind that many of the persons in need of assistance are so-called "economic refugees". Aside from the actual act of finding a person at sea, the only material requirement necessary to bring about the duty to provide assistance is the existence of a situation of distress on board, a term defined in the SAR Convention as a "situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance"<sup>24</sup>. Despite the apparent clarity of the preceding provisions, the full extent of the duty to render assistance or, more precisely, the existence and scope of related duties such as bringing the rescued persons to a place of safety etc remains unclear.

## II. Duty to Bring to a Place of Safety

Before examining the extent to which coastal States are required to allow for the disembarkation of persons rescued at sea, it is worth briefly

<sup>21</sup> A. Proelss, 'Rescue at Sea Revisited: What Obligations exist towards Refugees?', *Scandinavian Institute of Maritime Law Yearbook* (2008), 10. In Germany, for example, §2 of the Regulation concerning the Safety of Seafaring in conjunction with §323c of the Criminal Code, which foresees criminal sanctions for a failure to assist, are the relevant provisions transposing Art. 98 (1) UNCLOS.

<sup>22</sup> SOLAS Convention, annex, chapter V, reg. 10 (a); SAR Convention, annex, chapter 2, para. 2.1.10: "Parties shall ensure that assistance be provided to any person in distress at sea"; see also: UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea, 18 March 2002, 2, paras 5-6, available at <http://www.unhcr.org/refworld/docid/3cd14bc24.html> (last visited 21 August 2011).

<sup>23</sup> SAR Convention, annex, chapter 2, para. 2.1.10.

<sup>24</sup> SAR Convention, annex, chapter 1, para. 1.3.11.



stating that, despite some academic opinion to the contrary,<sup>25</sup> the flag State is under an obligation to bring rescuees to a place of safety. This obligation follows from the logical extension of the definition of rescue contained in the SAR Convention: “[A]n operation to retrieve persons in distress, provide for their initial medical or other needs, and *deliver them to a place of safety*”<sup>26</sup>. Without any specific definition provided for the term “place of safety” it has become common practice (albeit without a solid footing in law)<sup>27</sup> for this term to be understood as referring to the “next port of call” of the ship. This is in keeping with the opinions expressed by the Executive Committee (EXCOM) of the UNHCR.<sup>28</sup> The EXCOM extols the virtues of a practical solution to the problems connected with the rescue of asylum seekers<sup>29</sup> and thus, with respect to the rescue of persons on the high seas, it is safe to assume that in many instances the nearest port in terms of geographical proximity will generally be the next port of call considering the overriding safety concerns involved. Similarly, the European Commission has, by making reference to the duty contained in the SAR Convention, stated that “obligations relating to search and rescue include the transport to a safe place”<sup>30</sup>.

Though it may appear to be somewhat strained, the duty which the flag State is under to bring rescuees to a place of safety should nonetheless not be put on the same level as a duty to disembark. It is conceivable that a ship may itself act as a place of safety or, alternatively, it may enter a place of safety where the persons on board may receive whatever provisions or medical attention is deemed to be necessary without actually having to disembark the ship. The IMO Maritime Safety Committee has, however, stated that even in such situations where the ship “is capable of safely

<sup>25</sup> S. Rah, ‘Kein Flüchtlingsschutz auf See? Flüchtlings- und seerechtliche Probleme am Beispiel der „Cap Anamur“’, 18 *Humanitäres Völkerrecht* (2005) 4, 276.

<sup>26</sup> SAR Convention, annex, chapter 1, para. 1.3.2 (emphasis added). The non-obligatory nature of this provision must be borne in mind; nonetheless, it is indicative of the understanding shared by the States Parties to the SAR Convention as to what a rescue actually entails.

<sup>27</sup> R. Barnes, ‘Refugee Law at Sea’, 53 *International & Comparative Law Quarterly* (2004) 1, 47, 51.

<sup>28</sup> UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009, available at <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf> (last visited 5 July 2011), No. 23 (XXXII), 31.

<sup>29</sup> *Id.*, No. 26 (XXXIII), 34.

<sup>30</sup> Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea, SEC (2007) 691, 15 May 2007, para. 2.3.2.

accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made<sup>31</sup>. Thus the question of whether the flag State is under an obligation to disembark the rescuees at the place of safety and, as a corollary, whether the coastal or port State is also under an obligation to accept this disembarkation remains to be answered.

### III. Duty to Allow for Disembarkation

As is so often the case with many problems in the law of the sea, the question of whether an obligation exists to allow for the disembarkation of rescued persons at a place of safety centers on the balancing act which must be effected between the interests of flag States on the one hand and coastal States on the other. However, given that disembarkation will involve entering the territorial or perhaps even internal waters of a State, one is confronted with complex issues of territorial sovereignty. Proelss correctly pointed out that:

“Any obligation of a flag State to disembark shipwrecked persons at the next port of call would turn out to be useless, were it not logically linked with a corresponding duty of the coastal State of the next port of call to temporarily accept the rescued persons on its territory.”<sup>32</sup>

Thus, one must first turn one's attention to ascertaining whether the flag State is under a duty to disembark rescuees. This duty would necessarily be linked with a right to enter a coastal State's territory, an unacceptable impingement on the territorial sovereignty of that State. Despite a small amount of academic opinion to the contrary,<sup>33</sup> none of the relevant international Conventions contain such an obligation. The argument advanced by proponents of an obligation to disembark is often made as follows: Given that there is a duty to provide assistance at sea, any act

<sup>31</sup> International Maritime Organization (IMO), Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea (20 May 2004) available at <http://www.unhcr.org/refworld/docid/432acb464.html> (last visited 21 August 2011), annex 34, no. 6.13.

<sup>32</sup> Proelss, *supra* note 21, 14-15.

<sup>33</sup> H. von Brevern & J. M. Bopp, 'Seenotrettung von Flüchtlingen', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 841, 844; Weinzierl & Lisson, *supra* note 6, 38.

which would undermine the carrying out of such rescue is tantamount to a breach of international law. An absolute refusal to accept disembarkation limits the possibility or likelihood of a rescue taking place and thus it could be seen as undermining the execution of the rescue in the first place. Consequently, a right to disembarkation on the part of the rescuees must exist along with the corresponding duty on the flag and coastal States to carry out and accept the disembarkation respectively.<sup>34</sup> Any attempt to rely on para. 1.3.2 of the SAR Convention as being indicative of more than an implicit obligation to deliver to a place of safety is erroneous given that this particular provision is merely a definition without a distinct obligatory content.<sup>35</sup> In addition the point has been well made in recent literature on this issue that the actual obligatory norm merely requires that, rather than rescue, “assistance be provided to any person in distress at sea”<sup>36</sup>, thereby avoiding incorporating an explicit duty on the flag State to disembark within the SAR Convention.<sup>37</sup>

Notwithstanding the lack of an explicit duty to disembark, it may be plausible to rely on two alternate avenues of reasoning to infer such a duty. First, a comprehensive consideration of the notion of “rescue” as a single unified act beginning with the physical act of removing persons from the waters or from a vessel in distress and extending until the point in time at which such persons have entered a place of safety and disembarked the rescuing ship. This premise supports the practical approach advocated by the UNHCR EXCOM mentioned above in that it unburdens a ship’s master of primary responsibility as soon as possible.<sup>38</sup> Moreover, it serves the humanitarian purpose and intention of Art. 98(1) UNCLOS and the relevant norms of the SAR and SOLAS Conventions. It is based on a broad understanding of the “place of safety” criterion which cannot be considered to have been properly met if the rescued persons are to be maintained on board the rescuing vessel indefinitely.<sup>39</sup> Such an approach, however, neglects to factor in the concerns raised above regarding the non-obligatory nature of the language used with respect to “rescue(s)” and the preference shown for the term “assistance”. Second, it can be argued that, in recent

<sup>34</sup> UNHCR, *supra* note 22, Annex 1, para. 9.

<sup>35</sup> This provision is contained in a section of the SAR Convention entitled “Terms and Definitions”. Systematically, it cannot give rise to norms of an obligatory character.

<sup>36</sup> SAR Convention, annex, chapter 2, para. 2.1.10 (emphasis added).

<sup>37</sup> Proelss, *supra* note 21, 16.

<sup>38</sup> UNHCR, *supra* note 28, No. 26 (XXXIII), 34.

<sup>39</sup> UNHCR, *supra* note 22, para. 12.

years, a presumption in favor of disembarkation has developed which would *prima facie* oblige coastal States to accept the disembarkation of persons rescued at sea unless there are cogent reasons of public order militating against the application of this presumption. The pronouncements made by the MSC of the IMO in the aftermath of the 2004 amendments to SOLAS and SAR Conventions would seem to provide some evidence of this development, in particular where the Contracting Parties are required to “arrange disembarkation as soon as reasonably practicable”<sup>40</sup>. This contention is further supported by the statement of the UNHCR Working Group on the Question of Rescue of Asylum Seekers at Sea when it stated that “asylum-seekers rescued at sea should normally be disembarked at the next port of call”<sup>41</sup>.

Despite the initially promising reading of these statements, the weak language of the latter (“should”) is immediately apparent. Moreover, there is no footing for such a presumption in treaty law as, notwithstanding the broad discretion such a presumption would afford to the coastal State to decide to deny permission to disembark, it would amount to a considerable impingement of the rights of the coastal State. Consequently, it can be stated by way of summary that despite the existence of a duty on the flag States to assist those in need and on the coastal State to ensure the existence of mechanisms to ensure assistance can be provided speedily, there is no duty on the flag State to disembark the rescued persons, nor can there logically be a corollary duty on the coastal State under the terms of the international law of the sea to accept any disembarkees.<sup>42</sup>

## D. International Refugee Law

Bank posits that:

“[T]he obligation of the State responsible for the respective search and rescue region is one of co-ordination and cooperation,

<sup>40</sup> Inter-Agency, ‘Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees’ (September 2006) available at <http://www.unhcr.org/refworld/docid/45b8d1e54.html> (last visited 21 August 2011).

<sup>41</sup> UNHCR, Preliminary Report on Suggestions Retained by the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea, 1 October 1982, EC/SCP/24, available at <http://www.unhcr.org/refworld/docid/3ae68cbe1c.html> (last visited 21 August 2011), para. 3; Proelss, *supra* note 21, 16-17.

<sup>42</sup> The concept of a port of refuge for vessels in distress may account for an exception to this statement, see Proelss, *supra* note 21, 59.

which as such does not entail an explicit duty to allow disembarkation in one of its ports. At the same time, the obligation is also one of securing a certain result: disembarkation from the assisting ship and delivery to a place of safety as quickly as reasonably practicable.”<sup>43</sup>

This is even more so the case when dealing with asylum-seekers rather than “ordinary” persons in need at sea.<sup>44</sup> Obviously, a situation where asylum-seekers who have become rescuees are kept on board a ship following a potentially traumatic rescue experience for an undetermined amount of time is undesirable to say the least. Given that the international law of the sea does not seem to provide for this eventuality, a solution must be sought elsewhere, in this instance international refugee law. With 144 signatory States, the Convention Relating to the Status of Refugees of 1951<sup>45</sup> and its 1967 Protocol can be said to enjoy considerable significance with respect to regulating the fate of asylum-seekers who, having been rescued at sea, are now faced with the prospect of not being granted the right to disembark and potentially make use of their right to asylum. In particular the principle of *non-refoulement* contained in Art. 33(1) of the Refugee Convention is essential in determining whether asylum-seekers have the right to enter the territory of the coastal State. The *non-refoulement* principle contemplates a situation where a refugee may potentially be subjected to threats to his life or freedom on the basis of certain personal criteria and it acts to prevent any return of that person.<sup>46</sup> So, in the context of a discussion on the right to disembarkation, it would be more correct to refer to whether there is a positive duty on the coastal State not to refuse a person rescued at sea claiming the status of a refugee, i.e. the right is couched in somewhat more negative terms. Before examining the material effect of Art. 33(1) of the Refugee Convention on the rights of a rescuee, it must be determined whether it is applicable in circumstances where the refugee was found outside the territory of the State in question on the high seas, i.e. whether it enjoys extraterritorial effect.

<sup>43</sup> R. Bank, ‘Article 11 (Refugee Seamen/Gens de Mer Réfugiés)’, in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, para. 37.

<sup>44</sup> Such as passengers on a sinking ferry for example: Coppens & Somers, *supra* note 3, 383.

<sup>45</sup> Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.

<sup>46</sup> Fischer-Lescano, T. Löhr & T. Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’, 21 *International Journal of Refugee Law* (2009) 2, 262-263.

## I. Extraterritorial Applicability of *Non-Refoulement*

In the case of persons rescued on the high seas, they will fall under the jurisdiction of the flag State, which is, however, in no way required to provide the rescuees with asylum. Indeed, the flag State is not subject to any specific obligations at international law in this regard. Hence the practice of “next port of call” outlined above. This practice necessarily implies that the coastal State is faced with the prospect of (at least temporarily) accepting the asylum-seekers under the principle of *non-refoulement*. However, “there is a clear gap between the obligation of *non-refoulement* and the obligation to accord refugees the rights provided under international law”<sup>47</sup>, and therein lies the problem: The scope of the applicability of the Refugee Convention with regard to refugees on a vessel, even if that vessel were in the territorial sea or internal waters of the coastal State.

There are numerous examples of a State’s obligations under international law extending beyond the limits of its territory. The dictum of the European Court of Human Rights in its decision by the Grand Chamber in *Medvedyev et al v. France* indicated that, although an extra-territorial application of the Convention is exceptional, it is possible under certain limited circumstances.<sup>48</sup> Similar pronouncements have been made by the UN Human Rights Committee.<sup>49</sup> The Refugee Convention is silent of the issue of its extraterritorial applicability, yet it is submitted that there are a number of more or less compelling reasons which would seem to indicate that Art. 33(1) of the Refugee Convention ought to apply outside the territory of the States Parties. By way of a preliminary remark it is worthy to note that Art. 1(3) of the 1967 Protocol to the Refugee Convention states that the Protocol “shall be applied by States Parties hereto without any geographical limitation.” Despite its application being restricted to the Protocol, some academic commentators have interpreted this provision as

<sup>47</sup> Barnes, *supra* note 27, 67.

<sup>48</sup> *Medvedyev et al v. France*, ECHR, Application No. 3394/03, Judgment of 29 March 2010, paras 63-66; this is in line with the decision handed down in *Banković v. Belgium and others*, 11 *Butterworth’s Human Rights Cases* (2001) 435, para. 71. See further, E. Papastavridis, ‘European Court of Human Rights, *Medvedyev et al v. France* (Grand Chamber, Application No. 3394/03) Judgment of 29 March 2010’, 59 *International & Comparative Law Quarterly* (2010) 3, 867, 870; D. Guilfoyle, ‘*Medvedyev et al v. France*, ECHR’, 25 *The International Journal of Marine and Coastal Law* (2010) 3, 437.

<sup>49</sup> See G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed. (2007), 244-245.

being indicative of “a more general intention to the effect that the protective regime of the 1951 Convention [...] was not to be subject to geographic – or territorial – restriction”<sup>50</sup>. A number of other factors indicating an extraterritorial application must also be considered.

First, the 1951 Convention does not contain any clause limiting the application of the Convention to a particular territory. In the absence of a clause restricting the applicability to State territory, one can fairly make the assumption that Art. 33(1) applies anywhere that a State exercises jurisdiction over an asylum-seeker.<sup>51</sup> The litmus test for determining the exercise of jurisdiction as postulated by several international courts is that of “effective control”<sup>52</sup>. There can scarcely be a more obvious example of someone being under the effective control of another than being interdicted or having to be rescued from a sinking ship. Moreover, by beginning the journey in the first instance, the rescuees are making an active attempt to leave one jurisdiction and by approaching or even attempting to approach the border of another State they are attempting to subject themselves to another jurisdiction. Further, all of the provisions of the Refugee Convention that are indeed restricted to the territory of a State (such as Arts. 4, 15 and 18) make particular mention of the restriction. Applying an argument *a contrario*, Art. 33(1) contains no such limitation and thus cannot be said to be restricted to a particular territory.

Second, two textual considerations must be borne in mind. Art. 33(1) of the Refugee Convention states that a refugee shall not be returned “in any manner whatsoever.” This is an exceedingly broad formulation covering a wide range of actions which could potentially lead to the person seeking to enforce his status as a refugee being exposed to particular dangers should *refoulement* actually occur. In addition, the use of the terms “expel or return” in Art. 33(1) of the Refugee Convention indicates that there is a subtle distinction in the meaning to be afforded to these words. Return, in

<sup>50</sup> Sir E. Lauterpacht & D. Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, Opinion UNHCR, 20 June 2001, para. 84, quoted in Pallis, *supra* note 18, 345.

<sup>51</sup> W. Kälin, M. Caroni & L. Heim, ‘Article 33, para. 1 (Prohibition of Expulsion or Return (*Refoulement*)/Défense d'Expulsion et de Refoulement)’, in Zimmermann, *supra* note 43, para. 87.

<sup>52</sup> See e.g., Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14, 65, para. 116; Banković v. Belgium and others, *supra* note 48, para. 67; Öcalan v. Turkey, ECHR, Application No 46221/99, Judgment of 12 May 2005, para. 91.

contrast to the concept of expulsion, which implies that the person to be expelled has already entered a territory, suggests notions of sending back or bringing someone or something back to an original point of origin. This refers exclusively to the point from which the journey began and cannot be deemed to have any bearing on the place where the asylum-seeker was, in fact, found.<sup>53</sup> Thus, no “geographical restriction regarding the place where this obligation emerges [can] be understood from the wording”<sup>54</sup>. Indeed, even if one does not follow this interpretation, it is indicative of the intention of the drafters of the Convention to attempt to prevent any circumvention of the *non-refoulement* principle. Thus there is no restriction of the scope of the Convention to within the territory of the State concerned.

Third, teleological concerns confirm the importance of upholding human rights and guaranteeing fundamental freedoms, so as to ensure the broadest possible protection of refugees worldwide. A restrictive interpretation of the terms of Art. 33(1) of the Refugee Convention, which would attempt to limit its scope to the territory of a particular State, would frustrate this aim. The considerably more dynamic approach towards interpreting international human rights treaties resulting in greater recognition of extraterritorial application has, as outlined above, attained increased importance more recently and is most effective at ensuring that the rights of the refugees’ are being adequately considered from the rescues’ point of view.<sup>55</sup> This is supported by reference to the Preamble of the Convention which states one of the objects and purposes of the Convention as being a desire to “assure refugees the widest possible exercise of fundamental rights and freedoms.” Some commentators have even gone as far as suggesting that a limitation of the *non-refoulement* provision to the territory of a State would amount to an opportunity to circumvent the obligations owed by that State to the international community as it would then be permissible to simply move all border controls outside the territorial waters of that State and that this would be an act in male fides to thwart the Convention’s aims.<sup>56</sup> This author considers it

<sup>53</sup> Contra, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), 180.

<sup>54</sup> Fischer-Lescano, Löhr & Tohidipur, *supra* note 46, 268. See also, UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=45f17a1a4&page=search> (last visited 21 August 2011), para. 26-27.

<sup>55</sup> Fischer-Lescano, Löhr & Tohidipur, *supra* note 46, 269.

<sup>56</sup> *Id.*, 270.



somewhat excessive to burden a State with the mark of bad faith but also that it is certainly plausible that a rejection of the extraterritorial application could amount to a breach of Art. 26 of the Vienna Convention on the Law of Treaties, 1969.<sup>57</sup>

Notwithstanding some limited State practice to the contrary<sup>58</sup> as well as some statements made by delegations during the elaboration of the preparatory work of Art. 33,<sup>59</sup> it is submitted that these represent isolated non-authoritative inferences and that the following statement made by the UNHCR far better represents the law as it currently stands:

“[T]he purpose, intent and meaning of Art. 33(1) [...] are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be [at] risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.”<sup>60</sup>

Consequently, the principle of *non-refoulement* applies to refugees found as rescuees on the high seas.

## II. Material Applicability

It is often suggested that extra-territorial application of the *non-refoulement* principle of Art. 33(1) of the Refugee Convention, would amount to an automatic right to asylum. There is no norm whatsoever in the Convention that would require States to grant *eo ipso* a right of asylum. A distinction must be made between non-refoulement and rejection at the

<sup>57</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 332.

<sup>58</sup> Germany has rejected an extraterritorial application: BMI, Effektiver Schutz für Flüchtlinge, *Press Release*, 5 September 2002, 2; Australia has made similar statements: Executive Committee of the Programme of the United Nations High Commissioner for Refugees, UN Doc A/AC.96/SR.507, 3 December 1996, para. 71; so too has the USA: *Sale v. Haitian Centers Council, Inc.*, *supra* note 53, 180. Also, Executive Committee of the Programme of the United Nations High Commissioner for Refugees, UN Doc A/AC.96/SR.508 10 October 1996, para. 30. For a comprehensive overview of State practice see, Goodwin-Gill & McAdam, *supra* note 49, 244-253.

<sup>59</sup> Ad Hoc Committee on Refugees and Stateless Persons, UN Doc E/AC.32/SR.40, 27 September 1950, 31 *et. seq.*

<sup>60</sup> UNHCR, *supra* note 54, para. 24.

border. A State is not required to admit everyone presenting at its border, however, the content of *non-refoulement* prohibits States from turning away refugees. In order for that State to adequately fulfill its treaty obligations, it must first undertake an examination of the specific individual presenting at the border in order to determine whether or not that person is a refugee and, consequently, whether the rights according to refugees, including *non-refoulement*, apply. As Kälin *et al.* have stated:

“Protection under Art. 33 of the 1951 Convention lasts for an asylum seeker as long as his or her claim to be a refugee has not been refuted in a formal procedure by a final decision. This is a consequence of the fact that formal recognition as a refugee in a refugee status determination procedure is purely declaratory and not constitutive.”<sup>61</sup>

Hence, it is apparent that governments are under a compulsion to “provide access to official proceedings in order to verify refugee status”<sup>62</sup>. These official proceedings may not necessarily take place on the territory of a coastal State,<sup>63</sup> but in all likelihood, in order to ensure that all administrative and legal procedures are properly executed and in order to ensure that the person whose status is being determined is in a position to exercise his right to effective legal protection, the *non-refoulement* principle requires, in practice, that States must allow “temporary admission for the purpose of verifying the need for protection and the status of the person concerned”<sup>64</sup>. Consequently, although the principle of *non-refoulement* does not provide an absolute right to disembark, its practical completion by coastal States will usually require a temporary granting of access to a territory until such time as the refugee status of the rescuee can be determined.

<sup>61</sup> Kälin, Caroni & Heim, *supra* note 51, para. 116.

<sup>62</sup> Fischer-Lescano, Löhr & Tohidipur, *supra* note 46, 284.

<sup>63</sup> There are several recent examples of such processing being carried out on ships: the USA employed this tactic during the 1994 Haitian refugee crisis, Pallis, *supra* note 18, 347.

<sup>64</sup> Fischer-Lescano, Löhr & Tohidipur, *supra* note 46, 283.

## E. Conclusion

The plight of refugees on the high seas raises complex legal issues combined with delicate moral dilemmas – a genuinely invidious combination. As shown above, due to the lack of a legal requirement on coastal States to accept rescuees within their territories, the international law of the sea has failed to provide an adequate solution. It was submitted that the principle of *non-refoulement* applies and that, as a consequence, refugees rescued at sea have, in the majority of cases, a temporary right of disembarkation in order for their status to be determined. That this situation is, in the long term, untenable can scarcely be denied and as certain States seem to bear the brunt of such large-scale refugee influxes, an increased focus on burden-sharing and the creation of permanent agreements to this effect would appear to be the only long-term, practically achievable solution. Such agreements remain, for the moment, purely within the realm of wishful thinking and it can only be hoped that the sense of solidarity, which, for so many centuries, has been the mast of interactions at sea can be retained or perhaps even revived and thereby prevent tragedies occurring on an even larger scale than is already the case.

# **Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants**

Julian M. Lehmann\*

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## Abstract

In light of recent events causing people's movement into Europe, continued misuse of the term "migrant" in policy making and public discourse, and at the occasion of events celebrating the international regime of refugee protection, the human rights protection of irregular migrants is explored in relation to irregular migrants' entry/admission and expulsion/deportation. The term "migrant" has, in contrast to the term "refugee", no bearing on whether or not an international migrant has a need for international protection. While many irregular migrants have no such need, other migrants may be refugees or be in need of international protection "outside" the framework of the 1951 Convention relating to the Status of Refugees. The paper analyses the international human rights law framework applying to individuals with and without need for international protection, when their claims have a socio-economic dimension. The principle of non-refoulement remains the most important source of protection for irregular migrants; it is not concerned with the irregular status of a migrant and also has a bearing on procedural rights in status determination. Socio-economic motivations for flight are not a bar to being a refugee within the meaning of the 1951 Convention, if their underlying cause is persecution, or if motives are mixed. Refugee law can accommodate such claims and overcome a strict dichotomy but is currently only rarely and restrictively applied in this regard. In expulsion cases, virtually only the prohibition of torture, inhuman or degrading treatment is relevant. For individuals that have no need for international protection there are mitigating individual circumstances which a state has to take into account. All pertinent norms of international human rights law apply without distinction and irregular migrants may have, just as refugees may have, humanitarian needs that states should meet.

## A. Introduction

While the 1951 Convention on the Status of Refugees (the 1951 Convention) has reached its 60<sup>th</sup> anniversary, events in the Arab world continue to cause significant flows of individuals attempting to reach Europe. Though all European countries have ratified the 1951 Convention, which contains a distinct definition of the term “refugee”, public perception appears characterised by an ongoing confusion between use of terms “migrants” and “refugees”, with the former term frequently being employed to capture anybody not in need of international protection. In light of the events and their often distorted coverage and perception, it seems to be a good opportunity to elucidate the human rights protection of irregular international migrants in border control situations.<sup>1</sup>

This paper will specifically address human rights issues related to entry/admission and expulsion/deportation.<sup>2</sup> The paper will, from a primarily geographic European perspective, analyse the human rights legal aspects pertaining to admission and expulsion and make conclusions on *lacunae* in international law, rather than on state practice and the international cooperative framework. The paper will conceptualise irregular migration according to the protection needs of people undertaking it, localise those protection needs legally, and identify gaps in the relevant protection. Thereby, it will particularly look at people who leave for socio-economic reasons. The paper will, finally, draw conclusions *de lege lata* and *de lege ferenda*, mainly on the adequacy of the existing international legal framework.

<sup>1</sup> Irregular migration may generate a number of very different human rights concerns in all phases of the migration process, see Jorge Bustamante, Report of the Special Rapporteur on the human rights of migrants, UN Doc A/HRC/7/12, 25 February 2008, para. 15.

<sup>2</sup> Note that in this paper, these terms will be, together with “return”, used interchangeably.

## B. Irregular Migrants Are no Distinct Group in International Law

### I. “Migrants” as a Negative Definition to “Refugees”

First and foremost, the term “migrant” is overarching for those undertaking migration and not a legal term. There are refugees as a sub-category of migrants, the protection and status of whom is regulated by international law. Refugees are, cursorily, those outside their country of origin, fleeing a well-founded fear of persecution on the grounds of race, religion, nationality, membership in a particular social group (PSG) or political opinion. Persecution is not rigidly defined, but is predominantly understood to comprise violations of civil and political rights,<sup>3</sup> including the failure to protect from harm inflicted by non-state actors. Obligations are set out primarily in the 1951 Convention and its 1967 Protocol relating to the Status of Refugees (the Protocol), and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).

The creation of a protection regime under international refugee law has led to a negative definition of “migrants”,<sup>4</sup> which maintains that migrants are, *inter alia*, those who are *not* refugees. The United Nations High Commissioner for Refugees (UNHCR) defines a migrant as “a person who, for reasons other than those contained in the definition [of the 1951 Convention and the Protocol], voluntarily leaves his country in order to take up residence elsewhere. [...] If he is moved exclusively by economic considerations, he is an economic migrant [...]”<sup>5</sup>. It is evident that a person who would neatly fit into this category has no international protection needs. The use of the word “migrant” may thus be misleading from a perspective of international law.

Issues of definition are further complicated because individuals may have mixed motives to leave their country of origin, and because they may

<sup>3</sup> For a broader understanding of the term “persecution”, see below, section B. I.

<sup>4</sup> R. Karatani, ‘How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins’, 17 *International Journal of Refugee Law* (2005) 3, 517.

<sup>5</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reedited, UN Doc HCR/IP/4/Eng/REV.1, January 1992, para. 62.



move in groups which are not homogenous.<sup>6</sup> Indeed, refugees and individuals without protection need use not only the same routes, but also the same means of transport, including increasingly diverse methods of smuggling.<sup>7</sup> An example for such mixed movement is smuggling by boat in the Mediterranean and Gulf region. According to UNHCR, three quarters of all persons crossing the Mediterranean as “boat people” in 2009 filed an application for asylum, half of which were recognised.<sup>8</sup> Libyans who flee the 2011 armed conflict and clearly have a need for international protection, do so alongside other people who,<sup>9</sup> depending on their nationality and individual situation, may or may not have international protection needs.

Furthermore, push and pull-factors can be social, economic or political in nature, and may be related to deficient security, rule of law and human rights protection.<sup>10</sup> Refugees’ push and pull-factors may include, in addition to fear of persecution, economic elements, too. In this regard, mention must be made of secondary movements of refugees, which UNHCR estimates “likely to remain a feature of both refugee flows and mixed movements more generally”, if economic disparities between host states were not reduced.<sup>11</sup>

<sup>6</sup> UNHCR, Global Consultations on International Protection/Third Track: Refugee Protection and Migration Control: Perspectives from UNCHR and IOM, 31 May 2001, UN Doc EC/GC/01/11, para. 5.

<sup>7</sup> For the definition, see Article 3 lit. a of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling Protocol).

<sup>8</sup> Tagesschau.de, ‘Für Flüchtlinge kein Grund zum Feiern’ (13 June 2010) available at <http://www.tagesschau24.com/ausland/schengen110-tellafriend.html> (last visited 12 July 2010).

<sup>9</sup> UNHCR, ‘Hundreds Risk Return to Libya in Bid to Reach Europe by Boat’ (17 May 2011) available at <http://www.unhcr.org/4dd27eea9.html> (last visited 25 August 2011).

<sup>10</sup> UNDP, ‘Human Development Report 2009. Overcoming Barriers: Human Mobility and Development’ (2009) available at [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf) (last visited 25 August 2011), 11-14.

<sup>11</sup> UNHCR, High Commissioner’s Dialogue on Protection Challenges. Discussion Paper. Refugee Protection and Durable Solutions in the Context of International Migration, UN Doc UNHCR/DPC/2007/Doc. 02, para. 40.

## II. Who Is Irregular?

Irregularity, essentially, refers to the lack of the necessary permit to enter and stay within a territory of a state at a given time, and is thereby contingent upon domestic jurisdictions. However, most jurisdictions define irregularity by default, in contrast to regularity.<sup>12</sup>

The only aspect of irregular migration defined under international law is irregular entry. The Smuggling Protocol defines it as “crossing borders without complying with the necessary requirements for legal entry into the receiving State”<sup>13</sup>. Obligations on irregularity are imposed notably by the 1951 Convention and the Protocol with regard to refugees. According to UNHCR, the 1951 Convention for the host country incorporates the distinction between presence, lawful presence, lawful stay and durable residence.<sup>14</sup> This builds on a differentiation as to the regularity of presence made in the *travaux préparatoires* of the 1951 Convention.<sup>15</sup> Those individuals admitted to asylum procedures are lawfully present.<sup>16</sup> This is to be contrasted with the status of lawful stay, which a person has after refugee status has been formally recognised.<sup>17</sup> Drawing once more on the *travaux préparatoires* of the 1951 Convention, only those whose application for a residence permit has been rejected or those who did not lodge an application at all are in an irregular status.<sup>18</sup> As regards the legality of entry, accordingly, a refugee travelling to a border and temporarily admitted pending application for asylum would neither have entered irregularly nor

<sup>12</sup> E. Guild, ‘Who Is An Irregular Migrant?’, in Bogusz *et al.* (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004), 3, 4; this is also the approach taken by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 5.

<sup>13</sup> Article 3 lit. b of the Smuggling Protocol.

<sup>14</sup> UNHCR, ‘*Saadi v. United Kingdom*. Written Submissions on Behalf of the United Nations High Commissioner for Refugees’ (30 March 2007) available at <http://www.unhcr.org/refworld/docid/47c52072.html> (last visited 25 August 2011), para 12.

<sup>15</sup> See statement made by the French representative Rain, in UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifteenth Meeting Held at Lake Success, New York, on Friday, 27 January 1950, at 10.30 a.m., UN Doc E/AC.32/SR.15, 6 February 1950, para. 81.

<sup>16</sup> UNHCR, *supra* note 14, para. 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, para. 13 lit. b.

would he be irregularly present.<sup>19</sup> If non-refugees use applications for asylum for deceptive entry,<sup>20</sup> and are granted temporary admission pending application, they would similarly be lawfully *present*.<sup>21</sup> In such cases, however, UNHCR has argued that *entry* was unlawful.<sup>22</sup> Yet, UNHCR's interpretation is not universally agreed. In the case of *Saadi v. United Kingdom*, the European Court for Human Rights (ECtHR) held that that "until a State has 'authorised' entry to the country, any entry is 'unauthorised'"<sup>23</sup> and that a temporary admission<sup>24</sup> was no such authorisation. Under such a dictum, all international migrants, who enter without the required documentation, whether refugees or non-refugees, could be referred to as *irregular* migrants. As regards rejected asylum seekers, their irregularity mostly depends on the issuance of a decision that classifies them as "removable".

### III. Summary and Conclusions

Alongside the legal definition of refugees there is an ambiguous understanding of the term "migrant". On the one hand, it is an umbrella term covering all people undertaking migration. On the other hand, it stands in contrast to the term "refugees" and is often equated with economic migrant. The distinction is, on a practical level, blurred by mixed movements and motives, the fact that refugees increasingly use the same clandestine means of transport as irregular migrants, and by unfounded refugee claims.

<sup>19</sup> The Human Rights Committee (HRC) in *Celepli v. Sweden* considered those who lodged an application for asylum as lawfully within the territory of a state within the meaning of Article 12 ICCPR, see HRC, *Celepli v. Sweden*. Communication No. 456/1991, UN Doc CCPR/C/51/D/456/1991, 2 August 1994, Annex, para. 9.2.

<sup>20</sup> Europol, 'Facilitated Illegal Immigration Into the European Union' (March 2008) available at [http://57.67.199.6/publications/Serious\\_Crime\\_Overviews/Facilitated\\_illegal\\_immigration\\_2008.pdf](http://57.67.199.6/publications/Serious_Crime_Overviews/Facilitated_illegal_immigration_2008.pdf) (last visited 25 August 2011), 3.

<sup>21</sup> For EU law, see Article 7 of Council Directive 2005/85/EC of 1 December 2005, OJ 2005 L 326/13; see also Preamble Recital 9 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, OJ 2008 L 348/98.

<sup>22</sup> UNHCR, *supra* note 14, para 14.

<sup>23</sup> *Saadi v. United Kingdom*, ECHR, Application No. 13229/03, Judgment of 29 January 2008, para. 65.

<sup>24</sup> Temporary admission is a "non-status" under British law whereby aliens are lawfully physically present on the territory, and yet considered not to have entered the country legally. Other jurisdictions, such as Germany, allow for similar status ("Duldung", para. 54 Ausländergesetz).

Categorising international migrants in legal terms, according to their need for international protection, they may be,

- i. migrants who are refugees (international protection “within” the 1951 Convention/Protocol framework), with claims based on civil and political rights violations and/or claims that have a socio-economic dimension to it,
- ii. migrants in need of complementary protection (international protection “outside” the 1951 Convention/Protocol framework) who flee for reasons of generalised violence and/or for broader human rights reasons, including instances of socio-economic claims,
- iii. migrants not in need of international protection (in non-legal terms, some may be *economic migrants*)

Because of the understanding of migrants that associates their migration with socio-economic motivations, the cases where socio-economic reasons for flight play a role will be particularly discussed in the subsequent analysis.

### C. International Law Pertaining to Human Rights Protection of International Irregular Migrants in Border Control

As a matter of principle, it is the sovereign right of a state to decide who it will admit to its territory. The UN General Assembly has reaffirmed on numerous occasions that states had the “sovereign right to enact and implement migratory and border security measures”<sup>25</sup>. Although according to Article 12 of the International Covenant on Civil and Political Rights (ICCPR), everyone is “free to leave any country, including his own”, international human rights law (IHRL) does not recognise a corollary right to enter or reside in another state’s territory. In respect of border control, however, individuals have a right not to be *brought/returned* into some territories, which may, in effect, oblige a state to admit an individual to its

<sup>25</sup> GA Res. 61/165, 19 December 2006, para. 7; see also UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 97 (LIV) – 2003; *Amuur v. France*, ECHR, Application No. 19776/92, Judgment of 20 May 1996, para. 41.

territory. The underlying principle of *non-refoulement* governs the questions *if* and *to where* a state may expel persons.

Irrespective of the answers to these questions, IHRL further imposes obligations in respect of all other treatments towards migrants and thus in respect of measures of border control. Although it may be lawful under IHRL to treat irregular migrants differently in some respects than those lawfully residing or entering the territory,<sup>26</sup> the overwhelming majority of human rights law applies to irregular migrants irrespective of migration status when a person is in the jurisdiction of a state party to a respective instrument.<sup>27</sup>

## I. Admission and Non-Removal of Irregular Migrants for Reasons Relating to *Non-Refoulement*

### 1. Access to Asylum Procedures: The “Right to Seek Asylum”

In relation to the principle of *non-refoulement*, two issues are particularly pertinent. First, there is the need to identify refugees in mixed flows, as well as those with mixed motives or claims related to socio-economic deprivations. Second, there is the need to ensure that measures aimed at curbing irregular migration do not prevent refugees from submitting claims for the recognition of refugee status.<sup>28</sup>

<sup>26</sup> See for instance Articles 12 and 13 of the ICCPR. See also the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in which rights granted to irregular migrants are less extensive than those granted to regular migrants.

<sup>27</sup> See *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03. Inter-American Court of Human Rights (2003) Series A, No. 18; and HRC, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10.

<sup>28</sup> UNHCR, ‘Discussion Paper. Refugee Protection and Durable Solutions in the Context of International Migration’ (19 November 2007) available at <http://www.unhcr.org/4742a6b72.html> (last visited 25 August 2011), para. 25.

a) Substance of the Right in International Law – UDHR, 1951 Convention, HRC

The precise meaning of the right to seek asylum is not entirely clear. According to Article 14 para. 1 of the Universal Declaration of Human Rights (UDHR), “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”. This is reconfirmed by the Vienna Declaration and Programme of Action of 1993.<sup>29</sup> As it stands, these documents are not legally binding and the wording may be understood to merely restate states’ right to grant asylum, without a correlative duty.<sup>30</sup> However, the notion of a *right to seek* asylum has been argued to reflect customary international law as a procedural right,<sup>31</sup> because it is implicit in the 1951 Convention, and because one of its aspects, the prohibition of *refoulement*, has acquired that status.

The Executive Committee (ExCom) of UNHCR, which authoritatively reflects the *opinio iuris* of the participating states, has consistently affirmed the right to seek asylum.<sup>32</sup> According to Conclusion No. 82 (XLVIII), beside *non-refoulement* other aspects of the right are, *inter alia*, “access, [...] of asylum-seekers to fair and effective procedures for determining status and protection needs [and] the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs”<sup>33</sup>. In another Conclusion regarding manifestly unfounded or abusive applications, the Committee stated that, “the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by

<sup>29</sup> Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, UN Doc A/CONF.157/23, 12 July 1993, para. 23.

<sup>30</sup> G. S. Goodwin-Gil & J. McAdam, *The Refugee in International Law*, 3rd ed. (2007), 360-361. For the negotiations leading to such wording see T. Gammeltoft-Hansen & H. Gammeltoft-Hansen, ‘The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’, 10 *European Journal of Migration and Law* (2008) 4, 439.

<sup>31</sup> G. Goodwin-Gill, ‘Asylum: The Law and Politics of Change’, 7 *International Journal of Refugee Law* (1995) 1, 1, 4.

<sup>32</sup> See UNHCR, ‘A Thematic Compilation of Executive Committee Conclusions’ (August 2009) available at <http://www.unhcr.org/3d4ab3ff2.html> (last visited 25 August 2011), 29-31.

<sup>33</sup> UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 82 (XLVIII), lit. d subparts ii, iii.

an official of the authority competent to determine refugee status”<sup>34</sup>. The notion of fair procedures further includes the provision of relevant information and guidance and the possibility to appeal within an adequate time.<sup>35</sup>

The 1951 Convention does not contain provisions on asylum procedures. However, it implies procedural safeguards through the effectiveness of the Convention as a whole and, in particular, through its definition of a refugee. As the fear of persecution must be well founded, the definition includes an objective element, and thus warrants an individual assessment in which the claimant needs to be given the opportunity to present his case in an interview or hearing, in a language he understands.<sup>36</sup> Based on this treaty law and the ExCom conclusions, UNHCR has recommended that determination of refugee status or complementary protection needs to be carried out in a single procedure, by staff with the relevant legal knowledge, the use of interpreters and “appropriate cross-cultural interviewing”. Further recommendations included that no time limits exist for filing a claim after entry, that claimants have a right to legal assistance as well as representation and that there be access to appeal procedures.<sup>37</sup>

On the question whether Article 14 ICCPR (fair trial rights) is applicable in asylum cases, the Human Rights Committee (HRC) is divided. Hence, it has not applied the provision in its case law but has not entirely excluded this possibility.<sup>38</sup> It has been stated that the Committee’s practice suggests procedural guarantees in asylum cases would “hardly fall short of

<sup>34</sup> UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 30 (XXXIV), lit. e sublit. i.

<sup>35</sup> UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 8 (XXVIII), lit. e.

<sup>36</sup> See G. P. Heckman, ‘Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?’, 15 *International Journal of Refugee Law* (2003) 2, 212, 223.

<sup>37</sup> UNHCR, ‘Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards’ (2 September 2005) available at [www.unhcr.org/refworld/docid/432ae9204.html](http://www.unhcr.org/refworld/docid/432ae9204.html) (last visited 25 August 2011), 2-4.

<sup>38</sup> C. Phuong, ‘Minimum Standards for Return Procedures and International Human Rights Law’, 9 *European Journal of Migration and Law* (2007) 1, 105, 115, citing HRC, *V.R.M.B. v. Canada*, Communication No. 236/1987, UN Doc CCPR/C/33/D/236/1987, 18 July 1988, Annex, para. 6.3.

the guarantees provided in Article 14(1)”<sup>39</sup>. In state observations, the Committee has considered asylum procedures as a remedy against *refoulement* and voiced concerns about the availability of effective remedy in fast-track procedures. It has explicitly demanded that asylum seekers have sufficient time to file a claim.<sup>40</sup> In any case, the principle of non-discrimination remains applicable, which has also been confirmed by an individual case before the Committee on the Elimination of Racial Discrimination.<sup>41</sup>

## b) Procedural Guarantees in Europe

In the European context, the ECtHR has denied applicability of the ECHR’s Article 6 to asylum cases on the basis that “decisions regarding entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him”, as warranted by the chapeau of the article.<sup>42</sup> However, the ECtHR in its jurisprudence has required procedural guarantees at least for cases which concern an alleged breach of Article 3 ECHR (right to life), by recourse to Article 13. In such cases, it has held that procedures should grant claimants realistic opportunity to substantiate a claim<sup>43</sup> and thus found a time limit of five days for lodging a claim as contrary to the *non-refoulement* obligations in Article 3.<sup>44</sup> The Court also developed a standard of examination when it held, in *Vilvarajah*, that the examination should be “rigorous” due to the absoluteness of Article 3. Upon reviewing the meaning of this in the Court’s jurisprudence, Spijkerboer concluded that the scrutiny “must dispel any

<sup>39</sup> S. Persaud, ‘Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights’ (November 2006) available at <http://www.unhcr.org/4552f0d82.html> (last visited 25 August 2011), 15.

<sup>40</sup> *Id.*, 17.

<sup>41</sup> *Inter alia*, Committee on Elimination of Racial Discrimination, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 57th Session, UN Doc A/57/18, 2002, para. 79.

<sup>42</sup> *Maaouia v. France*, ECHR, Application No. 39652/98, Judgment of 5 October 2000, para. 40. See also S. Saroléa, *Droits de l’homme et migrations: de la protection du migrant aux droits de la personne migrante* (2006), 279.

<sup>43</sup> *Bahaddar v. Netherlands*, ECHR, Application No. 25894/94, Judgment of 19 February 1998, para. 45.

<sup>44</sup> *Jabari v. Turkey*, ECHR, Application No. 40035/98, Judgment of 11 July 2009, para. 40.



doubts as to the unsoundness of the claim”<sup>45</sup>. The European Court has further elucidated procedural questions in the case of *M.S.S. v. Belgium and Greece*.<sup>46</sup> In that case, the applicant, an Afghan national, had been, in the framework of the Dublin regime, deported to Greece from Belgium. Structural deficiencies of the Greek asylum system had however been published in numerous reports, *inter alia* by the UNHCR and the Council of Europe. The Court noted that “the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof.”<sup>47</sup> The Court noted the shortcomings in the assessment of Article 13, namely “insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision”<sup>48</sup>. The authorities had not offered the applicant a “real and adequate opportunity to defend his application for asylum”<sup>49</sup>. Regarding the possibility to appeal to the Greek Supreme Administrative Court, the applicant had received no information on legal advice, the number of lawyers drawn up for the legal aid was insufficient and the length of the proceedings excessive.

In European Union law, the right to seek asylum is stipulated in Article 6 of the Asylum Procedures Directive,<sup>50</sup> according to which “Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.” The Directive also sets out procedural standards, including those relating to language rights, communication with UNHCR or organisations working on its behalf, notice of the decision in reasonable time, access to counsel and personal interview, as well as accelerated procedures for unfounded

<sup>45</sup> T. Spijkerboer, ‘Subsidiarity and “Arguability”’: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases’, 21 *International Journal of Refugee Law* (2009) 1, 48, 69.

<sup>46</sup> *M.S.S. v. Belgium and Greece*, ECHR, Application No. 30696/09, Judgment of 21 January 2011.

<sup>47</sup> *Id.*, para. 352.

<sup>48</sup> *Id.*, para. 301.

<sup>49</sup> *Id.*, para. 313.

<sup>50</sup> Council Directive 2005/85/EC of 1 December 2005, OJ 2005 L 326/13.

applications, i.e. within the meaning of the Directive, those of safe countries of origin or safe third country.

Lastly, the Council of Europe has set some procedural standard in its Guidelines on accelerated asylum procedures, including legal advice and interpretation.<sup>51</sup>

## 2. Recognition of Refugee Claims

Socio-economic reasons alone cannot be invoked to claim recognition of refugee status. According to UNHCR, however, “[t]he distinction between an economic migrant and a refugee is sometimes blurred in the same way as the distinction between economic and political measures in an applicant’s country of origin is not always clear”<sup>52</sup>. On the one hand, irregular migrants may be refugees because of mixed motives, whereby the flight has a socio-economic motivation *together* with a well-founded fear of persecution. On the other hand, persecution may underlie a socio-economic rights violation or may find expression in socio-economic categories. At the same time, both possibilities may overlap.

As Foster has pointed out, mixed motives often lead to a dismissal of an asylum claim.<sup>53</sup> Additionally, the economic position of an asylum seeker is often used as proof of purely economic motives.<sup>54</sup> UNHCR has endorsed the opinion by Hathaway<sup>55</sup> that even where economic motives have turned the balance towards a decision to flee, such a decision should not affect a claim for asylum when there is a well-founded fear of persecution.<sup>56</sup>

<sup>51</sup> CoE: Committee of Ministers, ‘Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures’ (1 July 2009) available at <http://www.unhcr.org/refworld/docid/4a857e692.html> (last visited 25 August 2011).

<sup>52</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reedited, UN Doc HCR/IP/4/Eng/REV.1, January 1992, para. 63.

<sup>53</sup> M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007), 248-249.

<sup>54</sup> J. A. Klinck, ‘Recognizing Socio-Economic Refugees in South Africa: A Principled and Rights-Based Approach to Section 3(b) of the Refugees Act’, 21 *International Journal of Refugee Law* (2009) 4, 653, 665; Foster, *id.*, 238.

<sup>55</sup> J. C. Hathaway, ‘The Causal Nexus in International Refugee Law’, 23 *Michigan Journal of International Law* (2002) 2, 207, 209.

<sup>56</sup> UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees

With regard to the second category, jurisprudence appears to have recognised that deprivations of socio-economic rights have an impact which may be similar in severity to that of traditional claims revolving around civil and political rights, reflecting a broader notion of persecution and consideration of cumulative effects of violations in that sphere.<sup>57</sup> However, the prevailing view is that, in such cases, the notion of “persecution” warrants a nexus between violations of economic, social and cultural rights (ESCR) and violations of civil and political rights. Yet, such cases are not well represented in jurisprudence or scholarly literature. This may be *inter alia* due to a widely prevalent but erroneous view that every aspect of ESCR norms are subject to progressive realisation,<sup>58</sup> and the difficulties associated with establishing that persecution is for a Convention reason.<sup>59</sup> Thus, claims involving socio-economic rights may be rebutted because persecution is misinterpreted as generalised economic disadvantage.<sup>60</sup> Economic deprivations that may constitute persecution may be based on any Convention ground. One such example is discrimination against Roma. However, the notion of “membership in a particular social group”<sup>61</sup> is probably best suited to accommodate the various socio-economic deprivations that social groups face. Such groups may also be economic classes like castes, disabled persons, women<sup>62</sup> or children.<sup>63</sup>

to the Victims of Trafficking and Persons at Risk of Being Trafficked, UN Doc HCR/GIP/06/07, 7 April 2006, para. 29.

<sup>57</sup> Foster, *supra* note 53, 92; *id.*

<sup>58</sup> Note the opinion by the Committee on ESCR whereby every ESCR has a core not subject to progressive realisation, see UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), UN Doc E/1991/23, 14 December 1990, paras 9-10.

<sup>59</sup> Foster, *supra* note 53, 231.

<sup>60</sup> *Id.*, 287.

<sup>61</sup> See UNHCR, Guidelines on International Protection No. 2: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc HCR/GIP/02/02, 7 May 2002.

<sup>62</sup> See, for instance, Immigration and Refugee Board of Canada, ‘Women Refugee Claimants fearing Gender related persecution’ (13 November 1996) available at <http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx> (last visited 25 August 2011), which states that the notion of persecution is also to be interpreted by recourse to the ICESCR; for classifying women as a PSG in a more traditional case, see *R v. Immigration Appeal Tribunal and another, ex parte Shah*, [1999] UKHL 20.

<sup>63</sup> Foster, *supra* note 53, 331.

The only type of claims relatively well established are those of economic proscription, whereby a person is completely denied the possibility to obtain employment or earn a livelihood.<sup>64</sup> Meanwhile, according to Foster, determining whether partial forms of denial to employment qualify as proscription and whether less severe measures of discrimination similarly qualify is problematic. Questions also revolve around the harm caused, notably when there is deprivation, but not necessarily a threat to one's subsistence.<sup>65</sup> Other ESCR claims that have been accepted include cases in which children were denied education on ethnic grounds, denial of medical treatment for reasons of HIV/Aids or discrimination in obtaining housing.<sup>66</sup> There are also strong linkages conceivable between persecution and socio-economic rights with regard to gender-based persecution. Claims of domestic violence against women may be recognised, for instance, because of the state failure to protect, which may include some aspects of a support system, too. Recognition of claims may, however, fail because of the reluctance to recognise women as a PSG, or because of difficulties in establishing state responsibility when the original harm is inflicted by non-state actors or because of internal flight alternative.<sup>67</sup>

Whether such "less orthodox" claims are recognised depends on the respective jurisdiction and its application of the law. However, refugee law has undergone considerable development alongside the evolution and advancement of IHRL,<sup>68</sup> and is amenable to interpretation capable of encompassing claims with socio-economic deprivations.<sup>69</sup>

<sup>64</sup> J. C. Hathaway, *The Law of Refugee Status* (1991), 122-123; *Gash v. Nikshiqi (IAT)* [1997] INLR 96; and, for a list of jurisprudence, Foster, *supra* note 53, 94, fn. 23.

<sup>65</sup> Foster, *supra* note 53, 101.

<sup>66</sup> *Id.*, 104.

<sup>67</sup> Particularly for the problems of state responsibility, see M. Heyman, 'Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations', 17 *International Journal of Refugee Law* (2005) 4, 729.

<sup>68</sup> J. McAdam, *Complementary Protection in International Refugee Law* (2007), 198.

<sup>69</sup> Foster, *supra* note 53, 340.

### 3. Complementary Protection

#### a) Common Characteristics

Complementary protection is a form of protection “granted by States on the basis of an international protection need outside the 1951 Convention/Protocol framework”<sup>70</sup>. The international regimes of complementary protection are mostly created by IHRL. Sources of protection are the ICCPR, the Convention against Torture (CAT), the Convention of the Rights of the Child (CRC) and regional Conventions, notably the European ECHR and the Inter-American Convention on Human Rights.

*Non-refoulement* obligations are applicable where the return of an individual to any territory where he would be at risk of subsection to treatment that falls within the ambit of the principle and where any such treatment is attributable to the state.<sup>71</sup> Because the prohibition of *refoulement* in IHRL derives from the absolute prohibition of torture, inhuman and degrading treatment or punishment, it is itself absolute as well. It is not subject to limitation or derogation, nor is exclusion possible.<sup>72</sup>

In the ECtHR, the absolute nature of *refoulement* has been reiterated *inter alia* in *Saadi v. Italy*<sup>73</sup> and, most recently, in *A. v. Netherlands*<sup>74</sup> and *N. v. Sweden*.<sup>75</sup>

<sup>70</sup> McAdam, *supra* note 68, 21.

<sup>71</sup> *Id.*, 129; UNHCR amicus curiae brief in *Sale v. Haitian Centers Council, Inc.*, 509 US 155, 163, 179-87, 113 S. Ct 2549, 125 L.Ed.2d 128 (1993).

<sup>72</sup> Thus, for instance, the exclusion clause in the EU Qualification Directive (Council Directive 2004/83/EC of 29 April 2004, OJ L 304, 30/09/2004) only has bearing on the *subsidiary status*, which those excluded will not enjoy. It is, therefore, distinguishable from the *non-refoulement* obligation in Article 33 of the 1951 Convention, which explicitly provides for exceptions to *non-refoulement* in cases provided in Article 33 para. 2, for security reasons. This indicates that the criminalisation of irregular entry or stay of an irregular migrant, no matter how qualified in domestic law, or irregular entry coupled with drug or other offences have no legal significance on *non-refoulement*.

<sup>73</sup> *Saadi v. Italy*, ECHR, Application No.37201/06, Judgment of 28 February 2008, paras 137-141.

<sup>74</sup> *A. v. Netherlands*, ECHR, Application No. 4900/06, Judgment of 20 July 2010, paras 142-143.

<sup>75</sup> *N. v. Sweden*, ECHR, Application No. 23505/09, Judgment of 20 July 2010, para. 51; see also *A. v. Netherlands*, para.142 where the Court confirmed its earlier ruling in

With regard to the irregular migrants of particular interest to this paper, obligations of complementary protection are pertinent in several regards. Whether irregular migrants may face treatment contrary to *non-refoulement* obligations in a country they are deported to depends on the scope of these obligations, particularly whether and to what extent they may encompass socio-economic claims or severe humanitarian conditions.

#### b) Scope of Complementary Protection under the ICCPR

Although the prohibition of expulsion in the ICCPR is confined to aliens lawfully on the territory, the HRC has not excluded that in theory any right of the Covenant may lead to a *non-refoulement* obligation for any individual within a state's jurisdiction. Thus, in *A.R.J. v. Australia* it stated that "[i]f a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant"<sup>76</sup>.

However, even though this progressive view potentially extends *non-refoulement* obligations to the full range of rights included in the ICCPR, the actual case law by the HRC is limited to cases involving deportations that would expose the claimant to a violation of Articles 6 or 7.<sup>77</sup> There is, however, little evidence that it may include socio-economic risks. It may include medical cases, although case law only supports this argument with regard to illnesses that state conduct of the deporting state has caused, for instance through prolonged detention. In *C. v. Australia*, the HRC found a

*Chahal v. United Kingdom*, ECHR, Application No. 22414/93, Judgment of 15 November 1996 and *Saadi v. Italy*, ECHR, Application No. 37201/06, Judgment of 28 February 2008, that evidence for security threats would not augment the standard of proof in Article 3.

<sup>76</sup> HRC, *A.R.J. v. Australia*, Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996, 11 August 1997, Annex, para. 6.9; see also HRC, *G.T. v. Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996, 4 December 1997, para. 8.2; HRC, 'General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)' (10 March 1992) available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6924291970754969c12563ed004c8ae5?Opendocument> (last visited 25 August 2011), para. 9.

<sup>77</sup> In *G.T. v. Australia*, although the Committee did not consider the particular claim on the merits, it did not exclude the possibility that the right to family life may be violated by a deportation, see HRC, *G.T. v. Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996, 4 December 1997, para. 7.2 and Appendix A.

violation of Article 7 ICCPR if the applicant was deported, for it was “unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party’s violation of the author’s rights” (unduly prolonged detention in violation of Article 9 para. 1).<sup>78</sup> Lastly, the notion of cruel, inhuman or degrading treatment or punishment may be invoked in some cases of physical restraint.

### c) Scope of Complementary Protection under the ECHR

Although the ECHR does not explicitly contain the prohibition of *refoulement*, the ECtHR established the principle in its jurisprudence.<sup>79</sup>

In theory, the ECtHR has moved the full spectrum of Article 3 obligations into the *non-refoulement* obligations implicit in the ECHR. This includes, besides unnecessary recourse to physical force<sup>80</sup> measures with a socio-economic dimension. Thus, lack of medical treatment where giving rise to medical emergency or causing severe and prolonged pain<sup>81</sup> may be inhuman treatment. Degrading treatment contrary to Article 3 has been found in many cases of detention, when there was lack of daylight, overcrowding, unsanitary conditions<sup>82</sup> or lack of medical assistance.<sup>83</sup> The shared characteristic of violations under this Article is the “threshold of severity” test.<sup>84</sup>

However, in practice, cases in which deportations were found to be in violation of Article 3 have not included this broad range under Article 3. Yet, in *D. v. United Kingdom*, where the applicant was diagnosed with Aids while in detention in the United Kingdom and proposed for removal, the Court found unanimously that in the exceptional circumstances of the case,

<sup>78</sup> HRC, *C. v. Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002, para. 8.5.

<sup>79</sup> *Soering v. United Kingdom*, ECHR, Application No. 14038/88, Judgment of 7 July 1989, paras 85, 91 and later extended to deportation cases in *Cruz Varas and others v. Sweden*, ECHR, Application No. 15576/89, Judgment of 20 March 1991, paras 69-70.

<sup>80</sup> *Ribitsch v. Austria*, ECHR, Application No. 18896/91, Judgment of 21 November 1995, para. 38.

<sup>81</sup> *McGlinchey and others v. United Kingdom*, ECHR, Application No. 50390/99, Judgment of 29 April 2003, para. 57.

<sup>82</sup> *Kalashnikov v. Russia*, ECHR, Application No. 47095/99, Judgment of 15 July 2002, paras 97-99, 102.

<sup>83</sup> *Kudla v. Poland*, ECHR, Application No. 30210/96, Judgment of 26 October 2000, para. 94.

<sup>84</sup> N. Mole, *Asylum and the European Convention on Human Rights* (2002), 16.

and given the “compelling humanitarian considerations”, the deportation would amount to a violation of Article 3. This was because the applicant was in the final phase of the illness, lacked family support, and because deportation would have caused acute mental and physical suffering, reducing his life expectancy.<sup>85</sup> However, the accumulation was decisive, since the Court made clear in a later case that “the fact that the applicant’s [...] life expectancy, would be significantly reduced if he were to be removed [...] is not sufficient in itself to give rise to breach of Article 3”<sup>86</sup>. Also, the Chamber held that “aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison”<sup>87</sup>.

*N. v. United Kingdom* concerned a Ugandan national who had Aids which was treated during the nine years the applicant’s asylum application was pending. She claimed that the medication in Uganda was unaffordable and inaccessible in rural areas. The Court held that her case did not disclose very exceptional circumstances, for she was not at that time critically ill and for the rapidity of the deterioration of her illness was unclear.<sup>88</sup> The Court acknowledged the differences between contracting states and states of origin, as well as the varying levels of available treatment, but stated that while it was “necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States”<sup>89</sup>.

Thus, socio-economic differences are only a bar to deportation in the most exceptional cases, and only when coupled with compelling

<sup>85</sup> *D. v. United Kingdom*, ECHR, Application No. 30240/96, Judgment of 21 April 1997, paras 52-53.

<sup>86</sup> *N. v. United Kingdom*, ECHR, Application No. 26565/05, Judgment of 27 May 2008, para. 42.

<sup>87</sup> *D. v. United Kingdom*, ECHR, Application No. 30240/96, Judgment of 21 April 1997, para. 54.

<sup>88</sup> *N. v. United Kingdom*, ECHR, Application No. 26565/05, Judgment of 27 May 2008, para. 50.

<sup>89</sup> *Id.*, 44.



humanitarian considerations. For all other aspects of Article 3, several obstacles may preclude an irregular migrant from successfully invoking Article 3, notably the “real risk test”<sup>90</sup> and internal protection alternatives.<sup>91</sup>

Comparable to the ICCPR, *non-refoulement* obligations are not limited to violations of the right to freedom from torture, inhuman, and degrading treatment or punishment. In *Soering v. United Kingdom*, *Tomic v. United Kingdom*, *Z. and T. v. United Kingdom* and *F. v. United Kingdom*,<sup>92</sup> the Court did at least not exclude the possibility that other provisions implied *non-refoulement* obligations. However, in *Razaghi v. Sweden*, the Court seemed to exclude that Article 9 may be invoked for expulsion cases.<sup>93</sup>

In scholarly literature reviewing ECtHR jurisprudence, views range from the position that only Article 3 is applicable to the position that the full range of Convention rights is applicable in *refoulement* cases.<sup>94</sup> In practice, no complaint has yet been successful, for instance, on Article 6, where the Court held on several occasions that only a flagrant denial would preclude return.<sup>95</sup> In *Al-Moayad v. Germany*, the Court defined such flagrant denial in the Article 6 context as denial of access to an independent and impartial tribunal and denial of *habeas corpus*.<sup>96</sup> However, in *F. v. United Kingdom*, a case in which the applicant was a homosexual proposed for expulsion to

<sup>90</sup> *Soering v. United Kingdom*, ECHR, Application No. 14038/88, Judgment of 7 July 1989, para. 91; *Cruz Varas and others v. Sweden*, ECHR, Application No. 15576/89, Judgment of 20 March 1991, para. 69. In some cases, the Court has assessed post-return treatment to determine whether a breach of Article 3 was present, see *Shamayev and others v. Georgia and Russia*, ECHR, Application No. 36378/02, Judgment of 12 April 2005.

<sup>91</sup> *Salah Sheek v. Netherlands*, ECHR, Application No. 1948/04, Judgment of 11 January 2007, para. 137.

<sup>92</sup> *Tomic v. United Kingdom*, ECHR, Application No. 17837/03, Decision as to the Admissibility of 14 October 2003; *Z. and T. v. United Kingdom*, ECHR, Application No. 27034/05, Decision as to the Admissibility of 28 February 2006; *F. v. United Kingdom*, ECHR, Application No. 17341/03, Decision as to the Admissibility of 22 June 2004.

<sup>93</sup> *Razaghi v. Sweden*, ECHR, Application No. 64599/01, Decision as to the Admissibility of 11 March 2003; see M. den Heijer, ‘Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights’, 10 *European Journal of Migration and Law* (2008) 3, 277, 284.

<sup>94</sup> Den Heijer, *id.*, 295.

<sup>95</sup> *Id.*, 281.

<sup>96</sup> *Al-Moayad v. Germany*, ECHR, Application No. 35865/03, Decision as to the Admissibility of 20 February 2007, para. 101.

Iran, claiming a violation of Article 8 because of the Iranian prohibition of homosexuality, the Court held that the *non-refoulement* obligations of Articles 2 and 3 were to be seen in connection with the special importance of those provisions which did “not automatically apply under the other provisions of the Convention”<sup>97</sup>. Rejecting the application, the Court, however, did not state the level of harm necessary for there to be a violation of Article 8.

The House of Lords in the case of *Ullah* assessed ECtHR jurisprudence on *non-refoulement* and other Convention rights than Article 3, coming to the conclusion that, in principle, other Convention rights may bear *non-refoulement* obligations, too.<sup>98</sup> Thus, in *D. v. United Kingdom* and *Soering v. United Kingdom* the ECtHR did not exclude that it may be the case for Article 2, 4,<sup>99</sup> 5 and 6.<sup>100</sup> However, it was pointed out that successful reliance on any of those articles demanded the presentation of a very strong case, i.e. a test as strict as the one applied by the Court for *non-refoulement* obligations with regard to Article 3.<sup>101</sup>

Jurisprudence thus indicates that the Court applies a higher threshold for expulsion cases. For some provisions, this can be explained with limitation clauses. Such an approach was taken in *Bensaid v. United Kingdom*, with regard to Article 8.<sup>102</sup> The Court stated that while ill-treatment below the threshold of Article 3 may still be in breach of Article 8, interference was justified under Article 8 para. 2, for it was in accordance with law and necessary in a democratic society in the interests of the

<sup>97</sup> *F. v. United Kingdom*, ECHR, Application No. 17341/03, Decision as to the Admissibility of 22 June 2004, para. 3.

<sup>98</sup> *R (on the application of Ullah) v. Special Adjudicator; Do v. Secretary of State for the Home Department* [2004] UKHL 26, para. 21.

<sup>99</sup> *Ould Barar v. Sweden*, ECHR, Application No. 42367/98, Decision as to the Admissibility of 19 January 1999.

<sup>100</sup> *Soering v. United Kingdom*, ECHR, Application No. 14038/88, Judgment of 7 July 1989, para. 85; and *Banković Stojadinović, Stoimenovski, Joksimović and Suković v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom*, ECHR, Application No. 52207/99, Decision as to the Admissibility of 12 December 2001.

<sup>101</sup> *R (on the application of Ullah) v. Special Adjudicator; Do v. Secretary of State for the Home Department* [2004] UKHL 26, para. 24.

<sup>102</sup> *Bensaid v. United Kingdom*, ECHR, Application No. 44599/98, Judgment of 6 February 2001, para. 48.

economic wellbeing of the country and the prevention of disorder or crime.<sup>103</sup>

#### d) Convention of the Rights of the Child

*Non-refoulement* obligations may also arise from the Convention of the Rights of the Child (CRC). In General Comment 6 on unaccompanied children, the Committee of the Rights of the Child declares that “states shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child”<sup>104</sup>. The Committee specifically names Articles 6 (right to life) and 36 (freedom from torture, inhuman or degrading treatment or punishment, freedom from arbitrary detention, no separation from parents against child’s wish). However, the Committee also states that *non-refoulement* obligations were by no means limited to these provisions and maintains that the “assessment of a serious risk should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services”. This suggests that in light of the vulnerabilities to which children are susceptible, humanitarian cases of irregular migrant children may have a lower threshold to establish a real risk than adults. Although the Committee’s comments relate to unaccompanied children, it is at least conceivable that these principles may in some cases be applied to accompanied children too.

In addition to the *non-refoulement* obligations explicitly framed by the Committee, the obligation of non-return may also flow from Article 3 CRC, which stipulates that all action concerning children shall be taken in their “best interest”. Again in relation to unaccompanied children, the Committee states that in principle, the return to a country of origin shall only be effected when in the best interest of the child.<sup>105</sup> In the determination of the best interest the states shall take into account the safety, security and other conditions, including socio-economic conditions, awaiting the child upon

<sup>103</sup> For other cases where the Court affirmed the public interest of migration control, see McAdam, *supra* note 68, 144.

<sup>104</sup> Committee on the Rights of the Child, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc CRC/GC/2005/6, 1 September 2005, para. 27.

<sup>105</sup> *Id.*, para. 84.

return.<sup>106</sup> This suggests that the “best interest” provision may create an obligation independent of a substantive right such as Article 36, which for its humanitarian dimension, may be of particular relevance for some irregular migrant children. Although the CRC is nearly universally ratified and incorporated in many domestic legal systems, the principle’s content remains unclear, not least in admission and expulsion cases.<sup>107</sup> However, such a far-fetched interpretation of Article 3 CRC is not applied, even in countries which have established practice of applying the article in admission and deportation cases.<sup>108</sup>

The recognition of a child’s protection needs, whether under more “classic” *non-refoulement* or the best interest of the child, may in turn have implications for admission or removal of their parents, too, because the CRC takes a clear stand on the separation of parents and children. In turn, if expulsion/deportation is proposed for the parents, best interest considerations are relevant and indeed effected in some domestic law systems.<sup>109</sup>

## II. Admission and Non-Removal of Irregular Migrants for Reasons Unrelated to *Non-Refoulement*

While *non-refoulement* is concerned with the risk of a human rights violation in the state to which a person is deported, there are bars to the removal that are imposed by the violation of a right in and by the state that is deporting. This is the case with the right to family life. Thus, although the prohibition of expulsion in the ICCPR is confined to aliens lawfully on the territory, the HRC notes in relation to expulsion in General Comment 15 that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”<sup>110</sup>. The HRC has dealt with the issue of family

<sup>106</sup> *Id.*

<sup>107</sup> McAdam, *supra* note 68, 179.

<sup>108</sup> *Id.*, 184.

<sup>109</sup> *Id.*, 189.

<sup>110</sup> HRC, ‘General Comment No. 15: The Position of Aliens under the Covenant’ (11 April 1986) available at <http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument> (last visited 25 August 2011), para. 5.

life in three individual complaint cases.<sup>111</sup> In the case of *Steward v. Canada* it recognised that “due consideration” of the family ties had to be made and, in the assessment of the lawfulness of the expulsion, stated that “ample opportunity” had been given to the applicant to present his family ties in the domestic system.<sup>112</sup> However, the right to family life includes, both in the ICCPR and in the ECHR, a limitation clause. Case law of the ECtHR has, in accordance with jurisprudence on all limitation clauses, established that a legitimate aim is to be pursued, which immigration control was found to be *per se*.<sup>113</sup> Further, it needs to be necessary in a democratic society and be proportional. So far, the cases before the ECtHR have only concerned individuals who were in a regular situation before the removal proceedings, mostly individuals who forfeited their entitlement through the commitment of a crime.<sup>114</sup> It would thus appear that, if ever there was a consideration of Article 8 for a person with irregular migration status, the threshold for a measure to be disproportionate would be extremely high. This would have to be different if a child was concerned, as the CRC and the Committee on the Rights of the Child have set up an express strong legal framework for the protection of the right to family life.<sup>115</sup> Indeed, because the Convention on the Rights of the Child is universally ratified, there is a point to be made about the CRC content regarding family unity and family unification to represent the core content in international law. The CRC’s article on family unity does not contain a limitation clause; neither does the Convention foresee the possibility of derogation. This indicates that it can never be necessary, irrespective of the reasons put forward by a Contracting Party, to restrict the right to family unity as stated in the CRC.

<sup>111</sup> HRC, *Charles Edward Stewart v. Canada*, Communication No. 538/1993, UN Doc CCPR/C/58/D/538/1993, 1 November 1996; HRC, *Hendrick Winata and So Lan Li v. Australia*, Communication No. 30/2000, UN Doc CCPR/C/72/D/930/2000 (2001), 26 July 2001; HRC, *Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari v. Australia*, Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), 29 October 2003.

<sup>112</sup> *Steward v. Canada*, *id.*, para. 12.10.

<sup>113</sup> *Nyanzi v. United Kingdom*, ECHR, Application No. 21878/06, Judgment of 8 April 2008, para. 76.

<sup>114</sup> *Boultif v. Switzerland*, ECHR, Application No. 54273/00, Judgment of 2 August 2001.

<sup>115</sup> See Article 10 CRC; and Committee on the Rights of the Child, *supra* note 104, para. 12.

### III. Human Rights Protection of Individuals Classified as Removable – Expulsion/Deportation

Among irregular migrants, many may indeed leave their country of origin for generalised economic conditions without those conditions being exacerbated by discrimination, or without circumstances precluding their removal outside the 1951 Convention and the Protocol or under wider *non-refoulement* obligations. Included among those irregular migrants may be rejected asylum seekers, who either lodged their application *bona fide* or who used an application for deceptive entry. Under international law, these individuals have no right to remain in a territory and may thus be removed. However, this is predicated on the existence of a system of refugee determination<sup>116</sup> which is in accordance with the applicable standards discussed above. Although international law does not question the legitimacy of removal if *non-refoulement* obligations are abided by, IHRL governs the methods of removal.<sup>117</sup> Lastly, there is IHRL applicable to admission of returned individuals by their states of origin.

#### 1. Procedural Guarantees

Distinction must be made between those irregular migrants that have applied for asylum and those that have not. With respect to the former, in addition to the procedural guarantees discussed above, it is important to note that those asylum seekers who have been rejected in the initial decision should have a right to appeal, and that this appeal should have a formal postponing effect *vis-à-vis* the deportation. Such is the practice of the ECtHR, which has held that in asylum cases where Article 3 was at stake, the irreversible nature of the harm that might occur if the risk materialised and the absoluteness of that Article required a postponing effect.<sup>118</sup> Similarly the Committee Against Torture and the HRC have recommended

<sup>116</sup> J. Gibson, 'The Removal of Failed Asylum Seekers: International Norms and Procedures' (1 December 2007) available at <http://www.unhcr.org/cgi-bin/txis/vtx/search?page=search&docid=476651262&query=EXCOM%20Conclusions%20and%20Decision> (last visited 25 August 2011), 1.

<sup>117</sup> Phuong, *supra* note 38, 106.

<sup>118</sup> *Jabari v. Turkey*, ECHR, Application No. 40035/98, Judgment of 11 July 2009, para. 50.

such a postponing effect.<sup>119</sup> Indeed, it has been argued that a postponing effect was part of the right to a remedy contained in every human rights treaty.<sup>120</sup> As for the ICCPR, Article 13 is confined to aliens lawfully in a state's territory and, according to the HRC, excludes illegal entrants.<sup>121</sup> However, the HRC has noted that if the legality of an alien's entry or stay was in dispute, "any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13"<sup>122</sup>. Notable guarantees arising from Article 13 are that expulsions are effected only in pursuance of a decision reached in accordance with law and the right to have a case reviewed by the competent authority,<sup>123</sup> except in compelling cases of national security.

For irregular migrants without protection needs, no procedural guarantees arise from the ICCPR. However, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) contains procedural guarantees for expulsion that applies to all migrant works, irrespective of migration status and protection needs. These guarantees are also far more extensive than Article 13 ICCPR. Whereas Article 22 paras 2-3 ICRMW restate Article 13 ICCPR, most notably the right to review the decision, it also contains other elements of the fair trial rights in IHRL, including that the decision shall be communicated in a language the migrant understands and, upon request, in writing. Furthermore, migrants subject to expulsion have the right to compensation in case of annulment after the expulsion has been executed, shall have reasonable opportunity to settle claims for wages and shall not be required to pay the costs of expulsion. According to Article 23, a migrant shall also be informed without delay of his right to seek consular or

<sup>119</sup> Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, France, UN Doc CAT/C/FRA/CO/3, 3 April 2006, para. 7; HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Uzbekistan, UN Doc CCPR/CO/83/UZB, 26 April 2005, para. 12.

<sup>120</sup> J. McBride, *Access to Justice for Migrants and Asylum Seekers* (2009), 109; *Gebremedhin v. France*, ECHR, Application No. 25389/05, Judgment of 26 April 2007, para. 58.

<sup>121</sup> HRC, *supra* note 110, para. 9.

<sup>122</sup> *Id.*

<sup>123</sup> Note the difference to Article 32 para. 2 of the 1951 Convention, which guarantees a right to appeal.

diplomatic protection. However, the ICRMW has a poor record of ratifications; states parties are all sending rather than receiving states of migrants.

In the European context, Article 1 of the ECHR Seventh Protocol contains procedural guarantees for expulsion cases that are applicable only to migrants in a regular situation. However, it is applicable to those persons “whose lawful permission to be present is being set aside”<sup>124</sup>. There are also several soft law documents that provide authoritative guidance and are in part applicable to irregular migrants without protection needs. They include the Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons Twenty Guidelines on Forced Return,<sup>125</sup> the Council of Europe’s (CoE) Committee of Ministers Recommendation No. (99) 12 on the return of rejected asylum seekers,<sup>126</sup> and the CoE Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a CoE member state and the enforcement of expulsion orders.<sup>127</sup> According to the Twenty Guidelines on Forced Return, they partly reflect existing obligations. Among such obligations is the requirement to grant an accessible effective remedy to everybody against removal orders. Additionally, the guidelines in some parts explicitly exceed the existing obligations, notably the recommendation that notification shall be given in writing, in a language that the migrant understands and in time to enable the person to retrieve personal belongings.

## 2. Methods of Removal

When an irregular migrant is under the jurisdiction of a state, the full spectrum of human rights obligations are applicable. However, from a practical point of view, IHRL contains several norms that are particularly

<sup>124</sup> McBride, *supra* note 120, 100.

<sup>125</sup> CoE: Committee of Ministers, Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons – Twenty Guidelines on Forced Return, CM(2005)40 final, 9 May 2005.

<sup>126</sup> CoE: Committee of Ministers, Recommendation R (1999) 12 of the Committee of Ministers to Member States on the Return of Rejected Asylum-Seekers (and Explanatory Memorandum), (1999) 12, 18 May 1999.

<sup>127</sup> CoE: The Commissioner for Human Rights, Recommendation of the Commissioner for Human Rights Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders, CommDH/Rec (2001) 1, 19 September 2001.



relevant regarding methods of removal, and particularly forced removal. The most critical is the right to life and the prohibition of torture, inhuman or degrading treatment or punishment.<sup>128</sup> Thus, in the context of the ECHR, Article 4 of the Fourth Protocol prohibits the collective expulsion<sup>129</sup> of aliens, which is not limited to those in a regular situation. In the ICCPR, according to the HRC, the protection against collective expulsion is limited to regular migrants.<sup>130</sup> However, *non-refoulement* obligations may have ramifications on irregular migrants even if they do not have protection needs. A collective expulsion of groups in which there are people whose protection needs have not been determined is thus unlawful.

Furthermore, both norms clearly restrict the use of force that may be used to coerce an irregular migrant during removal. The HRC has noted that placing a cushion on the face of an individual to stop his resistance entailed a risk to life and advised Belgium to “re-examine the whole procedure of forcible deportations” and recommended that all security forces executing forced return received special training.<sup>131</sup> It has asserted elsewhere that the presence of independent observers or doctors should be allowed during forcible return.<sup>132</sup> Lastly, the CAT has welcomed the ban of any form of gagging, compression of the thorax, bending of the trunk and binding together of the limbs and recommended that states systematically allow medical examination to be conducted before removals and after failed

<sup>128</sup> In relation to the deportation of aliens, the Human Rights Committee has expressed concern over ill-treatment, see HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Switzerland, UN Doc CCPR/CO/73/CH, 12 November 2001, para 13.

<sup>129</sup> For a definition of forced expulsions see *Andric v. Sweden*, ECHR, Application No. 45917/99, Decision as to the Admissibility of 23 February 1999, para. 1: “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”.

<sup>130</sup> HRC, *supra* note 110, paras 9-10.

<sup>131</sup> HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Belgium, UN Doc CCPR/C/79/Add.99, 19 November 1998, para. 15.

<sup>132</sup> Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Covenant, Conclusions and Recommendations of the Committee against Torture, France, UN Doc CAT/C/FRA/CO/3, 3 April 2006, para. 11.

removal attempts.<sup>133</sup> The Committee against Torture has further proposed that states adopt rules on forcible return at the federal level to ensure compliance with the CAT.<sup>134</sup>

The European Committee for the Prevention of Torture (CPT) has deemed the following practices unlawful: physical assault to coerce a migrant to board a means of transport or to punish his refusal of doing so; withholding medication on the basis of a medical decision and in accordance with medical ethics; employing means that may obstruct a migrant's airways, such as using tape, cushions or padded gloves, or by pushing the face against a seat.<sup>135</sup>

According to the Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons Guidelines on Forced Return, existing obligations prohibit "restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia". Furthermore, the Guidelines recommend the issuance of regulations and guidelines, that members of escorts shall be identifiable, adequately trained, and that medical examinations be carried out before each removal. The CoE Commissioner of Human Rights has recommended that the "use during aircraft take-off and landing of handcuffs on persons resistant to expulsion should be prohibited".<sup>136</sup>

The UNHCR ExCom has adopted several conclusions dealing with the return of people not in need of international protection. It has deplored practices of return that endanger physical safety and reiterated that "irrespective of the status of the persons concerned, returns should be undertaken in a humane manner and in full respect for their human rights

<sup>133</sup> *Id.*

<sup>134</sup> Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Covenant, Conclusions and Recommendations of the Committee against Torture, Germany, UN Doc CAT/C/CR/32/7, 11 June 2004, para. 5, lit. c.

<sup>135</sup> CoE: CPT, 7th General Report on the CPT's Activities Covering the Period 1 January to 31 December 1996, CPT/Inf(97) 10, 22 August 1997, para. 36; CoE: CPT, 13th General Report on the CPT's Activities Covering the Period 1 January 2002 to 31 July 2003, CPT/Inf (2003) 35, 10 September 2003, paras 36 and 38.

<sup>136</sup> CoE: The Commissioner for Human Rights, Recommendation of the Commissioner for Human Rights Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders, CommDH/Rec (2001) 1, 19 September 2001, para. 18.

and dignity and without resort to excessive force”<sup>137</sup>. In cases where force is used, it should be “necessary, [...] proportional and undertaken in a manner consistent with human rights law”<sup>138</sup>. The Committee has also recommended that strategies for carrying out forced returns in safety and dignity be examined within a framework of international cooperation.<sup>139</sup>

#### IV. Humanitarian Obligations Applicable to Irregular Migrants Irrespective of a Need for International Protection and Outside Removal Proceedings<sup>140</sup>

##### 1. Rescue at Sea and the Right to Life

The principle to assist or rescue those in distress at sea<sup>141</sup> has been referred to as a “constitutional element of the law of the sea”<sup>142</sup> and is codified in a range of international treaties, including the UN Convention on the Law of the Sea, International Convention for the Safety of Life at Sea (SOLAS Convention), and the International Convention on Maritime Search and Rescue (SAR Convention). The principle’s content is expressed in SOLAS.

It is evident from the SOLAS Convention that the focus of the principle is the life and health of individuals, and that the principle applies in cases of individuals needing medical attention, not merely in cases where an entire *vessel* is in distress. The SAR Convention clarified the substance of the duty to engage in rescue at sea as encompassing the provision of

<sup>137</sup> UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 85 (XLIX), lit. bb.

<sup>138</sup> UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 96 (LIV) – 2003, lit. c.

<sup>139</sup> UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 79 (XLVII) – 1996, lit. u.

<sup>140</sup> Recent cases of boats carrying migrants in the Mediterranean are numerous. In one particularly problematic case, NATO was accused to have ignored the boat, see J. Shenker, ‘Aircraft Carrier Left Us to Die, Say Migrants’, *The Guardian*, 8 May 2011, available at <http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants> (last visited 25 August 2011).

<sup>141</sup> For the definition of distress under international law of the seas, see International Convention on Maritime Search and Rescue, Annex, Chapter 1, para. 1.3.11.

<sup>142</sup> K. Wouters & M. den Heijer, ‘The *Marine I* Case: A Comment’, 22 *International Journal of Refugee Law* (2010) 1, 1, 4.

medical aid and basic needs. These obligations have been interpreted to extend beyond territorial waters.<sup>143</sup> The 2004 amendments of the SAR Convention refined the duty to assist those in distress, creating an obligation for the state to ensure that “in every case a place of safety is provided within a reasonable time” to recovered survivors.<sup>144</sup> Some states have, however, objected to these amendments, contending that they may be interpreted as creating an obligation to let all survivors rescued in its SAR region disembark on the territory.<sup>145</sup> Consequently, instances in which entry into ports is prohibited still persist.<sup>146</sup> Meanwhile, it is clear that some frequent problems relating to irregular migrants’ distress, like disputes concerning the responsibility to respond to distress calls<sup>147</sup> or delays in rescue at sea operations<sup>148</sup> relate to the core of the principle, not its controversial aspects.

The obligations that maritime law imposes are not framed as human rights. The duty to deliver to a place of safety is to be understood as relating only to immediate well-being and is thus not governed by IHRL.<sup>149</sup> However, The UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea has stated that “[h]uman rights and refugee law principles are an important point of reference in handling rescue at sea situations”<sup>150</sup>. The right to life is under certain circumstances

<sup>143</sup> R. Weinzierl & U. Lisson, ‘Border Management and Human Rights – A Study of EU Law and the Law of the Sea’ (December 2007) available at <http://www.unhcr.org/refworld/category,REFERENCE,GIHR,,47b1b0212,0.html> (last visited 25 August 2011), 35-36.

<sup>144</sup> International Maritime Organization, Resolution MSC. 155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, MSC 78/26/Add.1 Annex 5, 20 May 2004, 1.

<sup>145</sup> Amnesty International, ‘Italy/Malta: Obligation to Safeguard Lives and Safety of Migrants and Asylum Seekers’ (7 May 2009) available at <http://www.amnesty.org/en/library/asset/EUR30/007/2009/en/75e53b86-79eb-4d39-a5d4-e0df8cf13a0c/eur300072009en.pdf> (last visited 25 August 2011), 3.

<sup>146</sup> *Id.*, 1-4.

<sup>147</sup> *Id.*

<sup>148</sup> UNHCR, ‘UNHCR Questions Delays in Rescue-at-Sea Operation off Malta’ (8 June 2010) available at <http://www.unhcr.org/4c0e33b66.html> (last visited 25 August 2011).

<sup>149</sup> UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 23 (XXXII); see also Wouters & Den Heijer, *supra* note 142, 7.

<sup>150</sup> UNHCR, The Treatment of Persons Rescued at Sea: Conclusions and Recommendations from Recent Meetings and Expert Round Tables Convened by the Office of the United Nations High Commissioner for Refugees, Report of the Office of the UNHCR, UN Doc A/AC.259/17, 11 April 2008, para. 8.

extraterritorially applicable on a vessel, when it is a vessel of the Coast Guard or when conduct is otherwise attributable.<sup>151</sup> The ECtHR admissibility decision in *Xhavara and others v. Italy*,<sup>152</sup> which was rejected *ratione temporae* and for failure to exhaust domestic remedies, showed the relevance of basic and fundamental human rights norms in such context. In that case, the applicants were irregular migrants whose boat was allegedly sunk by an Italian coast guard vessel outside coastal waters attempting to stop the boat as it traversed the Mediterranean to Italy, killing 58 passengers. The applicants claimed a violation of the right to life on behalf of their families, by virtue of failure to investigate. The Court recalled the principle voiced in *Osman v. United Kingdom* on the positive obligations implicit in Article 2 to protect the lives of individuals within the jurisdiction, as well as the obligation to adequately investigate any death caused that might have been caused by state agents.

## 2. Other Humanitarian Needs

Smuggled irregular migrants are often abandoned by their smugglers in hazardous areas like deserts,<sup>153</sup> or are in immediate humanitarian need after a perilous journey.<sup>154</sup> Legally speaking, it is a relatively straightforward claim that states have to meet these needs when they have apprehended irregular migrants and hold them in detention, for denying medical treatment or other basic necessities like food and water has been

<sup>151</sup> In the ECtHR context, see *Medvedyev and others v. France*, ECHR, Application No.3394/03, Judgment of 29 March 2010, para. 65; see also the decision by the Committee against Torture in *J.H.A. v. Spain* (Committee against Torture, *J.H.A. v. Spain*, Communication No. 323/2007, UN Doc CAT/C/41/D/323/2007, 21 November 2008), which concerned the rescue of the migrant passengers of the vessel *Marine I* off the Canary Islands by a Spanish rescue tug. The Committee observed that Spain “maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou” (para. 8.2).

<sup>152</sup> *Xhavara and fifteen others v. Italy and Albania*, ECHR, Application No. 39473/98, Decision as to the Admissibility of 11 January 2001.

<sup>153</sup> See the documentary monograph by F. Gatti, *Bilal. Viaggiare, lavorare, morire da clandestini* (2007).

<sup>154</sup> Migrants suffer of sicknesses, starvation, dehydration, hypothermia or skin burns, see K. Derderian & L. Schockaert, ‘Responding to “Mixed” Migration Flows: A Humanitarian Perspective’, 10 *SUR International Journal on Human Rights*, (2009) 1,105, 107.

found to be ill-treatment.<sup>155</sup> For instance, the HRC found that the deprivation of food and water for five successive days amounted to a violation of Article 7 ICCPR.<sup>156</sup> By analogy, denial of medical aid and basic necessities may amount to a violation of pertinent provisions guaranteeing humane treatment of persons deprived of liberty. Hence the HRC, in general Comment 21,<sup>157</sup> makes reference to the Standard Minimum Rules for the Treatment of Prisoners (1957),<sup>158</sup> one of which stipulates that such needs shall be met. For medical cases, however, case law suggests that there has to be a deterioration of the physical condition which can be attributed partly to the authorities' conduct, or to the conditions of detention.<sup>159</sup>

A different question is whether IHRL also imposes humanitarian obligations in cases where migrants are not detained. Such obligation may be derived from the right to adequate food, contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee on ESCR stated in General Comment 12 that the right, through the respect, protect, fulfil scheme, encompassed the obligation to *provide* when individuals are unable, for reasons beyond their control, to enjoy the right.<sup>160</sup> It is unclear whether that obligation is part of the core obligations not subject to progressive realisation. In any case, the problem is closely

<sup>155</sup> N. S. Rodley & M. Pollard, *The Treatment of Prisoners Under International Law*, 3rd ed. (2009), 407.

<sup>156</sup> HRC, *Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, UN Doc CCPR/C/51/D/414/1990, 10 August 1994, Annex, para. 6.4.

<sup>157</sup> HRC, 'General Comment No. 21: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Art. 10)' (10 April 1992) available at <http://www.unhchr.ch/tbs/doc.nsf/0/3327552b9511fb98c12563ed004cbe59?Opendocument> (last visited 25 August 2011), para. 5.

<sup>158</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at [http://www2.ohchr.org/english/law/pdf/treatment\\_prisoners.pdf](http://www2.ohchr.org/english/law/pdf/treatment_prisoners.pdf) (last visited 25 August 2011).

<sup>159</sup> See *Bitiyeva and X v. Russia*, ECHR, Application Nos 57953/00 and 37392/03, Judgment of 21 June 2007, paras 99-101.

<sup>160</sup> CESCR, General Comment 12: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/1999/5, 12 May 1999, para. 15.

related to obligations of a “negative” character, for instance not obstructing aid organisations to assist persons.<sup>161</sup>

## V. Summary and Conclusions

No specialised international law is applicable to irregular migrants’ human rights protection in general, or in particular areas like border control. However, whenever someone declares to seek protection, the pertinent IHRL applies fully, with some exceptions in fair trial rights in expulsion cases.

No migrant has a right to enter or reside in a state other than his own. The only right which may *in effect* result in states granting entry is the protection against *refoulement*, in the event that an irregular migrant is in need of international protection. However, granting entry remains framed as a right of the state rather than the individual.

The principle of *non-refoulement* has as its source treaty and customary international refugee law and IHRL. It applies to refugees, even if they have mixed motives for flight or if persecution takes the form of socio-economic deprivations. In the latter respect, international jurisprudence is meagre, with the modest exception of economic proscription. Extended *non-refoulement* obligations under IHRL and outside the 1951 Convention may, in theory, arise from various norms in IHRL and thus broaden the basis on which irregular migrants may claim a need for international protection. Thus, the right to a family life has been invoked in litigation, but is itself subject to limitation. In practice, *non-refoulement* obligations have been applied only on the grounds of the prohibition of torture, inhuman or degrading treatment or punishment. Hereunder, some socio-economic claims may be subsumed, notably cases with compelling humanitarian considerations. It is nevertheless evident that socio-economic reasons cannot normally be invoked as the basis for a claim for complementary protection.

In order to abide by the absolute principle of *non-refoulement*, states need to ensure adequate, that is fair and effective, determination of the protection needs of irregular migrants within their jurisdiction. Because of

<sup>161</sup> See, in this regard K. Luopajarvi, ‘Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?’, 15 *International Journal of Refugee Law* (2003) 4, 678, 696.

the implications of *non-refoulement* and its strong status in international law, it remains a cornerstone for the protection of all irregular migrants.

Only irregular migrants that have been determined not to be in need of international protection can be expelled. There is little evidence that procedural guarantees under international law against such expulsion go beyond those required for an adequate status determination, with the exception of the poorly ratified ICRMW. IHRL, however, restricts the use of methods for expulsion and grants those returned a right to re-enter their state of origin. Regardless of the need for international protection, there are also humanitarian obligations that partly derive from IHRL, and partly from other bodies of international law, such as the law of the sea.

## D. Challenges in Protection

A review of pertinent reports indicates miscellaneous deficiencies in human rights protection of international irregular migrants. In line with the preceding analysis, protection challenges all appear to be related to the principle of *non-refoulement*.<sup>162</sup> First, there is the challenge of ensuring access to procedures. Second, there is a challenge as to the substantive content of those procedures. Third, a challenge exists as to the scope of the actual principle of *non-refoulement*. Challenges concern both the existing law and its development.

### I. Access to Procedures

In order to curb irregular migration, states often resort to fast track procedures, whereby applicants for asylum are held in border areas and subject to an initial screening or expedited determination.<sup>163</sup> In the global consultations on international protection under UNHCR's auspices, several concerns were voiced over fast track procedures. They included refugee status determination (RSD) by border guards with limited experience in asylum matters and procedures (e.g., interview techniques and relevant protection principles), lack of safeguards and support to asylum seekers, and

<sup>162</sup> It is evident that the subsequent paragraphs reflect merely a selection. Other challenges that may be named, but that have been less subject of the present paper, are the criminalisation of irregular migration and the externalisation of migration control.

<sup>163</sup> UNHCR, Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures), UN Doc EC/GC/01/12, 31 May 2001, para. 21.



denial of access to UNCHR and NGOs working on behalf of it. Other aspects that may infringe upon the right to seek asylum at borders include the absence of translation into a language the asylum seeker understands.

When identification of asylum seekers takes place on board a ship after interception or the blocking of a vessel in the territorial sea, laws of the flag state are applicable. However, in such situations, questions arise as to access of administrative procedures and counsel, translation and privacy during interviews. UNHCR has therefore criticised both screenings and RSD on board ships in past situations and recommended that it be carried out on board ships only in “some limited instances depending on the number and conditions of the persons involved, the facilities on the vessel and its physical location”<sup>164</sup>. Access to fair and efficient asylum procedures within the meaning of the ExCom conclusions may best be assured after disembarkation. The ExCom of UNHCR observed that states in whose territory or territorial waters interception takes place have responsibility for addressing the protection needs of those intercepted. It also recommended *inter alia* that states respect the principle of *non-refoulement* and the right to seek and enjoy asylum in other countries; that they design adequate procedures to identify those in need of international protection among the intercepted persons; train officials on the applicable standards; and take into account the special needs of refugee women and children.<sup>165</sup>

## II. Procedural Safeguards

The principle of *non-refoulement* implies that asylum seekers should not be returned to a third country for a determination of their claim when the procedural safeguards of the “right to seek” are not met and when there is thus the risk of indirect *refoulement*. The ECtHR’s Grand Chamber has recently made this clear in the case of *M.S.S. v. Greece and Belgium*.<sup>166</sup> The

<sup>164</sup> UNHCR, ‘Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final version, including Annexes)’ (18 March 2002) available at <http://www.unhcr.org/refworld/docid/3cd14bc24.html> (last visited 25 August 2011), 6-7.

<sup>165</sup> UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 97 (LIV) – 2003; see also: UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc EC/50/SC/CRP.17, 9 June 2000.

<sup>166</sup> *M.S.S. v. Belgium and Greece*, ECHR, Application No. 30696/09, Judgment of 21 January 2011.

ECtHR rejected the argument of the Belgian authorities that it was sufficient to seek assurances from Greece as to the treatment of the applicant in Greece: “In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention”<sup>167</sup>.

The Court argued that it was, in the light of the information about Greece, up to the Belgian authorities “not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3”<sup>168</sup>.

While the existing obligations appear relatively clear in this respect, the challenge lies rather on the implementation. Although this may to a large extent depend on the political will within a state it must be mentioned that states may also lack the administrative capacity for registering and documenting. Where this is the case, international cooperation aimed at fostering expertise and capacity is to be welcomed. Existing obligations need constant reaffirmation in law and practice. The notion of “fair and effective” procedures, reaffirmed numerous times by the ExCom, is applicable to all irregular migrants who apply for asylum, and irregular status cannot exclude access to such procedures.

*De lege ferenda*, procedural safeguards itself are most likely to develop further with regard to individuals that claim a need for international protection. This also includes the postponing effect of asylum procedures *vis-à-vis* deportation, which, for instance, does not seem to be fully guaranteed in EU law. Thus, in the EU “Returns Directive”<sup>169</sup> there appear to be various circumstances in which irregular migrants may be classified

<sup>167</sup> *Id.*, para. 353.

<sup>168</sup> *Id.*, para. 359.

<sup>169</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, OJ 2008 L 348/98.

removable within the Directive's framework when asylum applications are pending.<sup>170</sup>

In contrast, the ICRMW stands alone in imposing a set of obligations for migrants without need for international protection and further in overcoming the dichotomy of regular and irregular migrants in expulsion cases. Its progressive stand thus appears unlikely to crystallise in international law in the short term.<sup>171</sup>

### III. Development of the Scope of *Non-Refoulement*

It has been demonstrated that in removal not the full range of treaty-based human rights is applicable. Both the HRC and the ECtHR have in practice restricted *non-refoulement* obligations to some provisions. There are several possible explanations for such restriction.

First, it may be explained by a hierarchy of norms, in particular between basic civil and political rights on the one hand, and social, economic and cultural rights on the other. In RSD, when the existence of persecution is determined, it is common practice to associate the term persecution to a basic core of civil and political rights.<sup>172</sup> However, there is, arguably, no evident hierarchy in international human rights law apart from a hierarchy that may be deduced from the possibility of derogation of a provision. Yet, the expulsion cases that were before the HRC do not allow for the conclusion that the higher threshold applied in such cases is based on such rationale. In General Comment 29, the Committee stated that every provision of the Covenant had a non-derogable core. The Committee's reasoning was that the requirement of proportionality in the derogation clause would preclude disregarding a Covenant provision completely.<sup>173</sup>

<sup>170</sup> A. Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive', 11 *European Journal of Migration and Law* (2009) 1, 1.

<sup>171</sup> The EU Returns Directive 2008/115/EC, for instance, in Article 2 lit. a, excludes from its scope irregular migrants that "are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State" or are subject to return as a criminal law sanction.

<sup>172</sup> See Hathaway, *supra* note 64.

<sup>173</sup> HRC, ICCPR, General Comment No. 29: States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 6.

Moreover, the HRC regards non-derogable cores as necessary for the protection of the actual non-derogable rights explicitly mentioned in the Covenant.<sup>174</sup> An approach whereby all rights in the Covenant may be a source of *non-refoulement* obligations if their core is violated is problematic to the extent that it is unclear in most cases what constitutes the core. Developing such clarity is to be aspired to. To attach *non-refoulement* obligations to the “derogability” of a provision seems a plausible avenue for the development of *non-refoulement* obligations.

Second, a different regime for removal cases may be justified by the fact that removal cases rely upon a risk for a migrant, rather than on a violation that has occurred. If *non-refoulement* obligations had wider application, more risks might arise for more individuals and thus unravel the substance of the principle. As for the European Court, it has been argued that the higher standard for expulsion cases resonated “with the idea that the Convention operates in an essentially regional context and primarily governs the European public order”, signifying that standards of the ECHR reflected a consensus in Europe that “cannot be automatically transposed to treatment received in countries not party to the Convention”<sup>175</sup>. Obviously, such reasoning can hardly convince when it comes to risks of treatment that violate both the ECHR and the ICCPR. It would equally be flawed in removal cases based on the ICCPR alone. However, it may be argued that there is a difference in quality between a violation that is committed directly within the domestic jurisdiction, and a *risk* of a violation that is committed in another jurisdiction, and that it is this difference alone that explains the restriction of the *non-refoulement* principle.

Leaving aside the reasons for the less complete applicability of IHRL in expulsion cases, the analysis has shown that IHRL could accommodate

<sup>174</sup> *Id.*, para. 16; see also HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel, UN Doc CCPR/CO/78/ISR., 21 August 2003, para. 12; see also HRC, ‘General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)’ (10 March 1992) available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6924291970754969c12563ed004c8ae5?Opendocument> (last visited 25 August 2011), para. 11; note also Article 10 ICCPR (together with General Comment No. 29, para. 13 lit. a); in HRC, *Arzuaga Giboa v. Uruguay*, Communication No. 147/1983, UN Doc CCPR/C/OP/2, 1 November 1985, para. 14, the Committee has found incommunicado detention to have contributed to a violation of Article 10.

<sup>175</sup> Den Heijer, *supra* note 93, 308-309.

needs of migrants whose claims have a socio-economic dimension. Hence emphasis ought to be on consolidation of existing obligations, taking into account the shortcomings of the migrant-refugee dichotomy.

## E. Conclusion

This paper conceptualised international irregular migration in border control from the perspective of IHRL. It expounded but endorsed the meaning of “migrants” as an umbrella term, while acknowledging the common understanding that migrants are those who leave their countries of origin or nationality for socio-economic related reasons. The dichotomy between refugees and economic migrants is simplistic and does not always reflect reality.

Through the principle of *non-refoulement*, international law in border control is almost wholly concerned with individuals that have a need for international protection, whether it has refugee law or complementary protection at its source. If such a need is present, *non-refoulement* is not concerned with the irregular status of a migrant. Socio-economic motivations for flight are not a bar to being a refugee within the meaning of the 1951 Convention, if their underlying cause is persecution, or if motives are mixed. Refugee law can accommodate such claims and overcome a strict dichotomy but is currently only rarely and restrictively applied in this regard. *Non-refoulement* obligations outside the 1951 Convention and the Protocol may fill this gap to some extent, but do at the moment not significantly exceed the substantial scope of the *non-refoulement* obligations in refugee law when it comes to socio-economic rights. In expulsion cases, virtually only the prohibition of torture, inhuman or degrading treatment is relevant. Furthermore, the scope of the prohibition in its extraterritorial application is limited. A more transparent application of this extraterritorial dimension is to be aspired to. A subtle development towards greater scope in the application of Article 3, as well as of other articles, is not only conceivable, but arguably also more consistent with the developing notions of extraterritorial obligations.

*Non-refoulement* obligations equally govern procedural rights in status determination. In this regard, it remains crucial for states to design and implement measures to legitimately restrict irregular migration of those not in need of international protection in a way that meets procedural guarantees, particularly in interception, fast track or “hot return” policies.

Individuals may be removed under international law if they have no need for international protection under the 1951 Convention or expanded

IHRL *non-refoulement* obligations, and if there is no other individual right violated, particularly the right to family life. It is essential to reiterate that such irregular migrants are also right holders under IHRL. Irregular migrants may also have, just as refugees may have, humanitarian needs that a state should meet. Here, no distinction should be made between regular and irregular migrants, or between varying needs for international protection. International law imposes such obligations, particularly, through the right to life.

Meanwhile, this paper has omitted some fundamental human rights concerns pertaining to irregular migrants, notably questions of legality of detention, status accorded pending application for refugee status<sup>176</sup> and, finally, access to ESCR and access to durable solutions. Human rights protection in admission and expulsion is not to be seen in isolation, but rather as piece of a jigsaw of norms in international law which are germane to the human rights protection of irregular migrants.

Although the majority of obligations are clear, recent developments in Europe show that politics can be prone to question them. Yet, what in situations of large influxes is more needed than anything else is a strong affirmation of the obligations as one of the pillars of a democratic society respecting the dignity of everybody.

<sup>176</sup> See J. C. Hathaway, 'What's in a Label?', 5 *European Journal of Migration and Law* (2003) 1, 1.



## **Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights**

Vladislava Stoyanova\*

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## Abstract

The international legal framework regulating the problem of human trafficking contains the presumption that the return of victims of human trafficking to their countries of origin is the standard resolution for their cases. However, victims might have legitimate reasons for not wanting to go back. For those victims, resort to the legal framework of the European Convention on Human Rights could be a solution. I elaborate on the protection capacity of Article 3 when upon return victims face dangers of re-trafficking, retaliation, rejection by family and/or community and when upon return to the country of origin victims could be subjected to degrading treatment due to unavailability of social and medical assistance. In light of the *Rantsev v. Cyprus and Russia* case, I develop an argument under Article 4 that states cannot send victims to those countries which do not meet the positive obligations standard as established in the case. Article 8 could be relevant: first, when the level of feared harm in the country of origin does not reach the severity of Article 3 but is sufficiently grave to be in breach of the right to private life and engage the non-refoulement principle, and second, when the victim has developed social ties within the receiving state and the removal will lead to their disruption.

## A. Introduction

It is widely recognized that persons who become subjects of human trafficking are in need of assistance and protection. However, there seems to be uncertainty on the content of that protection. Could protection include remaining in the territory of the state where victims have been trafficked? Many victims of human trafficking do not have a legal migration status in the countries into which they have been trafficked (the receiving states).<sup>1</sup> They could have entered with a false passport and/or visa; they could have entered clandestinely, thus their entry was not authorized by immigration officials; they might have entered legally, however, subsequently their presence in the country could have become illegal due to expiration of their visa or due to termination of the necessary conditions for legal presence of

<sup>1</sup> Countries on whose territory victims have been trafficked will be referred as receiving countries/states; these are the countries seeking to remove/deport the victims. Countries from which victims have been trafficked will be referred as countries of origin.

aliens in the territory of the respective state. In this sense, many victims of human trafficking fall within the category of “illegal” migrants.<sup>2</sup> As “illegal” migrants, the relevant aliens’ laws are applicable to them, which means that if they do not have a legal ground to remain in the receiving state they will either have to leave or will be forcefully deported. After their identification as victims of human trafficking, some of them might agree to cooperate with the authorities of the receiving state for the purposes of prosecuting the traffickers, and they could be granted temporary permission to stay. However, they may be deported when they are no longer required for prosecution purposes.

Victims of human trafficking might have legitimate reasons for not wanting to return to their home countries. Danger of re-trafficking; fear of retaliation by the members of the trafficking organizations; fear of being found by the trafficking organization since the victim has not earned the targeted amount of money; lack of social and/or medical assistance in the country of origin; rejection and stigmatization by the local community and/or by the victim’s family are but a few examples.<sup>3</sup> Hence, victims might be in need of protection in the form of remaining in the territory of the receiving state. In the present article, I examine the question of how victims of human trafficking could be eligible for complementary protection<sup>4</sup> under

<sup>2</sup> K. Koser, *International Migration: A Very Short Introduction* (2007), 54; See also G. Noll, ‘The Laws of Undocumented Migration’, 12 *European Journal of Migration and Law* (2010) 2, 143.

<sup>3</sup> These types of dangers have been identified based on the cases involving victims of human trafficking cited throughout the article. As additional confirmation of how realistic these dangers are, see for example, Human Rights Joint Committee of the British Parliament, ‘Examination of Witness (Questions 1-65), Mr Alan Campbell MP of 26 January 2010’, Q22 (24 March 2010) available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/88/10012602.htm> (last visited 31 August 2011); Concluding Observation of the Committee on the Elimination of Discrimination against Women, Albania, CEDAW/C/ALB/CO/3, (12-30 July 2010) available at [http://www.ecoi.net/file\\_upload/470\\_1283334\\_253\\_cedaw-c-alb-co-3.pdf](http://www.ecoi.net/file_upload/470_1283334_253_cedaw-c-alb-co-3.pdf) (last visited 31 August 2011); Home Office UK Border Agency, ‘Country of Origin Information Report Nigeria’, paras 26.13 and 26.14 (9 July 2010) available at [http://www.ecoi.net/file\\_upload/1226\\_1279789324\\_nigeria-150710.pdf](http://www.ecoi.net/file_upload/1226_1279789324_nigeria-150710.pdf) (last visited 15 July 2011); Country of Return Information Project, ‘Country Sheet Bosnia and Herzegovina’ (May 2009) available at [http://www.ecoi.net/file\\_upload/470\\_1258194867\\_cs-bosnia-en.pdf](http://www.ecoi.net/file_upload/470_1258194867_cs-bosnia-en.pdf) (last visited 31 August 2011).

<sup>4</sup> ‘Complementary protection’ describes protection granted by states on the basis of an international protection need outside the *Convention relating to the Status of Refugees*, 22 April 1954, 189 U.N.T.S. 150. It may be based on a human rights treaty or on more

the European Convention on Human Rights (hereinafter ECHR).<sup>5</sup> The article guides the reader through three stages. First, it points out the importance of identifying illegal immigrants as victims of human trafficking; without such identification the arguments justifying complementary protection due to the specific experiences associated with being a victim of human trafficking, will be rendered nonoperational. Second, I demonstrate that in the currently existing legal framework regulating human trafficking, there is hardly any protection to victims in the sense of allowing them to remain on the territory of the receiving countries. Third, I utilize the jurisprudence of the European Court of Human Rights (hereinafter ECtHR) for arguing that repatriating victims could be in breach of Article 3 (prohibition on torture, inhuman or degrading treatment), Article 4 (prohibition on slavery or servitude and forced labor), or Article 8 (right to respect for private and family life) of the ECHR, or a combination of any of these provisions.

The focus of the article on complementary protection is without prejudice to the eligibility of victims of human trafficking for refugee status.<sup>6</sup> However, the issue of refugee status determination has been excluded from the scope of the article since it raises specific problems which are worth dealing with in a separate contribution. In addition, several authors have already addressed the complications involved in victims' recognition as refugees.<sup>7</sup>

general humanitarian principles triggered by states' *non-refoulement* obligations; See J. McAdam, *Complementary Protection in International Refugee Law* (2007), 21.

<sup>5</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 3 September 1953, 213 U.N.T.S. 222 [ECHR].

<sup>6</sup> See UNHCR, 'Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked' (7 April 2006) available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=443679fa4&page=search> (last visited 31 August 2011); See also R. Piotrowicz, 'The UNHCR's Guidelines on Human Trafficking', 20 *International Journal of Refugee Law* (2008) 2, 242.

<sup>7</sup> See R. Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection', 24 *Australian Yearbook of International Law* (2005) 1, 159-180; A. Dorevitch & M. Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australian's Migration and Refugee Law', 9 *Melbourne Journal of International Law* (2008) 1, 1; O. Simic, 'Victims of trafficking for forced prostitution: Protection mechanisms and the right to remain in the destination countries' (July 2004) available at <http://www.gcim.org/attachements/GMP%20No%202.pdf> (last visited 31 August 2011); K. Saito, 'International

## B. Trafficked Victims or Smuggled Immigrants?

Before addressing the protection needs of victims of human trafficking, a preliminary issue has to be examined: the identification of persons as victims of human trafficking. This issue is of significance for the purposes of the article because if a case is not qualified as a case of human trafficking by the authorities of the receiving state, then the arguments in favor of granting complementary form of protection might not be functional.

In accordance with the definition of human trafficking as indicated in the UN Protocol against Trafficking and Council of Europe Trafficking Convention,<sup>8</sup> exploitation is viewed as fundamental to the trafficking experience. In connection with this, it is important to distinguish the phenomena of human trafficking from the phenomena of human smuggling, which is defined in the UN Protocol against Smuggling of Migrants.<sup>9</sup> The dichotomy between human smuggling and trafficking could be built on the following basis. First, unlike trafficking, smuggling does not entail coercion or deception, indicating that smuggling is a voluntary act on the part of those smuggled.<sup>10</sup> By contrast, the focus in cases of trafficking is on the exploitation and the majority of literature on trafficking has focused on women and prostitution.<sup>11</sup> Second, the services of smugglers end when

protection for trafficked persons and those who fear being trafficked' (December 2007) available at <http://www.unhcr.org/476652742.pdf> (last visited 31 August 2011).

<sup>8</sup> See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), 3 September 2003, [The Protocol against Trafficking]; See also *The Council of Europe Convention on Action against Trafficking in Human Beings*, (ETS No. 197), Warsaw, 16 Mai 2005. [Council of Europe Trafficking Convention], Art. 4(a).

<sup>9</sup> See *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime*, GA Res. 55/25, 28 January 2004, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 53, U.N. Doc. A/45/49 (Vol. I) (2001). The Protocol against the Smuggling of Migrants defines human smuggling in the following way: "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident".

<sup>10</sup> A. Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region* (2003), 17.

<sup>11</sup> K. Koser, 'The Smuggling of Asylum-Seekers into Western Europe: Contradictions, Conundrums and Dilemmas', in D. Kyle & R. Koslowski (eds), *Global Human Smuggling Comparative Perspectives* (2001), 59.

those smuggled have reached their destination, while trafficking results in people being exploited. Third, smuggling entails international movements; it always has a transnational element,<sup>12</sup> whereas trafficking can take place both within and across national frontiers.<sup>13</sup> Due to the specific subject matter of the present article, trafficking within national frontiers falls outside its scope. Fourth, smuggling entails illegal entry into a given state, and entry can both be legal and illegal in case of trafficking. A victim of human trafficking could have entered the destination country on a valid passport and/or visa and this in no way should preclude identification as a victim of human trafficking. Human smuggling could be summarized as an act of facilitating illegal entry<sup>14</sup> or as migrants exporting schemes, while human trafficking could be referred to as slave importing operations.<sup>15</sup>

Based on the above clarified distinction, the victimization of the trafficked persons and their need of protection and assistance have become understandable.<sup>16</sup> Once the case is defined as one of human trafficking, the migrants who are objects of the human trafficking are referred to as *victims*. However, there could be problems of how to define the case: is it a case of illegal immigration and thus possibly a case of human smuggling or is it indeed a case of human trafficking. This is related to the smuggling/trafficking dichotomy and the difficulties associated with its application in practice. It could be an artificial dichotomy if one looks at the realities of migration. Many migrants, including those who could be defined as victims of trafficking, in fact agree to be transported and expect to be exploited. There could be different degrees of victimization and exploitation during the migration process and once the migrant is in the receiving state.

<sup>12</sup> V. Bulger, M. Hofman & M. Jandl, 'Human Smuggling as a Transnational Service Industry: Evidence from Austria', 44 *International Migration* (2006) 4, 59, 61.

<sup>13</sup> The Council of Europe Trafficking Convention (see Art. 2) is applicable to all forms of trafficking in human beings, whether national or transnational.

<sup>14</sup> T. Obokata, 'Smuggling of Human Beings from Human Rights Perspective: Obligations of Non-state and State Actors under International Human Rights Law', 17 *International Journal of Refugee Law* (2005) 2, 394, 397.

<sup>15</sup> D. Kyle & J. Dale, 'Smuggling the State Back in: Agents of Human Smuggling Reconsidered', in D. Kyle & R. Koslowski (eds), *Global Human Smuggling Comparative Perspectives* (2001), 32.

<sup>16</sup> K. Ziegler, 'The Legal Framework of Trafficking and Smuggling in Germany: Victim Protection emerging from Witness Protection', in E. Guild & P. Minderhoud (eds), *Immigration and Criminal Law in the European Union, The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (2006), 97.

Therefore, the legal dichotomy between human smuggling and trafficking is an oversimplification of the reality and it does not and cannot represent the dynamics of the migration process. The concept of exploitation itself is hard to define.<sup>17</sup> The means in the definition of human trafficking, especially “abuse of power or of a position of vulnerability”, are similarly hard to establish. Migrants who agree and pay to be smuggled are also in a comparably vulnerable situation in relation to the smuggler. Accordingly, state officials themselves have difficulties identifying migrants as victims of human trafficking. When legitimate migration control considerations are added into the picture, identification of victims becomes even more problematic since many victims have irregular migration status and states are entitled to demand their removal. It has also been commented that states have an incentive to identify irregular migrants as having been smuggled, not as having been trafficked due to the protection obligations placed upon states towards victims of trafficking,<sup>18</sup> irrespective of how limited those obligations are. Accordingly, due to the problems with the distinction between human smuggling and trafficking, identification of irregular migrants as victims of human trafficking is hindered. If such identification is not made, protection and assistance is not likely to take place.

However, despite the hardship and uncertainty of passing the “test” of recognition as a victim of trafficking, such recognition might not ultimately ensure a fate different from the fate of a smuggled illegal migrant who is meant to be deported. This is due to the weak victim protection mechanisms as explained in the following section of the article.

### C. Victim Protection or Witness Protection?

Before proceeding with the issue of complementary protection under the ECHR, one more issue in the legal framework on human trafficking needs to be clarified. After recognition as a victim of human trafficking, the

<sup>17</sup> The Protocol against Trafficking, *supra* note 8, Art. 3(a), (second sentence) gives a non-exhaustive list of what exploitation might include. However, the concept remains vague. For the problems with the currently existing definition of human trafficking see G. Noll, ‘The Insecurity of Trafficking in International Law’, in V. Chetail (ed.), *Mondialisation, migration et droits de l’homme: le droit international en question* (2007), 343.

<sup>18</sup> A. Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’, 23 *Human Rights Quarterly* (2001) 1, 975, 982; C. Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law* (2008), 91.

fate of the victim could become a fate of a *witness*, which entails permission to remain in the territory of the receiving state *for the purposes* of the criminal prosecution of the traffickers. However, this possibility is not a victim protection mechanism. It fits into the discourse which presently dominates the “solutions” to the problem of human trafficking, namely to “combat” human trafficking, in addition to border control measures more robust prosecution and stricter criminalization is allegedly necessary.<sup>19</sup> Protection and assistance for victims have ostensibly been put forward in the discourse; however, on closer scrutiny, serious doubts as to the existence of a real victim protection regime arise as demonstrated below.

The purpose of the UN Trafficking Protocol is to protect and assist victims of trafficking “with full respect for their human rights”<sup>20</sup>. A pertinent question with regard to trafficked persons is: what does it mean to protect the person with *full* respect of his/her human rights? From the perspective of the human rights obligations of the receiving state, is this not an empty statement if the question whether that person can remain in the receiving state’s territory is left open? Under the ECHR, States have undertaken human rights obligations in regard to individuals who are “within their jurisdiction”<sup>21</sup>, which means that once deported the victim is rendered outside the jurisdiction and accordingly outside the realm of the receiving state’s human rights obligations. This is even expressly indicated in the UN Trafficking Protocol (Article 6(5)) which urges its state parties to “endeavor to provide for the physical safety of victims of trafficking in persons *while they are within its territory* (emphasis added).” The message to those states in whose territory the victims have been exploited seems to be: send the victims away from your territory so that you do not have to be concerned with their safety and with their human rights.

Part II of the Protocol with the promising title “Protection of Victims of Trafficking in Person” avoids any reference to the victims’ human rights, which is surprising if one considers the flamboyant commitment in Article 2 to protect victims “with full respect for their human rights”. As to the status of victims of trafficking in receiving states, the UN Protocol (Article 7(1)) stipules that “each State Party *shall consider* adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain

<sup>19</sup> A. Edwards, ‘Trafficking in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’, 36 *Denver Journal of International Law and Policy* (2007) 1, 9, 11.

<sup>20</sup> Protocol against Trafficking, *supra* note 8, Art. 2.

<sup>21</sup> See ECHR, *supra* note 5, Art. 1.

in its territory, temporarily or permanently, *in appropriate cases*”<sup>22</sup>. Article 8(2) further indicates that when a state returns a victim of trafficking to a state party of which that person is a national, the return shall be with *due regard* for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall *preferably* be voluntary.

One cannot fail to notice the discretionary language in which these provisions are framed. The self-contradictory formulation: “shall preferably be voluntary”, is particularly obvious. It is a “shall” obligation, however, at the same time it is “preferably.” The *travaux* makes clear that the “shall preferably be voluntary” phrase is “understood not to place any obligation on the State Party returning the victims”<sup>23</sup>. Similarly oxymoronic is the phrase “shall consider” in Article 7(1). In practice the “*shall*” does not imply an obligation. In addition, it is not in each and every case that the states “shall consider” measures to permit victims to remain in their territory, but only “in appropriate cases.” Which these “appropriate cases” are, is far from clear.

The Trafficking Protocol does not provide for victims’ right to remain in the territory of the receiving state. This touches upon the sensitive issue of immigration control and the prerogatives of states to determine who enters and remains on their territory. Many of the victims of human trafficking are illegal migrants and accordingly subject to aliens and immigration laws in the receiving states. The logical consequence is that victims of trafficking might be sent back to their countries of origin without their consent and/or despite any possible fears. The receiving states are reluctant to provide for right to remain and to legal residence for victims who are illegal immigrants since states are concerned that this could be a pull factor for more immigration. When the Trafficking Protocol was to be adopted many delegates feared that “the Protocol might inadvertently

<sup>22</sup> Emphases added.

<sup>23</sup> Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to 11<sup>th</sup> session, Addendum Interpretative notes for the official records of the negotiations of the UN Convention against Transnational Organized Crime and the Protocols thereto, UN Doc.A/55/383/Add.1, 3 November 2000, 14, para. 73, available at [http://www.unodc.org/pdf/crime/final\\_instruments/383a1e.pdf](http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf) (last visited 31 August 2011).



become a means of illicit migration”<sup>24</sup>. The receiving states did not want trafficking to create a hole in their migration system.

With regards to the countries from which victims originate, there is a clear change in the language used by the UN Protocol against Trafficking. While Article 8(2), which is related to the return of victims, is framed in a discretionary fashion, this is not the case with Article 8(1), which relates to the obligation of states to accept back victims who are their nationals or permanent residents. Accordingly, the repatriation dimension of the so called “protection” of victims is cast in the form of hard obligations.<sup>25</sup> Article 8(1) prescribes that countries of origin “shall [...] accept” the return of their nationals or permanent residents “without undue or unreasonable delay”. It is a universally recognized human right to return/enter the territory of one’s state of nationality.<sup>26</sup> However, this refers to an entitlement to enter/return, which implies that it is the individual’s discretion whether to return. While the UN Trafficking Protocol refers to obligation on states to accept the return of their nationals, which implies that the individual could be forced to return. The repatriation dimension of the UN Trafficking Protocol is further strengthened by the temporal obligation: “without undue or unreasonable delay”.

The Council of Europe Trafficking Convention has been perceived as being different from the Trafficking Protocol because of the former’s emphasis on victim protection. This is clearly indicated in the stated purposes of the Convention and in its intention to “*enhance* [emphasis added] the protection afforded by [the Protocol] and develop the standards

<sup>24</sup> L. Potts, ‘Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons’, 35 *George Washington International Law Review* (2003) 1, 227, 240; See also M. Valsamis, ‘The United Kingdom National Report on the Implementation of the Victims Protection Directive’ (29 April 2004) 907, available at [http://ec.europa.eu/home-affairs/doc\\_centre/immigration/docs/studies/odysseus\\_2004\\_81\\_victims\\_trafficking\\_national\\_reports\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/odysseus_2004_81_victims_trafficking_national_reports_en.pdf) (last visited 31 August 2011) as part of the project of the Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe.

<sup>25</sup> Noll, *supra* note 17, 356.

<sup>26</sup> *Universal Declaration of Human Rights*, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 13; *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 23 March 1976, Art. 12(4); *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. No. 46, 2 May 1968, Art. 3(2).

contained therein”<sup>27</sup>. Perhaps the most important of all victim protection provisions is the one relating to identification of individuals as victims of trafficking<sup>28</sup> and in particular, the obligation on the states to “provide its competent authorities with persons who are trained and qualified [...] in identifying and helping victims”<sup>29</sup>. As to the possibility of victims to remain in the territory of the receiving state, there are important innovations: if the competent authorities have *reasonable grounds* to believe that a person has been victim of trafficking in human beings, *that person shall not be removed from its territory until the identification process* as victim of the offence of trafficking in human beings has been completed by the competent authorities. Victims or presumed victims are to be given a *thirty-day period of grace* (recovery and reflection period) during which time they will be given support and assistance and permitted to decide whether or not to cooperate with the competent authorities. Victims cannot be repatriated against their will during this period. Once this thirty-day period is up, state parties are to issue a renewable residence permit to victims if, in their opinion, an extended stay is necessary owing to the victim’s personal situation *or* for the purposes of their cooperation in an investigation or prosecution. This provision has the practical effect of ensuring that States Parties retain the right to grant residence permits only to those victims cooperating with the authorities.<sup>30</sup>

The above analysis makes at least three things clear. First, the Protocol against Human Trafficking presumes that return of the victim is the

<sup>27</sup> See Council of Europe Trafficking Convention, *supra* note 8, preamble and Art. 1(1)(b).

<sup>28</sup> A. Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments’, 8 *European Journal of Migration and Law* (2006) 1, 163, 176.

<sup>29</sup> See Council of Europe Trafficking Convention, *supra* note 8, Art. 10(1).

<sup>30</sup> I am aware of two studies on the national legislation of the European Union member states concerning the provision of residence permit to victims of human trafficking. See G. Noll & M. Gunneflo, ‘Directive 2004/81 Victims of Trafficking Synthesis Report’ (2007) available at [http://ec.europa.eu/home-affairs/doc\\_centre/immigration/docs/studies/odysseus\\_2004\\_81\\_victims\\_trafficking\\_synthesis\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/odysseus_2004_81_victims_trafficking_synthesis_en.pdf) (last visited 1 September 2011). According to the Synthesis’ Report, in only three countries (Finland, the Netherlands and the Czech Republic) there is a possibility for residence permit not conditional on cooperation with the authorities. See also European Union Agency for Fundamental Rights, ‘Country Reports on the FRA Report “Child Trafficking in the EU – Challenges, Perspectives and Good Practices”’ (July 2009) available at [http://194.30.12.221/fraWebsite/research/background\\_cr/cr\\_child\\_traff\\_0709\\_en.htm](http://194.30.12.221/fraWebsite/research/background_cr/cr_child_traff_0709_en.htm) (last visited 31 August 2011).

standard solution. This is supported by, from the one hand, the discretionary language in which any commitments by the receiving states are phrased, and from the other hand, by the hard obligations incumbent upon the countries of origin to readmit the victims. The Protocol against Trafficking could be read as a comprehensive multilateral readmission agreement, suggesting that return will be the standard response in handling trafficking victims. The proper place of the trafficked migrants is supposedly at home.<sup>31</sup>

Second, as it is clear from the Council of Europe Trafficking Convention, protection in the sense of remaining in the territory of the receiving states is not actually a victim protection scheme, but a witness protection scheme. The receiving states are struggling with alleviating a conflict within their interest to control immigration. Proper immigration control presupposes removal of illegally staying migrants. Victims of human trafficking often fall within this category of migrants. However, states are interested in ensuring prosecution and conviction of traffickers, which serves not only the suppression of crimes against persons but also sanctioning breaches of immigration control, which could be involved in the trafficking. Successful prosecution necessitates availability of witnesses. Thus, the temporal residence permit for victims is a way of reconciling this clash. The victim will be allowed to stay as long as she is available and useful as a witness.

Third, since neither on UN, nor on Council of Europe level the human trafficking legal framework affords a right for the victims of human trafficking to remain on the territory of the receiving states, it is necessary to have resort to the states' human rights obligations, in particular the principle of *non-refoulement* as developed by the jurisprudence of the ECtHR which has the effect of imposing a prohibition on states to remove individuals to countries where they are at risk of harm.

<sup>31</sup> Noll, *supra* note 17, 357.

## D. Protecting Victims as Persons Eligible for Complementary Protection under the European Convention on Human Rights

### I. Article 3 – Prohibition on Torture, Inhuman or Degrading Treatment

The ECHR does not contain a right to asylum; neither does it expressly safeguard the principle of *non-refoulement*.<sup>32</sup> However, starting with the *Soering* judgment,<sup>33</sup> the ECtHR has developed a body of case law on Article 3 which imposes on states an obligation not to return persons to countries where there are *substantial grounds* for believing that they face a *real risk* of being subjected to torture, inhuman or degrading treatment or punishment. After *Soering*, the prohibition on *refoulement* has been established as inherent in the general terms of Article 3 of the ECHR.<sup>34</sup> The *non-refoulement* obligations of Council of Europe Member States under Article 3 of the ECHR have been subject of a comprehensive research and therefore the only purpose of the present article is to address the relevance of Article 3 to victims of human trafficking.<sup>35</sup> The analysis of the protection possibilities under Article 3 is divided into two subsections: the first one concentrating on non-state agents and the types of harm which they could cause to a victim; and the second one looks into a scenario when the harm in the country of origin is neither inflicted by state nor by non-state agents, but it is the failure of the state of origin to provide care and assistance to the

<sup>32</sup> McAdam, *supra* note 4, 136.

<sup>33</sup> *Soering v. The United Kingdom*, ECtHR (1989) Application No. 14038/88. Soering was charged with murder in the state of Virginia, The United States. He was arrested in England and United States requested his extradition. Soering successfully argued before the ECtHR that his extradition will be in violation of Article 3 since he is in danger of being subjected to torture, inhuman or degrading treatment due to his exposure to the “death row phenomena” if extradited to Virginia to face capital murder charges.

<sup>34</sup> See *Cruz Varas v. Sweden*, ECtHR (1991) Application No. 15576/89; *Vilvarajah and Others v. the United Kingdom*, ECtHR (1991) Application No. 13163/87, 13164/87 and 13165/87; *H.L.R. v. France*, ECtHR (1997) Application No. 24573/94, 1997; *Chahal v UK*, ECtHR (1995) Application No. 22414/93; *Salah Sheekh v. the Netherlands*, ECtHR (2007) Application No. 1948/04; *Saadi v. Italy*, ECtHR (2008) Application No.37201/06.

<sup>35</sup> See K. Wouters, *International Legal Standards for the Protection from Refoulement* (2009); N. Mole, *Asylum and the European Convention on Human Rights* (2007).

victim. Within the first subsection entitled ‘Dangers from Re-trafficking, Retaliation, Rejection by Family and/or Community’, I have also included discussion of two issues of relevance when the source of risk barring *refoulement* originates from non-state agents; to wit, failure of the state to provide protection and the availability of internal protection alternative.

### 1. Dangers from Re-Trafficking, Retaliation, Rejection by Family and/or Community

Without dismissing other possible factual complexities and varieties characterizing the individual case of each victim, it is submitted that there are two non-state agents that could cause harm to the victim in her country of origin. First, the individuals involved into trafficking or the trafficking gang could cause harm in the form of re-trafficking; retaliation since the victim could have testified against her traffickers and the trafficking organization or she is believed to have testified; the victim might not have earned the targeted amount of money as a result of which the traffickers might try to find her. Second, the victim’s community and/or the family in the country of origin could be another possible agent of harm and in these cases the concrete type of harm could be rejection and stigmatization by the community and/or the family due to the victim’s involvement in sex trade and prostitution. In each of these scenarios the following legal issues as developed in the ECtHR’s case law arise: whether the harm reaches the severity of inhuman or degrading treatment;<sup>36</sup> the individualization of the harm which relates to the standard of proof: “substantial grounds for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3”<sup>37</sup>; and since the agents of the harm are non-state, the issue of availability and sufficiency of state protection arises.<sup>38</sup>

<sup>36</sup> In *Hilal v. the United Kingdom*, ECtHR (2001) Application No. 45276/99, para. 60, the ECtHR held that “[i]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case”.

<sup>37</sup> *Salah Sheekh v. the Netherlands*, *supra* note 34, para. 135.

<sup>38</sup> In *H.L.R. v. France*, *supra* note 34, para. 40, the ECtHR held that “[o]wing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or group of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving state [the state where the individual is to be deported] are not able to obviate the risk by providing appropriate protection”.

## a) Re-trafficking

If the harm is re-trafficking, the level of severity of the harm necessary to meet the threshold of Article 3 is not problematic. There is little doubt that the type of treatment to which victims of human trafficking are subjected, amounts to inhumane or degrading treatment. They are raped; forced to engage in sexual acts; bought and sold and treated as objects for profit; subjected to physical maltreatment; held in captivity. However, it has to be shown that there are substantial grounds for believing that the victim would face the same kind of dangers upon return. It might be difficult to prove that once having been trafficked, the victim is again in danger of re-trafficking. The risk of re-trafficking should have a more personal nature.<sup>39</sup> The mere possibility of re-trafficking will not be sufficient to give rise to a breach of Article 3; there should be some distinguishing features characterizing the case of the victim, which to lead to individualization of the harm feared.<sup>40</sup> In certain countries certain section of the population are in general exposed to the risk of human trafficking. After all, human trafficking is a crime<sup>41</sup> and in general all individuals are exposed to the danger of becoming a victim of a crime. A general risk of re-trafficking will not make an individual eligible for protection under Article 3. The relevant question at this juncture relates to the level of individualization. The authoritative judgment in this regard is *Salah Sheekh v. the Netherlands*. The ECtHR accepted that the treatment to which the applicant claimed he had been subjected prior to his leaving Somalia can be classified as inhuman within the meaning of Article 3 and noted that the minority (Ashraf) to which he belonged continues to be vulnerable to abuses.<sup>42</sup> In the opinion of the ECtHR, the argument by the Dutch government that “problems experienced by the applicant were to be seen as a consequence of the generally unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people,” is insufficient to remove the applicant from the scope of Article 3.<sup>43</sup> The only distinguishing feature that the applicant was required to establish was his belonging to the Ashraf

<sup>39</sup> Mole, *supra* note 35, 32.

<sup>40</sup> *Vilvarajah and Others v. the United Kingdom*, *supra* note 34, para. 111.

<sup>41</sup> See R. Piotrowicz, ‘The Legal Nature of Trafficking in Human Beings’, 4 *Intercultural Human Rights Law Review* (2009) 1, 175, 183.

<sup>42</sup> *Salah Sheekh v. the Netherlands*, *supra* note 34, para. 146.

<sup>43</sup> *Salah Sheekh v. the Netherlands*, *supra* note 34, para. 147.

minority.<sup>44</sup> The ECtHR concluded that the protection afforded by Article 3 of the ECHR is to be rendered illusory “if, in addition to the fact of his belonging to the Ashraf – which the Government has not disputed – the applicant were required to show the existence of further special distinguishing features”<sup>45</sup>. If those principles are transposed to a case of a victim of human trafficking seeking the protection of Article 3 due to danger of re-trafficking, it should be sufficient if the victim proves either one strong distinguishing feature of her case or a combination of features which make her case distinguishable. Such possible features could be: she has not earned the targeted amount of money and/or has not paid her debt as a result of which her trafficker might go to extreme lengths to find her; she has been trafficked by a trafficking organization/gang which makes it more likely that upon return she might meet some of them; the traffickers believe that she holds incriminating information and she might testify against them in the country of origin; the victim could be from a particular background, from a particular age group, coming from certain ethnicity or minority, having no education and residing in certain areas of the country, which puts her at very high risk of re-trafficking. There could be a combination of such factors. For example, it has been recognized that

“if a victim has been trafficked by a gang of traffickers, as opposed to a single trafficker, then the risk of re-trafficking may be greater for someone who escapes before earning the target earnings set by the trafficker, because the individual gang members will have expected to receive a share of the target sum and will, therefore, be anxious to ensure that they do receive that share or seek retribution if they do not”<sup>46</sup>.

## b) Retaliation

If the harm feared by the victim is retaliation, then there will be clear individual targeting of the victim if she is to be returned. The facts of the case *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of*

<sup>44</sup> Salah Sheekh v. the Netherlands, *supra* note 34, para. 148.

<sup>45</sup> *Id.*

<sup>46</sup> United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, ‘PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department’ (23 November 2009) para. 192, available at <http://www.unhcr.org/refworld/docid/4b0ab38f2.html> (last visited 1 September 2011).

*State for the Home Department* are exemplary for this type of harm.<sup>47</sup> The woman in this case was trafficked from Moldova into the United Kingdom. She subsequently gave evidence against Z., the person responsible for her exploitation. This resulted in the successful prosecution of Z who received a term of imprisonment. At the time when the Secretary of State for the Home Department took a decision to direct the woman's removal from the United Kingdom, Z. had already served his sentence. The woman was afraid from Z, Z's family and Z's associates if she is to return to Moldova. Z had a wide network of contacts throughout Eastern Europe and the woman had given evidence that Z's associates are still in Moldova and that the trafficking operation is still ongoing.<sup>48</sup>

### c) Rejection by Family and/or Community

If the victim is afraid that upon her return she will be ostracized and rejected by her family and/or community, the anticipated harm is of individual nature since it is the particular victim to be targeted due to her involvement in prostitution, which involvement could be contrary to the established moral and societal principles and norms. A relevant question is whether this rejection and its consequences amount to a harm which reaches the threshold of inhuman or degrading treatment. Importantly, any conclusion on this issue will depend on the particular society and situation within the country of origin. Rejection by family and community combined with inability and/or unwillingness by the country of origin to provide essential support structures, in the form of housing, medical assistance and care, rehabilitation, education necessary for finding a job, all of which are fundamental for severing the dependence of the victim on her family and/or community, could result in a serious harm amounting to inhuman or

<sup>47</sup> United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 'SB (PSG - Protection Regulations – Reg 6) Moldova v. Secretary of State for the Home Department' (26 November 2007) available at <http://www.unhcr.org/refworld/docid/47837c902.html> (last visited 31 August 2011).

<sup>48</sup> The legal issues discussed in the case 'SB (PSG - Protection Regulations – Reg 6) Moldova v. Secretary of State for the Home Department', *supra* note 47 refer to the human trafficking victims' eligibility for refugee status. The UK Asylum and Immigration Tribunal determined in the case that in the context of Moldovan society "former victims of trafficking for sexual exploitation" form a particular social group for the purposes of the refugee definition. In the context of the present article, I put an emphasis on the facts of the case which are demonstrative of retaliation as a possible type of harm.



degrading treatment. In some societies, it may be enough for her family to reject a woman to make her whole existence in her original community untenable.<sup>49</sup> Relevant questions would be how victims are perceived in the surrounding society; if there is social stigmatization; if victims refuse to avail themselves of follow up assistance because of concerns about members of their home communities learning about their experiences.

d) Non-State Agents of Harm and Failure of the State to Provide Protection

The ECtHR's jurisprudence has firmly established that the protection obligations under Article 3 "apply in situations where the danger emanates from persons or groups of persons who are not public officials"<sup>50</sup>. When the source of harm is non-state, the issue of availability and quality of protection offered by the country of origin, the country where the individual is to be deported, is of significance. As reaffirmed by the ECtHR: "it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection"<sup>51</sup>.

The pertinent question is what kind of measures the country of origin is expected to undertake in order to be concluded that it provides protection for victims of human trafficking. As it is evidenced from the international legal framework in the field of human trafficking, imposition of criminal sanctions is the principle response.<sup>52</sup> Indeed, in case of harm inflicted by one private individual to another private individual, in order for the state to live up to its positive obligations to ensure the human rights of the injured individual, the state is expected to criminalize the activity constituting the harm and to prosecute the alleged perpetrator.<sup>53</sup> However, in the particular

<sup>49</sup> Piotrowicz, *supra* note 7, 167.

<sup>50</sup> *T.I. v. the United Kingdom*, ECtHR Decision No. 43844/98, ECHR 2000-III; H.L.R. v. France, *supra* note 34, para. 40.

<sup>51</sup> H.L.R. v. France, *supra* note 34, para. 40; Salah Sheekh v. the Netherlands, *supra* note 34, para. 137.

<sup>52</sup> See Protocol against Trafficking, *supra* note 8, Art.5; Council of Europe Trafficking Convention, *supra* note 8, Chapter IV. On this issue see generally the contributions in E. Guild & P. Minderhoud (eds), *Immigration and Criminal Law in the European Union, The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (2006).

<sup>53</sup> *Siliadin v. France*, ECtHR (2005) Application No. 73316/01, para. 148. The positive obligations of states include "categorization of many forms of conduct as criminal

country of origin there could be problems rendering prosecution unlikely: high level of corruption; initiation of criminal investigation only if the victim makes a complaint and, in reality, she is not likely to do that since she is afraid of the authorities.<sup>54</sup> Alternatively, the country of origin might have criminalized trafficking and might take successful steps to prosecute, but still in practice there might not be sufficient protection for the particular victim. The circumstances surrounding the case of the particular victim could be of such a nature as to demand a higher level of protection and the country of origin might not be able to meet that demand. This was under consideration by the United Kingdom Asylum and Immigration Tribunal in the case of *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*. The main issue determining the victim's asylum claim was the ability and willingness of the Nigerian authorities to offer protection to victims of trafficking.<sup>55</sup> After concluding that "the legal and institutional foundation for combating trafficking and, equally important, support for victims of trafficking, have been in place in Nigeria",<sup>56</sup> the analysis of the ability and willingness of the state to protect had a second step. This second step required answer to the question whether the situation of the appellant was so peculiar that the state was not likely to provide additional protection. The source of the peculiarity in this concrete case was that the victim had escaped before earning the targeted sum demanded by the traffickers. In such a situation the traffickers "are very likely to go to extreme lengths in order to locate the victim or members of the victim's family, to seek reprisals"<sup>57</sup>.

activity"; See Jacobs, White & Ovey (eds), *The European Convention on Human Rights* (2010), 176.

<sup>54</sup> The USA Trafficking in Persons Report 2009 indicates in regard to some countries that victims are required to file a formal complaint and many of them do not do that due to fear of violence or reprisals, or lack of confidence in the country's criminal justice system. See for example, the report on Azerbaijan (p. 70) and Guatemala (p. 146), available at <http://www.state.gov/documents/organization/123357.pdf> (last visited 1 September 2011).

<sup>55</sup> *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, *supra* note 46, para. 191.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, para. 192; The UK Asylum and Immigration Tribunal did not analyze on the substance whether in this situation Nigeria was capable of protection, since on the facts of the case it was found that there was no evidence that the victim had been trafficked by a gang of traffickers.

When it is the community and/or family within the country of origin with its particular social morals rejecting women involved in the sex trade or stigmatizing them as AIDS positive, then effective legal system for the detection, prosecution and punishment of acts constituting the feared harm is not the appropriate response. The appropriate response within the country of origin will be protection of victims by providing shelters and social assistance, to which they can have access. Therefore, availability of protection in the country of origin should be interpreted in the sense of whether the measures undertaken provide meaningful and effective protection against the non-state agents for the particular victim. Due consideration is to be given to the specific protection needs (as access to shelters and quality of social assistance) of victims of human trafficking. This approach was adopted by the UK Upper Tribunal, which took note that the shelters for victims of human trafficking in Thailand provide detention-like environment; that counseling services are very limited; that great deal of personal information is required and “given the perception of corruption, and of the appellant’s belief that her trafficker had links with the authorities”, victim would be reluctant to provide such information for fear of reprisals.<sup>58</sup>

#### e) Internal Protection Alternative

The existence of internal protection is an issue in cases involving victims of human trafficking since it is non-state agents who are the source of feared harm and thus is might be expected from the victim to relocate within her country of origin in a safe place where the non-state agents will not harm her. Availability of internal protection alternative has been a reason for victims of human trafficking being denied protection as refugees. This happened, for example, in the case of *JO (Internal Relocation - No Risk of Re-Trafficking) Nigeria v. Secretary of State for the Home Department* decided by the UK Immigration Appeal Tribunal.<sup>59</sup> It was

<sup>58</sup> United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), ‘AZ (Trafficked women) Thailand v. Secretary of State for the Home Department’ (8 April 2010) available at [http://ec.europa.eu/anti-trafficking/download.action;jsessionid=r0TbTfcY2Vc7C2whbq7hm25PvJ89kKLGJlX4Bd3qFxV9T6nPHTh!-1845574121?nodeId=078a2deb-e1b6-4063-a139-5735358db042&fileName=Thailand+v.+Secretary+of+State+for+the+Home+Department\\_en.pdf&fileType=pdf](http://ec.europa.eu/anti-trafficking/download.action;jsessionid=r0TbTfcY2Vc7C2whbq7hm25PvJ89kKLGJlX4Bd3qFxV9T6nPHTh!-1845574121?nodeId=078a2deb-e1b6-4063-a139-5735358db042&fileName=Thailand+v.+Secretary+of+State+for+the+Home+Department_en.pdf&fileType=pdf) (last visited 1 September 2011).

<sup>59</sup> United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, ‘JO (Internal Relocation - No Risk of Re-Trafficking) Nigeria v. Secretary

recognized that the girl, who was under 18 years old and trafficked to the UK, would face a real risk of harm on return to her home area in Nigeria. The woman who trafficked her was from the same village as the girl. Either she would be there when the girl returned or it was reasonably likely that she would come to learn of the girl's return. It was further recognized that the girl was "indebted" with 40 000 dollars and the woman would use violence to extort the money.<sup>60</sup> After making these findings, the UK Immigration Appeal Tribunal addressed the issue of internal protection alternative. The Tribunal agreed with the submissions of the Secretary of State for the Home Department that it "was not plausible to suggest the family members [the girl was also ill-treated by her stepmother] or the woman who trafficked her in her home village would be able or would have the motivation to locate her elsewhere in Nigeria"<sup>61</sup>. Unfortunately, it was not considered how a female child could be expected to relocate on her own in a country where informal social safety nets and belonging to ethnicity group play a paramount role. It is not only the significance of social networks, but gender factors also have a role. In some countries of origin, practically women might not have an internal freedom of movement; if they relocate on their own they could be viewed as violators of their own culture and be stigmatized. For example, in regard to Albania, it has been held that internal relocation is unlikely option to victims of human trafficking due to the difficulties of a single woman to reintegrate into a society where the family is the principal unit for welfare and mutual support as well as the channel through which employment is most often obtained.<sup>62</sup> This relates to one of the guarantees as a precondition for relying on an internal flight alternative: possibility for settlement.<sup>63</sup> I submit that when assessing the

of State for the Home Department' (10 September 2004) available at <http://www.unhcr.org/refworld/docid/47a70794d.html> (last visited 1 September 2011).

<sup>60</sup> *Id.*, para. 9.

<sup>61</sup> *Id.*, paras 12-13.

<sup>62</sup> United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 'AM and BM (Trafficked women) Albania v. Secretary of State for the Home Department' (18 March 2010), para. 187, available at <http://www.unhcr.org/refworld/docid/4ba796112.html> (last visited 1 September 2011).

<sup>63</sup> In the case of Salah Sheekh v. the Netherlands, *supra* note 34, the ECtHR ruled that "as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee

conditions in the proposed area of relocation and the possibility for settlement, the recognized special needs of victims of human trafficking (facilities for physical, psychological and social recovery, appropriate housing, medical and material assistance)<sup>64</sup> are to be given full consideration. If these special needs are not met, then it is not to be expected from the victim to relocate. Further, in assessing the internal protection alternative, not only the mere availability of shelters is to be addressed, but the existing options and the situation faced after leaving the shelters. This argument finds firm support in the case of *KA, AA, & IK (domestic violence - risk on return) Pakistan v. Secretary of State for the Home Department*,<sup>65</sup> where the UK Tribunal concluded that the viability of internal relocation alternative for victims of domestic violence (whose situations is very similar to victims of human trafficking in terms of the source of harm: non-state agents of harm combined with unavailability of state protection) depends not only to the availability of shelters/centers but also on the situation women will face after they leave such centers.

## 2. Lack of Social and Medical Assistance in the Country of Origin

My objective in this section of the article is to examine how the prohibition on inhumane or degrading treatment embodied in Article 3 of the ECHR could be of relevance for victims of human trafficking who are unwilling to go back because their countries of origin cannot offer them appropriate social and/or medical assistance. There might not be a “*real risk*” of re-trafficking, of being targeted for the purposes of retaliation or of severe rejection by the family and/or community reaching the level of inhuman or degrading treatment, but the harm only consists of unavailability of social and/or medical assistance necessary for victims of trafficking. Taking into consideration the horrific experiences of trafficking, the suicidal tendencies (this is particularly relevant when the victim has already made suicide attempts) and the post-traumatic stress disorder from which victims

ending up in a part of the country of origin where he or she may be subjected to ill-treatment” (para. 141).

<sup>64</sup> See Protocol against Trafficking, *supra* note 8, Art.6 (3).

<sup>65</sup> See United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), ‘KA, AA, & IK (domestic violence - risk on return) Pakistan v. Secretary of State for the Home Department’ (22 April 2010) available at <http://www.unhcr.org/refworld/docid/4c3ed00d2.html> (last visited 1 September 2011).

suffer, the mere unavailability of social and/or medical assistance in the country of origin might reduce the victim to a situation of degrading treatment.

The leading case on the issue is *D. v. The United Kingdom*<sup>66</sup> in which the ECtHR held that removing an AIDS patient in the terminal stages of his illness, would violate Article 3. The case of *D. v. The United Kingdom* furthers the protection offered by Article 3 of the ECHR since the ECtHR held that Article 3's prohibition on return, covers situations where there is no deliberately inflicted act that breaches Article 3, but rather an inability of the state to provide basic facilities that would prevent the individual at risk from being reduced to living in circumstances that could be construed as inhuman or degrading treatment. The applicant was not at risk of intentionally inflicted harm by any state or non-state agents. The source of the risk was the *inability of the state* to provide basic facilities.<sup>67</sup> As the ECtHR explains, it has reserved to itself

“sufficient flexibility to address the application of Article 3 in other contexts that might arise, where the source of the risk of proscribed treatment in the receiving country [the country of origin is meant here] stemmed from factors which could not engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, did not in themselves infringe the standards of Article 3”<sup>68</sup>.

Although, the ECtHR held that the removal of the applicant will be in violation of Article 3, in *D. v. the UK*, the ECtHR also underlined the exceptional circumstances of the case and pointed to “the applicant’s *fatal illness* (emphasis added)” and to the “real risk of *dying* (emphasis added) under most distressing circumstances”<sup>69</sup>.

<sup>66</sup> *D. v. The United Kingdom*, ECtHR (2007) Application No. 30240/96.

<sup>67</sup> *Id.*, para. 49.

<sup>68</sup> *N. v. The United Kingdom*, ECtHR (2008) Application No. 26565/05, para. 32.

<sup>69</sup> *D. v. The United Kingdom*, *supra* note 66, para. 53; In *N. v. The Secretary of State for the Home Department*, the House of Lords concluded in regard to the case of *D. v. The United Kingdom* that “it was the fact that he was already terminally ill while present in the territory of the expelling state that made his case exceptional”. See United Kingdom: House of Lords, ‘N (FC) v. Secretary of State for the Home Department’ (5 May 2005) para. 36, available at <http://www.unhcr.org/refworld/docid/43fc2d1a11.html> (last visited 1 September 2011).

In *Bensaid v. the United Kingdom*, a case involving a schizophrenic Algerian national treated in the UK and threatened with deportation from the UK, the ECtHR noted that the suffering associated with possible relapse of his medical condition could, in principle, fall within the scope of Article 3. However, the ECtHR made it clear that “The fact that the applicant’s circumstances in Algeria would be less favorable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention” and that this case “does not disclose the exceptional circumstances of *D. v. the United Kingdom*, where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts”. Accordingly, the ECtHR did not find that there is a sufficient real risk that the applicant’s removal in these circumstances would be contrary to the standards of Article 3.<sup>70</sup>

In *N. v. the United Kingdom*, the ECtHR elucidated the general principles applicable in this type of cases. In particular, it highlighted that the “high threshold set in *D. v. the United Kingdom*” should be maintained “given that in such cases the alleged future harm would emanate *not from the intentional acts or omissions of public authorities or non-state bodies* (emphasis added), but instead from a *naturally occurring illness* (emphasis added) and the lack of sufficient resources to deal with it in the receiving country”<sup>71</sup>. Maintaining a high threshold in cases like *D. v. the United Kingdom*, *Bensaid v the United Kingdom* and *N. v. the United Kingdom*, practically means that Article 3 is applied to guarantee *a dignified death* in the receiving country rather than guaranteeing a life which is not degrading.

<sup>70</sup> *Bensaid v the United Kingdom*, ECtHR (2001) Application No.44599/98, 2001, paras 36-40.

<sup>71</sup> *N. v. The United Kingdom*, *supra* note 68, paras 42-45. It should also be taken into account that the principles established by the ECtHR in *N. v. The United Kingdom*, *supra* note 68, have not received the support of all judges. There is a strong dissenting opinion by Judges Tulkens, Bonello and Spielmann who criticize the justification for maintaining a high threshold. They emphasize that Article 3 equally applies where the harm stems from a naturally occurring illness and a lack of adequate resources to deal with it in the receiving country, if the minimum level of severity, in the given circumstances, is attained. Therefore, whether the harm stems from international acts or omissions of public authorities or non-state bodies should be irrelevant. They point to the absolute nature of Article 3, which allows neither for any balancing analysis, nor for policy considerations such as budgetary constraints. If the approach of the dissenters is to be followed, then it will be sufficient to prove that there are substantial grounds to believe that the unavailability of social and/or medical assistance in the country of origin will expose the victim to a situation, which meets the minimum level of severity of Article 3.

As it is evident from the above cited ECtHR's pronouncement, the justification for this high threshold is that the source of the harm is not acts or omissions by state or non-state entities, but 'naturally occurring illness'. I argue that this justification is not applicable to cases involving victims of human trafficking because their cases are distinguishable from the above mentioned cases (*Bensaid v the United Kingdom* and *N. v. the United Kingdom*), in which the ECtHR refused to grant Article 3 protection.

To make the distinction, I ask the question what is a 'naturally occurring illness'? Can the mental, physiological or physical illness from which a victim of trafficking suffers and for which she is in need of special care, be qualified as a 'naturally occurring illness'? That illness is direct result of being a victim of human trafficking; the illness is 'natural' to the extent that each normal human being will naturally develop a mental, psychological and/or physical illness if she is subjected to the harm normally experienced in cases of trafficking. However, it is not naturally *occurring*. The suffering of a victim of human trafficking is a consequence of having been a subject to severe exploitation, which should not have been allowed to happen in the first place. The exploitation was most probably made possible due to omissions by both states: the receiving state on whose territory the exploitation occurred and the sending state from whose territory the trafficking started. Both states might through their omissions be involved in the suffering of and the harm already sustained by the victim, in the sense that both states might have failed to fulfill their international obligations by allowing the functioning of the criminal trafficking enterprise. The trafficking has usually started in the country of origin and the victim has ended up being exploited in the receiving state. Both states have respective obligations. This issue was dealt with by the ECtHR in the case of *Rantsev v. Cyprus and Russia*, where "[i]n light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking" the ECtHR found the application admissible *rationi loci* in regard to Russia (the country of origin).<sup>72</sup> Accordingly, the country of origin could through its omissions be responsible for the harm done to the victim, for which harm the victim is in need of special social and/or medical assistance. Cyprus, the receiving state in the case, was found responsible for violation of Article 4, which the ECtHR declared to include within its scope human trafficking, since Cyprus failed to fulfill its positive obligation to put in place appropriate legislative

<sup>72</sup> *Rantsev v. Cyprus and Russia*, ECtHR (2010) Application No. 25965/04, para. 207.



and administrative framework (the artist visa regime in Cyprus was found to be most troubling to the point that the visa regime itself created favorable conditions for human trafficking).<sup>73</sup> This could be interpreted to the effect that it might well be the case that the receiving state has created the conditions for the suffering of the victim. In cases involving the prohibition on *refoulement*, the analysis is concentrated on the acts/omissions of the authorities in the country of origin. However, still, when making an assessment whether the receiving state is prohibited from sending back a victim of trafficking, the receiving states' own omissions should be allowed into the picture. These omissions should be considered in the analysis since the receiving state could argue that it has nothing to do with the harm caused to the victim due to unavailability of medical and social facilities in the country of origin; when in fact it could have a lot to do with the harm for which such facilities are needed and thus the receiving state cannot simply escape from addressing the care necessary to heal the harm.

In anticipation of an argument that it is the *future harm* which should emanate from intentional acts or omissions of public authorities, while the victim's illness is a result of past acts/omissions, I argue that it would be artificial within the context of human trafficking to make a differentiation between past harm and future harm. The past harm could be the exploitation itself, while the future harm could be lack of special care needed to address the mental and physical consequences from that same exploitation. Eventually it is one and the same harm done to a human being for which that person is in need of special medical and social assistance. If such assistance is unavailable in the country of origin, the receiving state should not send the victim there. A second line of reasoning is possible to address the abovementioned anticipated argument. The harm which the victim will sustain due to lack of medical and social facilities in the country of origin could emanate from that country's omissions. If that country is a party to the UN Protocol against Trafficking, then it is bound by Article 6(3), which provides that

“[e]ach State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant

<sup>73</sup> *Id.*, paras 290-293.

organizations and other elements of civil society, and in particular, the provision on

- (a) Appropriate housing; [...]
- (c) Medical, psychological and material assistance”.

It is true that Article 6(3)’s obligations are hedged by the phrase “shall consider”, which means that the state parties have not accepted hard obligation to indeed provide for the physical, psychological and social recovery of victims. However, still when the ECtHR makes an assessment whether it would be in breach of ECHR to send a victim of human trafficking back to the country of origin, Article 6(3) should not simply be ignored.

A victim of human trafficking is eligible for protection under Article 3 of the ECHR and thus cannot be removed from the territory of the receiving state, due to inability of the country of origin to provide basic medical and social facilities, which inability will reduce the victim to living in circumstances that could be construed as inhuman or degrading treatment. First, the ECtHR has recognized that Article 3 is applicable when the source of the risk is the inability of the state to provide basic facilities. At this point, it should not be forgotten what the ECtHR said in the old case of *Airey v. Ireland*:

„Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”<sup>74</sup>

This pronouncement demonstrates that entering the sphere of social and economic rights when applying the ECHR does not *per se* constitute a problem. Second, since cases of victims of human trafficking have

<sup>74</sup> *Airey v. Ireland*, ECtHR (1979) Application No. 6289/72, para. 26; Mrs Airey wanted a judicial separation from her violent husband. She was effectively unable, however, to institute the appropriate court proceedings herself as she did not have sufficient legal knowledge to litigate. Since she had no money to pay for a lawyer and legal aid was not available, she claimed that in practice she did not have access to court contrary to Article 6(1) of the ECHR. The ECtHR agreed with her.

distinguishable characteristics, a high threshold in the sense of having a fatal illness and of applying Article 3 to guarantee a dignified death rather than guaranteeing life which is not degrading, is unsubstantiated.

However, the unavailability of social and/or medical assistance should lead to suffering reaching the minimum level of severity required by Article 3. Pertinent considerations for each case would be the availability of family and community support, since there could be alternatives to state support and provision of facilities by the state. It should be kept in mind that in some countries of origin, the family and the community could be more a source of harm than of support. Thus, the state could be the only provider for physical, psychological and social recovery for the victim and for medical, psychological and material assistance.

## II. Article 4 – Prohibition of Slavery, Servitude, Forced or Compulsory Labour

Article 4(1) of the ECHR provides that “[n]o one shall be held in slavery or servitude”. This is an absolute prohibition. Article 4(2) provides that “[n]o one shall be required to perform forced or compulsory labour”, which is qualified to the extent allowed by Article 4(3) of the ECHR. The ECtHR has tried to clarify the distinction between the three concepts. The 1926 Slavery Convention contains the following definition:

“Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>75</sup>

The ECtHR has referred to this definition and has furnished the following understanding of ‘slavery’: the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an object.<sup>76</sup> With regard to the concept of ‘servitude’, the ECtHR has held that

<sup>75</sup> *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*, 9 March 1927, 60 L.N.T.S. 253 [Slavery Convention of 1926].

<sup>76</sup> *Siliadin v. France*, *supra* note 53, para. 122; *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 276. It has to be noted that the ECtHR has not been consistent in its approach to defining trafficking and slavery. In *Siliadin v. France*, *supra* note 53, the ECtHR found that the case of the applicant was not one of slavery since it defined slavery in accordance with its classic meaning in the 1926 Slavery Convention. And yet, in *Rantsev v. Cyprus and Russia*, *supra* note 72, the ECtHR determined that human trafficking was based on the definition of slavery. In para.281, the ECtHR ruled that “trafficking in human beings, by its very nature and aim of exploitation, is based on

what is prohibited is a “particularly serious form of denial of freedom”; it entails an obligation under coercion to provide one’s services.<sup>77</sup> For “forced or compulsory labor” to arise, there must be some physical or mental constraint, as well as some overriding of the person’s will.<sup>78</sup>

Article 4’s protection cannot be sustained by simply claiming that a person *was* a victim of trafficking, since to engage the principle of *non-refoulement* it will be necessary to show that the individual *will* face a real risk of serious harm in the sense of Article 4 if removed. Thus, while Article 4 will be highly relevant to an individual at risk of re-trafficking (or to other conditions constituting slavery or servitude), from which the receiving state is unable or unwilling to offer protection, the generality of Article 3 may otherwise better encapsulate the harm feared on return, such as reprisals or retaliation from trafficking gangs or individuals, severe community or family ostracism, or severe discrimination. As was demonstrated in the previous section of the present article, Article 3 could also be relevant when there is no medical and/or social assistance available in the country of origin. Thus, the level of harm envisioned by Article 3 (inhuman or degrading treatment) could be lower than the harm envisioned by Article 4. Accordingly, arguing non-removal under Article 3 could be more successful.

However, this does not mean that Article 4 is superfluous. The reasons are at least two. The first reason is the finding by the ECtHR in the case of *Rantsev v. Cyprus and Russia* that trafficking in human beings “threatens the human dignity and fundamental freedoms of the victims and cannot be considered compatible with the democratic society and *values* [emphasis added] expounded” in the ECHR and the ECtHR’s conclusion that

the exercise of powers attaching to the right of ownership”. For further discussion on the problem see J. Allain, ‘Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’, 10 *Human Rights Law Review* (2010) 3, 546. In addition, although in *Siliadin v. France*, *supra* note 53, the ECtHR relies on the 1926 Slavery Convention to define slavery, it says “the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of *legal ownership* [emphasis added] over her, thus reducing her to the status of an ‘object’”. The slavery definition in the 1926 Slavery Convention does not require “legal ownership”; all that it requires is “powers attaching to the right of ownership”. See J. Allain, ‘The Definition of Slavery in International Law’, 52 *Howard Law Journal* (2009) 2, 239.

<sup>77</sup> *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 276.

<sup>78</sup> *Siliadin v. France*, *supra* note 53, para. 117; *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 276.

trafficking itself, within the meaning of Article 3(a) of the UN Trafficking Protocol and Article 4(a) of the Council of Europe Trafficking Convention, falls within the scope of Article 4 of the ECHR.<sup>79</sup> The second reason is the elaborate positive obligations within the context of human trafficking, which the ECtHR imposes on states in order to comply with Article 4 of the ECHR.<sup>80</sup> Each of these two distinguishing features is to be used for the advancement of arguments justifying protection for victims.

In *Siliadin v France*, the ECtHR recognized that Article 4 imposes positive obligations on states and it held that the criminal law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.<sup>81</sup> The applicant was a 15 year old girl from Togo, who was taken to France. She became an unpaid servant to various families. The ECtHR qualified her situation as being one of servitude and forced labor and found a violation of Article 4 since France did not fulfill its positive obligation to impose criminal law sanctions. The ECtHR explained that

“limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice”<sup>82</sup>.

The ECtHR’s approach in *Siliadin v. France* restricted to requiring imposition of criminal law sanctions, has justifiably been subject of criticism. In particular, from the case of *Siliadin v. France*, it appears that for trafficked child workers the approach of the ECtHR to positive obligations, as applied to Article 4, may not extend much beyond the obligation to have robust criminal law with appropriate crimes and adequate sanctions. However, the needs of such children go much further, as was

<sup>79</sup> Rantsev v. Cyprus and Russia, *supra* note 72, paras 272-282.

<sup>80</sup> *Id.*, paras 283-308.

<sup>81</sup> *Siliadin v. France*, *supra* note 53, para. 148; For commentary on the case see Holly Cullen, ‘*Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights*’, 6 *Human Rights Law Review* (2006) 3, 585, 590-591.

<sup>82</sup> *Siliadin v. France*, *supra* note 53, para. 89.

demonstrated by the facts of *Siliadin v. France*. Such children need regularization of their immigration status. They also need rehabilitation measures such as re-housing and education.

In *Rantsev v. Cyprus and Russia*, the ECtHR explained that prosecution is only one aspect of states' positive obligation. Thus, states' positive obligations arising under Article 4 were considered within a broader context.<sup>83</sup> However, still the facts of the case were such that the ECtHR did not address issues of irregular migration status and rehabilitation. The girl who was allegedly trafficked in Cyprus had entered the country on a valid visa and had a regular migration status; she allegedly committed suicide or was murdered and accordingly the problem of rehabilitation was irrelevant.

What makes *Rantsev v. Cyprus and Russia* a landmark case are the positive obligations elaborated by the ECtHR in regard to human trafficking: positive obligation to put in place an appropriate legislative and administrative framework (the artist visa regime in Cyprus did not afford effective protection against trafficking and exploitation); positive obligation to take protective and operational measures (the authorities in Cyprus failed to take protective measures within the scope of their powers to remove the individual from the situation of trafficking or risk of trafficking); and procedural obligation to investigate trafficking. Taking into account these elaborate obligations, will states parties to the ECHR be prohibited from sending victims or potential victims of human trafficking to those countries of origin, which do not live up to the positive obligation required by Article 4 as interpreted by the ECtHR? The answer to this question could be in negative since it is not expected from the country of origin to provide the same level of human rights protection in comparison with the level of human rights protection in the potential country of asylum (the receiving state), in order for a person to be declared as non-removable.<sup>84</sup> However,

<sup>83</sup> *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 285

<sup>84</sup> In *Januzi v The Secretary of State for the Home Department*, The House of Lords held that a person may be removed where an internal flight alternative exists, even if the general standards of living in that part of the country are not as high as the state where asylum was sought. However, the position would be different if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment. See United Kingdom: House of Lords, 'Januzi (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Hamid (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Gaafar (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Mohammed (FC) (Appellant) v. Secretary of State for the Home Department

here the issue involves not any human right, but specifically the prohibition on slavery and servitude, which is non-derogable<sup>85</sup> and as the ECtHR has noted, “enshrines one of the basic values of the democratic societies making up the Council of Europe”<sup>86</sup>. Thus Article 4 is put on the same level as Article 3 of the ECHR. The case of *Soering v. The United Kingdom*<sup>87</sup> was the first case, in which the ECtHR found that Article 3 of the ECHR contains the prohibition on *refoulement*. What is of importance is how the ECtHR substantiated this finding. The ECtHR ruled that

„[t]his absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. ... It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article“<sup>88</sup>.

(Respondent) (Consolidated Appeals)’ (15 February 2006) available at <http://www.unhcr.org/refworld/docid/43f5907a4.html> (last visited 1 September 2011). The ECtHR has also stated that “On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the Convention”. See *Z and T v. the United Kingdom*, Decision of 28 February 2006.

<sup>85</sup> Pursuant to Article 15(2) of the ECHR, no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3, 4(1) and 7 is permissible.

<sup>86</sup> *Siliadin v. France*, *supra* note 53, para.82.

<sup>87</sup> *Soering v. The United Kingdom*, *supra* note 33.

<sup>88</sup> *Id.*, para. 88.

It would hardly be compatible with the underlying values, spirit and intendment of the ECHR, were a state party to send an individual to a country where there are substantial grounds for believing that she would be in danger of being subjected to treatment contrary to Article 4 and in the assessment of the standard of “substantial grounds for believing”, the positive obligations in regard to Article 4 as elaborated on by the ECtHR in *Rantsev v. Cyprus and Russia*, are not fully considered. Thus when assessing the risk of treatment contrary to Article 4 upon return in the country of origin, the following is to be considered: the legislative and administrative framework in that country, and if it affords *effective* protection against trafficking and exploitation; the capacity, training, and willingness of the authorities to *identify* and protect victims and, to take operational measures (in case the authorities are aware of circumstances giving rise to a credible suspicion that an individual was, or was at real and immediate risk of being, a victim of trafficking and exploitation, they have to take protective measures);<sup>89</sup> and the conduction of effective investigation.

### III. Article 8 – Right to Respect for Private Life

Article 8 of the ECHR protects the right to private and family life. The purpose of the present section is to analyze if and how it is possible to argue that the removal of a victim of human trafficking from the territory of the receiving state could be in violation of this article. The analysis of Article 8 starts with the question whether the measures undertaken in respect to the individual are of such a nature as to fall within the scope of Article 8. This presupposes answer to the questions whether there is a family life and what is a private life. From the beginning, it is important to be clarified that the relevance of Article 8 only to situations specific to victims of human trafficking is to be addressed. Cases in which a victim claims protection under Article 8 since his/her removal from the territory of the receiving state will result in disruption of family life<sup>90</sup> are not addressed since this is a problem that could be faced by every documented or undocumented migrant and thus it is not specific to victims of human trafficking. In this sense it is the right to private life, which constitutes the focus of the present analysis.

For this purpose, it is necessary to present how the ECtHR has construed the notion of “private life”. In the case of *Bensaid v. the United*

<sup>89</sup> *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 296

<sup>90</sup> See H. Storey, ‘The Right to Family Life and Immigration Case Law at Strasburg’, 39 *International Comparative Law Quarterly* (1990) 2, 328, 341.



*Kingdom*, the ECtHR held that “‘private life’ is a broad term not susceptible to exhaustive definition”<sup>91</sup>. ‘Private life’ includes “the physical and moral integrity of the person”<sup>92</sup> and mental health, since “the preservation of mental stability is [...] an indispensable precondition to effective enjoyment of the right to respect for private life”<sup>93</sup>. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.<sup>94</sup>

There are two lines of argumentation in regard to Article 8 for the purposes of the present article. The first is based on the question how the right to private life is engaged in relation to a removal of a victim from the receiving state, where the anticipated harm on the territory of the country of origin (the country where the victim is to be sent to) will be contrary to the requirements of the ECHR. The responsibility of the receiving state under the prohibition on *refoulement* is engaged since there is a real risk that the deportation of the victim will lead to violation of her private life due to the particular circumstances in the country of origin.<sup>95</sup> The second direction is based on the question how the receiving state through the act of deportation impedes the enjoyment of private life in the receiving state’s territory by a victim who had developed strong social ties in that same state.<sup>96</sup>

Venturing into the first line of argumentation, I suggest an argument that the foreseeable consequences for the victim’s health, physical and moral integrity and mental stability (all falling within the notion of private

<sup>91</sup> *Bensaid v. The United Kingdom*, *supra* note 70, para. 47.

<sup>92</sup> *Stubbings and Others v. The United Kingdom*, ECtHR (1996) Application No. 22083/93; 22095/93, para. 61.

<sup>93</sup> *Bensaid v. The United Kingdom*, *supra* note 70, para. 47.

<sup>94</sup> See H. Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights* (2006), 43; N. Blake, ‘Developments in the Case Law of the European Court of Human Rights’, in B. Bogusz *et al.* (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004), 447.

<sup>95</sup> This question relates to the issue whether any other article besides Article 3 of the ECHR could engage the prohibition on *refoulement*. For a comprehensive discussion of this issue see United Kingdom: House of Lords, ‘Regina v. Special Adjudicator, Ex parte Ullah; Do (FC) v. Secretary of State for the Home Department’ (17 June 2004) available at [http://www.unhcr.org/refworld/country,,GBR\\_HL,,PAK,,4162ab484,0.html](http://www.unhcr.org/refworld/country,,GBR_HL,,PAK,,4162ab484,0.html) (last visited 1 September 2011).

<sup>96</sup> For a more detailed discussion on the difference between the two perspectives see the Speech by Baroness Hale of Richmond (para.41- 65) in United Kingdom: House of Lords, ‘R v. Secretary of State for the Home Department, ex parte Razgar’ (17 June 2004) available at [http://www.unhcr.org/refworld/country,,GBR\\_HL,,IRQ,,46c998742,0.html](http://www.unhcr.org/refworld/country,,GBR_HL,,IRQ,,46c998742,0.html) (last visited 26 July 2011).

life as interpreted by the ECtHR) from the deportation is that she will suffer harm in the country of origin, which does not reach the severity of Article 3, but which reaches the level of severity of Article 8. The victim might suffer from post-traumatic stress disorder for which she is in need of special treatment, which is not available in her country or origin. This could be combined with unavailability of social assistance, including accommodation; discrimination; no prospects to earn one's living; no family and community support. The result could be severe relapse including commission of suicide.<sup>97</sup> In the case of *Bensaid v. The United Kingdom*, the ECtHR recognized that ill-treatment falling below the Article 3's threshold could breach the right to private life under Article 8 "where there are sufficient adverse effects on physical and moral integrity."<sup>98</sup> When the threshold of seriousness under Article 3 is not satisfied, the ECtHR should examine "closely and carefully the situation of the applicant and of her illness under Article 8 of the Convention, which guarantees, in particular, a person's right to physical and psychological integrity"<sup>99</sup>. However, even if the question whether the proposed removal will result in interference with the right to private life is answered in affirmative, additional threshold has to be passed: the interference has to be of such *gravity* as to engage the *non-refoulement* obligation under Article 8 of the receiving state. This relates to

<sup>97</sup> See United Kingdom: Court of Appeal (England and Wales), 'Y (Sri Lanka) v. Secretary of State for the Home department; Z (Sri Lanka) v. Secretary of State for the Home Department' (29 April 2009) available at <http://www.unhcr.org/refworld/docid/49faec8c2.html> (last visited 1 September 2011). In this judgment, the UK Court of Appeal held that the concomitant findings that the applicants fear is no longer objectively well-founded and that there exists a local health service capable of affording treatment do not materially attenuate the risk, which is subjective, immediate and acute. There was a clear likelihood that the appellants' only perceived means of escape from the isolation and fear in which return would place them would be to take their own lives.

<sup>98</sup> *Bensaid v. The United Kingdom*, *supra* note 70, para. 47. Nicholas Blake and Raza Husain argue that it is reasonable for Article 3 and Article 8 to cover different levels of ill-treatment. See N. Blake & R. Husain, *Immigration, Asylum and Human Rights* (2003). Jane McAdam adds that in theory, if Article 8 recognizes a lower threshold, it obviates the need for concurrent Article 3 claim. However, protection of private life remains subject to the balancing test. See McAdam, *supra* note 4. Helene Lambert tries to clarify the theoretical distinction between Article 3 and Article 8 and she criticizes the strong interdependent relationship forged between the two provisions. See H. Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities', 24 *Refugee Survey Quarterly* (2005) 1, 39, 40–49.

<sup>99</sup> *N. v. The United Kingdom*, *supra* note 68, Dissenting Opinion, para. 26.

the principle that the *non-refoulement* obligations cannot be interpreted to the effect that a state party to the ECHR is prohibited from removing an individual “unless satisfied that the conditions awaiting him in the country of destination [the country of origin or any country to which the person is to be removed] are in full accord with each of the safeguards of the Convention”<sup>100</sup>. Thus the *non-refoulement* obligation under Article 8 is triggered in case of flagrant denial or nullification of the right in the country where the victim is to be sent.<sup>101</sup> This requirement was applied in *MP Romania v. Secretary of State for the Home Department*. The woman, a victim of human trafficking, argued that her return to her country of origin will be in violation of Article 8 of the ECHR. The UK Immigration Appeal Tribunal found that the proposed removal would constitute interference by the public authority with the exercise of her right to respect for her private life. However, it was found that such interference would not have consequences of such gravity as potentially to engage the operation of Article 8.

The second way of approaching Article 8 in cases of victims of human trafficking includes consideration of their level of integration into the society of the receiving state and the social relationships which they have developed therein. This relates to the victims’ identity, personal development, development of relationships with other human beings and the outside world, all of which fall within the scope of personal life. During the years in the receiving state, the victim might have formed a private life on the basis of her associations and contacts with people and organisations which have helped her to recover, to come to terms with her illness and have provided the specialized medical, social and psychological support needed. The removal could result in severance of these relationships and/or no prospects of developing similar relationships in the country of origin, which could be indispensable for the victims’ rehabilitation.

In *Sisojeva v. Latvia*, the ECtHR has recognized that

<sup>100</sup> *Soering v. The United Kingdom*, *supra* note 33, para. 85; In *Soering*, the ECtHR accepted that the UK’s *non-refoulement* obligation under Article 6 (right to fair trial) could be engaged. However, it also made the qualification that “an issue might *exceptionally* be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a *flagrant* denial of a fair trial in the requesting country” (para. 113).

<sup>101</sup> See speech of Lord Bingham in United Kingdom: House of Lords, *supra* note 95.

“the decisions taken by States in the immigration sphere can in some cases amount to interference with the right to respect for private and family life secured by Article 8(1) of the Convention, in particular where the persons concerned possess strong personal or family ties in the host country which are liable to be seriously affected by an expulsion order”<sup>102</sup>.

In light of this pronouncement in *Sisojeva v. Latvia*, there is strong support of the idea that the removal of non-nationals residing irregularly in a state party to the ECHR, but who are integrated in the host society, could be in violation of Article 8. This expansion of the scope of Article 8 concerns aliens who have strong ties in the receiving state and are integrated in that state’s society. It is doubtful whether these conditions could be met in cases of victims of human trafficking. Even if they have been in the receiving country for a long time, they will most probably be isolated from the society as, for example, is evidenced from the facts in the case of *Siliadin v France*.<sup>103</sup> However, these conditions could be met, for example, in cases of victims who have been allowed to remain in the receiving state for the purpose of acting as witnesses in the criminal prosecution of traffickers. During that time, their personal ties with the host society could become strong.

Whenever approach to Article 8 is adopted, the analysis of Article 8 does not stop with the establishment that the deportation will expose the victim to harm in the country of origin severe enough to engage the *non-refoulement* obligations of the receiving state, or with the establishment that the victim has integrated into the host society. As opposed to Article 3 and Article 4 of the ECHR, the right to private life is qualified. An interference with the right to private life is justified and thus there will be no violation of the ECHR if the interference with the right is in accordance with the law, pursues a legitimate aim under Article 8(2), and is necessary in a democratic society – that is, it responds to an important social need and is proportionate. Although immigration control is not, of itself, an interest which the state may expressly invoke,<sup>104</sup> it provides “the medium through which other

<sup>102</sup> *Sisojeva v Latvia*, ECtHR (2005) Application No. 60654/00, para. 101.

<sup>103</sup> In *Siliadin v France* no claim under Article 8 was made. However, the facts of the case are demonstrative of the situation of victims of trafficking and show how they stay in isolation.

<sup>104</sup> The UK Immigration and Appeal Tribunal has adopted quite an extreme approach in this respect since it has ruled that “legitimate immigration control will almost certainly

legitimate aims are promoted”<sup>105</sup> such as national security, public safety, public health and morals, rights and freedoms of others, the country’s economic wellbeing, and the prevention of disorder and crime. In *Bensaid v. The United Kingdom*, the ECtHR concluded that even if there was an interference with Article 8, that interference may be regarded as in compliance with Article 8(2), namely as a measure “in accordance with the law”, pursuing the aims of protection of the economic well-being of the country and the prevention of disorder and crime, as well as being “necessary in a democratic society” for the achievement of these aims.<sup>106</sup> In *PO Trafficking Nigeria* case, the UK Asylum and Immigration Tribunal accepted that “the appellant has a private life in the United Kingdom and were the appellant to be removed, there would be interference”<sup>107</sup>. It took note that the woman who was a victim of human trafficking had been in the UK for over four years. During that time she had undergone various training courses and has become dependent on support and help from the POPPY Project.<sup>108</sup> However, it was concluded that although the decision to remove her will interfere with her private life, it was necessary in order to maintain immigration control.<sup>109</sup>

It seems that it is relatively easy for the receiving state to characterize its action of removal as falling within the prescribed exceptions of Article 8(2). On the one hand, the ECtHR has expanded the notion of “private life”<sup>110</sup>, which allows victims of human trafficking to substantiate the existence of interference in case of removal. On the other hand, however, it seems to be equally easy to justify the interference under Article 8(2). Jane

mean that derogation from the rights will be proper and will not be disproportionate.”

See United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, ‘Kacaj (Article 3 – Standard of Proof – Non-State Actors) Albania v. Secretary of State for the Home Department’ (19 July 2001) para. 25, available at <http://www.unhcr.org/refworld/docid/4680c86fd.html> (last visited 1 September 2011).

<sup>105</sup> Blake & Husain, *supra* note 98, para. 4.72.

<sup>106</sup> *Bensaid v. The United Kingdom*, *supra* note 70, para. 48.

<sup>107</sup> *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, *supra* note 46, para. 210.

<sup>108</sup> Poppy Project has been established in the United Kingdom in order to provide accommodation and support to women who have been trafficked into prostitution or domestic servitude. See [http://www.eaves4women.co.uk/POPPY\\_Project/POPPY\\_Project.php](http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php) (last visited 1 September 2011).

<sup>109</sup> *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, *supra* note 46, paras 209-217.

<sup>110</sup> P. van Dijk *et al.*, *Theory and Practice of the European Convention on Human Rights*, 4th ed. (2006), 665.

McAdam comments that applicants seeking to rely on other ECHR's provisions typically invoke them in conjunction with Article 3, since Article 3 is a recognized ground for non-removal and an unqualified provision. The ECtHR's approach is to consider the Article 3's claim first, and if that is successful then prohibition on removal based on Article 8 will not be addressed. Where Article 3's claim fails, Strasbourg jurisprudence suggests there is little likelihood of the facts reaching the relevant severity threshold under other articles, given that they generally permit balancing of the rights of the individual vis-à-vis the state's interests.<sup>111</sup>

The ECtHR is yet to deliver a judgment on a case involving removal due to irregular migration status of a victim of human trafficking.<sup>112</sup> The present article will make two submissions in regard to such cases. First, the moral cause should be taken into account in any assessment under Article 8, in terms of the impact of the removal on the physical and psychological integrity of a victim of trafficking, having been exploited in the receiving country by criminals who ought not to have been allowed to do so. In addition to that exploitation, the uncertain immigration status has adverse effects on victim's mental health. These considerations must be taken into account when conducting the balancing test under Article 8(2). Further on, when a victim is allowed to stay for the purposes of the criminal prosecution of her traffickers and she develops social ties within the receiving state, simply sending her back after exhaustion of her usefulness as a witness since the state interests to exercise immigration control have greater weight in the balancing analysis as opposed to the interests of the victim, is far from acceptable. I argue that in this case the state has conceded its immigration

<sup>111</sup> McAdam, *supra* note 4, 145.

<sup>112</sup> At the time of writing, I am aware of two such cases before the ECtHR: *M. v. the United Kingdom*, Application No. 16081/08, Decision of 1 December 2009 and *L.R. v. the United Kingdom*, Application No.49113/09. *M. v. the United Kingdom* is case on challenging the decision of the UK authorities to refuse asylum and human rights protection to a young orphan girl who was trafficked, as a minor, firstly within Uganda for the purposes of sexual exploitation and then into the UK for the same purpose. The applicant complained that if she were returned to Uganda she would suffer a severe deterioration in her mental health and run a real risk of further sexual exploitation and trafficking, contrary to Articles 3, 4 and 8 of the ECHR. The ECtHR decided to strike the case out of its list since a friendly settlement was achieved. As a result of that friendly settlement M. was granted three years leave to remain in the UK. In regard to *L.R. v. the United Kingdom*, a judgment is yet to be delivered; for the facts of the case see <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=866566&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited 1 September 2011).

control objectives and the interests of the individual are to overbalance these objectives in the proportionality analysis under Article 8(2).

Second, it is an established principle in the ECtHR's jurisprudence that the provisions of the ECHR are not the sole framework of reference for the interpretation of the rights and freedoms enshrined therein.<sup>113</sup> The rights in the ECHR are not applied in vacuum.<sup>114</sup> Accordingly, the provisions and the purpose of the Council of Europe Trafficking Convention "to protect the human rights of victims of trafficking"<sup>115</sup> are to be taken into regard. Once abused by the traffickers, a victim should not simply be sent back, if it is not in accordance with her will and if she might be exposed to further suffering. Otherwise, the purpose of the Council of Europe Trafficking Convention has no real and practical meaning for the victims. Similarly, the measures indicated in this legal instrument for the physical, psychological and social recovery of victims, will have no real and practical meaning. It is not only that they have no real and practical meaning, but also simply sending back victims since they are undocumented migrants, undermines the whole legitimacy of the anti-trafficking measures. It does so because it appears that the objective of the anti-trafficking legal instruments and measures is not to help victims, but it is instead furtherance of the migration control interests of the receiving states. Accordingly, in the application of the balancing analysis under Article 8(2), it should be considered that the rights in the ECHR are not applied in vacuum, which means that the purpose of assisting victims of human trafficking and of protecting their human rights are to be fully included in the balancing test.

## E. Conclusion

Pursuant to the present international legal framework on human trafficking, sending victims home to their countries of origin is viewed as the presumed solution to their cases with the option for delaying the return home if the victim acts as a witness. Thus, I propose resort to complementary protection under the ECHR for those victims who have legitimate reasons not to go back. Article 3 of the ECHR which includes the principle of *non-refoulement* could be used when upon return the victims fear re-trafficking, retaliation, rejection by family and/or community. The

<sup>113</sup> Rantsev v. Cyprus and Russia, *supra* note 72, para. 273.

<sup>114</sup> *Id.*

<sup>115</sup> Council of Europe Trafficking Convention, *supra* note 8, Art. 1.1(b).

protection capacity of Article 3 is broader than that, though, as it could successfully be argued that return is prohibited since it will expose the victim to degrading situation due to the lack of social and medical assistance in the country of origin. As to Article 4 of the ECHR, states will be prohibited from sending victims of human trafficking to those countries of origin which do not live up to the positive human rights obligations within the context of human trafficking as elaborated by the ECtHR in *Rantsev v. Cyprus and Russia*. Article 8 of the ECHR is of use, first, when the level of feared harm in the country of origin does not reach the severity of Article 3 but is sufficiently grave to be in breach of the right to private life and engage the *non-refoulement* principle, and second, when the victim has developed social ties within the receiving state and her removal will lead to their disruption.







